Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
FM Radio Service, LLC	)	FCC File No. 0001523859
Renewal Application and Waiver Request	)	
Station WNXG464	)	

MEMORANDUM OPINION AND ORDER

ADOPTED: FEBRUARY 25, 2010 **RELEASED: FEBRUARY 25, 2010**

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This item denies a petition for reconsideration related to a late-filed 800 MHz Specialized Mobile Radio ("SMR") license renewal. FM Radio Service, LLC ("FM Radio")[1] seeks reconsideration of an Order dismissing its late-filed renewal application and denying its request for waiver to file late. As discussed below, we deny the petition because FM Radio has not demonstrated a material error or omission, or offered new facts or evidence that were not considered in the Order.[2]

II. BACKGROUND

2. Generally, the Commission licenses Private Land Mobile Radio ("PLMR") applicants on frequencies in categories, or "pools," based on eligibility. These include the 800 MHz Public Safety and the Business/Industrial/Land Transportation ("B/ILT") Categories. The Commission previously permitted "intercategory sharing" where applicants eligible for licensing in one category obtain licenses on channels outside of their respective categories if certain criteria are met, including that no channels are available in the category for which the applicant is eligible.[3] However, the Wireless Telecommunications Bureau ("Bureau") placed a freeze on the filing of new applications for intercategory sharing on all PLMR frequencies in the 806-821/851-866 MHz bands to curb the increase in such applications for

[1] Petition for Reconsideration filed by FM Radio Service, LLC, FCC File No. 0001523859 (filed Mar. 2, 2007) ("Petition"); Letter from Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Russell H. Fox, Counsel for FM Radio Service, LLC (Jan. 31, 2007)("Order").

[2] *See, e.g.*, American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, *Order on Reconsideration*, 15 FCC Rcd 15448 (2000); Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Order on Reconsideration*, 13 FCC Rcd 14583 (1998).

[3] 47 C.F.R. § 90.621(e).

Public Safety Category channels by B/ILT licensees whose own channels were subject to increased demand from SMR applicants.

3. On July 16, 1998, the Commission granted Northwest Pipeline Corporation ("Northwest") an 800 MHz SMR license with an expiration date of September 30, 2003 ("License").[4] Although the frequency was designated for use in the public safety 800 MHz pool, the Commission granted the License to Northwest (a non-public safety entity) under the intercategory sharing rules in effect at that time.[5] The License was assigned to FM Radio on January 6, 2003.

4. Section 1.955(a) of the Commission's rules requires a licensee to file a timely renewal application by the expiration date of its authorization or else the authorization automatically terminates.[6] FM Radio failed to timely file for license renewal and therefore its authorization automatically terminated on the expiration date.[7] On November 21, 2003, 52 days after its license expired, FM Radio filed a renewal application and request for waiver of Section 1.955(a).[8]

5. In the Waiver Request, FM Radio stated that the delay in filing its renewal application was due to administrative error and argued that a waiver was warranted because FM Radio was in the unique situation of being unable to reapply for a new 800 MHz SMR license because that spectrum had been designated for use in the public safety 800 MHz pool.[9] Thus, FM Radio argued, absent a waiver, the public would be deprived of its service.[10]

6. The Bureau's Mobility Division ("Division") denied the Waiver Request and dismissed the pending renewal application, finding that administrative error was insufficient to support a waiver. The Division also found that FM Radio had failed to demonstrate how its loss of revenue or commercial service to its customers met either prong of the waiver standard under Commission rule section 1.925.[11]

7. FM Radio now argues that the Commission should reconsider the Order because the Division (1) failed to adequately consider FM Radio's justifications for the Waiver Request; and (2) acted inconsistently with other Commission decisions granting reinstatement.[12]

8. On June 13, 2007, following the Division's denial of FM Radio's waiver request and dismissal of its renewal application, the Public Safety and Homeland Security Bureau ("PSHSB") issued a license for the same frequency as WNXG464 to the Regional Transportation Commission of Clark County, Nevada ("RTC").[13] On May 6, 2008, RTC requested an extension of its June 13, 2008

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[4] FM Radio Service, LLC Request for Waiver and Reinstatement of Call Sign WNXG464, FCC File No. 0001523859 (filed Nov. 21, 2003) ("Waiver Request") at 2-3.

[5] *Id.* at 3. In addition, the Commission granted Northwest's application to convert the License to commercial status and add mobile transmitter frequencies. *Id.*

[6] 47 C.F.R. § 1.955(a).

[7] Order at 1.

[8] *Id.* at 1; *see generally* Waiver Request.

[9] Order at 2.

[10] *Id.*

[11] *Id.*; *see also* 47 C.F.R. § 1.925.

[12] Petition at 2-3.

[13] *See* FCC File No. 0003429760.

construction deadline, which was granted on May 8, 2008, and the deadline was extended to December 13, 2008.[14] FM Radio filed an informal request to set aside RTC's license on July 9, 2008.[15] In addition, on August 5, 2008, the Commission received a letter from RTC advocating for denial of the Petition.[16] RTC argues that FM Radio is requesting the same relief as in the Waiver Request, but has not presented new facts in support.[17] Moreover, RTC states that it is a governmental entity providing public transit services in the greater Las Vegas area and has contracted for installation of a communications system utilizing the license.[18] RTC asserts that requiring it to seek a new license at this time would be contrary to the public interest.[19] Subsequently, on December 5, 2008, RTC filed the construction notification for its license, WQHA740.[20] The construction notification remains pending.

III. DISCUSSION

9. We deny the Petition for Reconsideration because it neither demonstrates a material error or omission by the Division in the Order nor introduces any new facts not previously considered by the Division. Section 1.106 of the Commission's rules permits parties to file petitions for reconsideration of actions by the Commission or by delegated authority.[21] Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.[22] A petition that "simply reiterates arguments previously considered and rejected will be denied."[23] Section 1.106(d) of the Commission's rules provides that a petition for reconsideration must state with particularity the respects in which the petitioner believes the action taken by the Commission should be changed. The petition must also specifically state the form of relief sought.[24]

10. FM Radio requests reconsideration of the Order because the Division allegedly (1) failed to adequately consider FM Radio's justifications for the Waiver Request; and (2) acted inconsistently with other Commission decisions granting reinstatement.[25] Specifically, FM Radio contends that the Division only considered its reason for untimely filing of its renewal application (administrative error), but did not

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[14] *See* Request for Extension of Time, FCC File No. 0003429766 (filed May 6, 2008).

[15] Informal Request for Commission Action filed by FM Radio Service LLC, FCC File No. 0003429760 (filed July 9, 2008).

[16] Letter from Zev Kaplan, General Counsel, Regional Transportation Commission of Southern Nevada, to Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission at 2 (Aug. 5, 2008) ("RTC Letter").

[17] *Id.* at 2.

[18] *Id.* at 1.

[19] *Id.*

[20] FCC File No. 0003668163 (filed Dec. 5, 2008).

[21] 47 C.F.R. § 1.106(a)(1).

[22] *See* WQAM License Limited Partnership, *Memorandum Opinion and Order,* 15 FCC Rcd 13549, 13549 ¶ 2 (2000) (citing WWIZ, Inc., 37 FCC 685, 686 (1964), *aff'd sub nom. Lorrain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c)).

[23] Petition for Reconsideration by Warren C. Havens, AMTS Consortium, LLC, Telesaurus-VPC, LLC and Telesaurus Holdings GB LLC, *Memorandum Opinion and Order,* 22 FCC Rcd 1860, ¶ 7 (WTB 2007).

[24] 47 C.F.R. § 1.106(d)(1) and (d)(2).

[25] Petition at 2-3.

consider the length of the delay (52 days) or the fact that it could not seek additional 800 MHz authorizations when it filed the Waiver Request.[26] In addition, FM Radio argues that the Division's decision does not treat similarly situated licensees similarly because in the case of Educational Broadband Services licenses, the Bureau's Broadband Division reinstated licenses years after the licenses had expired.[27]

11. We find FM Radio's arguments unpersuasive. FM Radio fails to demonstrate a material error or omission by the Division in the Order. We find that the Division appropriately considered the relevant factors in examining FM Radio's late filed renewal request. Renewal applications filed more than 30 days after license expiration are subject to strict review.[28] In determining whether to grant a late-filed application, the Commission considers all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[29] In addition, the Commission may grant a waiver request where (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.[30] Here, the Division appropriately found that FM Radio's administrative error was an insufficient basis for a waiver of the rules,[31] and that FM Radio failed to meet either prong of the waiver standard.[32] The Waiver Request provided no specific information about the service FM Radio provided or the customers it served. Although FM Radio maintained that its circumstances were unique because it would be unable to apply for new 800 MHz SMR frequencies because of the 800 MHz rebanding freeze,[33] in this regard, FM Radio is no different from any other 800 MHz licensee that failed to timely renew its license. Accordingly, we find that the Division was correct in denying the Waiver Request.

12. In addition, the precedent cited by FM Radio in support of its claim of disparate treatment is distinguishable. In the *EBS Renewal Order*, the Broadband Division granted waivers of the Commission's renewal rule in order to facilitate the Commission's substantial, multi-year efforts to transition the 2500-2690 MHz Band.[34] The Broadband Division reasoned that the transition process would "require an extraordinary degree of coordination and negotiation among all affected licensees in

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[26] *Id* at 2.

[27] *Id.* at 3 (citing Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (Broadband Division, WTB 2007) ("*EBS Renewal Order*")).

[28] Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485-86 ¶ 22 (1999) ("*ULS Order*"); Waiver Requests Required for Late-Filed Renewal Applications in Most Wireless Services, *Public Notice*, 18 FCC Rcd 16703 (WTB 2003) ("*Waiver Request Public Notice*").

[29] *Waiver Request Public Notice,* 18 FCC Rcd 16703; *see also ULS Order*, 14 FCC Rcd at 11485-86 ¶ 22.

[30] 47 C.F.R. § 1.925(b)(3).

[31] Order at 2.

[32] *Id.*

[33] Waiver Request at 3.

[34] *EBS Renewal Order*, 22 FCC Rcd at 882 ¶ 7.

the transition area over a finite time period" and that granting the waiver requests would "create greater certainty for existing and future transition proponents regarding which EBS licenses [would] be part of the transition."[35] The Broadband Division concluded grant of the waiver requests would "facilitate a more rapid restructuring of the band" which would ultimately promote faster delivery of wireless broadband and educational services in the band.[36] The unique circumstances justifying waiver in that case are not present here, and thus, we reject FM Radio's argument that the Division deviated from Commission precedent.

13. Finally, because we find that the Division did not err in denying the Waiver Request, we dismiss as moot FM Radio's informal request to set aside RTC's license.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4 (j), 5(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c), and 303(r) , and sections 0.331 and 1.106, of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, that the Petition for Reconsideration filed by FM Radio Service LLC on March 2, 2007, IS HEREBY DENIED.

15. It is further ORDERED that the Informal Request for Commission Action filed by FM Radio Service LLC, FCC on July 9, 2008, IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Deputy Chief
Wireless Telecommunications Bureau

[35] *Id.* at 882-883 ¶ 7.

[36] *Id.*