

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

In the Matter of Applications of)	
)	
ROHEL PASCUAL)	
)	
For Renewal of License for Broadband Radio Service)	File No. 0004708992
Station WHT593, Aguadilla, Puerto Rico)	
)	
For Involuntary Transfer of Control of Broadband Radio)	File No. 0004708488
Service Station WHT593, Aguadilla, Puerto Rico)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 2012

Released: April 3, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a request for waiver of the May 1, 2011 deadline for Broadband Radio Service (BRS) licensees to demonstrate substantial service. We therefore dismiss associated applications involving that license, and determine that the license automatically cancelled on May 1, 2011.

II. BACKGROUND

2. On August 22, 1996, Rohel Pascual (Pascual) was issued a license for Station WHT593, with an expiration date of May 1, 2001.¹ Under the rules in effect in 2001, BRS licensees were required to file their renewal applications between thirty and sixty days prior to the license expiration date.² On April 30, 2001, prior to the license expiration date but past the deadline for filing a renewal application, Pascual filed an application to renew the license for Station WHT593.³ Pascual stated the Renewal Application was not timely filed because he suffered a stroke around the time it was due.⁴ The stroke made Pascual unable to ensure the Renewal Application was filed in a timely manner.⁵

3. On November 19, 2004, the Wireless Telecommunications Bureau returned the 2001 Renewal Application and directed Pascual to request a waiver of Section 21.19 of the Commission's

¹ File No. BLMD-9651380.

² See 47 C.F.R. § 21.11(c) (2001).

³ File No. 20010430AAB (filed Apr. 30, 2001) (2001 Renewal Application).

⁴ 2001 Renewal Application, Request for Waiver of Renewal Filing Window (filed Nov. 30, 2004) (2004 Waiver Request).

⁵ *Id.*

Rules.⁶ On November 30, 2004, Pascual amended the Renewal Application and submitted the Waiver Request.⁷

4. On September 2, 2005, WHTV Broadcasting Corporation (WHTV) filed a Petition to Deny⁸ the Renewal Application. WHTV argued, *inter alia*, that Station WHT593 had not been operational and that Pascual has intentionally misrepresented the operational status of the facilities.⁹ Pascual responded that the station was operational until June of 2005 and that the claims of untruthfulness were false.¹⁰ Pascual offered an affidavit from Mr. Leo Thomasian (Thomasian), the president of Caribbean Wireless System (CWS) and the lessee of WHT593,¹¹ stating that Station WHT593 was operational until June 6, 2005.¹²

5. On January 25, 2007, the Broadband Division (“Division”) of the Wireless Telecommunications Bureau granted the 2004 Waiver Request, dismissed WHTV’s Petition to Deny for lack of standing, and directed processing of the 2001 Renewal Application.¹³ The Division noted Thomasian’s declaration that the station was operational until June 6, 2005.¹⁴ The Division also observed, “Pascual, like all other BRS and EBS licensees, will be required to demonstrate substantial service by May 1, 2011 or risk license forfeiture.”¹⁵ The 2001 Renewal Application was granted on January 26, 2007, with a new license expiration date of May 1, 2011.¹⁶

6. Mr. Pascual passed away on July 6, 2007.¹⁷ His son, Ricardo, has nominally assumed responsibility for the license.¹⁸ Mr. Pascual’s heirs believed CWS was operating the station pursuant to the lease.¹⁹ They unsuccessfully attempted to contact Mr. Thomasian to ascertain the status of the license.²⁰

7. On January 16, 2009, NSAC, LLC, a wholly-owned subsidiary of Clearwire Corporation (together “Clearwire”), filed an Initiation Plan to transition the Mayaguez/Aguadilla-Ponce, Puerto Rico Basic Trading Area (BTA489), where Station WHT593 is located, to transition all of the licensees in

⁶ Notice of Return, Ref. No. 3092578 (Nov. 19, 2004).

⁷ Waiver Request.

⁸ Petition to Deny, WHTV Broadcasting Corporation (Sep. 2, 2005) (Petition to Deny).

⁹ Petition to Deny.

¹⁰ Opposition to Petition to Deny, Rohel Pascual (Sep. 30, 2005) (Opposition).at 4-5.

¹¹ See Opposition, Affidavit of Leo Thomasian (Sep. 30, 2005).

¹² *Id.*

¹³ Rohel Pascual, *Memorandum Opinion and Order*, 22 FCC Rcd 867 (WTB BD 2007) (2007 Renewal Order).

¹⁴ *Id.*, 22 FCC Rcd at 870 ¶ 8.

¹⁵ *Id.*, 22 FCC Rcd at 871 n.38.

¹⁶ File No. 20010430AAB (granted Jan. 26, 2007).

¹⁷ See File No. 0004708488 (Involuntary Transfer Application), Request for Waiver – Expedited Action Requested (Assignment Waiver Request) (filed Apr. 28, 2011) at 1.

¹⁸ *Id.*

¹⁹ Renewal Application, Amendment to Address the Concerns in the Return Notice, Waiver Request – Expedited Action Requested (filed Jan. 7, 2012) (Renewal Waiver Request) at 1.

²⁰ *Id.*

BTA489 from the old band plan to the new band plan.²¹ Station WHT593 was included in the list of stations to be transitioned in BTA489.²² Then on March 18, 2011, Clearwire filed a Post-Transition Notification, in which Clearwire informed the Commission that it had completed the transition for BTA489.²³ Although Station WHT593 was included in the list of stations that were transitioned, the Commission's Universal Licensing System shows that the license for Station WHT593 has not been modified its license to show that it is authorized to operate on the new E group channels.²⁴

8. On April 28, 2011, applications were filed for renewal of license of Station WHT593²⁵ and to involuntarily transfer control of the license to Quasar Communications, Inc., a corporation controlled by Mr. Pascual's heirs.²⁶ Pascual's heirs sought a waiver of Section 1.948(g) of the Commission's Rules to waive the requirement that an application for involuntary transfer of control involving the death of a licensee be filed within 30 days after such death.²⁷ Pascual's heirs did not provide evidence of substantial service as part of the renewal application, as required by Section 27.14(o) of the Commission's Rules.²⁸

9. On November 9, 2011, the Bureau returned the Renewal Application because there was no evidence that substantial service had been provided or that a modification application had been filed reflecting Station WHT593's transition to the new band plan.²⁹ In response, Pascual's heirs sought a waiver of the substantial service requirements and of the requirement to file a transition modification application.³⁰ They expressed the belief that the station was operating pursuant to the lease with CWS.³¹ The heirs terminated the lease with CWS because Mr. Thomasian has not responded to their inquiries and for other reasons.³² They intend to provide wireless broadband service, but admit that they lack the technical knowledge to provide such service and also indicate that "financial considerations" are an issue.³³ They ask the Commission to take into account their belief that CWS was operating the station, and ask for the Commission's "indulgence and patience."³⁴ They argue that renewing the license would

²¹ Letters from Nadja S. Sodos-Wallace, Senior Regulatory Counsel and Assistant Secretary, Clearwire Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jan. 16, 2009).

²² *Id.* at Exhibit A.

²³ Letters from Nadja S. Sodos-Wallace, Senior Regulatory Counsel and Assistant Secretary, Clearwire Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Mar. 18, 2011) ("Mayaguez BTA Completion Letter").

²⁴ Under the old band plan, channels E1, E2, E3, and E4 were six-megahertz non-contiguous channels located at 2596-2602 MHz, 2608-2614 MHz, 2620-2626 MHz, and 2632-2638 MHz, respectively. Under the new channel plan, Channels E1, E2 and E3 are 5.5-megahertz contiguous channels located at 2624-2629.5 MHz, 2629.5-2635 MHz and 2635-2640.5 MHz, respectively. Channel E4 is a six megahertz channel located in the Middle Band Segment at 2608-2614 MHz.

²⁵ File No. 0004708992 (filed Apr. 28, 2012) (Renewal Application).

²⁶ Involuntary Transfer Application.

²⁷ Assignment Waiver Request at 1.

²⁸ *See* 47 C.F.R. § 27.14(o).

²⁹ Notice of Return, Ref. No. 5248599 (Nov. 9, 2011).

³⁰ Renewal Waiver Request.

³¹ *Id.* at 1.

³² *Id.*

³³ *Id.* at 1-2.

³⁴ *Id.* at 2.

have a positive impact on one of Puerto Rico's most economically depressed and rural areas, including the Mayaguez campus of the University of Puerto Rico.³⁵ Although the heirs indicated they would file a request for extension of the May 1, 2011 substantial service deadline,³⁶ no such application was filed.

III. DISCUSSION

10. We conclude that Pascual's heirs have not shown that a waiver of the May 1, 2011 deadline for providing substantial service or requesting an extension of time to construct deadline is warranted. To be granted a waiver, the heirs must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual 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.³⁷

11. We find that the heirs has not shown how granting its waiver request would further the underlying purpose of the EBS substantial service requirement, which is to fulfill our statutory duty to "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services."³⁸ On the contrary, it appears that the heirs are not able to put this spectrum to use. They admit that they lack the technical knowledge to operate the station, and they provide no evidence that they can partner with someone that could provide that technical knowledge. It also appears that the heirs may lack the financial wherewithal to operate the station. In the absence of showing that the heirs would be able to provide service, we cannot credit their claims that renewing the license would provide benefits to the service area. Furthermore, we believe that the heirs have not been diligent. We understand that Mr. Pascual's death could have caused some confusion and delay. We believe, however, that there was sufficient time between his death in 2007 and May 1, 2011 for the heirs to ascertain the status of the station, make their plans, and provide service. While the heirs believed that CWS was operating the station, the *2007 Renewal Order* clearly indicated that CWS had ceased operations in June 2005. Under those circumstances, we conclude that the public interest would be best served by enforcing the May 1, 2011 substantial service deadline.

12. Mr. Pascual's heirs have also failed to demonstrate that strictly applying the May 1, 2011 substantial service deadline would be inequitable or unduly burdensome. The heirs had more than ample time after Mr. Pascual's death to provide service. Moreover, in the absence of any clear plan for providing service, it is not inequitable to cancel the license and allow the existing BTA licensee to acquire the spectrum and place it in use.³⁹

³⁵ *Id.*

³⁶ *Id.*

³⁷ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

³⁸ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

³⁹ While Mr. Pascual's heirs have not formally requested an extension of the May 1, 2011 substantial service deadline, the available facts show that they would not be entitled to an extension. An applicant seeking an extension of a construction deadline must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control." See 47 C.F.R. § 1.946(e). As noted above, we believe the main cause of the failure to meet the substantial service is the inability of the heirs to develop a plan for placing the station in operation, which is a matter within their control.

13. An authorization for a BRS license automatically terminates if the licensee fails to meet construction or coverage requirements.⁴⁰ In light of our conclusion that grant of a waiver of the May 1, 2011 substantial service deadline is not in the public interest, we find that the license to operate Station WHR893 automatically terminated on May 1, 2011, the date that BRS licensees were required to demonstrate substantial service. We therefore direct dismissal of the Renewal Application and the Involuntary Transfer Application. The remaining waiver requests are moot.

IV. CONCLUSION AND ORDERING CLAUSES

14. We deny the request for waiver of the May 1, 2011 substantial service deadline for BRS stations. The license for Station WHT593 therefore automatically terminated on May 1, 2011. We therefore dismiss the Renewal Application and Involuntary Transfer Application filed with respect to Station WHT593.

15. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.925 and 27.14(o) of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.14(o), that the request for waiver of the substantial service deadline for Station WHT593 filed on January 7, 2012 in connection with the application for renewal of Station WHT593 (File No. 0004708992) IS DENIED.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the license for Station WHT593 IS DECLARED TERMINATED as of May 1, 2011.

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL DISMISS the applications for renewal of license (File No. 0004708992) and for involuntary transfer of control (File No. 0004708488) of Station WHT593.

18. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division,
Wireless Telecommunication Bureau

⁴⁰ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).