

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

In the Matter of)
)
Pierce County, Washington) Call Sign WPOT795
)
Petition for Reconsideration)

ORDER

Adopted: October 13, 2020

Released: October 14, 2020

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On February 3, 2020, Pierce County, Washington (Pierce or the County) filed a Petition for Reconsideration (Petition) of the Commission’s notice terminating Pierce’s license to operate under a component (Path 1) associated with call sign WPOT795.¹ For the reasons stated below, we deny the Petition.

II. BACKGROUND

2. On March 30, 2019, the Commission’s Universal Licensing System (ULS) sent Pierce a construction reminder alerting it of the pending construction deadline for Path 1 of microwave system call sign WPOT795. This reminder advised Pierce to file a Notice of Construction for WPOT795 Path 1 by December 18, 2019.² On December 18, 2019 Tacoma Public Utilities (TPU)—described by Pierce as a joint venture with Pierce for the upgrade of a shared microwave system³ with multiple call signs—timely filed a request for extension of time to construct the system, stating that “[t]he current system is quite complicated and has live critical services and the migration is taking long (sic) than planned.”⁴ The TPU request was granted on October 10, 2019, but not for WPOT795 Path 1 because TPU failed to include WPOT795 Path 1 in its extension request—an omission that Pierce attributes to inadvertence on TPU’s part.⁵

¹ See Pierce County Washington Petition for Reconsideration of WPOT795 (components of) (filed February 2, 2020).

² See 47 CFR § 1.946 (d) (“A licensee who commences service or operations within the construction period or meets its coverage or substantial services obligations within the coverage period must notify the Commission by filing FCC Form 601. The notification must be filed within 15 days of the expiration of the applicable construction or coverage period.

³ Petition at 1.

⁴ See Petition at Attachment.

⁵ Petition at 1 (stating that TPU “inadvertently did not include this reciprocating Pierce County-Licensed-call.”).

3. On January 22, 2020, ULS issued Pierce a letter advising it that the notification deadline had passed and that Path 1 of the WPOT795 license was in termination pending status.⁶ On February 2, 2020, Pierce timely filed the instant Petition.⁷

4. Pierce asks that we reinstate the WPOT795 Path 1 authorization because of TPU's error and seeks an extension of the construction deadline for Path 1 until June 18, 2020.⁸ It states that upgrade of the new microwave system has taken longer than planned because inclement winter weather hindered the process. It represents that construction efforts and implementation have resumed, and significant effort has been placed on bringing the system online.⁹

III. DISCUSSION

5. When TPU—not Pierce, the licensee—filed an extension request on the same day the construction notification was due, and omitted WPOT795 Path 1, the deficient TPU filing did not eliminate Pierce's obligation to either file a construction notification or, itself, seek an extension of the construction deadline prior to the WPOT795 Path 1 construction deadline. We therefore dismiss that portion of the Pierce petition which seeks an extension of time to construct because Pierce's request is late filed. Section 1.946(e) of the Commission's rules requires that such requests must be filed before the construction deadline.

6. We also deny Pierce's request to reinstate the WPOT795 Path 1 authorization based on Pierce's representation, in its Petition, that TPU inadvertently omitted WPOT795 Path 1 in TPU's filing. The record does not disclose if Pierce reviewed the TPU filing to ascertain whether WPOT795 Path 1 was included, even after Pierce was advised of the imminent WPOT795 construction deadline, something expected of a diligent licensee if it relies on a third party to act on its behalf. Moreover, it is well established that: (1) a licensee cannot justify failure to adhere to a Commission rule by claiming reliance on a third party for that compliance,¹⁰ and (2) clerical error, whether by the licensee or a third party, is an insufficient basis on which excuse compliance with a rule.¹¹

⁶ See Construction/Coverage Deadline, Notice of Termination Pending Status, Reference No. 6608933 (dated Jan. 22, 2020).

⁷ See Petition at 1. Under the Commission's auto-term process, if a licensee, by the end of the 30-day period for seeking reconsideration does not rebut the presumption that it did not timely meet its construction or coverage requirement, ULS will change the status of the license, location, or frequency to "Terminated," effective on the date of the construction deadline. See *Wireless Telecommunications Bureau Announces Deployment Of "Auto-Term," the Automated Feature in its Universal Licensing System That Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses*, Public Notice, 21 FCC Rcd 163 (WTB 2006). Given that ULS issued the Notices of Termination Pending Status on January 22, 2020 and Pierce filed its Petition on February 2, 2020, its petition is timely.

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., *Clyde W. Pierce*, Memorandum Opinion and Order, 4 FCC Rcd 2378 (1989) (holding that applicant's detrimental reliance on advice from a consultant concerning a signature requirement did not excuse compliance with the signature compliance rule and that "[p]arties are charged with knowledge of and are bound by statutes and regulations despite reliance to their detriment upon incorrect information received from third parties." Cf. *Rosner v. Secretary of Health, Ed. and Welfare*, 306 F. Supp. 853, 855 (S.D.Fla.1970). (Applicant responsible for its application and for compliance with Commission rules.)

¹¹ See *Instapage Network, Ltd.*, Order on Reconsideration, 17 FCC Rcd 19083, 19091-92 (WTB 2002) paras. 16-19 ("[o]versight," "[c]onfusion," and "[b]ad judgment" inadequate to excuse failure to file construction notification). See also, *Zayo Group, LLC*, Order, DA 20-4, ___ FCC Rcd ___ (PSHSB Jan. 3, 2020) citing *Empire Broadcasting*, Memorandum Opinion and Order, 25 FCC 2d 68, 69 (1970) (mere oversight or failure to be aware of the Commission's requirements will not excuse licensee from its obligation to operate in compliance with the Commission's Rules); *Shared Data Networks*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18184, 18187 (EB 2005) (earth station licensee's lack of awareness of its responsibilities is not a mitigating factor

7. Section 1.106(c)(2) of the Commission's rules provides that a petition for reconsideration may rely on facts not previously presented if we find that "consideration of the facts relied on is required in the public interest."¹² We find that Pierce has not provided sufficient justification for us to grant its Petition. A lack of inter-agency coordination is not a unique factual circumstance justifying a waiver and excusing failure to comply with the Commission's construction requirements.¹³ We thus deny Pierce the relief it seeks, i.e., a waiver of sections 1.955 and 101.63 of the Commission's rules for Path 1. These rules require not only that a station be timely constructed, but also that it be placed into operation before the construction deadline. Pierce neither did so nor filed a timely extension request. Thus, under the cited rules' plain terms, Pierce's license for WPOT795 Path 1, terminated automatically upon Pierce's failure timely to place it into operation. Pierce's Petition cites no authority for a rule waiver under these circumstances. We therefore deny the Petition.

8. Pierce, however, may file a new, properly coordinated application for WPOT495 Path 1 if it desires to use its previously licensed frequencies. In addition, if Pierce needs to operate while an application is pending with the Commission, it may file a request for special temporary authority in accordance with section 1.931 of the Commission's rules.¹⁴

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i) and 303(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), and section 1.106 of the Commission's rules, 47 CFR § 1.106, that the Petition for Reconsideration filed February 3, 2020, by Pierce County, Washington, **IS DENIED**.

10. **IT IS FURTHER ORDERED** that the licensing staff of the Policy and Licensing Division **SHALL MODIFY** the authorization for call sign WPOT795, Path 1, in accordance with this Order and the Commission's Rules.

11. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 CFR §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

warranting a downward adjustment in a proposed forfeiture amount). *See also, Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358 (1986) (stating that "employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations"); *Anderson Communications*, Memorandum Opinion and Order, 16 FCC Rcd 15020, 15021 para. 5 (2001) ("[w]e do not believe that an inadvertent failure to renew a license in a timely manner is so unique or unusual to warrant a waiver of the rules.").

¹² 47 CFR § 1.106(c)(2).

¹³ *See* the Commission's waiver criteria at 47 CFR § 1.925. *See also WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1415 (2003).

¹⁴ *See* 47 CFR § 1.931.