

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

In the Matter of the Applications of)
)
DUKE POWER COMPANY) FCC File Nos. 743382, 743385
)
for Private Operational Fixed)
Microwave Radio Station Licenses)

ORDER

Adopted: November 18, 1999

Released: November 18, 1999

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Duke Power Company (Duke Power) operates several fixed microwave service (FMS) radio stations in the 2 GHz band and inadvertently allowed the licenses for two of those stations to expire. Duke Power has now filed applications for new licenses for the same facilities¹ and requests a waiver of the Commission's Rules that would otherwise authorize the stations on a secondary basis.² For the reasons set forth below, we deny Duke Power's request for primary status.

II. BACKGROUND

2. The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services (PCS).³ To this end, the Commission has adopted certain transition rules.⁴ In doing so, the Commission balanced the needs of incumbent FMS licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and

¹Applications for Authorization in the Microwave Services (FCC File Nos. 743382, 743385) (filed June 29, 1998) (Applications).

²Duke Power Company Request for Waiver of Federal Communications Commission Rule Section 101.81 (filed June 29, 1998) (Waiver Request).

³Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

⁴See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public and most conducive to the introduction of new services. See *ET First Report and Order*, 7 FCC Rcd at 6886-87 ¶ 5.

implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.⁵ Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant length of time, by the end of which the incumbents are to relocate to another portion of the spectrum.⁶ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁷ Second, the Commission is authorizing new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.⁸ Most minor modifications of FMS stations are also authorized on a secondary status unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the ET licensee.⁹ The result is that while incumbent FMS licensees are able to continue operating their systems with primary status -- as those systems currently exist -- any expansions and most modifications to the systems result in secondary status.

3. Duke Power is an electric utility serving approximately two million customers in North and South Carolina.¹⁰ In support of its electric operations, Duke Power operates an extensive telecommunications network, which includes a private microwave system with over fifty FMS stations.¹¹ Due to an administrative oversight, Duke Power failed to timely renew the licenses for two of those FMS stations, Station WIA442, Drexel, North Carolina, and Station WNEI464, Brevard, North Carolina,¹² and the licenses automatically expired on November 3, 1997.¹³ Duke Power discovered its error in June 1998 and filed applications for new licenses for the stations.¹⁴ The stations operated in the 2 GHz band and were originally authorized with primary status.¹⁵ In connection with its applications, Duke Power requests a waiver of the Commission's rules that provide that new FMS stations in the 2 GHz band will

⁵*ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding A Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8866-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

⁶47 C.F.R. §§ 101.69(b), 101.79(a). See also *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁷See 47 C.F.R. §§ 101.69(a), 101.71-101.77.

⁸47 C.F.R. § 101.81.

⁹*Id.*

¹⁰Waiver Request at 1.

¹¹*Id.*

¹²*Id.*

¹³See 47 C.F.R. § 101.65(a) (1998) (currently codified at 47 C.F.R. § 1.955(a)(1)).

¹⁴See Waiver Request at 1.

¹⁵*Id.* at 2.

be authorized on a secondary basis to ET licensees. Duke Power states that it seeks to have its stations "re-licensed" with primary status and to retain the same call signs.¹⁶

III. DISCUSSION

4. In this case, while the stations at issue were originally authorized with primary status, Duke Power allowed the licenses for those stations to lapse. Duke Power requests a waiver of the rules so that its new licenses for the stations can be accorded primary status. We may grant a request for waiver when (i) the underlying purpose of the rule(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 circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁷ For the reasons set forth below, we conclude that grant of the requested waiver is not warranted. We therefore deny Duke Power's request for a waiver of the rules.

5. Turning to the first of the two standards for deciding a waiver request, Duke Power argues that the primary purpose of the 2 GHz licensing rules is to ensure that the costs of relocation do not escalate beyond the level originally contemplated by the Commission.¹⁸ Duke Power states that because it had previously been licensed at the same locations, it is not adding any "new" stations, nor is it increasing the relocation costs beyond what they were at the time the Commission decided to reallocate the 2 GHz band from FMS to ET services.¹⁹ Further, Duke Power states that its stations were still listed in the frequency coordinator's 2 GHz microwave data base, and that therefore no ET licensee could have detrimentally relied on the fact that Duke Power's licenses had expired.²⁰ Duke Power therefore contends that the underlying purposes of the rules would not be served by applying the rules to its case.²¹

6. We disagree. The goals of the 2 GHz licensing rules are not only to limit relocation costs, as Duke Power argues, but also to clear the 2 GHz spectrum by allowing FMS stations to lose primary status as those stations change. In declining to expand the licensing policy beyond these contours, the Commission stated that limiting primary site grants is necessary to protect the interests of PCS (and other ET) licensees.²² Moreover, the rules themselves demonstrate that limiting relocation costs are not the only purpose the rules serve. For example, all major modifications result in a 2 GHz FMS station being accorded secondary status, regardless of the effect on relocation costs.²³ Further, licensees that make

¹⁶*Id.* at 1.

¹⁷47 C.F.R. § 1.925(b)(3).

¹⁸ Waiver Request at 2.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.* at 2-3.

²²*Cost Sharing First Report and Order*, 11 FCC Rcd at 8869 ¶ 88.

²³47 C.F.R. § 101.81.

certain minor modifications must affirmatively justify primary status, not just show that the modifications will not add to relocation costs in order to retain primary status. Thus, we believe that a determination as to whether grant of the requested waiver is warranted should not be limited solely to an analysis of the impact on potential relocation costs.

7. Duke Power also argues that the primary emphasis of the rules is with respect to the PCS portion of the 2 GHz band, and that its stations are in the non-PCS portion.²⁴ Indeed, argues Duke Power, one of its stations is in a portion of the spectrum that has yet to even be targeted for a particular ET service.²⁵ While Duke Power is correct that the focus of the Commission's decisions was on the PCS portion of the 2 GHz band, we do not believe that this is determinative of the outcome of this matter. In this connection, we note that the Commission specifically applied the 2 GHz licensing rules to all portions of the 2 GHz band.²⁶ Thus, we are not persuaded that the fact that Duke Power is in the non-PCS portion of the 2 GHz band is a sufficient reason to waive the current licensing rules. For these reasons, we conclude that Duke Power has not shown that the underlying purpose of the 2 GHz FMS licensing rules would not be served or would be frustrated by applying them to this case.

8. Turning to the second of the two standards for granting a waiver, Duke Power argues that that this case presents unique or unusual circumstances that render application of the licensing rules inequitable, unduly burdensome and contrary to the public interest.²⁷ Duke Power states that at the time its licenses expired, it was going through a major reorganization as a result of a merger and then relocated its offices.²⁸ It argues that because of these events, it overlooked timely renewing its licenses.²⁹ We do not believe that an inadvertent failure to renew a license in a timely manner in connection with the merger of a company or the subsequent relocation of its offices is so unusual as to warrant a waiver of the rules. Moreover, we note that at the time Duke Power's licenses expired, petitions for reinstatement had to be filed within thirty days of the license's expiration.³⁰ In this case, Duke Power's applications were filed nine months after the licenses expired. It therefore is not eligible for reinstatement under the rules then in effect. Since that time, the Commission has adopted a new reinstatement policy pursuant to which, while licensees may seek reinstatement beyond thirty days after their licenses' expiration, such petitions will not be routinely granted and will be subject to stricter review.³¹ Thus, pursuant to that policy, lapsed licenses will not routinely be reinstated. We therefore

²⁴Waiver Request at 3.

²⁵*Id.*

²⁶*Cost Sharing Report and Order*, 11 FCC Rcd at 8869-70 ¶¶ 90-92.

²⁷Waiver Request at 3-4.

²⁸*Id.* at 1.

²⁹*Id.*

³⁰*See* 47 C.F.R. § 101.65(b)(1) (1998).

³¹Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, 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*, 14 FCC Rcd 11145, 11154-55 ¶¶ 21-22 (1999).

decline to routinely waive the Commission's rules in order to grant primary status to 2 GHz FMS stations when those stations have not been reinstated.

9. Duke Power also argues that if it is denied primary status for the stations at issue, it will be required to relocate to a higher frequency band not only these stations, but also the stations to which these stations are "paired." This, argues Duke Power, will be an additional financial burden. However, Duke Power is in no different a situation in this respect than is any licensee that loses primary status for its FMS station, by modification or "re-licensing." Accordingly, we do not believe that Duke Power has shown that its case presents unusual or unique circumstances such that it is entitled to a waiver of the Commission's Rules.

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.925 and 101.69 of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.69, the Request for Waiver of Duke Power Company, filed on June 29, 1998, IS DENIED.

11. This action is 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

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
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