

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

In the Matter of )
)
NATIONWIDE RADIO COMMUNICATIONS, )
INC. ) File No. 661467
)
Application to modify the license for Specialized )
Mobile Radio Station KNFG237, in Chicago, )
Illinois Channel 851.3875 MHz )
)

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 2001

Released: April 4, 2001

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review by Nationwide Radio Communications, Inc. (Nationwide), of a letter decision by the Deputy Chief, Licensing and Technical Analysis Branch (Licensing Branch), Commercial Wireless Division, Wireless Telecommunications Bureau. In this order, we review Nationwide's application to modify its license to add 32 mobile units for Specialized Mobile Radio (SMR) station KNFG237, a single-channel station licensed on 800 MHz General Category channel 851.3875 MHz. Based on our review, we conclude that because another licensee had fully loaded the channel, Nationwide's modification application was properly dismissed as defective and that its underlying license automatically cancelled as a result of permanent discontinuance of operation. Therefore, we deny Nationwide's Application for Review.

II. BACKGROUND

2. Nationwide obtained the license for station KNFG237 by assignment on June 5, 1992. Under the rules applicable at the time, conventional General Category channels were subject to loading rules that required the licensee to obtain authorization for the specific number of mobiles associated with the system.

1 Letter from Terry Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, to Nationwide Communications, Inc., August 25, 1997 (Licensing Branch Letter).

2 Id. at 1.

3 47 CFR § 90.135(a)(5) (1991). The end-user licensing rules were applicable to SMR General Category licensees who obtained site-specific licenses prior to our conversion of the General Category to licensing by auction on a market-area basis. The end-user licensing rules no longer apply to SMR licensees in the 800 MHz band. See In the Matter of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End-Users Specialized Mobile Radio Systems, Memorandum Opinion and Order, 7 FCC Rcd 5558 (1992)(End-User Order).

The loading rules further specified that General Category channels were available for licensing on a shared basis until the channel was loaded with 70 mobiles, at which point further licensing of the channel in the same geographic area was not allowed.<sup>4</sup> When Nationwide acquired the license for station KNFG237, it sought to obtain authorization for two end-user licenses. However, the Land Mobile Branch of the former Private Radio Bureau returned those end-user applications as defective. Nationwide failed to correct the defect.<sup>5</sup>

3. On August 3, 1992, J&K Communications, Inc. (J&K) applied for an SMR license on Nationwide's frequency in the same geographic area. Simultaneously, Dart Cab Company (Dart) filed an end-user application for 70 mobile units to be associated with J&K's SMR station.<sup>6</sup> Nationwide filed a petition to dismiss J&K's application. On November 3, 1992, the Land Mobile Branch denied Nationwide's petition and granted J&K's application.<sup>7</sup> The Land Mobile Branch also granted Dart's end-user application for 70 mobile units, which caused the channel to become fully loaded and unavailable for further licensing. Nationwide filed a petition for reconsideration of the Land Mobile Branch's decision on December 28, 1992, 25 days after the period for filing for reconsideration had run. The Land Mobile Branch dismissed Nationwide's petition as untimely,<sup>8</sup> and Nationwide filed a further petition for reconsideration on January 21, 1993. On May 16, 1995, the former Office of Operations of the Wireless Telecommunications Bureau denied Nationwide's further petition.<sup>9</sup> Nationwide did not seek review of this decision.

4. On April 23, 1994, while its petition for further reconsideration against J&K was pending, Nationwide filed a modification application to load 32 mobile units on station KNFG237. On June 13, 1995, the Land Mobile Branch returned Nationwide's application as defective. Because the channel was already fully loaded by J&K, the Land Mobile Branch determined that the channel was unavailable for loading of additional mobiles by Nationwide. The Land Mobile Branch found that the application could not be granted on a "short-spaced" basis because it did not contain a coordination statement from a frequency coordinator or a co-channel concurrence statement from J&K, as required by the Commission's short-spacing rules.<sup>10</sup>

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<sup>4</sup> 47 CFR § 90.633(b).

<sup>5</sup> Licensing Branch Letter at 1.

<sup>6</sup> Under the end-user licensing rules in effect at the time, SMR licensees could provide service to licensed third party end users, whose mobiles then counted towards the SMR licensee's loading of the channel. In October 1992, the Commission eliminated third party end-user licensing for SMR and required all mobiles to be identified on the license of the SMR provider. *See End-User Order*, 7 FCC Rcd at 5559.

<sup>7</sup> Letter from Terry Fishel, Chief, Land Mobile Branch, Private Radio Bureau, to Nationwide Communications, Inc., November 3, 1992.

<sup>8</sup> Letter from Terry Fishel, Chief, Land Mobile Branch, Private Radio Bureau, to Nationwide Communications, Inc., December 30, 1992.

<sup>9</sup> Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief, Office of Operations – Gettysburg, to George Petrutsas, Esq., March 16, 1995.

<sup>10</sup> 47 CFR § 90.621(b)(4).

5. Nationwide filed a petition for reconsideration of the Branch's decision on June 16, 1995. On November 1, 1996, the Deputy Associate Bureau Chief of the former Office of Operations<sup>11</sup> granted Nationwide's reconsideration petition, and restored Nationwide's April 23, 1994 modification application to the Land Mobile Branch's application processing line.<sup>12</sup> The Office of Operations Letter stated that no frequency coordination was required to add mobile units to Nationwide's authorization, and made no mention of J&K's co-channel authorization or the fact that J&K had fully loaded the channel.<sup>13</sup> On August 25, 1997, the Licensing and Technical Analysis Branch issued the Licensing Branch Letter, which set aside the Office of Operations Letter and dismissed Nationwide's application as defective because it lacked a coordination statement or co-channel concurrence statement from J&K.<sup>14</sup> The Licensing Branch Letter stated that the prior Office of Operations decision was a "nullity" because it failed to account for J&K's exclusive right to the channel. The letter additionally stated that because Nationwide had no mobiles associated with its system, Nationwide's system was not operational as defined by Section 90.633(b) of the Commission's rules, and therefore the license had automatically cancelled.<sup>15</sup> Nationwide filed the instant application for review of the Licensing Branch Letter on September 18, 1997.<sup>16</sup>

### III. DISCUSSION

6. In its Application for Review, Nationwide argues that the Licensing Branch Letter should be set aside because the Licensing and Technical Analysis Branch did not have the authority to review and overturn a decision of the Deputy Associate Bureau Chief in the Bureau's Office of Operations.<sup>17</sup> We agree that the Licensing and Technical Analysis Branch lacked the authority to overturn the decision of a higher level official in the Bureau, as it did in this case. In light of this procedural irregularity, we review *de novo* the status of Nationwide's license and its April 23, 1994 modification application to add 32 mobile units.

7. Based on our review of the record, we conclude that the modification application was defective, and thus properly dismissed. The record indicates that at the time Nationwide applied to load 32 mobiles on Station KNFG237, the channel was already fully loaded with 70 mobiles by J&K, and was therefore unavailable for licensing to Nationwide.<sup>18</sup> Moreover, Nationwide's modification application could not be granted under the Commission's short-spacing rules, because Nationwide did not submit a coordination statement from a frequency coordinator or a statement from J&K consenting to the modification, as

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<sup>11</sup> The Office of Operations was eliminated as part of a Wireless Bureau reorganization in 1997. Its functions were transferred to the Commercial Wireless Division and the Public Safety and Private Wireless Division.

<sup>12</sup> Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief, Office of Operations – Gettysburg, to George Petrutsas, Esq., November 1, 1996 (Office of Operations Letter).

<sup>13</sup> *Id.* The Licensing and Technical Analysis Branch was created as a result of the Bureau's 1997 reorganization. *See* fn 4.

<sup>14</sup> Licensing Branch Letter at 2.

<sup>15</sup> *Id.*

<sup>16</sup> We refrained from acting on this matter as part of the Wireless Bureau's 1999-2000 backlog reduction efforts because the Bureau received indications that a relatively prompt settlement of the case was possible. No settlement has occurred, however, so we are now acting on the Application for Review.

<sup>17</sup> Nationwide Application for Review at 1.

<sup>18</sup> *See* Licensing Branch Letter at 1; *see also* fn. 9, *supra.*, 47 CFR § 90.633(b).

required by section 90.621(b)(4).<sup>19</sup> In light of these facts, the Branch decision on June 13, 1995, to return the application as defective was correct. The Bureau's Office of Operations letter, dated November 1, 1996, restoring the application to the application processing line, which failed to acknowledge the fact that J&K had fully loaded the co-channel, was in error. Furthermore, after the application was restored, Nationwide did not amend the application to provide a coordination statement or a co-channel concurrence. As a result, the application continued to be defective under the Commission's Part 90 rules, and was properly subject to dismissal.

8. We also agree with the Licensing Branch's conclusion that the original license for Station KNFG237 cancelled for discontinuance of operation. Under the applicable rules, a General Category system that is non-operational for more than a year is deemed to have permanently discontinued operations, which results in automatic cancellation of the license.<sup>20</sup> Moreover, in order to be considered "operational," the system must have at least one associated mobile operating on the channel.<sup>21</sup> In this case, Nationwide never obtained an authorization for mobiles as required by section 90.135(a)(5).<sup>22</sup> Subsequently, J&K obtained exclusive rights to the channel by loading it with 70 mobiles, which precluded Nationwide from further operation. The result in this case is consistent with that of *Abraham Communications, Inc.*,<sup>23</sup> in which we upheld the cancellation of a conventional SMR license for non-operation because the licensee failed to license any of the end users on its system and a subsequent licensee fully loaded the channel. The same reasoning applies here. Therefore, we affirm that Nationwide's license for Station KNFG237 automatically cancelled.

#### IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Nationwide Radio Communications in the above captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

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<sup>19</sup> 47 CFR § 90.621(b)(4).

<sup>20</sup> 47 CFR § 90.157.

<sup>21</sup> 47 CFR § 90.633(d).

<sup>22</sup> 47 CFR § 90.135(a)(5).

<sup>23</sup> *Abraham Communications, Inc., Memorandum Opinion and Order*, FCC 96-324 (rel. Sept. 18, 1996).