

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

In the Matter of )  
 )  
License Acquisitions, LLC ) WT Docket No. 02-55  
 )  
Request to Rescind ESMR Election - Improving )  
Public Safety Communications in the 800 MHz )  
Band. )

**ORDER**

**Adopted: May 16, 2019**

**Released: May 17, 2019**

By the Commission:

**I. INTRODUCTION**

1. On April 9, 2018, License Acquisitions, LLC (License Acquisitions) submitted via e-mail a petition seeking reconsideration<sup>1</sup> of the Public Safety and Homeland Security Bureau’s (Bureau) March 12, 2018 denial of its request to rescind its election under the 800 MHz rebanding program to relocate to the Enhanced Specialized Mobile Radio (ESMR) portion of the band.<sup>2</sup> On July 25, 2018, the Bureau dismissed the reconsideration petition because License Acquisitions submitted the petition via email, which is barred by Section 1.106(i) of the Commission’s rules.<sup>3</sup>

2. On August 24, 2018, License Acquisitions filed an Application for Review (AFR) of the Bureau’s reconsideration decision.<sup>4</sup> In the AFR, License Acquisitions argues that the Bureau erred in dismissing its reconsideration petition<sup>5</sup> and that the Commission has the ability to waive the dismissal of the petition, revive it, and review the original Bureau decision denying License Acquisitions’ request to rescind its ESMR election.<sup>6</sup>

3. For the reasons set forth below, we deny the Application for Review, affirm the Bureau’s decision to dismiss the petition, and decline to revive it.

<sup>1</sup> The Petition for Reconsideration was submitted on April 9, 2018 via email from Rob Somers, General Counsel, License Acquisitions, LLC to the email address PSHSB800@fcc.gov.

<sup>2</sup> The request to rescind the licensee’s ESMR election was made in a Nov. 28, 2017 letter from Rob Somers, Esq., General Counsel, License Acquisitions, LLC, addressed to Marlene H. Dortch, Secretary, Federal Communications Commission (Request to Rescind). The Request to Rescind was denied by the Bureau, which found that “[a]llowing License Acquisitions to switch from ESMR to non-ESMR spectrum 12 years after the fact would require revisions to the band plan that would be highly disruptive to the almost-completed rebanding process and would in fact unwind progress that has already been made.” See *License Acquisitions, LLC, Request to Rescind ESMR Election*, Order, 33 FCC Rcd 2211 (PSHSB 2018) (Election Order).

<sup>3</sup> *License Acquisitions, LLC, Request to Rescind ESMR Election*, Order, WT Docket No. 02-55, DA 18-768 (PSHSB July 25, 2018) (Order on Reconsideration), citing 47 CFR § 1.106(i).

<sup>4</sup> Application for Review, filed by License Acquisitions, LLC, August 24, 2018 (AFR).

<sup>5</sup> AFR at 2-3.

<sup>6</sup> *Id.* at 3-4.

## II. DISCUSSION

4. Section 1.106(i) of the Commission's rules provides the following with respect to the filing of petitions for reconsideration:

Petitions for reconsideration, oppositions, and replies shall conform to the requirements of §§1.49, 1.51, and 1.52 and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554, by mail, by commercial courier, by hand, or by electronic submission through the Commission's Electronic Comment Filing System [ECFS] or other electronic filing system (such as ULS [Universal Licensing System]). Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed.<sup>7</sup>

The Bureau noted that License Acquisitions submitted its reconsideration petition solely via email to the email address PSHSB800@fcc.gov.<sup>8</sup> Applying Section 1.106(i), which bars consideration of petitions for reconsideration submitted only by electronic mail, the Bureau dismissed the petition.<sup>9</sup>

5. License Acquisitions argues that the Bureau's reading of Section 1.106 is incorrect. It claims that the petition was properly filed because, for purposes of Section 1.106, the e-mail address PSHSB800@fcc.gov should not be considered to be an email address, but rather an "electronic filing system (such as ULS)" for docketed filings related to 800 MHz rebanding.<sup>10</sup> License Acquisitions offers no support for this assertion, which is contradicted by the history of the email box in question.

6. By way of background, in 2006, the Wireless Telecommunications Bureau (WTB) created an email address, pscidreview@fcc.gov, for 800 MHz licensees to file statements of position and related documents for *de novo* WTB reviews of recommended resolutions of rebanding issues made by the 800 MHz Transition Administrator (TA).<sup>11</sup> In 2007, PSHSB issued a public notice replacing pscidreview@fcc.gov with the new email address PSHSB800@fcc.gov, which PSHSB expressly designated "for non-docketed filings relating to the 800 MHz rebanding process."<sup>12</sup> In the public notice, the Bureau stated that creation of the new email address "does not supersede other formal filing requirements in the Commission's rules" and directed that docketed filings "should continue to be filed in the Electronic Comment Filing System (ECFS) or as otherwise provided in Part 1 of the Commission's rules."<sup>13</sup> The Bureau provided that non-docketed filings that could be submitted to the PSHSB800@fcc.gov email address included, but were not limited to: 1) licensee requests for extension of time for planning or rebanding implementation; 2) requests for waiver to allow reimbursement of

<sup>7</sup> 47 CFR § 1.106(i) (emphasis supplied).

<sup>8</sup> Order on Reconsideration at 1.

<sup>9</sup> *Id.*

<sup>10</sup> AFR at 2.

<sup>11</sup> *Wireless Telecommunications Bureau Announces Procedures for De Novo Review in the 800 MHz Pub. Safety Proceeding*, Public Notice, 21 FCC Rcd 758 (WTB 2006) (Requiring statements of position in *de novo* review proceedings and related documents to be sent to pscidreview@fcc.gov and directing parties not to file such documents in ECFS).

<sup>12</sup> *Pub. Safety & Homeland Sec. Bureau Announces Creation of New Email Address for Non-Docketed 800 MHz Rebanding Filings*, Public Notice, 22 FCC Rcd 17704, 17704 (2007) (Rebanding Filings Public Notice) (footnote omitted). Delegated authority for handling 800 MHz rebanding was transferred from WTB to PSHSB when PSHSB was established. See *Establishment of the Public Safety and Homeland Security Bureau and Other Organizational Changes*, Order, 21 FCC Rcd 10867 (2006).

<sup>13</sup> Rebanding Filings Public Notice at 17704 and 17704 n.1.

rebanding costs for facilities operating pursuant to Special Temporary Authority; and 3) filings in *de novo* review proceedings.<sup>14</sup> License Acquisitions’ petition for reconsideration—a docketed filing—did not qualify, as a general matter, as a *non-docketed* filing related to the 800 MHz rebanding process, nor did it fall into any of these three specifically identified categories. Moreover, had the Bureau intended to waive or supersede Section 1.106(i) regarding the filing of petitions for reconsideration to permit such filings via e-mail, it would have so stated in the public notice. Instead, the Bureau clearly stated that PSHSB800@fcc.gov was not to be used for filings that required adherence to the “formal filing requirements in the Commission’s rules,” and was not to be used for docketed filings.<sup>15</sup>

7. License Acquisitions argues that the Bureau should have accepted its reconsideration petition via email because the Bureau accepted and acted upon its underlying Request to Rescind—which was sent by email to PSHSB800@fcc.gov—without returning it, placing it in the docket, or seeking public comment on it. License Acquisitions contends that if it was sufficient to file the underlying request by e-mailing it to the designated address (rather than filing it in ECFS), it should not have had to file in ECFS a petition seeking reconsideration of that request.<sup>16</sup> However, the Commission’s rules specify filing requirements for reconsideration petitions that are different from the rules applicable to informal requests for Commission action such as License Acquisitions’ original rescission request.<sup>17</sup> Here, it is License Acquisitions’ attempted filing of a formal petition for reconsideration, not its original request, that is at issue. And given the fact that the Bureau’s Election Order—the subject of License Acquisitions’ petition for reconsideration—was clearly a docketed FCC decision (*see supra* note 17), any suggestion that a Section 1.106 petition for reconsideration of that decision could be submitted under procedural guidelines specifically described as applicable only to non-docketed filings is unreasonable.

8. License Acquisitions also argues that the Bureau should not have dismissed the petition because the Rebanding Filings Public Notice stated that docketed filings “should” be filed in ECFS—not that they “must” be filed in ECFS.<sup>18</sup> This argument that the Bureau’s language was only precatory cannot be reconciled with the fact that Section 1.106(i) definitively states that “[p]etitions submitted only by electronic mail . . . shall not be considered to have been properly filed.”<sup>19</sup>

9. License Acquisitions correctly notes that the Commission may waive its rules for good cause shown.<sup>20</sup> It then suggests that the Commission should make an *ad hoc* departure from Section

---

<sup>14</sup> *Id.* The Rebanding Filings Public Notice made it clear that the third example—filings in *de novo* proceedings—was a reference to the filings that the 2006 WTB-created version of the email address was designed to accommodate (*i.e.*, licensee-filed statements of position and related documents for *de novo* reviews (then handled by WTB) of recommended resolutions of rebanding issues made by the 800 MHz TA mediator). *See id.* at 17704 n.4.

<sup>15</sup> *Id.* We note that no other entity attempted to file a petition for reconsideration, or any other docketed filing, by using the PSHSB800 email address.

<sup>16</sup> AFR at 3.

<sup>17</sup> *Compare* 47 CFR § 1.41, Informal requests for Commission action, *with* 47 CFR § 1.106, Petitions for reconsideration in non-rulemaking proceedings. (“Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed.” 47 CFR § 1.106(i)). The Bureau’s March 12, 2018 Election Order, was a formal action that, following Commission procedures, was posted as a “Commission Action” in WT Docket No. 02-55 in ECFS. A petition for reconsideration of a docketed action is a formal filing that must comply with the requirements of Section 1.106 of the Commission’s Rules; it is not covered by the informal procedures of an email filing process expressly restricted to filings of certain types of informal 800 MHz-related requests in non-docketed proceedings.

<sup>18</sup> AFR at 3 *citing* Rebanding Filings Public Notice.

<sup>19</sup> 47 CFR § 1.106(i). *See, e.g., Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (DC Cir. 1973) (noting that while use of the word “may” is ordinarily permissive, use of “shall” is generally intended as a mandatory direction).

<sup>20</sup> AFR at 3, 4 *citing* 47 CFR § 1.3.

1.106(i) because of the asserted public interest benefits of allowing it to rescind its ESMR election.<sup>21</sup> We disagree, not only because of the lack of public interest benefit in acceding to License Acquisitions' request, but also because doing so would undercut "orderliness and predictability which are the hallmarks of lawful administrative action."<sup>22</sup> As an initial matter, since License Acquisitions failed to present to the Bureau any argument for waiver of the reconsideration petition filing requirements, License Acquisitions is barred from raising such arguments in an application for review.<sup>23</sup> Moreover, while the Commission can waive its rules on its own motion, we do not discern any good cause basis for doing so here.<sup>24</sup> Because License Acquisitions has not shown good cause why we should reverse the Bureau's decision, we deny the Application for Review and affirm the Bureau's action.

10. Even if we were to agree that the Bureau should have treated License Acquisitions' petition for reconsideration as properly filed—which we do not—we would nevertheless deny the AFR for the substantive reasons set forth in the following discussion and as provided by the Bureau when it declined, in the Election Order, to allow License Acquisitions to rescind its ESMR election.<sup>25</sup> First, License Acquisitions failed to request permission to rescind this election for an unreasonably long period of time after the election was made—it waited until 2017 before attempting to rescind the 12-year-old ESMR election made and reaffirmed by its predecessor in 2005 and 2006, respectively<sup>26</sup>—providing no convincing rationale for this inordinate delay, and offering no justification to excuse the disruption that granting it would cause. Further, on multiple occasions after acquiring the licenses in 2010 and prior to its 2017 rescission request, License Acquisitions represented to the Commission that it was fully prepared to construct an ESMR system and that it had acquired all non-frequency dependent equipment, tower leases, and property necessary to do so.<sup>27</sup> As the Bureau noted, the intent of the original deadline on ESMR elections would be frustrated were the Commission to find that License Acquisitions could now withdraw that election over twelve years after it was made.<sup>28</sup>

11. Second, we disagree with License Acquisitions' contention that granting it relief at this late date would not affect 800 MHz rebanding.<sup>29</sup> License Acquisitions is incorrect when it states that its

---

<sup>21</sup> AFR at 3.

<sup>22</sup> *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-951 (D.C. Cir. 1986), citing *Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C. Cir. 1976).

<sup>23</sup> See 47 CFR § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").

<sup>24</sup> The DC Circuit has found that although equitable principles do enable an agency to avoid applying the clear terms of a rule to a specific situation if adequately justified under established procedures for considering exceptions to the agency's rules (e.g., by applying the agency's waiver requirements and standards), if the need for such equitable relief arises from the petitioner's own mistakes in construing or following clear agency rules, or if the relief would injure another party that had fully complied with the rules, the request for relief should be denied. *Orange Park Florida TV*, 811 F.2d 664, 674-75 (D.C. Cir. 1987). As discussed above, the petitioner here failed to follow long-established rules governing the filing of petitions for reconsideration. Moreover, as discussed below, *sua sponte* waiver of the Commission's rules to enable the grant of the relief originally requested by petitioner would lead to harm to other parties that have fully complied with the Commission's ESMR election requirements.

<sup>25</sup> See generally Election Order, *supra* note 2.

<sup>26</sup> By way of background, in the *800 MHz Report and Order*, geographic area (EA) licensees were afforded the option to: (1) relocate all of their systems in a market into the new ESMR portion of the 800 MHz band; (2) relocate their systems as close as possible to the new ESMR band but remain in the non-cellular portion of the band operating on a strict non-interference basis; or (3) to remain on their current channels on a strict non-interference basis. See *Improving Pub. Safety Communications in the 800 MHz Band, Consolidating the 800 & 900 MHz Industrial/Land Transp. & Bus. Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) para. 162, as amended by Erratum, DA 04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459, 19 FCC Rcd 21818 (2004) (*800 MHz Report and Order*). See also *Transition Administrator Press Release*, Public Notice, 20 FCC Rcd 668 (WTB 2005). In May 2005, License

(continued....)

former frequencies are “still available to it to reassume as its own.”<sup>30</sup> Its frequencies in the Mexico border area were offset frequencies<sup>31</sup> which the Fifth Report and Order in the 800 MHz proceeding eliminated.<sup>32</sup> Consequently, if License Acquisitions were allowed to rescind its ESMR election, the 800 MHz TA would have to provide License Acquisitions with new regular, i.e., non-offset, frequencies.<sup>33</sup> Moreover, in reliance on License Acquisitions’ ESMR election, the TA has provided other rebanding licensees in the border area with non-ESMR frequencies that conflict with at least some of those that would have been covered by License Acquisitions’ license had it not elected to relocate to the ESMR portion of the band.<sup>34</sup> Therefore, if License Acquisitions were allowed to rescind its ESMR election, the TA would have to provide it with replacement frequencies, which would result in additional expense to and delay of the rebanding program. But even assuming the changes were feasible, there is no corresponding public interest benefit to justify them. The sole reason License Acquisitions has advanced for the relief it seeks is that it has changed its business plan. Thus, it has abandoned the ESMR service it pledged to provide, and now instead proposes to lease its originally assigned frequencies to another company.<sup>35</sup> While this arrangement might well benefit License Acquisitions, we fail to perceive, and License Acquisitions has failed to identify, any public interest benefit that would result.

12. License Acquisitions is correct that we can consider applications for review of Bureau decisions when there is an “erroneous finding as to an important material question of fact” or “prejudicial procedural error.”<sup>36</sup> However, as detailed above, the Bureau committed neither factual nor procedural

(Continued from previous page)

Acquisitions’ predecessor, Silver Palm Communications, Inc. (Silver Palm), elected to relocate to the ESMR band. In October 2005, the Commission afforded licensees such as Silver Palm the opportunity to either reaffirm or withdraw their elections to relocate to the ESMR band. In February 2006, Silver Palm affirmed its ESMR election. In July 2010, License Acquisitions acquired Silver Palm’s licenses. On Nov. 28, 2017, twelve years after the initial election by Silver Palm, and seven years after License Acquisitions acquired Silver Palm’s licenses, License Acquisitions sought leave to withdraw its ESMR election and return to Silver Palm’s originally authorized frequencies. *See supra* note 2.

<sup>27</sup> *See, e.g.*, License Acquisitions, Request for Waiver of the Deadline for Completion of 800 MHz Rebanding, May 20, 2011 at 2. (“Licensee has made, affirmed, and re-affirmed its election to relocate to the ESMR band with the Transition Administrator (‘TA’) for relocation of License to new channels . . . Licensee has already purchased real property, repeater station equipment and portable radios for construction of License and has a commitment of tower space for the repeater equipment.”) *See also*, Letter from Carole L. Downs, Manager, License Acquisitions, LLC, to Michael J. Wilhelm, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, July 7, 2011; Letter from Carole L. Downs, Manager, License Acquisitions, LLC, to Michael J. Wilhelm, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, July 14, 2015, stating similar claims regarding its construction progress.

error in dismissing the petition for reconsideration. For the reasons provided above, we therefore affirm the Bureau's dismissal of License Acquisitions' emailed petition for reconsideration and deny the AFR.

### III. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 CFR § 1.115, that the Application for Review filed by License Acquisitions on August 24, 2018, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

(Continued from previous page)

<sup>28</sup> Election Order, 33 FCC Rcd at 2212.

<sup>29</sup> AFR at 4.

<sup>30</sup> *Id.*

<sup>31</sup> An 800 MHz offset frequency is one displaced by 12.5 kilohertz from a standard 800 MHz channel.

<sup>32</sup> *Improving Public Safety Communications in the 800 MHz Band*, Fifth Report and Order, 28 FCC Rcd 4085, 4092 para.19 (PSHSB 2013). See 47 CFR § 90.613 Frequencies available.

<sup>33</sup> We note that License Acquisitions entered into a Frequency Reconfiguration Agreement (FRA) with Sprint on May 28, 2014. Under the terms of the FRA, License Acquisitions relinquishes specific frequencies in the 809-817/854-862 MHz (non-ESMR) portion of the 800 MHz band and Sprint relinquishes specific frequencies in the 817-824/862-869 MHz (ESMR) portion of the 800 MHz band, thereby permitting License Acquisitions, consistent with its ESMR election, to construct and activate an ESMR system. License Acquisitions subsequently filed waiver requests, appended to its applications for license renewal, which waiver requests were opposed by Sprint and are still pending before the Wireless Telecommunications Bureau. See, e.g., Request for Waiver of the Deadline for Completion of 800 MHz Rebanding License Acquisitions LLC, Call Sign WPSJ767 (May 23, 2011); Sprint Petition to Deny (June 30, 2011); License Acquisitions Motion to Strike (July 20, 2011); License Acquisitions Opposition to Petition to Deny (July 11, 2011); Sprint Reply to Opposition to Petition to Deny (July 14, 2011). The FRA is not effective until the Commission issues a ruling on these requests. See Sprint and License Acquisitions FRA, May 28, 2014, at 1, §1(a). The FRA is being held in escrow by the TA pending a ruling on these requests. Were License Acquisitions granted the relief it seeks here, the FRA would have to be revised, introducing further delay into the 800 MHz rebanding process.

<sup>34</sup> For example, the Commission's ULS shows that the TA revised License Acquisitions' offset frequency, 856.725 MHz, in the San Antonio, Texas market, to non-offset frequency 856.7375 MHz and made it available to rebanding licensee, American Electric Power Service Corporation. See <http://wireless2.fcc.gov/UlsApp/UlsSearch/searchLicense.jsp>.

<sup>35</sup> AFR at 4-5.

<sup>36</sup> AFR at 3 citing 47 CFR § 1.115(b)(2)(iv-v).