

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

In the Matter of)	
)	
Richard Duncan d/b/a Anderson)	File No. 96F092
Communications)	
)	
Finder's Preference Request)	
For Station WNFY616, Licensed to)	
Morris Communications, Inc.)	
at Greenville, South Carolina)	

**MEMORANDUM OPINION AND ORDER
 AND ORDER ON REMAND**

Adopted: March 7, 2003

Released: March 12, 2003

By the Commission:

I. INTRODUCTION

1. On February 12, 2001, the Commission released an order denying Morris Communications Inc.'s (Morris) Application for Review and affirming the automatic cancellation of five of the ten channels authorized under Morris's above-captioned Specialized Mobile Radio (SMR) license for failure to construct the frequencies by the applicable deadline. The Commission order also affirmed the grant of a dispositive finder's preference to Richard Duncan d/b/a Anderson Communications (Duncan).¹ On April 17, 2002, the United States Court of Appeals for the District of Columbia affirmed in part and vacated in part the Commission's order.² In vacating the order, the Court remanded the case on the limited question of whether the Commission should grant Morris's request for waiver of the one-year construction requirement, which was presented for the first time in its Application for Review. We dismiss Morris's waiver request because it is a new argument prohibited under our rules. We also find that it fails to meet our waiver standard.

II. BACKGROUND

2. Section 90.631(e) of our rules requires that an SMR licensee construct a station within one year of the date of license grant.³ Section 90.631(f) provides that failure to place a station in permanent operation within one year results in automatic cancellation of the license.⁴ On February 2, 1989, the

¹ In the Matter of Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order*, 16 FCC Rcd 4312 (2001) (*Commission Order*).

² *Morris Communications, Inc. v. FCC*, No. 01-1123 (D.C. Cir. Apr. 17, 2002) (*Morris Remand*).

³ 47 C.F.R. § 90.631(e). Section 90.631(e) provides that "[e]xcept as provided in § 90.629 [extended implementation], licensees of trunked facilities must complete construction within one year." *Id.* The rule was identical in 1990. 47 C.F.R. § 90.631(e) (1990).

⁴ 47 C.F.R. § 90.631(f). Section 90.631(f) provides that "[i]f a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629 [extended implementation], its license cancels automatically. For purposes of this section, a base station is
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Commission granted Morris a license on Station WNFY616 for a five-year term to operate on ten SMR channels (861-865.3625 MHz and 856-860.1125 MHz). Consistent with the Section 90.631(e) requirement that licensees of trunked facilities construct within one year, Morris's license was conditioned on its constructing the authorized facilities within one year of the date of license grant, *i.e.*, by February 2, 1990.

3. On February 6, 1990, Morris submitted a Construction Notification informing the Land Mobile and Microwave Division's Compliance Branch (Compliance Branch) that it had constructed five channels on 861-865.3625 MHz.⁵ Morris, however, had not constructed the remaining five channels, 856-860.1125 MHz, by the construction deadline. Even though it had not constructed the five 856-860.1125 MHz channels by the specified one-year deadline, and it was on notice pursuant to Section 90.631(f) of the rules, that failure to timely construct resulted in the automatic cancellation of those five frequencies, Morris submitted an application on January 7, 1994, to renew its license for all ten channels.⁶ The Compliance Branch granted the application on April 20, 1994, for an additional five-year term.⁷ While the renewal license listed all ten frequencies initially authorized to Morris, the license also included the express condition that the five channels, for which Morris had failed to provide notice of construction, must have been constructed on or before February 2, 1990.

4. In November 1995, Duncan filed a Finder's Preference Request for the five channels on 856-860.1125 MHz.⁸ Under the finder's preference program, an entity could recover licensed frequencies by submitting information regarding the existing licensee's failure to comply with construction requirements or other applicable rules.⁹ According to Duncan, Morris did not construct the five channels until October 1994, more than four years after the construction deadline.¹⁰ Duncan therefore argued that Morris's license for those frequencies had automatically cancelled because Morris had failed to comply with Sections 90.631(e) and (f) of our rules.¹¹

5. The Office of Operations notified Morris of the Finder's Preference Request by letter dated January 17, 1996,¹² and on February 16, 1996, Morris filed its opposition.¹³ While admitting that it had

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not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation." *Id.* In 1990, the rule provided that "[i]f a station is not placed in permanent operation within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission." 47 C.F.R. § 90.631(f) (1990).

⁵ Construction Notification Form Letter from Morris Communications, Inc. to Linda Freeman, Land Mobile and Microwave Division's Compliance Branch (filed Feb. 6, 1990) (Construction Notification). Morris's Construction Notification states that it had completed construction of the channels on 861-865.3625 MHz in June 1989. *Id.*

⁶ Application for Renewal of Private Radio Station License, FCC Form 574R, File No. 8811634931 (Jan. 7, 1994).

⁷ The expiration date on Morris's renewed license was February 2, 1999. The license was renewed again in 1998, for an additional five-year term. The current expiration date is February 2, 2004.

⁸ Letter from Richard W. Duncan d/b/a Anderson Communications to the Federal Communications Commission (Nov. 12, 1995) (Finder's Preference Request).

⁹ 47 C.F.R. § 90.173(k) (1994). Failure to comply with Sections 90.155, 90.157, 90.629, and 90.633(c) or (d) of our rules could also result in channel recovery under the finder's preference rules. *Id.*

¹⁰ Finder's Preference Request at 2.

¹¹ Finder's Preference Request at 2.

¹² Letter from Anne Marie Wypijewski and William H. Kellet, Office of Operations, to Morris Communications, Inc. (Jan. 17, 1996) (Compliance File No. 96F092). Morris was given thirty days to file its opposition. *Id.* at 1.

¹³ Opposition to Finder's Preference Request filed by Morris Communications, Inc. (Feb. 16, 1996) (Opposition to Finder's Preference Request).

not constructed and placed the five frequencies at issue into operation until October 1994, Morris contended that this construction was timely under authority granted by its renewed license for Station WNFY616.¹⁴ On December 19, 1996, the Office of Operations notified Morris that because the Finder's Preference Request had presented undisputed evidence that Morris had not constructed the five channels by the February 2, 1990 construction deadline, Morris's license for those frequencies had automatically cancelled.¹⁵ The Office of Operations also awarded Duncan a finder's preference for the cancelled channels.¹⁶ On January 21, 1997, Morris filed a Petition for Reconsideration of the cancellation of its license, repeating the arguments it made in its opposition to the Finder's Preference Request.¹⁷ On November 16, 1999, the Commercial Wireless Division rejected Morris's arguments and affirmed the partial automatic cancellation of Morris's license and the award of the dispositive finder's preference to Duncan.¹⁸

6. On December 16, 1999, Morris filed an Application for Review of the Division's order.¹⁹ In addition to repeating its earlier arguments, Morris, for the first time, argued that, even if it did violate Sections 90.631(e) and (f), the Commission should grant Morris a waiver of the one-year construction requirement because it relied in good faith on the "unconditional grant" of all ten channels under its renewed license.²⁰ On February 12, 2001, we denied Morris's Application for Review and affirmed the Division's order,²¹ but we did not expressly consider Morris's waiver request. On April 17, 2002, the Court of Appeals affirmed our determination that the license relating to the five 856-860.1125 MHz channels had automatically cancelled by operation of law when Morris failed to construct station facilities within one year of the license grant.²² However, because the Commission had not addressed Morris's waiver request, the Court also vacated and remanded the case on the limited question of whether Morris's request for waiver of the one-year construction requirement should be granted.²³ We now address that issue.

¹⁴ Opposition to Finder's Preference Request at 3.

¹⁵ Letter from Anne Marie Wypijewski and William H. Kellet, Office of Operations, to Frederick M. Joyce, counsel to Morris Communications, Inc. (Dec. 19, 1996).

¹⁶ Letter from Anne Marie Wypijewski and William H. Kellet, Office of Operations, to Richard W. Duncan (Dec. 19, 1996).

¹⁷ Petition for Reconsideration filed by Morris Communications, Inc. (Jan. 21, 1997). Specifically, Morris argued that it had timely constructed the five channels in reliance on the renewed license, and that the Commission should not modify that authorization without due process. In addition, Morris argued that "forcing" it to discontinue service would be inequitable because the station was constructed and providing service to subscribers. *Id.* at 2-4.

¹⁸ In the Matter of Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order*, 14 FCC Rcd 19325 (CWD 1999).

¹⁹ Application for Review filed by Morris Communications, Inc. (Dec. 16, 1999).

²⁰ Application for Review at i, 10-11.

²¹ Specifically, the Commission affirmed that Morris's license for channels 856-860.1125 MHz automatically cancelled on February 2, 1990. *Commission Order*, 16 FCC Rcd at 4313, ¶ 2. The Commission also determined that construction of the channels after the station's license was renewed did not cure Morris's violation of Section 90.631(f) because the license renewal had a special condition that each channel renewed must have been constructed by February 2, 1990. *Id.* at 4312-13, ¶ 2.

²² *Morris Remand*, No. 01-1123, slip op. at 1-2. In addition, the Court ruled that Morris had no standing to challenge the award of the finder's preference to Duncan. *Id.* at 1.

²³ *Morris Remand*, No. 01-1123, slip op. at 2.

III. DISCUSSION

7. We reject Morris's argument that we should waive the construction deadline for the five 856-860.1125 MHz channels on both procedural and substantive grounds. First, we find the waiver request to be procedurally improper because Morris raised the argument for the first time in its Application for Review. Section 1.115(c) provides that no application for review will be granted if it relies on questions of fact or law upon which the designated authority, subject to Commission review, has been afforded no opportunity to pass.²⁴ Morris could have requested from the Bureau a waiver of the construction requirement and an extension of the deadline on many occasions prior to the filing of its Application for Review, dating back to the period before its construction authority expired. Moreover, to the extent that Morris now attempts to rely on the renewal license to justify its belated construction, it could have raised this argument in support of a waiver of the construction requirement in its Opposition to Duncan's Finder's Preference Request or in a separately filed waiver request. Instead, Morris presented its waiver request for the first time in its Application for Review. Moreover, Morris does not offer any explanation for failing to raise its request in a manner that would have allowed the Bureau to consider its argument, and does not seek a waiver of Section 1.115(c). We therefore dismiss Morris's waiver request as a new argument prohibited under our rules.

8. Second, even if Morris's request were not a new argument prohibited by Section 1.115(c), we would deny the request on its merits under Section 1.925 of our rules. Section 1.925 provides that we may grant a waiver request if it is shown that: (1) the underlying purpose of the rule 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 unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁵ Morris does not meet either of these standards.

9. We reject Morris's argument that unique circumstances exist in this case because Morris constructed and is operating the five 856-860.1125 MHz channels in good faith reliance on the authority granted by the license that was renewed in 1994.²⁶ Morris offers no explanation whatsoever as to why it failed to construct the channels by the February 2, 1990 construction deadline. Rather, Morris argues that even though the license for the five channels cancelled four years before Morris filed its renewal application, the renewal of its license somehow reinstated the license, removed all prior license conditions, and established a new construction period for the five channels.²⁷ We disagree. Renewal of a license does not by itself grant new authority removing or modifying conditions that were applicable at the time the original license was granted. Renewal authority is approval to continue operating under the conditions of the original license. Morris received its original license for the subject frequencies on the condition that it construct, pursuant to Section 90.631(e) of our rules, within one year of the date the license was issued.²⁸ The renewal license included an express statement that the renewal of authority for the five 856-860.1125 MHz channels was contingent on facilities for those channels having been

²⁴ 47 C.F.R. § 1.115(c).

²⁵ 47 C.F.R. § 1.925.

²⁶ Application for Review at 11.

²⁷ Application for Review at 3, 6-7. Morris specifically states that "[b]ased on the authority granted by the renewed license, Morris timely constructed and place the five frequencies into operation in October 1994, pursuant to Section 90.631(e) of the Commission's rules. *Id.*

²⁸ 47 C.F.R. § 90.631(e). See *In the Matter of Aeronautical Radio, Inc., Memorandum Opinion and Order*, 3 FCC Rcd 6994, 6995, ¶ 12 (Private Radio Bureau 1988) (stating that all trunked station licensees in the 800 MHz band receive their authorizations on condition that they construct within a one-year period, and suffer automatic cancellation under the terms of their license if the condition is not met) (*Aeronautical Radio*).

constructed by February 2, 1990 – the same condition that had appeared on the original license.²⁹ This notification on the face of the renewal license stating that operation of the five channels was subject to the original construction deadline clearly put Morris on notice that the renewal license afforded Morris no authority to construct beyond the authority provided by the original license. In light of this explicit notification, Morris cannot reasonably claim that it acted in good faith reliance on the renewal when it proceeded to construct facilities over four years after the authorized construction deadline. We also note that Morris has not identified any decision or rule to suggest that renewal of an existing authorization somehow removes conditions and creates new construction authority. Morris's proffered justification therefore does not provide information sufficiently unique or unusual to grant its waiver request.

10. Moreover, we observe that Morris submitted a renewal application for all ten frequencies. By signing the renewal application, Morris certified that the application contained no false statements. In addition, the renewal application form expressly instructs the licensee to place an "x" in Item 6 of the form "if all technical information is correct on the form." Morris placed an "x" in Item 6, effectively certifying that it had met all the conditions required with respect to the ten frequencies listed in the application. Morris, however, has acknowledged in this proceeding that, at the time it filed the renewal application, it had not met the construction deadline for the five channels and, in fact, had not even constructed the five channels. The instructions provided in the renewal application clearly put Morris on notice that it had a responsibility to ensure the accuracy of its application. Assuming Morris did not intend to mislead the Compliance Branch when it filed its application, Morris apparently included the five cancelled frequencies by mistake in its application. Morris's own failure to submit an accurate renewal application does not constitute unique or unusual circumstances sufficient to grant Morris's request for waiver, and we decline to grant Morris's waiver request on that basis.³⁰

11. We also reject Morris's argument that a waiver should be granted because the underlying purpose of the construction rules would not be served by denial of the waiver request.³¹ The purpose of construction deadlines is to ensure that spectrum is used in an efficient and timely manner.³² Morris's substantial delay in constructing its facilities clearly undermines this purpose. Morris held the spectrum and constructed the facilities for the five channels at issue in the waiver request in October 1994, more

²⁹ Specifically, the renewal and the original licenses expressly reflected the condition by including a notification that the frequencies 856-860.1125 MHz be constructed in conformance with Section 90.631 by February 2, 1990.

³⁰ Morris's reliance on *Mobile Communications Corp. of America v FCC*, 77 F.3d 1399 (D.C. Cir. 1996) to support its argument that it should be able to keep the frequencies because it relied on the renewal of its license is misplaced. See Application for Review at 6. In *Mobile*, the Commission awarded Mobile Telecommunications Technologies Corp. (M-Tel) a pioneer's preference and repeatedly informed M-Tel that it would receive a license without having to pay for that license. Before M-Tel received the license, however, Congress amended Commission procedures to require use of auctions for allocating certain licenses. 77 F.3d at 1402. Under that mandate, the Commission reversed itself, requiring M-Tel to pay a discounted auction price for its license, but did not provide M-Tel an opportunity to address the question of its reliance on the initial statements that it would not have to pay for its license. As a result, the Court remanded the case to the Commission for consideration of those arguments. *Id.* at 1407. In *Mobile*, the Commission made explicit representations that it would do one thing, M-Tel relied upon those representations, and then the Commission took different action. That is not the case here. As we have already stated, Morris has been consistently and uniformly been on notice since 1989, when it received its original license, that failure to construct the channels on 856-860.1125 MHz in a timely manner would result in automatic cancellation of the license for those frequencies. Renewal of Morris's license, especially where Morris submitted erroneous information on its application and the renewal license reiterated the existing construction deadline, did not create any basis or argument for reliance as was the case in *Mobile*.

³¹ Application for Review at 10-11.

³² See *Aeronautical Radio*, 3 FCC Rcd at 6955, ¶ 12 (explaining that construction deadline and automatic cancellation policies "ensure that scarce spectrum space is either put to prompt use by the existing licensee or returned to the Commission for reassignment to another ready and able to construct").

than four years after the construction deadline. We cannot permit Morris's actual construction many years after the deadline to remedy its failure to construct in a timely manner.³³ As we have previously stated, if constructing and operating facilities so many years after grant of a license can, in itself, excuse the failure to construct in a timely manner, enforcement of the one-year requirement becomes a meaningless or arbitrary exercise.³⁴

12. Similarly, we reject Morris's argument that the underlying purpose of the finder's preference program would not be served by denial of the waiver request.³⁵ Morris characterizes the purpose of the finder's preference program as "enhanc[ing] spectrum efficiency by identifying more unused channels and reassigning them to persons who will use them effectively."³⁶ Morris's focus on this element of the finder's preference program, however, ignores the larger objective set forth by the Commission – to supplement Commission efforts to determine whether licensees are in compliance with construction and loading requirements "by providing incentives for parties to survey private land mobile usage and identify licensees who have failed to construct, place in operation, or continue to operate their stations."³⁷ In fact, granting a waiver here on the basis of Morris's untimely construction would completely undermine the goal of the program to ensure that licensees conduct station operations in compliance with our rules. Rather than support waiver of the construction requirements as argued by Morris, the objectives of the finder's preference program as well as the goal of our construction requirements reinforce the appropriateness of denying the waiver.

13. Nor are we persuaded by Morris's statement that it should be granted waiver relief because its customers use equipment that allegedly cannot be readily operated on any other analog SMR system.³⁸ Morris's bare claims do not provide any evidence or explanation about why users of the Morris system have no other options available to them, including use of Morris's own system on the five channels that were timely constructed. Notably, Morris does not refute Duncan's claim that two other licensees currently provide analog service in the Charlotte, North Carolina area.³⁹ Finally, Morris argues that it has

³³ See *Commission Order*, 16 FCC Rcd at 4312-13, ¶ 2 (finding that Morris's construction of the channels on 856-860.1125 MHz after the station's license was renewed does not cure the violation of Section 90.631(f) of the Commission's rules).

³⁴ See *Aeronautical Radio*, 3 FCC Rcd at 6955, ¶ 13 (concluding that if construction and operation within three years could excuse lack of construction within the prescribed one year construction deadline, then enforcement of the one-year construction requirement becomes a meaningless exercise).

³⁵ Application for Review at 10-11.

³⁶ Application for Review at 10 (emphasis in original omitted) (citing Amendment of Parts 1 and 90 of the Commission's Rules Concerning Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, 6 FCC Rcd 7297, 7309, ¶ 77 (1991) (*Finder's Preference Report and Order*)).

³⁷ *Finder's Preference Report and Order*, 6 FCC Rcd at 7303, ¶ 34; see Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Memorandum Opinion and Order*, 8 FCC Rcd 6690, 6691, ¶ 6 (1993) (stating that the finder's preference program "permitted finders, in brief, to seek out licensees of channels in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands that have violated station construction or operation rules"). We also note that Section 90.173(k) expressly states that "[r]ecovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155 [placed in operation], 90.157 [discontinued operations], 90.629 [construction and placed in operation under extended implementation], 90.631(e) or (f) [construction, placed in operation, and discontinued operations], or 90.633(c) or (d) [construction and placed in operation]."

³⁸ Application for Review at i-ii, 4, 8, 11. Morris claims that it is the only provider of analog SMR service on the subject channels. *Id.* at 4.

³⁹ In his Opposition to Morris's Application for Review, Duncan provides evidence that South Sales Communications offers LTR analog service and Chadmoore Communications offers Motorola analog service in the Charlotte area. Opposition to Application for Review filed by Richard Duncan d/b/a Anderson Communications at

(continued....)

invested a great deal of money to construct the subject frequencies.⁴⁰ As we have already stated, Morris has been on notice since 1989, when it first received its authorization, that the license would automatically cancel with respect to any channels for which facilities were not constructed by February 2, 1990. Morris chose to expend funds in the face of that knowledge and in violation of our rules. Even if service to some customers may be temporarily interrupted, which Morris has failed to establish in any event, we cannot allow licensees to create equities in their favor based on their own blatant wrongdoing when a waiver based on that wrongdoing would undermine the purpose of our rules. Accordingly, we deny Morris's waiver request.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Request for Waiver included in the Application for Review filed by Morris Communications, Inc. on December 16, 1999, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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2 & Ex.4 (Dec. 29, 1999). In response, Morris stated that Duncan did not explain whether the type of equipment provided by these companies would "work for the specific frequencies at issue." Reply to Opposition to Application for Review filed by Morris Communications, Inc. at 8, n.5 (Jan. 11, 2000).

⁴⁰ Application for Review at 7-8.