

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

In the Matter of
BIG BEND TELEPHONE COMPANY, INC.
Application for Renewal of the License for
Common Carrier Fixed Point-to-Point Microwave
Service Station WBB272, Six Shooter, Texas

ORDER ON RECONSIDERATION

Adopted: September 6, 2001

Released: September 11, 2001

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

I. INTRODUCTION

1. On April 4, 2001, Big Bend Telephone Company, Inc. (BBTC) filed a request for reconsideration of the March 5, 2001 action taken by the Licensing and Technical Analysis Branch (Branch) of the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division). The Branch dismissed BBTC's renewal application for 2 GHz Fixed Point-to-Point Microwave Service Station WBB272, Six Shooter, Texas, and returned, without action, BBTC's request for correction of the Commission's Universal Licensing System (ULS) database to show the license for Station WBB272. For the reasons set forth below, we grant BBTC's reconsideration petition.

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). To this end, the Commission has adopted certain transition rules. 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 implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees. Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, we permit the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a

1Big Bend Telephone Company, Inc. Petition for Reconsideration (filed April 4, 2001) (Reconsideration Petition).

2Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (ET First Report and Order).

3See 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. ET First Report and Order, 7 FCC Rcd at 6886 ¶ 5.

4ET 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, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (Cost Sharing First Report and Order).

significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁵ 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.⁶ In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.⁷ Most minor modifications of FMS stations are also authorized on a secondary basis 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.⁸ 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. Station WBB272 was initially authorized in 1987.⁹ On December 23, 1990, BBTC timely filed application File No. 27124-CF-R-91 for renewal of the license. The license was renewed for a ten-year license term expiring on February 1, 2001. On July 2, 1991, BBTC filed application File No. 12648-CF-P-91 seeking authorization to modify the license for Station WBB272 by adding additional 2 GHz paths. That application was granted. On October 21, 1991, however, BBTC notified the Commission that it would not be implementing the approved modification to Station WBB272.¹⁰ The letter referred to application File No. 12648-CF-P-91, and stated:

We are hereby notifying the Commission that we will not construct the facility authorized in the referenced application, in view of the fact that one of the points of communication for this station has become unavailable and other arrangements are being made at this time to compensate for the unavailability of that site.

Since we have not yet received the instrument of authorization, we are unable to submit it for cancellation.¹¹

On December 18, 1991, the Commission announced that the “[a]uthorization for Station WBB272 [was] cancelled 11/05/1991.”¹² The public notice specifically referred to application File No. 12648-CF-P-91.¹³

4. BBTC states that, because in 1991, the Commission did not have a searchable licensing database available to the public, it “had no way of verifying that the Commission had only deleted the construction authorization issued in File No. 12648-CF-P-91, . . . or whether it had deleted the underlying license for [S]tation WBB272 from the license database.”¹⁴ BBTC states that only in

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

⁶See 47 C.F.R. §§ 101.69(a), 101.71-101.77

⁷47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and they are not protected from interference from primary operations. *Cost Sharing First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. *Id.*

⁸47 C.F.R. § 101.81.

⁹See *Public Notice*, Rep. No. D-380-A (rel. May 6, 1987).

¹⁰Letter from Bruce A. Wood, Officer, Big Bend Telephone Co., to James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission (filed Oct. 21, 1991).

¹¹*Id.*

¹²*Public Notice*, Rep. No. D-623-A, at 17 (rel. Dec. 18, 1991).

¹³*Id.*

¹⁴Reconsideration Petition at 4 n.3.

connection with the preparation of its application for renewal of the license for Station WBB272, in advance of the February 1, 2001 license expiration, did it discover that the license did not appear in the Commission's ULS database.¹⁵ By letter dated January 19, 2001, BBTC requested that the Commission correct the ULS database to show the license for Station WBB272.¹⁶ While its license correction request was pending, it manually filed its application for renewal of the license for Station WBB272, on January 29, 2001, with a request for waiver of Rule Section 1.913(b) to permit the paper filing of the application.¹⁷ By letter dated February 15, 2001, in response to an informal request for additional information from the Branch staff, BBTC supplemented its license correction request.¹⁸

5. On March 5, 2001, the Branch (a) dismissed BBTC's license renewal application, and (b) returned its ULS license database correction request without action because the request "require[d] review by the Commission's legal counsel due to the sensitivity of th[e] station's primary 2 GHz status."¹⁹ The Branch then instructed BBTC to file a formal petition requesting the reinstatement of WBB272.²⁰

II. DISCUSSION

6. As a preliminary matter, we agree with BBTC that the Branch should not have returned its licensing database correction request without acting on it.²¹ If the matter required additional legal review, the Branch should have referred the request and renewal application to the Division's Policy and Rules Branch, rather than placing the burden on BBTC to submit another request. Therefore, we will address the merits of the request herein.

7. BBTC argues that our licensing database should be corrected to show its license for Station WBB272 because it requested cancellation only of the authorization for the paths added to the license in 1991, not cancellation of the entire license.²² It also contends that the December 18, 1991 public notice announced only the cancellation of additional paths, rather than cancellation of the entire license.²³ BBTC asserts that denial of its correction request, which would in effect revoke BBTC's license because it did the Commission the courtesy of revealing the non-construction of the additional paths,²⁴ would violate BBTC's procedural due process rights under Section 312 of the Communications

¹⁵*Id.* at 3.

¹⁶*See Id.*

¹⁷License Renewal Application Filed on January 29, 2001: FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (filed Jan. 29, 2001). Electronic filing, which is required by Section 1.913(b) of the Commission's Rules, 47 C.F.R. § 1.913(b), was not possible because the license did not appear in the ULS database.

¹⁸Letter from Richard D. Rubino, Esq., Blooston, Mordkofsky, Dickens, Duffy, & Prendergast, to Ruth Taylor, Microwave Section, Federal Communications Commission (filed Feb. 16, 2001).

¹⁹Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Richard D. Rubino, Blooston, Mordkofsky, Dickens, Duffy & Prendergast (Mar. 5, 2001).

²⁰*Id.*

²¹*See* Reconsideration Petition at 6-7.

²²*Id.* at 4-5.

²³*Id.*

²⁴Under the rules then in effect, licenses were required to provide notification of the construction of a major modification. *See* 47 C.F.R. § 21.43(b) (1991). If notification was not filed, the authorization for the modification (but not underlying license) automatically terminated. *See* 47 C.F.R. § 21.44(a)(1) (1991). Thus, argues BBTC, it

(continued....)

Act.²⁵

8. The Commission adopted a new policy in 1999 to govern the disposition of late-filed renewal applications.²⁶ We also have applied this policy to requests in certain other licensing contexts.²⁷ Under the current policy, renewal applications that are filed within thirty days of the expiration of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under the Commission's Rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.²⁸ Applicants who file renewal applications more than thirty days after the license expiration may also request that the license be renewed *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action, including more significant fines or forfeitures.²⁹ In determining whether to grant a late-filed renewal application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee. Taking into account all the facts and circumstances of the instant matter, including the specific factors set forth by the Commission in the context of late-filed renewal applications, we conclude that BBTC should be granted the requested relief.

9. In particular, we believe that our decision in *Medina Electrical Cooperative, Inc.* provides guidance for the disposition of the matter now before us. In that case, a FMS licensee successfully negotiated a voluntary relocation agreement with the winning bidder for the spectrum in which it operated, and accordingly modified its license to relocate a 2 GHz path to the 6 GHz band.³⁰ Three weeks after the modification was granted, an employee of the licensee cancelled the license instead of renewing it, in the erroneous belief that the station had acquired a new call sign when the modification application was granted.³¹ Four months thereafter, the licensee requested reinstatement of the license.³² We found that the licensee did not intend to cancel its license, given that it had recently negotiated the station's relocation to another frequency band and modified its license.³³ We also noted that termination of the license would adversely affect the public because the licensee provided electric service in a rural area where reliable common carrier communications services did not appear to be readily available.³⁴ We

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would be unjust to penalize it for voluntarily providing notification to clarify the status of its license. Reconsideration Petition at 6.

²⁵Reconsideration Petition at 5, 7-8 (citing 47 U.S.C. § 312).

²⁶Biennial 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 the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999) (*ULS Reconsideration MO&O*).

²⁷*See Comcast 38 GHz, Inc., Order*, 16 FCC Rcd 10862, 10864 ¶ 7 (WTB PSPWD 2001) (involving cancellation filed by third party); *Medina Electric Cooperative, Inc., Order on Reconsideration*, DA 99-2314, ¶ 5 (WTB PSPWD rel. Oct. 26, 1999) (*Medina*) (involving unintended voluntary cancellation of license by licensee).

²⁸*See ULS Reconsideration MO&O*, 14 FCC Rcd at 11485 ¶ 22.

²⁹*See id.*

³⁰*Medina*, at ¶ 3.

³¹*Id.*

³²*See id.*

³³*See id.*, ¶ 6.

³⁴*See id.*

therefore reinstated the license with primary status.³⁵

10. Similarly, we are persuaded that BBTC did not intend to cancel its license for Station WBB272 in October 1991, only six months after the Commission renewed it when it notified the Commission that it would not be implementing the modification for the additional paths. Notwithstanding any ambiguity in the October 21, 1991 letter,³⁶ BBTC has now demonstrated that it did not seek cancellation of its license.³⁷ Therefore, we grant BBTC's reconsideration petition.

IV. CONCLUSION AND ORDERING CLAUSES

11. Taking into account all the facts and circumstances of the matter before us, we conclude that BBTC's petition for reconsideration should be granted. We shall correct the ULS database to reflect BBTC's license for Station WBB272 as an active FCC authorization. In addition, we shall return the renewal application to pending status for further processing by the Branch consistent with our decision herein.³⁸

12. **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 Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Request for Reconsideration, filed on April 4, 2001, by BBTC **IS GRANTED** to the extent indicated above.

13. **IT IS FURTHER ORDERED** that the application for renewal of the license for Station WBB272, submitted by BBTC on January 29, 2001, **SHALL BE PROCESSED** by the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch consistent with this *Order on Reconsideration*.

14. This action is taken under designated 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
Wireless Telecommunications Bureau.

³⁵See *id.* Ordinarily, new 2 GHz FMS stations are authorized only on a secondary basis. See 47 C.F.R. § 101.81.

³⁶We note that the letter is not as unambiguous as BBTC now contends, for the letter discussed turning in the license for cancellation, which would not have been appropriate to effectuate the cancellation of only the additional paths.

³⁷*Cf.* County of San Mateo, California, *Order on Review and Reconsideration*, 16 FCC Rcd 4291, 4294 ¶ 7 (2001) (petition demonstrated that, notwithstanding earlier ambiguity, it had not sought dismissal of its reconsideration petition).

³⁸We conclude the 2 GHz license should not lose its primary status on the grounds that the present application was filed more than 30 days after the cancellation. See *Medina*, ¶6. Therefore, if there is no other reason why secondary status is appropriate, see 47 C.F.R. § 101.81, the license shall be reinstated *nunc pro tunc* with primary status.