

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

In the Matter of)
)
THE BEEPER PEOPLE, INC.)
) FCC File Nos. 0000476453, 0000476454
Request for Waiver of Section 101.81 of the)
Federal Communications Commission's Rules)

ORDER

Adopted: October 12, 2001

Released: October 17, 2001

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

I. INTRODUCTION

1. The Beeper People, Inc. (Beeper) request waivers of the Commission's Rules to allow it to retain primary status for its licenses to operate 2 GHz Fixed Microwave Service (FMS) Station WLC691, Newburgh, New York, and Station WLC690, Mt. Beacon, New York, upon the grant of its application to relocate Station WLC691 to a new site. For the reasons set forth below, we deny Beeper's request.

II. BACKGROUND

2. In 1992, the Commission reallocated portions of the 2 GHz band from FMS to emerging technology (ET) systems, including the personal communications services (PCS). The Commission intended to reaccommodate the FMS licensees in a manner that would be most advantageous to incumbent users, least disruptive to the public, and most conducive to the induction of new services. Accordingly, first, to preserve the availability of the existing vacant 2 GHz spectrum, the Commission decided to license all new facilities in the 2 GHz band on a secondary basis. Second, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permitted 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 were to relocate to other spectrum. Third, the Commission restricted the type of modifications and extensions FMS licensees could make to their 2 GHz systems and retain primary status. Fourth, the Commission provided ET licensees with the option

1The Beeper People, Inc. Request for Rule Waiver at 1 (Waiver Request).

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 R&O); see also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 1542 (1992) (ET NPRM).

3ET First R&O, 7 FCC Rcd at 6886-87 ¶ 5.

4Id. at 6891-92 ¶ 31; ET NPRM, 7 FCC Rcd at 1545 ¶ 23. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and are not protected from interference from primary operations.

5ET First R&O, 7 FCC Rcd at 6890-91 ¶¶ 22-29; ET NPRM, 7 FCC Rcd at 1545 ¶ 24.

of requiring the FMS incumbents to relocate sooner and paying the additional costs caused by the earlier relocation.⁷ One practical effect of these rules was that incumbent FMS licensees that were authorized on a primary basis would have the cost of relocating to other bands paid for by the new ET licensees if the ET licensees force them to relocate. On the other hand, ET licensees are under no obligation to relocate 2 GHz links that were authorized on a secondary basis.

3. On May 14, 1992, the Microwave Branch, Licensing Division of the former Private Radio Bureau (Microwave Branch) issued a *Public Notice* stating that while new facilities in the 2 GHz band would be given secondary status, secondary status would not be accorded to those stations licensed prior to January 16, 1992, as to which the FMS licensee made certain minor or technical modifications of their facilities.⁸ The *Public Notice* further indicated that secondary status would not be accorded in situations where additional links were required to complete a communications network or where new facilities and/or frequencies were operationally connected to a network system licensed prior to January 16, 1992, where the applicant made a valid showing of its need for the new facilities.⁹ Later that year, the Commission affirmed this approach.¹⁰ As a result, licensees of existing 2 GHz facilities could make certain modifications and minor extensions and retain primary status, but major extensions or expansions would result in a station being accorded secondary status unless a special showing of need was made to justify primary status.¹¹

4. On October 12, 1995, the Commission sought comment on whether it should continue to grant any 2 GHz FMS applications on a primary basis.¹² The Commission stated that to the extent practicable it would continue to apply the existing rules governing primary and secondary status to pending applications, but that subsequently filed applications would be granted primary status only for modifications that would not add to the relocation costs of PCS licensees.¹³ Thus, the Commission set forth a limited list of technical changes that would be granted primary status and stated that any other modifications would be permitted only on a secondary basis, unless the incumbent made a special showing of need to justify primary status and established that the modifications would not add to the relocation costs of PCS licensees.¹⁴

5. On April 25, 1996, the Commission adopted the current regulations regarding the licensing of FMS systems in the 2 GHz band,¹⁵ which went into effect August 1, 1996.¹⁶ As a result,

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⁶ *ET First R&O*, 7 FCC Rcd at 6891-92 ¶ 31.

⁷ *Id.* at 6890 ¶ 24; *ET NPRM*, 7 FCC Rcd at 1545 ¶ 26.

⁸ Two Gigahertz Fixed Microwave Licensing Policy, *Public Notice*, Mimeo No. 23115 (May 14, 1992).

⁹ *Id.*

¹⁰ Redevelopment 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, 6891-92 ¶ 31 (1992).

¹¹ *Id.*

¹² Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *Notice of Proposed Rule Making*, 11 FCC Rcd 1923, 1925 ¶ 2 (1995) (*Cost Sharing NPRM*).

¹³ *Id.* at 1926 ¶ 4.

¹⁴ *Id.*

¹⁵ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-89 (*Cost Sharing First Report and Order*); 47 C.F.R. § 101.81.

¹⁶ 61 Fed. Reg. 29679, 29680, 29695 (1996).

major modifications and extensions are licensed on a secondary basis, and primary status is granted only for a limited number of technical changes.¹⁷ All other minor modifications render the modified license secondary unless the FMS licensee justifies primary status and the modification does not add to the relocation costs to be paid by the new ET licensees.¹⁸

6. Beeper currently utilizes the two 2 GHz FMS stations involved herein to control its paging operations in the Albany-Newburgh, New York area.¹⁹ In February 1989, the former licensee of Station WLC691, Carmody's Radio Paging Service, Inc., assigned the station license to Beeper.²⁰ At the time of the assignment, Station WLC691 was located at the residence of Leo Carmody, but, apparently in connection with the assignment of the license for the Station WLC691, Mr. Carmody gave Beeper six months from completion of the transaction to remove the station's facilities from his property.²¹ Beeper then, apparently without prior Commission approval, relocated the facilities of Station WLC691 to a location within the city of Newburgh, New York, and reoriented the antenna of the associated Station WLC690 to directionalize it towards Station WLC691.²² Beeper states it sought a new location for Station WLC691 as close as possible to the authorized location, and settled on a site 0.7 miles away.²³ Beeper states that it was not possible to find a suitable location any closer within an area zoned for commercial use.²⁴

7. On June 20, 2001, Beeper filed applications to modify the licenses for Stations WLC690 and WLC691 to recognize its relocation of Station WLC691.²⁵ In connection with these applications, Beeper seeks a waiver of Section 101.81(c) of the Commission's Rules that would otherwise authorize the modifications only on a secondary basis.²⁶ Beeper states that, as Station WLC691 utilizes the same equipment as currently authorized, at its new location, the cost to an ET licensee of relocating the incumbent microwave licensee to an alternative technology has not increased as a result of the move.²⁷ Finally, Beeper states that many of its subscribers are engaged in essential services affecting the health and well being of the public in the area.²⁸

¹⁷ *Cost Sharing First Report and Order*, 11 FCC Rcd at 8868 ¶ 86; 47 C.F.R. § 101.81.

¹⁸ *Id.*

¹⁹ Waiver Request at 2.

²⁰ *Id.* at 1.

²¹ *See id.*

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.* Beeper states that the authorized site is zoned for residential use only, and Mr. Carmody apparently obtained an exemption in order to locate the station there. *Id.*

²⁵ FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000476453 (filed June 20, 2001); FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000476454, Exhibit 1 (filed July 13, 2001). Beeper concurrently requested special temporary authority to operate under the modified parameters, pending the processing of its applications. *See* FCC File Nos. 0000496668 (WLC691) and 0000481033 (WLC690). The Commission granted special temporary authority on July 3, 2001.

²⁶ *See* Waiver Request at 1.

²⁷ *See id.*

²⁸ *Id.* at 2.

III. DISCUSSION

8. As noted above, Section 101.81 of the Commission's Rules provides that, after April 26, 1996, all major modifications and extensions to 2 GHz FMS systems will be authorized only on a secondary basis.²⁹ As an initial matter, Beeper argues that Stations WLC690 and WLC691 should retain their primary status because the modifications occurred prior to April 25, 1996.³⁰ In short, Beeper asserts that, as the modification occurred prior to April 25, 1996, it is exempt from the requirements of Section 101.81 of the Commission's Rules that would compel the Commission to grant Beeper's application for license modification of Station WLC691 with secondary status. We disagree. Section 101.81 governs all 2 GHz license modification applications granted after the rule took effect, regardless of when the application was filed or when the modification was actually implemented.³¹

9. In the event we conclude that Section 101.81 governs the pending applications, Beeper requests waivers of that rule to allow the stations to retain their primary status.³² Among other changes, Beeper proposes a relocation of Station WLC691 in excess of five seconds, which is a major modification.³³ With respect to Station WLC690, Beeper proposes, *inter alia*, to change the transmit antenna azimuth by more than one degree, which also is a major modification.³⁴ Beeper, therefore, correctly notes that it needs waivers of Section 101.81 of the Commission's Rules in order to retain primary status for the stations. We may grant a request for a 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(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁵

10. Beeper argues that this case presents unusual circumstances under which applying the rule according secondary status to the applicant's station license would be inequitable, and that it has no reasonable alternative. As support for grant of its requested waiver, Beeper relies on our decision in *Telcom Systems, Ltd. (Telcom)*.³⁶ In that case, Telcom filed a modification application in order to relocate a 2 GHz station within the city of Marathon, Florida, and sought a waiver of the Section 101.81 to allow the station to retain primary status.³⁷ In support of its waiver request, Telcom stated it would have preferred not to relocate the facility, but was compelled to do so because the owner of the tower on which Telcom leased antenna space planned to dismantle the tower.³⁸ In our decision granting Telcom's waiver request, we found it highly significant that the relocation was caused by circumstances "beyond its control."³⁹ We also found significant Telcom's representation that its station was located in a sparsely

²⁹See 47 C.F.R. § 101.81.

³⁰*Id.* at 1.

³¹Amendment 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, 8868 ¶ 88 (1996).

³²Waiver Request at 1.

³³See 47 C.F.R. § 101.81(c).

³⁴See 47 C.F.R. § 1.929(d)(1)(ix).

³⁵47 C.F.R. § 1.925(b)(3).

³⁶See *Telcom Systems Ltd., Order*, DA 99-2296 (WTB PSPWD rel. Oct. 25, 1999).

³⁷*Id.*, ¶ 3.

³⁸*Id.*

³⁹*Id.*, ¶¶ 5, 6.

populated area of the Florida Keys and that its proposed new site was the closest suitable location.⁴⁰ Based on these facts, we concluded that the case presented unusual circumstances and that Telcom had no option but to relocate the station.⁴¹

11. Beeper argues that the present matter is “virtually identical” to *Telcom*.⁴² We disagree. Beeper claims that its relocation also was caused by circumstances beyond its control, *i.e.*, the former owner of the station ordering Beeper to remove it from his property.⁴³ Beeper also states that it sought a new location in a commercial area as close as possible to the authorized location and settled on a site only 0.7 mile from the authorized location, and that it was not possible to find a suitable location any closer within an area zoned for commercial use.⁴⁴ We note, however, that based on the information before us, it appears that Beeper was aware when it acquired the license for Station WLC691 that it would not be permitted to use the same location. As a result, it could have elected to obtain an initial license to operate at a different location, or to acquire a station that did not have to be relocated. Instead, Beeper, in its business judgment, chose to acquire a station that it knew it would have to relocate. Thus, we are not persuaded that the relocation was caused by circumstances “beyond its control.” Unlike Telcom, which had no option but to relocate its existing station, based on the information before us we conclude that Beeper was not so compelled. Given our belief that it had advance knowledge of the future need to relocate Station WLC691, we find that Beeper fails to make a persuasive case that the relocation was caused by circumstances beyond its control. Therefore, we conclude that grant of a waiver is not warranted under the circumstances presented and will accord Stations WLC691 and WLC690 secondary status.

III. CONCLUSION

12. Based on the record before us, we conclude that Beeper has failed to demonstrate that grant of a waiver of Section 101.81 of the Commission’s Rules is warranted. We therefore deny its requests for waivers of Section 101.81 of the Commission’s Rules. We note, however, that a denial of the waiver requests does not mean that Beeper may not operate the subject stations; rather, assuming the applications are otherwise proper, Beeper’s authorization to operate such stations will be accorded secondary status.⁴⁵

IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925, and 101.69 of the Commission’s Rules, 47 C.F.R. §§ 1.925, 101.69, the Beeper People, Inc.’s Waiver Request, filed June 20, 2001, IS DENIED.

14. IT IS FURTHER ORDERED that applications FCC File Nos. 0000476453 and 0000476454 SHALL BE REFERRED to the Licensing and Technical Analysis Branch of the Public Safety and Public Wireless Division for processing consistent with this *Order* and the applicable Commission rules.

⁴⁰*Id.*

⁴¹*Id.*, ¶ 5.

⁴²Waiver Request at 2.

⁴³*Id.* at 1.

⁴⁴*Id.* at 2.

⁴⁵Our decision herein addresses only Beeper’s waiver requests, and is taken without prejudice to any enforcement action with respect to unauthorized operation under the modified parameters.

15. 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
Wireless Telecommunications Bureau