

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

In the Matter of
Mobile Telephone & Paging Inc.
Late-Filed Renewal Application
For Station WPVI590 and
Request for Waiver of Section 1.949
File No. 0005325257

Order

Adopted: February 4, 2013

Released: February 4, 2013

By the Assistant Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On June 18, 2012, Mobile Telephone & Paging Inc. (Mobile Telephone) filed an application in a timely manner to renew the license for Station WPVI590. The application was dismissed, however, because Mobile Telephone failed to submit the proper application filing fee. The scheduled expiration date for the license and the deadline for filing the associated application for renewal was June 21, 2012. On July 25, 2012, Mobile Telephone filed a second application to renew the license for Station WPVI590, along with a request for waiver of the deadline for filing the application. For the following reasons, we grant the request for waiver and direct the Mobility Division to process the associated renewal application.

II. BACKGROUND

2. Station WPVI590 is authorized to operate on Channel Block FF (152.165-152.195 MHz; 158.625-158.655 MHz) of the Part 22 VHF/UHF paging (CP) band in the Honolulu, Hawaii market area (BEA172). In 2001, Mobile Telephone was the highest bidder in Auction No. 40, the paging auction, for eight licenses, including the license for Station WPVI590. The other seven licenses were for Stations WPVI584, WPVI585, WPVI586, WPVI587, WPVI588, WPVI589, and WPVI591, all of which are also authorized to operate in the Honolulu, Hawaii market area (BEA172). The licenses were granted on June 21, 2002, with ten-year terms ending June 21, 2012.

3. On March 26, 2012, nearly 90 days before the deadline for filing a renewal application, the Commission's Universal Licensing System (ULS) issued Mobile Telephone a letter to remind the licensee that its authorization for Station WPVI590 was about to expire and needed renewed. ULS also sent out renewal reminder letters to Mobile Telephone for its other seven paging licenses. In response,

1 FCC File No. 0005267890, filed by Mobile Telephone & Paging Inc. (June 18, 2012).

2 FCC File No. 0005325257, filed by Mobile Telephone & Paging Inc., Att. "Request for Waiver to Accept Late Renewal Filing Fees" (July 25, 2012) (Waiver Request).

3 Renewal Reminder Notice, ULS Reference No. 5339740 (Mar. 26, 2012). The letter was sent to two addresses. One to Garrett R. Hargrave, Schwaninger & Associates, P.C., 1331 H Street, NW, Suite 500, Washington, D.C. 20005; and the second to James Black, Mobile Telephone & Paging Inc., P.O. Box 1705, Kamuela, Hawaii 96743.

4 ULS Reference No. 5339734 (Mar. 26, 2012) (WPVI584); ULS Reference No. 5339735 (Mar. 26, 2012) (WPVI585); ULS Reference No. 5339736 (Mar. 26, 2012) (WPVI586); ULS Reference No. 5339737 (Mar. 26,

on June 18, 2012, Mobile Telephone filed applications to renew all eight licenses. On July 10, 2012, ULS issued Mobile Telephone a letter dismissing the renewal application for Station WPVI590 because the licensee did not submit a payment for the application filing fee.⁵ The dismissal was placed on public notice on July 18, 2012.⁶

4. On July 25, 2012, one week after the dismissal was placed on public notice, Mobile Telephone filed its second application to renew the license for Station WPVI590, along with a request for waiver of the deadline for filing the application. In its waiver request, Mobile Telephone explains that it submitted the June 18, 2012 application for Station WPVI590 along with FCC Form 159, the Commission's remittance form, but that the payment for the application to renew the license for Station WPVI590 was not processed.⁷ Fee payment for Mobile Telephone's second renewal application for Station WPVI590 was confirmed on the same day it was filed, July 25, 2012, and the application was accepted for filing on August 1, 2012.⁸ No oppositions to the application or waiver request were filed. The other seven renewal applications filed on June 18, 2012, were processed and granted on August 15, 2012,⁹ with new license expiration dates of June 21, 2022.

III. DISCUSSION

5. Under Section 1.949(a) of the Commission's rules, licensees must file renewal applications no sooner than 90 days prior to expiration and no later than the expiration date of the license for which renewal is sought.¹⁰ In fact, licenses automatically terminate upon the expiration date, unless a timely application for renewal is filed.¹¹ Licensees may, however, file an application for renewal and request a waiver of the filing deadline if the renewal application is not filed in a timely manner. We may grant a waiver request, pursuant to Section 1.925 of the Commission's rules, 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.¹²

6. Under its policy regarding late-filed renewal applications in wireless services, the Commission has acknowledged that there may be circumstances when a renewal filing is missed and that the subsequent denial of the renewal application and termination of the license would be too harsh a result

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2012) (WPVI587); ULS Reference No. 5339738 (Mar. 26, 2012) (WPVI588); ULS Reference No. 5339739 (Mar. 26, 2012) (WPVI589); and ULS Reference No. 5339741 (Mar. 26, 2012) (WPVI591).

⁵ *Notice of Dismissal*, ULS Reference No. 5407873 (July 10, 2012). See 47 C.F.R. § 1.1118(a) (providing that “[f]ilings subject to fees and accompanied by defective fee submissions will be dismissed under § 1.1111(d) of this subpart where the defect is discovered by the Commission's staff within 30 calendar days from the receipt of the application or filing by the Commission”).

⁶ Wireless Telecommunications Bureau Market-Based Action, *Public Notice*, Report No. 7925 at 4 (July 18, 2012).

⁷ Waiver Request at 1.

⁸ Wireless Telecommunications Bureau Market-Based Accepted for Filing, *Public Notice*, Report No. 7959 at 1 (Aug. 1, 2012).

⁹ Wireless Telecommunications Bureau Market-Based Action, *Public Notice*, Report No. 8016 at 10 (Aug. 22, 2012).

¹⁰ 47 C.F.R. § 1.949(a).

¹¹ *Id.* § 1.955(a)(1).

¹² *Id.* § 1.925(b)(3)(i)-(ii).

in proportion to the nature of the violation.¹³ To mitigate a harsh result, under the Commission's policy regarding late-filed renewal applications in wireless services, where a renewal application is filed up to 30 days after the license expiration date, a waiver of the filing deadline and the renewal application will be granted as long as the application is otherwise sufficient under Commission rules, but the licensee may be subject to enforcement action.¹⁴

7. In cases where the renewal application is filed more than 30 days after the license expiration date, however, the waiver request will not be routinely granted, is subject to stricter review, and also may be accompanied by enforcement action.¹⁵ In determining whether to grant a waiver request, the Commission takes into consideration all of the facts and circumstances involved, including the length in delay of filing, the licensee's performance record, the reasons for the failure to timely file, and the potential consequences to the public if the license were to terminate.¹⁶ Because Mobile Telephone filed its pending renewal application 34 days after the license for Station WPVI590 expired, its request for a waiver is subject to this stricter level of review.

8. Upon reviewing the facts and circumstances in this case, we believe that grant of Mobile Telephone's request for waiver of the deadline for filing its renewal application for Station WPVI590 is warranted. In its waiver request, Mobile Telephone explains that it filed its application on June 18, 2012, along with FCC Form 159, the Remittance Advice form that must accompany any payment to the Commission, including the payment of application fees.¹⁷ Mobile Telephone further explains that "[e]ight individual applications were filed at that time, [but] apparently only seven payments were processed by debit card."¹⁸

9. We find that Mobile Telephone has demonstrated that it intended to retain the license for Station WPVI590 and attempted in good faith to comply with Commission rules. Mobile Telephone filed its first renewal application for the station in a timely manner three days before the filing deadline. In fact, Mobile Telephone filed the first renewal application for Station WPVI590 along with seven other applications that were processed and granted without issue. Importantly, Mobile Telephone submitted the proper payment forms that must accompany the application fees for each of the eight applications. While Mobile Telephone also submitted the proper fee payments for seven applications, it failed to submit the fee payment associated with the application to renew the license for Station WPVI590.

10. We have repeatedly held that the filing of a timely, but defective renewal application warrants a waiver to permit the late filing of a subsequent renewal application, where the licensee acted in good faith and moved promptly to file a proper renewal application after learning that the original attempt fell short.¹⁹ In *KNTV License, Inc.*, the former Public Safety and Private Wireless Division (PSPWD)

¹³ In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 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*, 14 FCC Rcd 11476, 11485, ¶ 22 (1999) (*ULS MO&O*).

¹⁴ *Id.*

¹⁵ *Id.*; see, e.g., *Shubat Transportation Company, Notice of Apparent Liability for Forfeiture*, 26 FCC Rcd 3782 (EB 2011) (proposing a forfeiture of \$19,000 for unauthorized operation and failure to submit a renewal application in a timely manner for a private land mobile radio service station).

¹⁶ *ULS MO&O*, 14 FCC Rcd at 11485, ¶ 22.

¹⁷ Waiver Request at 1.

¹⁸ *Id.*

¹⁹ See In the Matter of Paging Systems, Inc. Applications to Renew Licenses for Stations WPKC922 and WPKC923, *Order*, 26 FCC Rcd 5913, ¶ 6 (MD WTB 2011), *aff'd on reconsideration*, 26 FCC Rcd 16175, 16177, ¶ 6 (MD WTB 2011) (granting a request for waiver where the licensee's timely filed renewal application was dismissed because the

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granted requests for waiver of the filing deadline for renewal applications for two Private Operational Fixed Microwave Service licenses.²⁰ The expiration date on the licenses was March 5, 2001. KNTV filed renewal applications on February 20, 2001, approximately two (2) weeks before the expiration date, but submitted the filing fee to the wrong lockbox. The applications were dismissed on March 13, 2001, after the licenses expired.²¹

11. After contacting Commission staff to find out why its applications were dismissed, KNTV filed a second set of applications on March 22, 2001, along with a single FCC Form 159, and two checks to the correct lockbox. This set of applications was dismissed on April 10, 2001, because both checks were submitted along with only one form.²² After contacting the FCC Call Center to find out why its applications were dismissed again, the licensee filed a third set of applications on May 4, 2001, along with separate payment forms and separate checks and requests for waiver of the deadline for filing renewal applications.²³ PSPWD granted the waiver requests, in significant part, because the licensee filed its first set of applications to renew the licenses nearly two weeks prior to their scheduled expiration dates, “clearly demonstrat[ing] its intent to remain authorized to operate the subject stations in compliance with the Commission’s Rules.”²⁴

12. Similarly, in *Kent H. Sager*, the former Commercial Wireless Division (CWD) granted the request for waiver of the filing deadline for renewal applications on reconsideration.²⁵ Sager submitted his renewal application for Station WNSS514 four times, once before the license expiration date, which was November 6, 2000. Sager submitted his initial renewal application on November 2, 2000, to Mellon Bank, but did not remit the proper fee. Mellon Bank returned the application on November 3, 2000, requesting the correct payment.²⁶ Sager resubmitted the application with the proper fee on November 14, 2000. CWD’s Licensing and Technical Analysis Branch (Branch) returned the application again on December 12, 2000, because it did not include Sager’s Taxpayer Identification Number.²⁷ Sager submitted a corrected application to Mellon Bank on January 19, 2001, with the proper fee and a request for waiver of the filing deadline. After being informed the waiver request must be filed

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licensee mistakenly submitted the application as a modification application, rather than as a renewal-modification application, as intended); James H. Barker, Esq. Request for Waiver of Filing Deadline, Cricket Licensee (Reauction), Inc., *Letter*, 24 FCC Rcd 3298, 3302 (MD WTB 2009) (*Cricket Reauction*) (granting a request for waiver of the deadline for filing renewal applications because the licensee demonstrated that it intended to retain its license and attempted in good-faith to comply with Commission rules, and promptly notified Commission staff and filed a renewal application upon discovering its error); In the Matter of Dardanelle Fire Department Application to Renew License for Station WNHQ335, Dardanelle, Arkansas, *Order*, 17 FCC Rcd 10901, 10902, ¶ 4 (PSPWD WTB 2002) (granting a request for waiver of the deadline for filing renewal applications, finding that the licensee’s application was untimely only because prior good-faith efforts to renew its license were defective and that the facts of the case reflected good-faith efforts on the part of the licensee to retain its license).

²⁰ In the Matter of Applications of KNTV License, Inc. For Renewal of Private Operational Fixed Microwave Service Stations WNTI263 and WNTI264, San Jose, California, *Order*, 16 FCC Rcd 20440 (PSPWD WTB 2001).

²¹ *Id.* at 20440-41, ¶ 2.

²² *Id.* at 20441, ¶ 3.

²³ *Id.*

²⁴ *Id.* at 20442, ¶ 7

²⁵ In the Matter of Kent H. Sager Application for Renewal of the License for SMR-Trunked System WNSS514 and Associated Request for Waiver of the Commission’s Rules, *Order*, 16 FCC Rcd 21353 (CWD WTB 2001).

²⁶ *Id.* at 21353, ¶ 2.

²⁷ *Id.* at 21353, ¶ 3.

separately, Sager resent the application with the waiver request to Gettysburg on February 7, 2001.²⁸ The Branch dismissed the application on February 22, 2001, without acting on the waiver request, and Sager petitioned for reconsideration on March 8, 2001.²⁹ CWD granted reconsideration, concluding that denying the waiver request would not serve the underlying purpose of the rule, given Sager's good faith attempts to file a timely renewal application.³⁰

13. Finally, in *Pilot Communications*, the Mobility Division granted requests for waiver of the deadline for filing applications to renew nine paging licenses.³¹ The applications were initially submitted in a timely manner three weeks before the filing deadline, but dismissed for an alleged failure on the part of the licensee to submit required regulatory fees for two FM radio construction permits. In response to the dismissals, Pilot resubmitted a second set of applications after the filing deadline, along with a request for waiver of that deadline. The Mobility Division believed that Pilot's diligent efforts to file timely renewal applications prior to the scheduled expiration dates for its paging licenses and its prompt attempts at correcting subsequent errors did not warrant a result as harsh as license termination.³²

14. In the instant case, as well as in *KNTV*, *Sager*, and *Pilot Communications*, the timely filed renewal applications were dismissed without prejudice as defective under Section 1.934 of the Commission's rules because of errors made with respect to fee payments.³³ The initial renewal applications in *KNTV* and *Sager* were dismissed because of insufficient payment of, or errors made in, submitting application fees. In each case, however, the licensees attempted in good faith to submit renewal applications in compliance with Commission rules.³⁴ Similarly, Mobile Telephone's timely filed renewal application was dismissed for failure to submit the proper application fee. Mobile Telephone, however, did submit a remittance form with the initial renewal application and responded promptly correcting its error in failing to submit the actual payment once it discovered its timely filed application for renewal had been dismissed. Mobile Telephone's actions show that it attempted in good faith to submit its renewal application in compliance with Commission rules, clearly demonstrating its intent to remain authorized to operate Station WPVI590.

²⁸ *Id.*

²⁹ *Id.* at 21353-54, ¶ 3.

³⁰ *Id.* at 21354, ¶ 5.

³¹ Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Peter Gutmann, Esq., Counsel to Pilot Communications (July 8, 2011) (ULS File Nos. 0003833602, 0003833603, 0003833604, 0003833605, 0003833606, 0003833608, 0003833609, 0003833610, and 0003833611).

³² *Id.* at 6-7.

³³ See 47 C.F.R. § 1.934(d) (providing that "[t]he Commission may dismiss without prejudice an application that it finds to be defective [and further states that] "[a]n application is defective if (1) it is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character; ... [or] (3) the appropriate filing fee has not been paid; ...").

³⁴ We have also granted waiver of the deadline for filing renewal applications where the licensee provided documentation showing that it had attempted in good faith, but failed to file a renewal application in a timely manner, see *Cricket Reauction*, 24 FCC Rcd at 3302-03 (granting a request for waiver of the deadline for filing a renewal application, in part, where the licensee provided a copy of a "draft" renewal application that was generated in ULS within the 90-day renewal period, but not filed, demonstrating that the licensee intended to retain its license and attempted in good-faith to comply with Commission rules), and where the licensee demonstrated that the late-filed application was intended to be part of a larger group of applications that were filed in a timely manner, see Letter from Cyndi Thomas, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau to Cheng-Yi Liu, Esq., Counsel to Wave Runner, LLC (ULS File Nos. 0004868550 and 0004868551) (Dec. 14, 2011); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Tony S. Lee, Esq., Counsel to Nex-Tech, Inc. (ULS File Nos. 0003957435 and 0003957438) (Sept. 9, 2010)).

15. We also note that the Commission has expressly rejected certain reasons, in and of themselves, for a licensee's inadvertent failure to file a renewal application in a timely manner, including "simple forgetfulness" and "administrative oversight,"³⁵ and has emphasized that a licensee is fully responsible for knowing the terms of its license and filing a timely renewal application.³⁶ We have previously found, however, that a distinction exists between a licensee that unsuccessfully attempts to file a renewal application in a timely manner, and a licensee that takes no action until after the filing deadline.³⁷ Licensees that do not take any action until after the filing deadline have almost always simply forgotten about or overlooked the deadline.³⁸ Mobile Telephone, however, took appropriate action when it filed its first renewal application prior to the filing deadline. Mobile Telephone did not simply forget to file its renewal application. Mobile Telephone knew the terms of the license and took good-faith action to meet those terms and to comply with Commission rules.

16. In addition to its good-faith effort to file the renewal application in a timely manner, the record shows that Mobile Telephone has previously complied with Commission rules. Upon review of the license information stored in ULS, Mobile Telephone has consistently met the regulatory requirements for its other licenses.³⁹ We further note that no one has opposed Mobile Telephone's application or request for waiver. Consequently, we are persuaded, under the facts and circumstances presented, that application of Section 1.949 of the Commission's rules would be unduly burdensome and that grant of Mobile Telephone's waiver request is warranted. In granting Mobile Telephone's waiver request, we direct the Mobility Division to process Mobile Telephone's renewal application filed on July 25, 2012.

³⁵ *ULS MO&O*, 14 FCC Rcd at 11485, ¶ 21. The Commission rejected the view that turnover in recordkeeping personnel, failure to check computer records, or simple forgetfulness are valid excuses, in and of themselves, for failure to file a timely renewal application. *Id.*

³⁶ *Id.*

³⁷ See *Cricket Reauction*, 24 FCC Rcd at 3305-06 (finding a distinction exists between a licensee that unsuccessfully attempts to file a renewal application in a timely manner, and a licensee that takes no action until after the filing deadline, in which case the licensee has almost always simply forgotten about or overlooked the deadline); State Contracting and Engineering Corporation, *Order on Reconsideration*, 18 FCC Rcd 1685, 1689, ¶ 11 (PSPWD WTB 2003) (finding a clear distinction between a licensee that unsuccessfully attempts to renew the license before it expires, and one that submits nothing until more than 30 days after the license expiration date); *cf.* In the Matter of Interstate Power and Light Co. Requests for Extension of Time to Construct Private Land Mobile Radio Stations, *Order*, 18 FCC Rcd 11051, 11057, ¶ 17 (PSPWD WTB 2003) (granting a request for extension of time to construct where the licensee submitted extension requests four times, twice before the construction deadline, and noting that "[t]here is a clear distinction between a licensee that unsuccessfully attempts to timely file and one who submits nothing until the time expires").

³⁸ *Cricket Reauction*, 24 FCC Rcd at 3305-06 (citing In the Matter of Lynchburg MDS, L.L.C. License of Multipoint Distribution Service Station WMI288 in Lynchburg, Virginia, *Memorandum Opinion and Order*, 19 FCC Rcd 2817, 2820, ¶ 10 (BD 2004) (denying a request for waiver of the filing deadline for renewal applications and a petition for reinstatement of a license where the licensee provided no adequate justification for its managerial oversight)); see In the Matter of City of Henderson, Nevada Fixed Microwave Services Application to Reinstatement License for Station WNER752, Henderson, Nevada, *Order*, 14 FCC Rcd 16156, 16159, ¶ 7 (PSPWD 1999) (finding particularly relevant, in granting reinstatement of a license, that the licensee did not simply allow its license to lapse, but attempted to renew the license in a timely manner).

³⁹ According to Commission licensing records, Mobile Telephone currently holds two active industrial/business pool (IK) licenses, six active site-specific 800 MHz Specialized Mobile Radio service (YM) licenses, in addition to the seven other paging (CP) licenses discussed in this case. Mobile Telephone has submitted construction notifications and renewal applications for each license in a timely manner, and the applications and notifications have been granted or accepted.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131, 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, the request for waiver filed on July 25, 2012, by Mobile Telephone & Paging Inc. in association with application File No. 0005325257 IS GRANTED.

18. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, the renewal application File No. 0005325257 submitted on July 25, 2012, by Mobile Telephone & Paging Inc. SHALL BE PROCESSED in accordance with Commission rules.

FEDERAL COMMUNICATIONS COMMISSION

Cyndi Thomas
Assistant Chief, Mobility Division
Wireless Telecommunications Bureau