

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

In the Matter of
CUMULOUS COMMUNICATIONS
CORPORATION
Request for Initiation of Revocation Proceeding
Regarding Industrial/Land Transportation Station
WPLU580, Mount Veeder, California

ORDER

Adopted: June 6, 2003;

Released: June 9, 2003

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

1. Introduction. On November 20, 2001, Vino Farms (Vino) filed a request that the Commission initiate a revocation proceeding regarding Industrial/Land Transportation Station WPLU580, Mount Veeder, California. Vino argues that the license for Station WPLU580 automatically cancelled pursuant to Section 90.157 of the Commission's Rules for failure to operate during a one-year period. For the reasons set forth below, the request is denied.

2. Background. Vino is the licensee of Industrial/Land Transportation Station WPBD572, Mount Veeder, California. Stations WPLU580 and WPBD572 operate at the same location and on the same frequency pair (813/858.3625 MHz). Station WPLU580 was initially authorized on February 20, 1998, and Station WPBD572 was initially authorized on July 1, 1998. On April 19, 2001, the Commission consented to the assignment of the license for Station WPLU580 from MG Paving to Cumulous Communications Corporation (Cumulous). The assignment was consummated on May 7, 2001.

3. On November 20, 2001, Vino filed the instant request. Vino argues that neither MG Paving nor Cumulous operated the station for a period of over one year, from February 20, 2000 until November 19, 2001, and, thus, that the license automatically cancelled pursuant to Section 90.157 of the Commission's Rules. It states that it has routinely monitored frequency pair 813/858.3625 MHz, and has never heard any transmissions from Station WPLU580. It also states that it has seen no physical indication that Station WPLU580 is located at the communications site on Mount Veeder.

1 Request for Initiation of Revocation Proceeding (filed Nov. 20, 2001) (Request).

2 47 C.F.R. § 90.157.

3 On February 28, 2002, subsequent to the filing of the Request, the Commission consented to the assignment of the license from Cumulous to Nextel of California, Inc.

4 Request at 2 and Affidavit of Jim Ledbetter.

5 Affidavit of Jim Ledbetter.

4. On December 5, 2001, Cumulous filed an opposition to Vino's request.⁶ Cumulous asserts, based on the construction certification that MG Paving submitted to the Commission on November 16, 1998, that MG Paving initiated operations on frequency pair 813/858.3625 MHz on April 12, 1998.⁷ Cumulous concedes, however, that the station was not operational when it acquired the license.⁸ It states that it constructed Station WPLU580 (by having frequency pair 813/858.3625 MHz programmed into another co-located licensee's repeater) before the Commission consented to the assignment of the license, but did not commence operations until after the license was assigned.⁹

5. On November 14, 2002 and January 27, 2003, the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division (Division) asked MG Paving to provide information regarding the operational status of Station WPLU580 during the time the station was licensed to MG Paving.¹⁰ The Division's letters were returned as undeliverable.

6. *Discussion.* We have reviewed the record in this proceeding and find that the information before us is not dispositive on either front. We agree with Cumulous¹¹ that sporadic monitoring without monitoring logs is insufficient to prove that a station has permanently discontinued operation.¹² For example, we note that Vino did not submit monitoring studies substantiating claims of inoperation.¹³ Nor does Vino explain how often it uses its mobile units. On the other hand, that MG Paving stated in its construction certification that it commenced operation on April 12, 1998 does not demonstrate that the station remained in operation with no lapse of at least twelve months. Indeed, Cumulous' concession that the station was inoperative prior to assignment of the license shows that there was a lapse of some length. We, however, are unable to determine definitely the duration of such period. Further, our attempts to contact MG Paving directly to obtain additional information regarding this issue were unsuccessful.

7. Given the inconclusiveness of the record before us, we believe that the most appropriate action is to deny Vino's request. While the few facts before us lend support to Vino's arguments, we conclude that they fail to provide a sufficient basis upon which to reach a determination that the license, which MG Paving assigned over two years ago, is no longer valid. We believe that denying the request is more equitable than canceling the license based on so sparse a record.

8. *Conclusion.* Based on the information available to us, we find that we have insufficient evidence on which to conclude that Station WPLU580 discontinued operation for at least twelve months. Accordingly, we deny Vino's request.

9. IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the

⁶ Cumulous Opposition to Request for Initiation of Revocation Proceeding (filed Dec. 5, 2001) (Opposition).

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.* and Declaration of Damon Silva.

¹⁰ Letter dated Nov. 14, 2002 from John J. Borkowski, Assistant Chief, Public Safety and Private Wireless Division, to Wayne Gilstrap, MG Paving; Letter dated Jan. 27, 2003 from John J. Borkowski, Assistant Chief, Public Safety and Private Wireless Division, to Wayne Gilstrap, MG Paving.

¹¹ Opposition at 3.

¹² See, e.g., Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999); Mayer Reprographics, Inc., *Order on Reconsideration*, DA 03-1879, ¶ 7 (WTB PSPWD rel. June 4, 2003); Brookfield Development, Inc., *Order*, DA 03-1756, ¶ 7 (WTB PSPWD rel. May 23, 2003), and cases cited therein.

¹³ See, e.g., S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8157 ¶ 8 (2001).

request for initiation of revocation proceeding filed November 20, 2001 by Vino Farms IS DENIED.

10. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau