

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

In the Matter of Application of)
)
 CUMULOUS COMMUNICATIONS) FCC File No. 0000419539
 CORPORATION)
)
 Request for Initiation of Revocation Proceeding)
 Regarding Industrial/Land Transportation Station)
 WPLU580, Mount Veeder, California)

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 2004

Released: August 18, 2004

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a petition for reconsideration filed on July 9, 2003 by Vino Farms, licensee of Industrial/Land Transportation Station WPBD572, Mount Veeder, California.¹ Vino Farms seeks reconsideration of an action² by the former Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau)³ denying Vino Farms’s request for revocation of consent to the assignment of authorization application for co-channel Station WPLU580, Mount Veeder, California, from MG Paving to Cumulous Communications Corporation (Cumulous).⁴ For the reasons discussed below, we deny the petition.

II. BACKGROUND

2. On April 5, 2001, MG Paving filed an application with the Commission to assign Station WPLU580, Mount Veeder, California, to Cumulous.⁵ On April 11, 2001, the application was accepted for filing, and on April 19, 2001, the Commission consented to the application. The assignment was consummated by MG Paving and Cumulous on May 7, 2001.⁶

¹ Vino Farms Petition for Reconsideration (filed July 9, 2003) (Petition).
² Cumulous Communications Corporation, *Order*, 18 FCC Rcd 11449 (2003) (*Order*).
³ The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. *See* Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).
⁴ Request for Initiation of Revocation Proceeding (filed Nov. 20, 2001) (Request).
⁵ FCC File No. 0000419539 (filed April 5, 2001). Station WPLU580, which operates on frequency pair 813/858.3625 MHz, was initially authorized to MG Paving on February 20, 1998.
⁶ On November 11, 2001, Cumulous filed an application with the Commission to assign Station WPLU580 to Nextel of California, Inc. *See* FCC File No. 0000635233 (filed Nov. 7, 2001). The application was accepted for filing on November 14, 2001, and consented to by the Commission on February 15, 2002.

3. On November 20, 2001, VINO Farms submitted a request, urging the Commission to revoke its consent to the assignment of authorization of Station WPLU580 from MG Paving to Cumulous.⁷ Specifically, the Request alleges that the license automatically cancelled pursuant to Section 90.157 of the Commission's Rules, 47 C.F.R. § 90.157, because MG Paving had not operated the station for a period of over one year, from February 20, 2000, until at least April 19, 2001.⁸ In support of the Request, VINO Farms stated that it had routinely monitored frequency pair 813/858.3625 MHz, and had never heard any radio frequency transmission from Station WPLU580.⁹ VINO Farms also stated that during the period in question, it had seen no physical indication that Station WPLU580 had ever been operated at the Mount Veeder site.¹⁰

4. On December 5, 2001, Cumulous filed an opposition to VINO Farms's request.¹¹ Cumulous asserted that MG Paving had initiated operations on frequency pair 813/858.3625 MHz on April 12, 1998 as indicated by the construction certification filed with the Commission by MG Paving on November 16, 1998.¹² Cumulous conceded, however, that the station was "not operational" at the time it had acquired the license from MG Paving.¹³

5. In the June 6, 2003 *Order*, the Division determined that the facts alleged in the record were not dispositive to support the remedy sought in the Request. Specifically, the Division stated that VINO Farms's "sporadic monitoring" of the frequencies without monitoring logs was not sufficient to substantiate its claim that Station WPLU580 had not been operational for over twelve months.¹⁴ But the Division also noted that the mere fact that MG Paving stated in its construction certification filed with the Commission that it had commenced operation on April 12, 1998, "does not demonstrate that the station remained in operation with no lapse of at least twelve months."¹⁵ Thus, while the Division noted that the record "shows that there was a lapse of time," it could not "determine definitely the duration of such period."¹⁶ Based on these facts, the Division concluded that the Request did not conclusively demonstrate that a cancellation of the license was warranted pursuant to the Commission's Rules.¹⁷ Citing "so sparse a record," and noting as an aside that the subject license had been assigned over two years ago, the Division concluded that the public interest would best be served by denying the Request, rather than canceling the license.¹⁸

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⁷ See *supra* note 4.

⁸ Request at 2 and Affidavit of Jim Ledbetter.

⁹ *Id.*

¹⁰ Affidavit of Jim Ledbetter.

¹¹ Cumulous Opposition to Request for Initiation of Revocation Proceeding (filed Dec. 5, 2001) (Opposition) at 8. At the time the Opposition was filed, the Commission had not yet consented to the pending assignment application between Cumulous and Nextel of California, Inc. See *supra* note 6.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Order*, ¶ 6. The Division also noted that VINO Farms' failed to explain how often it had used its mobile units.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See ¶ 8.

¹⁸ *Order*, ¶ 7.

6. The instant Petition filed by Vino Farms argues that the Division erred because in addition to the facts previously pled as a matter of record, testimony from site manger, Pinnacle Tower, Inc. (Pinnacle) proves conclusively that the Station WPLU580 had not been installed at the authorized transmitter location since February 2000 when Pinnacle took over management of the site.¹⁹ On July 23, 2003, Cumulous filed an opposition to the Petition.²⁰ On August 7, 2003, Vino Farms submitted a late-filed reply to the Opposition.²¹

III. DISCUSSION

7. Section 90.157 of the Commission's Rules states that a "[s]tation license shall cancel automatically upon permanent discontinuance of operations....[a]ny station which has not operated for one year or more is considered to have been permanently discontinued."²² The issue before us for reconsideration is whether, in light of Section 90.157 and the facts pled before the Division, the Division erred in reaching its decision to deny the Request filed by Vino Farms. We conclude that the Division committed no reversible error.

8. As an initial matter, we note that the Petition raises no new facts that either have not already been considered by the Division or could not have otherwise been known or learned by Vino Farms through the exercise of ordinary due diligence.²³ The Petition merely states that the Division erred because "third party" evidence already entered into the record supports a *prima facie* showing that the station was not operational for a period of a year or more.²⁴ Specifically, Vino Farms points to a statement made to it by Pinnacle attesting that the station had not been operational since Pinnacle assumed management responsibility over the site in February of 2000.²⁵ Vino Farms claims that because MG Paving did not have a lease that would enable it to operate at the site, the station could not have been operational from February 2002, until at least April 19, 2001, when the Commission consented to the assignment.²⁶ The statement by Pinnacle was entered into the record as part of Vino Farms's Request and was duly considered by the Division. But for reasons stated in the *Order*, and as further elaborated below, we do not find this testimony persuasive.

9. Commission precedent is well-established in its requirement that claims of a station's non-operation or permanent discontinuance should be substantiated by detailed radio frequency (RF) monitoring studies.²⁷ As noted in the *Order*, Vino Farms did not submit monitoring studies to

¹⁹ Petition at 2.

²⁰ Opposition to Petition for Reconsideration (filed July 23, 2003) (Opposition).

²¹ Motion to Accept Late-Filed Reply to Opposition to Petition for Reconsideration (filed August 7, 2003) (Reply).

²² See 47 C.F.R. § 90.157.

²³ See 47 C.F.R. §§ 1.106(b)(2), (c)(1).

²⁴ Petition at 4. Notably, Vino Farms does not dispute the Division's analysis and conclusion that sporadic monitoring is not sufficient to prove that a station has discontinued its operations.

²⁵ *Id.* Cumulous points out that in a subsequent conversation with Pinnacle, Pinnacle acknowledged that its previous statement to Vino Farms was based on a review of only its lease records, not radio frequency testing. *Id.*, citing Affidavit from Damon Silva submitted in support of the Opposition. Cumulous further explained that it had caused the construction of the station facilities prior to acquiring the authorization from MG Paving by contracting with Pacific Wireless Technologies (PWT) to install the station at PWT's site at the same location. See Opposition at 2.

²⁶ In its Opposition, Cumulous stated that in a subsequent conversation with Pinnacle, Pinnacle revealed that its statement to Vino Farms was on the basis of lease records, not an RF monitoring study. Opposition at 2-3.

²⁷ See, e.g., University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2982 ¶ 11 (2001) (sporadic monitoring of a channel does not make a *prima facie* case that a licensee has permanently discontinued operations); *S&L Teen Hospital Shuttle*, *Memorandum Opinion and Order*, *Memorandum Opinion and* (continued....)

substantiate its claims that operation of Station WPLU580 had permanently discontinued and therefore cancelled automatically. The instant Petition neither cures this obvious defect nor explains why the requisite monitoring studies had not been conducted in the first instance.²⁸ Indeed, Commission precedent requires, at a minimum, proof of detailed RF monitoring studies to substantiate allegations of permanent discontinuance of operations to avoid the very outcome now sought by Vino Farms – that is, the cancellation of a license based on third party statements or second-hand knowledge.²⁹ Thus, while the weight of the record indicates that the station was non-operational for some indeterminate period of time,³⁰ it does not support a finding that the alleged period of non-operation existed for a year or more.

IV. CONCLUSION

10. The Division noted that the record was “sparse,” and on reconsideration, we find the record no more revealing or conclusive than when the Division first reviewed it. Given the paucity of record before it, we find no basis, consistent with the Commission’s Rules and established precedent, for the Division to have granted the Request. Although Cumulous conceded that the station was non-operational for a period of time, Vino Farms bears the burden to demonstrate that the station was *prima facie* non-operational for a least a year or more. Having determined that Vino Farms’s failed to substantiate its claim with the requisite RF studies, the Division correctly denied the Request. Accordingly, for the reasons stated herein, the petition for reconsideration is denied.

V. ORDERING CLAUSES

11. IT IS ORDERED, pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed July 9, 2003, by Vino Farms IS DENIED.

12. 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

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Order, 16 FCC Rcd 8153, 8157 ¶ 8 (2001) (allegation of inoperation deemed unsubstantiated without monitoring studies); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000) (evidence of sporadic monitoring by itself does not conclusively demonstrate that a station licensee has discontinued operations as defined in Section 90.157 of the Commission’s Rules) (Quatron); Ballentine, *Memorandum Opinion and Order*, 14 FCC Rcd 18956, 18957-8 ¶ 5 (1999) (an allegation of sporadic monitoring is insufficient to demonstrate non-operation); Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (an allegation of sporadic monitoring, by itself, is insufficient to conclusively demonstrate that a station has permanently discontinued operation).

²⁸ See 47 C.F.R. § 1.106(e). This rule states, in relevant part, that “[w]here a petition for reconsideration is based upon a claim of electrical interference, . . . such petition . . . must be accompanied by an affidavit of a qualified radio engineer.” *Id.*

²⁹ See In the Matter of Brookfield Development, Inc. and Colorado Callcom, *Memorandum Opinion and Order*, FCC 04-161 ¶ 17 (rel. July 23, 2004) (noting that a threshold *prima facie* showing cannot stand on conjecture, second-hand information or ultimate, conclusory facts).

³⁰ See Opposition at 4.

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