

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

In the Matter of License of)
)
ACTION COMMUNICATIONS, INC.)
)
To Operate Private Land Mobile Radio Station)
WPHD220, Everett, Washington)

ORDER

Adopted: March 29, 2004

Released: April 7, 2004

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

1. *Introduction.* On December 12, 2003, Action Communications, Inc. (Action) filed a Response to Inquiry and Petition for Reconsideration (Response/Petition) with the Federal Communications Commission (Commission). The Response/Petition is intended to serve both as a Response to a Letter of Inquiry sent to Action by the Commission's Enforcement Bureau on November 18, 2003¹ and as a Petition for Reconsideration of what Action terms the "Commission's *proposed* action to cancel Action's authorization" for Private Land Mobile Radio Station WPHD220 in Everett, Washington.² The Petition for Reconsideration addresses an October 22, 2003 letter ruling by the former Public Safety and Private Wireless Division (Division),³ Wireless Telecommunications Bureau. In that decision the Division concluded, based on the evidence before it, that Station WPHD220 had not been timely constructed, and that the license had therefore cancelled automatically pursuant to section 90.155(a) of the Commission's Rules.⁴ For the reasons stated below, we dismiss the Response/Petition insofar as it seeks reconsideration of the Division Letter.

2. *Background.* As recounted in the Division Letter, Action acquired the WPHD220 license through an assignment of the license from Miller Gardens.⁵ On February 21, 2002, the Commission received correspondence from Richard Hartlage, the Director/Curator of Miller Gardens, alleging under penalty of perjury that his purported signature on the assignment application was a forgery, and that Miller Gardens had never constructed the authorized station during the several years it held the

¹ See Letter, dated Nov. 18, 2003, from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Perry Wheeler, Action Communications, Inc. (Enforcement Bureau Letter).

² Response/Petition at 1 (emphasis added).

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 See Letter, dated Oct. 22, 2003, from D'wana R. Terry, Chief, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau, to Perry Wheeler, Action Communications, Inc. at 1 (Division Letter) (citing 47 C.F.R. § 90.155(a)).

⁵ *Id.*

WPHD220 license.⁶ Based on this information, the Division concluded that the record evidence “clearly demonstrates that Station WPHD220 was not constructed within twelve months of the license grant.”⁷ Accordingly, the Division continued, “the license for Station WPHD220 cancelled automatically twelve months after the license grant. That automatic cancellation took place long before the assignment application was filed in 1999 regarding Action. Consequently, the assignment was invalid *ab initio* as there was no license extant that could be assigned.”⁸ The Division further stated that it would modify the Commission’s licensing records to reflect the cancellation of the license.⁹ The Division also directed Action, *inter alia*, to cease and desist from operating private land mobile radio facilities under authority of the license for Station WPHD220 within ten days of the date of the letter, warning that continued operation would be deemed unauthorized operation, potentially subjecting Action to administrative sanctions.¹⁰

3. On November 18, 2003, the Enforcement Bureau sent its Letter of Inquiry to Action. The Enforcement Bureau Letter inquired, under authority of sections 4(i), 4(j), 308(b) and 403 of the Communications Act of 1934, as amended,¹¹ as to the factual circumstances surrounding the assignment of the license for Station WPHD220 from Miller Gardens to Action in order to assess whether Action may have acquired the license through fraudulent means.¹² The Enforcement Bureau Letter directed Action to provide the information and documents specified therein within fourteen days from the date of the Enforcement Bureau Letter.¹³ The Enforcement Bureau subsequently granted a request by Action for an extension of time, until December 12, 2003, to respond to the Enforcement Bureau Letter.¹⁴

4. On December 12, 2003, Action filed its response to the Enforcement Bureau Letter, recounting facts relevant to its acquisition of the WPHD220 license and providing requested documentation. Action asserts that it was innocent of any wrongdoing with respect to its acquisition of the license.¹⁵ Action further avers, *inter alia*, that Station WPHD220 had been timely constructed within

⁶ *Id.* (citing Letter, dated Feb. 21, 2002, from Richard W. Hartlage, Director/Curator, Miller Botanical Garden, to Federal Communications Commission).

⁷ *Id.*

⁸ *Id.* (citing Mobile Relay Associates, *Order*, 18 FCC Rcd 12974, 1297 ¶ 10 (WTB PSPWD 2003); James A Kay, Jr., *Memorandum Opinion and Order*, 17 FCC Rcd 5951, 5952 ¶ 6 (WTB PSPWD 2002) (“once [expiration] occurred and became final, there was nothing to [renew] because the authorization no longer existed”).

⁹ *Id.*

¹⁰ *Id.* at 1-2. The Division added that if Action needed to operate the station for an additional period of time in order to mitigate disruption and inconvenience, it would have to first apply for Special Temporary Authorization. *Id.* at 2. Finally, the Division directed Action to file a responsive letter within fifteen days of the date of the Division Letter. *Id.* Action filed a timely response confirming that operations had ceased, as directed by the Division, but also asserting that, with respect to this matter, Action had “acted appropriately and in good faith.” Letter, dated Oct. 27, 2003, from Perry Wheeler, President, Action Communications, Inc., to Jeffrey Tobias, Policy and Rules Branch, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau.

¹¹ 47 U.S.C. §§ 154(i), 154(j), 308(b), 403.

¹² Enforcement Bureau Letter at 1.

¹³ *Id.*

¹⁴ See Electronic mail, dated December 1, 2003 from Alan S. Tilles, Shulman, Rogers, Gandal, Pordy & Ecker, P.A., to William Knowles-Kellett, Investigations & Hearings Division, Enforcement Bureau (memorializing earlier conversation on that date between the correspondents in which the deadline for Action’s response to the Enforcement Bureau Letter was extended to December 12, 2003).

¹⁵ Response/Petition at iii. Action represents that “[a]t all times pertinent hereto, Action has been in full compliance with the Commission’s Rules regarding the acquisition of WPDH220. The FCC Form 1046 [assignment

twelve months of authorization, and thus was in full compliance with section 90.155(a) of the Commission's Rules. Action adds that it is clear from the totality of record evidence, including Mr. Hartlage's own statements to the Commission, that Miller Gardens had in fact operated under the authorization of the WPHD220 license.¹⁶ Action accordingly argues that the license for Station WPHD220 should be reinstated because the Division erred in concluding that Station WPHD220 was not constructed within the twelve-month period required by section 90.155(a).¹⁷

5. *Discussion.* We dismiss the Response/Petition insofar as it seeks reconsideration of the Division Letter.¹⁸ The Response/Petition was not filed within thirty days from the date on which public notice was given of the Division Letter, as statutorily mandated.¹⁹ Public notice of the Division Letter was provided on October 22, 2003, because the Division Letter was dated October 22, 2003. However, the Petition/Response was not filed until December 12, 2003, well past the thirty-day period. The fact that Action filed a timely response to the Enforcement Bureau Letter on December 12, 2003, providing information relevant to matters discussed in the Division Letter as well as matters discussed in the Enforcement Bureau Letter, is of no consequence in this regard. The issuance of a Letter of Inquiry such as issued by the Enforcement Bureau does not toll the statutorily prescribed thirty-day period for filing a petition for reconsideration of an independent, albeit related, Commission action. Action has cited no authority to conclude otherwise.

6. The Response/Petition also is subject to dismissal because it was not filed at the correct location. Section 1.106(i) of the Commission's Rules provides that a petition for reconsideration must be submitted to the Secretary, Federal Communications Commission, Washington, D.C. 20554.²⁰ The Commission maintains different offices for different purposes, and persons filing documents with the Commission must take care to ensure that their documents are filed at the correct location specified in the Commission's Rules.²¹ Applications and other filings not submitted in accordance with the correct

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application] was signed by a person with apparent authority, with an identical signature to the signature on the original licensee's complaint." *Id.*

¹⁶ *Id.* at iii, 8-10.

¹⁷ *Id.* at iii, 8-11.

¹⁸ Action appears to suggest in places that the appropriate triggering event for a petition for reconsideration has not yet occurred. That is, Action notes that the WPHD220 license remains listed as active in the Commission's Universal Licensing System (ULS), and intimates that it must wait for the status of the license to be changed in ULS before it is permitted to file a petition for reconsideration. *See, e.g.*, Response/Petition at 1 n.2 (arguing that it is "appropriate for Action to file a consolidated pleading with regard to the November 18 inquiry, as well as an *early* Petition for Reconsideration with regard to the [Division's] *impending* cancellation of the license for WPDH220 from the Commission's database.") (emphases added). This clearly is not so. As section 90.155(a) explicitly states, and Commission precedent emphasizes, *see* n.8, *supra*, the cancellation of a license for violation of section 90.155(a) occurs automatically, without need for any affirmative Commission action. Changing the ULS status of a license from "Active" to "Cancelled," at least in these circumstances, is simply a ministerial act. The event triggering the 30-day period for petitions for reconsideration in this case was public notice of the Division Letter, which occurred on October 22, 2003, the date appearing on the Division Letter. *See* 47 C.F.R. § 1.4(b)(5). Indeed, Action elsewhere acknowledges that the Commission action from which it seeks relief – the cancellation of its license (based on the determination made in the Division Letter) – has already occurred. *See* Response/Petition at 11 (requesting reinstatement of the license).

¹⁹ *See* 47 U.S.C. § 405(a); *see also* 47 C.F.R. § 1.106(f).

²⁰ 47 C.F.R. § 1.106(i).

²¹ 47 C.F.R. § 0.401. Action properly filed its responses to the Enforcement Bureau Letter and the Division Letter with the respective designated staff persons. This is not relevant to the question of whether the petition for reconsideration was properly filed. Neither the Enforcement Bureau Letter nor the Division Letter suggested that it

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addresses or locations will be returned to the filer without processing.²² A document is filed with the Commission upon its receipt at the location designated by the Commission.²³ Accordingly, the plain language of the Commission's Rules states that a petition for reconsideration submitted to the Commission at a location other than the Office of the Secretary is not properly filed.²⁴

7. *Conclusion.* Insofar as Action's Response/Petition is intended to be a petition for reconsideration of the Division Letter, the Response/Petition is dismissed as improperly filed. The Response/Petition was not timely filed, and was not filed in the proper location for petitions for reconsideration. Accordingly, we have no occasion to consider the merits of the arguments set forth in the Response/Petition.²⁵

8. Accordingly, IT IS ORDERED that pursuant to Sections 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, the Petition for Reconsideration filed by Action Communications, Inc. on December 12, 2003, IS DISMISSED.

9. 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 Critical Infrastructure Division
Wireless Telecommunications Bureau

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would be appropriate to consolidate a petition for reconsideration with either response and then submit the consolidated filing to the staff person in lieu of filing with the Office of the Secretary.

²² *Id.*

²³ 47 C.F.R. § 1.7; First Auction of Interactive Video and Data Service (IVDS) Licenses, Request for Waiver of Applications Deadline, *Memorandum Opinion and Order*, 11 FCC Rcd 1134, 1135 (1996); Complaints Regarding Cable Programming Services Prices, *Amended Order on Reconsideration*, 10 FCC Rcd 12778, 12780 n.14 (CSB 1995).

²⁴ *See, e.g.*, Memorandum of Agreement between the Federal Communications Commission and Elkins Institute Inc., *Order on Reconsideration*, 14 FCC Rcd 5080 (WTB 1999) (determining that a facsimile copy to a division office neither complied with the Commission's Rules nor ameliorated the late filing with the Secretary's office); Columbia Millimeter Communications, LP, *Order on Reconsideration*, 14 FCC Rcd 2782 (WTB PSPWD 1999) (finding that a petition for reconsideration sent to the Commission's lock box at Mellon bank neither complied with the Commission's Rules nor ameliorated the late filing with the Secretary's office), *aff'd.*, *Order on Reconsideration*, 15 FCC Rcd 10251 (WTB PSPWD 2000). *See also* Petition for Reconsideration Filing Requirements, *Public Notice*, 15 FCC Rcd 19473 (WTB 2000).

²⁵ The action taken herein does not in any way preclude consideration of the Response/Petition as a timely response to the Enforcement Bureau Letter. The action taken herein is without prejudice to the Enforcement Bureau's resolution of the issues under its investigation, or to any action the Enforcement Bureau may take in this case.