

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

In the Matter of Applications of
SAMUEL FERGUSON
To Operate a Two-Way Mobile System
In the San Diego, California Area
On the Frequencies
861.3500/816.3500 MHz
and
A TO Z ENTERPRISES, INC.
To Operate a Two-Way Mobile System
In the San Diego, California Area
On the Frequencies
861.3500/816.3500 MHz
File Nos. 656123, 9606D040708
File Nos. 662404, 9606D042160

ORDER ON RECONSIDERATION

Adopted: December 11, 2000

Released: December 13, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition filed on March 27, 2000, by A to Z Enterprises, Inc., d/b/a A to Z Towing (A to Z) requesting reconsideration of the Public Safety and Private Wireless Division's (Division) denial of two petitions filed by A to Z. The Division affirmed the dismissal of A to Z's applications seeking authorization to operate a two-way mobile system on frequency pair 861.3500/816.3500 MHz in the San Diego, California area, and granted an application filed by Samuel Ferguson (Ferguson) to operate its two-way mobile system on the same frequency pair in the same area. We also have before us a petition for stay filed on March 27, 2000 by A to Z, requesting the grant of a stay of the effect of the Division's action, pending the outcome of A to Z's March 2000 Petition. For the reasons discussed below, A to Z's March 2000 Petition is denied and A to Z's March 2000 Petition for Stay is dismissed as moot.

1 Petition for Reconsideration (filed March 27, 2000) (A to Z's March 2000 Petition).

2 See Samuel Ferguson and A to Z Enterprises, Order, 15 FCC Rcd 4363 (WTB PSPWD 2000) (February 25, 2000 Order).

3 Petitions for Reconsideration (filed September 7, 1994 and October 2, 1998) (respectively, A to Z's September 1994 Petition and A to Z's October 1998 Petition).

4 Petition for Stay (filed March 27, 2000) (A to Z's March 2000 Petition for Stay).

## II. BACKGROUND

2. On August 12, 1988, A to Z received a five-year authorization to operate Station WNGT848 on frequency pair 861.3500/816.3500 MHz in the San Diego area. A to Z failed to renew its authorization to operate Station WNGT848 by the scheduled August 12, 1993 expiration date. As a result, Station WNGT848's authorization expired as of August 12, 1993. Between January 1994 and July 1996, A to Z and Ferguson each filed two applications for the subject frequency pair.<sup>5</sup> On March 24, 1994, A to Z filed a request for Special Temporary Authorization (STA), seeking authorization to operate its communications system. A to Z's STA Request was granted on March 24, 1994, authorizing A to Z to operate on the subject frequencies under Call Sign KAC5571 on a secondary, non-interference basis, during the pendency of this proceeding.<sup>6</sup>

3. Ferguson's 1994 Application was granted on May 31, 1994, authorizing Ferguson to operate a Conventional Industrial/Land Transportation system on the subject frequencies under Call Sign WPEV482.<sup>7</sup> On June 30, 1994, A to Z requested reconsideration of the May 31, 1994 licensing action.<sup>8</sup> On August 9, 1994, Ferguson's authorization to operate Station WPEV482 was set aside, and A to Z's 1994 Application was dismissed as prematurely filed.<sup>9</sup> The basis for those actions was that both applications were premature because A to Z's original license had not been deleted from the Commission's database at the time A to Z and Ferguson filed their 1994 Applications. Both A to Z and Ferguson filed Petitions for reconsideration of the August 9, 1994 ruling.<sup>10</sup>

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<sup>5</sup> See FCC File No. 656123 (filed by Ferguson on Jan. 25, 1994, and amended by Ferguson on April 1, 1994 to reflect its status as an individual, not as a corporation) (Ferguson's 1994 Application); FCC File No. 662404 (filed by A to Z on March 31, 1994) (A to Z's 1994 Application); FCC File No. 9606D040708 (filed by Ferguson on June 11, 1996) (Ferguson's 1996 Application); and FCC File No. 9606D042160 (filed by A to Z on June 17, 1996) (A to Z's 1996 Application).

<sup>6</sup> See Special Temporary Authorization (STA) granted March 25, 1994 under Call Sign KAC5571. The STA, with subsequent renewals, authorized A to Z to operate on frequency pair 816.3500/861.3500 MHz in the San Diego, California area until August 11, 2000. We note that a letter was faxed to the FCC's Gettysburg location on August 23, 2000, requesting the set-aside of A to Z's STA to operate Station KAC5571 (Request to Rescind STA). See Letter to Laurel Woods, Federal Communications Commission, from Agnes Pennington, Communications Consultant, on behalf of Ferguson (dated Aug. 16, 2000). A to Z filed an Opposition to the Request to Rescind STA on August 24, 2000. This Order on Reconsideration acts on the Request to Rescind STA and A to Z's Opposition.

<sup>7</sup> Ferguson's 1994 application, FCC File No. 656123, was granted under Call Sign WPEV482 on May 31, 1994, revoked on August 9, 1994, and deleted from the Commission's database on June 3, 1996.

<sup>8</sup> Petition for Reconsideration (filed June 30, 1994) (A to Z's June 1994 Petition). A to Z has continuously operated on a secondary, non-interference basis under an STA on the subject frequencies since March 25, 1994. A to Z's current STA is for the period August 11, 2000, through February 11, 2001.

<sup>9</sup> See Letter to Raymond A. Kowalski, counsel to A to Z Enterprises, Inc., from W. Riley Hollingsworth, Federal Communications Commission (dated August 9, 1994).

<sup>10</sup> Petition for Reconsideration (filed by A to Z on September 7, 1994) (A to Z's September 1994 Petition); Petition

4. On October 30, 1994, A to Z's original authorization was finally deleted from the Commission's licensing database. The frequency did not become available for reassignment at that time, however, because Ferguson's authorization to operate Station WPEV482 was not deleted from the Commission's database until June 3, 1996. On June 11, 1996, Ferguson's 1996 Application was filed, followed by the filing of A to Z's 1996 Application on June 17, 1996. Both applicants sought authorization to operate on the subject frequencies.<sup>11</sup> Ferguson's 1996 Application was granted on September 3, 1998, by the Division's Licensing and Technical Analysis Branch (Branch), because Ferguson was the first to re-file for the subject frequencies when they became available for reassignment.<sup>12</sup> A to Z sought reconsideration of the September 3, 1998 grant of Ferguson's 1996 Application.<sup>13</sup>

5. On February 25, 2000, the Division denied A to Z's September 1994 and October 1998 Petitions.<sup>14</sup> The Division affirmed the dismissal of A to Z's 1994 Application because the subject frequencies had not been deleted from the Commission's licensing database and were thus not available for assignment at that time.<sup>15</sup> In addition, Ferguson's September 1994 Petition was dismissed on February 25, 2000, because it was untimely filed by one day.<sup>16</sup> With respect to A to Z's October 1998 Petition, the Division affirmed the Branch's grant of the subject frequencies to Ferguson because Ferguson was the first applicant to file for the frequency pair after it was deleted from the Commission's licensing database.<sup>17</sup>

6. On March 27, 2000, A to Z filed the instant Petition and Petition for Stay.<sup>18</sup> A to Z argues that it has been using the subject frequencies since 1988, presently under an STA, and only allowed its license to lapse "inadvertently."<sup>19</sup> A to Z alleges that Ferguson's 1994 Application was fraudulent, since Ferguson initially filed as a corporation, but did not have corporate status. A to Z argues that after Ferguson's 1994 Application was dismissed on August 9, 1994, Ferguson's September 1994 Petition was filed, requesting

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for Reconsideration (filed by Ferguson on September 9, 1994) (Ferguson's September 1994 Petition).

<sup>11</sup> *Supra* note 2 at 2.

<sup>12</sup> *See* Letter to Raymond Kowalski, counsel to A to Z Towing, and Samuel Ferguson, from Steven Linn on behalf of Mary Shultz, Federal Communications Commission (dated September 3, 1998).

<sup>13</sup> *Supra* note 3.

<sup>14</sup> February 25, 2000 *Order*, 15 FCC Rcd at 4369 ¶ 20.

<sup>15</sup> *Id.* at 4367 ¶ 13.

<sup>16</sup> *Id.* at 4367 ¶ 12.

<sup>17</sup> *Id.* at 4368 ¶ 16.

<sup>18</sup> *Supra* notes 1 and 4. We note that a Petition for Expedited Action relating to A to Z's March 2000 Petition and March 2000 Petition for Stay was filed on August 8, 2000, on behalf of A to Z. (A to Z's Petition for Expedited Action). The instant action disposes of A to Z's Petition for Expedited Action.

<sup>19</sup> A to Z's March 2000 Petition at 2.

reconsideration of the August 9, 1994 dismissal action, and the subject frequencies should not have been deleted from the Commission's database on June 3, 1996, until after Ferguson's September 1994 Petition had been resolved. A to Z characterizes the deletion of the frequencies on June 3, 1996 as "fundamental error."

### III. DISCUSSION

7. The parties do not dispute the decisionally significant facts in this case. A to Z allowed its authorization to operate Station WNGT848 on frequency pair 861.3500/816.3500 to expire on August 12, 1993, by failing to submit a renewal of license application in a timely manner. To avoid frequency coordination errors, the frequencies covered by an expired private land mobile radio (PLMR) license remain unavailable for reassignment to any applicant until the license is deleted from the Commission's database.<sup>20</sup> This has been a consistent PLMR policy,<sup>21</sup> and the normal reassignment process for PLMR licenses.<sup>22</sup> After A to Z failed to renew its license in August of 1993, its license remained on the Commission's database until October, 1994. The frequencies were then still unavailable for assignment until June 3, 1996, when Ferguson's license for Station WPEV482 was deleted from the database.<sup>23</sup> When implementing its database deletion policy, the Commission noted that its deletion policy did not provide a guarantee that the deletion would take place in a timely manner.<sup>24</sup> Once the frequencies were deleted from the Commission's database, applicants were free to file for the frequencies associated with the station.<sup>25</sup> Because private land mobile

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<sup>20</sup> See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Memorandum Opinion and Order*, PR Docket No. 90-481, 8 FCC Rcd 6690, 6693 at para. 24 (1993).

<sup>21</sup> See e.g., Central Radio Communications Corp., *Memorandum Opinion and Order*, 11 FCC Rcd 17,110 (1996) (three applications were dismissed because each application sought a channel after the expiration of a station license which was not yet available on the Commission's database).

<sup>22</sup> See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 at paras. 22-25 (1991).

<sup>23</sup> We note that frequency pair 861.3500/816.3500 MHz became available on October 30, 1994, when the subject frequencies were deleted from the Commission's database. Both Ferguson and A to Z had filed applications for the frequencies in 1994, prior to the October 30, 1994, deletion date. Due to the premature filing of Ferguson and A to Z's 1994 applications, both of the 1994 applications were subsequently dismissed. Ferguson was the first to re-file for the frequencies on June 11, 1996, followed by A to Z on June 17, 1996. The frequencies were subsequently granted to Ferguson under Call Sign WPJN775 on August 12, 1996. The August 12, 1996, authorization was set aside on August 14, 1996. The frequencies were again granted to Ferguson under Call Sign WPMU478 on January 4, 1999. The January 4, 1999, authorization was set aside on January 22, 1999, pending further review.

<sup>24</sup> See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 at para. 25 (1991).

<sup>25</sup> See, e.g., Central Radio Communications Corp., *Memorandum Opinion and Order*, 11 FCC Rcd 17,110 (1996) (three applications were dismissed because each application sought a channel after the expiration of a station license which was not yet available on the Commission's database).

radio stations are available on a first-come, first-served basis,<sup>26</sup> and Ferguson was the first applicant to file for the subject frequencies after the subject frequencies had been deleted from the Commission's licensing database, Ferguson's 1996 application was accepted for filing and granted.

8. A to Z asserts that the deletion of Station WPEV482 from the Commission's database on June 3, 1996, was "fundamental error," because Ferguson's 1994 Petition had not been resolved at the time of deletion. We do not agree with A to Z's argument that we are required to toll all actions where a licensee files a petition for reconsideration. To the contrary, Section 1.102(b)(2) of the Commission's Rules states that an action taken pursuant to delegated authority that is the subject of a petition for reconsideration is stayed pending disposition of that petition only at the discretion of the designated authority.<sup>27</sup> Ferguson did not present facts in its 1994 Petition sufficient to justify tolling the deletion of the subject frequencies prior to the June 3, 1996 deletion date, nor did it request such tolling.<sup>28</sup>

9. A to Z argues that Ferguson's 1994 Application was in some way "fraudulent." This argument has been addressed in the February 25, 2000 *Order*.<sup>29</sup> The February 25, 2000 *Order* noted that Ferguson's 1994 Application was originally filed to reflect corporate status, but was amended to reflect status as an individual.<sup>30</sup> The February 25, 2000 *Order* also disposed of Ferguson's 1994 Application, on the basis that it had been filed prior to the deletion of the subject frequencies from the Commission's licensing database.<sup>31</sup> Review of A to Z's March 2000 Petition reveals that the February 25, 2000 action contains no material error or omission and that the arguments raised by A to Z have already been considered and rejected. A to Z has not shown material error or omission in the February 25, 2000 action, nor has it raised additional facts not known or not existing until after the petitioner's last opportunity to present such matters.<sup>32</sup> Thus, we find that A to Z's March 2000 Petition simply reiterates arguments previously considered and rejected and should be denied on this basis.<sup>33</sup> In light of our decision to deny the A to Z March 2000 Petition, we are dismissing, as moot, A to Z's March 2000 Petition for Stay.

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<sup>26</sup> See 47 C.F.R. § 90.611(b).

<sup>27</sup> See 47 C.F.R. § 1.102(b)(2). See also *Time Warner, Inc., Order*, 13 FCC Rcd 7934 (1997).

<sup>28</sup> See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order*, 12 FCC Rcd 18,349 at ¶ 20 (1997).

<sup>29</sup> February 25, 2000 *Order*, 15 FCC Rcd at 4364 ¶ 4.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4367 ¶ 13.

<sup>32</sup> See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C.Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

<sup>33</sup> *Id.*; Applications of Gaines, Bennett Gilbert, *Memorandum Opinion and Order*, 8 FCC Rcd 3986 (Rev. Bd. 1993).

#### IV. CONCLUSION AND ORDERING CLAUSES

10. Ferguson was the first applicant to file an application after the subject frequencies were deleted from the Commission's licensing database. We find that there was nothing improper in the Branch's action of deleting the subject frequencies from the licensing database prior to the resolution of Ferguson's 1994 Petition. A to Z's March 2000 Petition does not show a material error or omission in the February 25, 2000 *Order*, nor does it raise additional facts not known or not existing until after petitioner's last opportunity to present such matters. Accordingly, denial of A to Z's March 2000 Petition and dismissal of A to Z's March 2000 Petition for Stay is warranted.

11. For the reasons discussed above, IT IS ORDERED, 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, that the petition for reconsideration filed by A to Z Enterprises, Inc. d/b/a A to Z Towing on March 27, 2000, IS DENIED.

12. IT IS FURTHER ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the Petition for Stay filed by A to Z Enterprises Inc., d/b/a A to Z Towing on March 27, 2000, IS DISMISSED AS MOOT.

13. As a result of this action, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the grant of Samuel Ferguson's Application No. 9606D040708 IS HEREBY AFFIRMED, authorizing Ferguson Ready Mix to operate Station WPMU478 on frequencies 861.3500/816.3500 MHz in the San Diego, California area.

14. 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

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