

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

In the Matter of)
)
DATARADIO CORPORATION)
)
Emergency Petition for Waiver of)
Section 90.547 of the Commission's Rules)

ORDER

Adopted: November 13, 2000

Released: November 14, 2000

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

I. INTRODUCTION

1. On December 20, 1999, Dataradio Corporation (“Dataradio”) filed an emergency petition for waiver of Section 90.547 of the Commission's Rules¹ to permit it to manufacture mobile and portable transmitters that do not operate on nationwide narrowband interoperability channels.² For the reasons set forth herein, we deny Dataradio’s Petition.

II. BACKGROUND

2. On September 29, 1998, the Commission established a band plan and adopted service rules in the public safety spectrum at 764-776 MHz and 794-806 MHz (collectively, the 700 MHz band).³ The Commission apportioned the 700 MHz band use designations as follows: approximately fifty-three percent for general use, ten percent for interoperability,⁴ and thirty-seven percent reserved for later designation.⁵

¹47 C.F.R. § 90.547 provides that “[m]obile and portable transmitters designed pursuant to standards adopted by the National Coordination Committee to operate in the 764-776 MHz and 794-806 MHz frequency bands must be capable of operating on any of the designated nationwide narrowband interoperability channels approved by the Commission.”

²Dataradio Emergency Petition for Waiver (filed Dec. 20, 1999) (“Petition”).

³Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *First Report and Third Notice of Proposed Rule Making*, WT Docket No. 96-86, 14 FCC Rcd. 152 (1998) (*First Report and Third Notice*).

⁴The term “interoperability” refers to the ability of different governmental agencies to communicate across jurisdictions and with each other. *See First Report and Third Notice*, 14 FCC Rcd. at 189-90 ¶ 76.

⁵*See id.* at 175-76 ¶ 43. The precise allocation is 52.5% for general use, 10.8% for interoperability, and 36.7% held in reserve. *Id.*

As part of this action, the Commission required that all narrowband⁶ mobile and portable 700 MHz band public safety radios be capable of operating on all of the narrowband nationwide interoperability channels.⁷

At the same time, the Commission established the Public Safety National Coordination Committee (“NCC”), an advisory committee established under the Federal Advisory Committee Act,⁸ to make recommendations to the Commission regarding standards concerning equipment to operate on the interoperability channels in the 700 MHz band.

3. Dataradio develops, manufactures, and implements wireless products and networks supporting data applications for mobile and fixed uses in the public safety and private wireless communities.⁹ On December 20, 1999, Dataradio requested a waiver of Section 90.547 to allow it to manufacture 700 MHz band public safety radios that do not operate on the nationwide interoperability channels.¹⁰

III. DISCUSSION

4. Section 1.925 of the Commission’s Rules provides that a rule waiver will not be granted unless an applicant shows that either: (a) the underlying purpose of the rule will not be served or would be frustrated by its application in the particular case, and that grant of the waiver is in the public interest; or (b) the unique facts or unusual circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or the applicant has no reasonable alternative.¹¹ For the reasons discussed below, we conclude that Dataradio has not made the requisite showing that grant of its requested waiver of Section 90.547 is warranted.

⁶The term “narrowband” refers to bandwidth less than or equal to 25 kHz. 47 C.F.R. § 90.531 sets forth the band plan for the 764-776 MHz and 794-806 MHz public safety bands.

⁷*First Report and Third Notice*, 14 FCC Rcd. at 213 ¶ 135; *see also* 47 C.F.R. § 90.547.

⁸5 U.S.C. , App. 2 (1988).

⁹Petition at 3.

¹⁰On February 9, 2000, the Wireless Telecommunications Bureau sought public comment on Dataradio’s waiver request. Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by Dataradio Corporation for Exemption From Rule requiring Transmitter Capabilities on Interoperability Channels, *Public Notice*, DA 00-230 (WTB PSPWD rel. Feb. 9, 2000). We received comments and reply comments from American Association of State Highway and Transportation Officials (“AASHTO”), Association of Public-Safety Communications Officials-International, Inc. (“APCO”), Public Safety Wireless Network (“PSWN”), and Motorola; reply comments from Com-Net Ericsson Critical Radio Systems (“Ericsson”), Dataradio, Forestry-Conservation Communications Association (also representing its parent organizations, the National Association of State Foresters and the International Association of Fish and Wildlife Agencies (collectively, “FCCA”)), City of Long Beach, California (“Long Beach”), County of Los Angeles, California (“Los Angeles”), International Association of Fire Chiefs, Inc. and the International Municipal Signal Association (collectively, “IAFC/IMSA”), City of Mesa, Arizona (“Mesa”), New York State Technology Enterprise Corporation, V&L Com Inc. (“V&L”); and ex parte letters and/or presentations from Kathleen M.H. Wallman (“Wallman”) (which was subsequently withdrawn), and Dataradio.

¹¹47 C.F.R. § 1.925(b)(3).

5. *Underlying purpose.* The Commission enacted Section 90.547 to promote nationwide interoperability in the 700 MHz band, and ultimately require that all new equipment used in the 700 MHz band be interoperability-capable. The Commission concluded that the inability of public safety agencies to communicate efficiently with each other was a glaring deficiency in existing public safety communications.¹² Recognizing interoperability as an essential requirement for the effective functioning and fulfillment of the missions of public safety agencies, the Commission adopted this rule to further the development of a regulatory framework to meet vital current and future public safety communications needs.¹³ Given this backdrop, we find that Dataradio has failed to demonstrate that the underlying purpose of Section 90.547 of the Commission's Rules will not be served or would be frustrated by its application in this case, or that grant of the waiver is in the public interest.

6. In its waiver request, Dataradio asserts that requiring it to comply with Section 90.547 (*i.e.*, to manufacture interoperability-capable equipment) undermines the purpose of the rule.¹⁴ Specifically, it contends that having to wait for 700 MHz interoperability standards to be adopted by the Commission is tantamount to allowing the interoperability spectrum to "hold hostage" the entire narrowband spectrum. Dataradio contends that such application of the rule deprives public safety users of immediate access to the 700 MHz band General Use channels, and is contrary to the Commission's underlying intent to balance the need for interoperability with that for other public safety communications.¹⁵

7. We believe that Dataradio misinterprets the Commission's intent regarding Section 90.547 of the Commission's Rules. A significant benefit of allocating the 700 MHz spectrum to public safety use from broadcast use is that, once broadcasters have vacated the spectrum, there will be only public safety communications accommodated in the spectrum.¹⁶ In short, the rules for public safety use of this spectrum, as envisioned by Section 90.547 in particular, are written to further the best public interest policies for such unused spectrum. Although a band plan was adopted dividing the use of the public safety spectrum by designating ten percent for interoperability, the Commission's overall approach was designed so *all* public safety agencies would be interoperability-capable.¹⁷ As a result, we believe that a decision that creates a lack of interoperability would in fact undermine the efficiency of the use of the entire spectrum and the Commission's express goals in establishing rules for the public safety 700 MHz band.¹⁸

¹²*First Report and Third Notice*, 14 FCC Rcd. at 156 ¶ 7.

¹³*See* Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *Notice of Proposed Rule Making*, WT Docket No. 96-86, 11 FCC Rcd. 12460, 12468-49 ¶¶ 21-22 (1996) (*First Notice*).

¹⁴Petition at 10-11.

¹⁵*Id.* at 11.

¹⁶Congress has directed that the 700 MHz band be reallocated from television broadcast to public safety use. *See* 47 U.S.C. § 337(b)(1).

¹⁷*See generally First Report and Third Notice*, 14 FCC Rcd. at 37-39 ¶¶ 73-76.

¹⁸*Id.* at 156 ¶ 7. The Commission noted the importance of interoperability when it stated, "[I]nability to communicate hinders cooperation and coordination between public safety agencies on a day-to-day basis as well as during emergencies. We believe that the present inability of public safety agencies to communicate with each other

8. Dataradio asserts that the shortage of spectrum for public safety users and the immediate need to access state-of-the-art data equipment prevents users from accessing the latest narrowband technology.¹⁹ Some commenters state that we should allow use of the 700 MHz band before the Commission adopts interoperability standards in order to satisfy current needs.²⁰ Dataradio argues that delaying licensing of the General Use channels serves no purpose because not all public safety entities desire or require interoperability.²¹ In this connection, it claims that while interoperability, especially for voice use, is important for some agencies, many data requirements for internal purposes can be satisfied on the General Use channels.²²

9. We are not persuaded by Dataradio's argument that many public safety entities do not necessarily require interoperability but merely desire the option to obtain radios with interoperability features.²³ Dataradio's assertion presupposes that any such "option" automatically justifies its request to manufacture radios prior to interoperability standards being established, and that immediate manufacture of equipment (absent standards) should take precedence over the Commission's goals stated in the *First Report and Third Notice* and the NCC process.²⁴ We disagree. By adopting Section 90.547, the Commission foreclosed users from the option to elect whether or not to purchase 700 MHz radios without interoperability capability. We agree with PSWN that public safety agencies need interoperability channels to effectively perform their critical, often life-saving missions,²⁵ and see no evidence justifying a departure from the Commission's general policy regarding all public safety 700 MHz band users having access to interoperability channels.

10. Dataradio and some commenters argue that Section 90.547 serves no purpose under the present circumstances because immediate access to the General Use channels will not prevent public safety

is one of the most critical deficiencies in today's public safety communications." *First Notice*, 11 FCC Rcd. at 12469 ¶ 22; see also Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements through the Year 2010; Establishment of Rules and Requirements For Priority Access Service, *Second Notice of Proposed Rule Making*, WT Docket No. 96-86, 12 FCC Rcd. 17706, 17718-22 ¶¶ 27-33 (1997); *Final Report of the Public Safety Wireless Advisory Committee* 19-20, 45-48 (Sept. 11, 1996).

¹⁹Petition at 3.

²⁰See AASHTO Comments at 5-6; FCCA Reply Comments at 1-2; IAFC/IMSA Reply Comments at 1; V&L Reply Comments at 1.

²¹Petition at 3, 12.

²²*Id.*

²³See *id.* at 12-13.

²⁴The Commission chartered the NCC, *inter alia*, to advise the Commission on national interoperability and technical standards to be adopted for use in the 700 MHz band. See *First Report and Third Notice*, 14 FCC Rcd. at 197 ¶ 92; see also 63 Fed. Reg. 58645 (1999).

²⁵See PSWN Comments at 4.

data interoperability once appropriate standards are developed.²⁶ AASHTO, for example, says that the Commission could simply require all equipment manufactured after the approval of a data interoperability standard to meet the requirement.²⁷ Ericsson suggests requiring any manufacturer exercising the requested waiver to agree that non-interoperable radios either: (1) will be modified to include a capability of operating on any of the designated nationwide interoperability channels, or (2) will be removed from the air by some date certain.²⁸

11. We disagree with the contention that granting Dataradio's Petition would not impact realization of national interoperability. We recognize that public safety agencies generally operate within limited budgets and thus are less inclined to replace existing equipment prior to the end of the equipment's useful life absent extraordinary circumstances.²⁹ We are concerned that if Dataradio's request were granted, it would mean that when interoperability standards for the 700 MHz band are adopted and radios manufactured accordingly, those public safety entities that purchased the "earlier" equipment (*e.g.*, Dataradio's non-interoperability capable) will be reluctant, perhaps financially unable, to buy radios that comply with the 700 MHz interoperability standards. As a result, the overall plan of the Commission to achieve interoperability on the 700 MHz band would be jeopardized.³⁰ Achieving the Commission's goal requires that only equipment capable of operating on designated nationwide narrowband interoperability channels be used. In addition, arguments for "grandfathering" the earlier general use radios no doubt would be made, and public safety entities would be even more reluctant to purchase the interoperable equipment. Thus, we conclude that Dataradio has not made a sufficient showing that grant of the requested waiver is warranted under Section 1.925(b)(3)(a).

12. *Unique circumstances.* Alternatively, Section 1.925 allows for waiver of a rule for unique circumstances when a petitioner demonstrates that application of the rule would be inequitable, burdensome, or otherwise contrary to public interest, or the petitioner has no reasonable alternative.³¹

²⁶Petition at 13.

²⁷AASHTO Comments at 5-6.

²⁸Ericsson Reply Comments at 4-5.

²⁹APCO Comments at 3-4.

³⁰We also note that while Dataradio correctly observes that the *PSWAC Final Report* recommended that spectrum for interoperability be taken from the 138 MHz and 512 MHz bands and not from a new allocation in the 700 MHz band, Petition at 8, the Commission nonetheless was well aware of this recommendation when it adopted the *First Report and Third Notice* designating 2.6 megahertz of spectrum in the 700 MHz band for interoperability purposes. Moreover, although the FCC in the *Third Notice* sought comment on proposals to promote interoperability on public safety channels below 512 MHz, legislation subsequently reclaimed the three megahertz of spectrum in the 138-143 MHz band for Government use that earlier was reallocated for non-Government use. The NTIA originally identified 139.0-140.5 MHz and 141.5-143 MHz, for reallocation in response to the Balanced Budget Act of 1997. Pub. L. No. 105-33, § 4004, 111 Stat. 251 (1997), 47 U.S.C. § 337(a)(1). In the National Defense Authorization Act of FY 2000, Pub. L. No. 106-65, § 1062, 113 Stat. 767 (1999), however, Congress reclaimed that spectrum for exclusive federal use, thereby rendering both the issue and that portion of Dataradio's Petition moot.

³¹47 C.F.R. § 1.925(b)(3).

Here, Dataradio asserts that its case presents unique or unusual circumstances justifying a waiver, because, absent a waiver, it will be years before narrowband equipment can be manufactured and certified, regional plans for the general use channels developed, and frequency assignments made.³²

13. Dataradio's position is not unique in that it is but one of a number of companies that develop, manufacture, and implement wireless products and networks supporting data applications for mobile and fixed uses in the public safety and private wireless communities. Indeed, *all* manufacturers of radios intended for use in the 700 MHz band are under the purview of Section 90.547.³³ In short, as one commenter noted, Dataradio's request does not deal with a specific implementation; rather, the requests seeks blanket authority to manufacture equipment for the 700 MHz band before complete rules and guidelines are developed.³⁴ It is axiomatic that the Commission must not eviscerate a rule by a waiver.³⁵ We believe that grant of the Dataradio Petition would eviscerate the underlying purpose of Section 90.457 of the Commission's Rules. Furthermore, we believe that Dataradio has reasonable alternatives within the existing Rules. Given Dataradio's position that there is a critical need for its equipment for public safety use, we note that it is not foreclosed from manufacturing equipment for use in public safety bands other than the 700 MHz band.³⁶ However, it does not yet have the option to manufacture equipment for operation in the 700 MHz band.

14. Moreover, we reject Dataradio's argument that it will be years before digital interoperability standards are approved.³⁷ Contrary to Dataradio's suggestion, the record indicates that the process for establishing relevant narrowband interoperability standards is proceeding on a timely basis.³⁸ On February

³²Petition at 3, 10.

³³We take administrative notice that Motorola is also a communications equipment manufacturer of radios used by the public safety community. Moreover, it has a representative on the NCC Steering Committee. *See* NCC Report at 3. It is instructive that Motorola itself, while not opposed to limited relief for Dataradio as described in its waiver request, nonetheless believes that additional steps must be taken before manufacturers, including Dataradio, can begin implementing solutions for public safety users in the 700 MHz band. Motorola Comments at 4.

³⁴Mesa Comments at 1.

³⁵Nextel Communications, Inc., *Order*, 14 FCC Rcd. 11678, 11691-92 ¶ 31 (WTB 1999), review pending (filed Aug. 20, 1999) *citing* Riverphone, *Memorandum Opinion and Order*, 3 FCC Rcd. 4690, 4692 ¶ 12 (1988).

³⁶For example, public safety channels designated for use in the 800 MHz public safety band channels (*i.e.*, 806-824 MHz and 851-869 MHz); and other channels designated for public safety use (*e.g.*, 150-174 MHz, 450-470 MHz, and 220-222 MHz.)

³⁷*See* APCO Comments at 3; Los Angeles Reply Comments at 1-2; Motorola Comments at 3 (due to efforts of many devoted public safety interests, the NCC standards-setting has proceeded much faster than originally expected).

³⁸When the Commission established the interoperability portion of the 700 MHz band and chartered the NCC to recommend a national interoperability operational plan for Commission review and approval (as well as the technical standards to apply to all public safety interoperability channel equipment), the Commission knew the process would not be accomplished "immediately." Indeed, the Commission expected the NCC to complete its

25, 2000, the NCC issued its report recommending, *inter alia*, digital interoperability standards for both voice and narrowband data communications.³⁹ Some commenters urge quick action in adopting the standards recommended by the NCC, so that equipment vendors can move forward to develop interoperable 700 MHz data communications equipment which could be made available to public safety users in the very near future.⁴⁰ Ericsson supports Dataradio's Petition until digital television implementation actually takes place. It believes that the initial NCC recommendations are not the final answer, and that Dataradio's request is not obviated.⁴¹ It also states that imposing requirements on equipment that, for all intents and purposes, will be unusable on a widespread basis for many years to come does not seem an appropriate way to facilitate early entry into the general use portion of the 700 MHz band.⁴² Dataradio, for its part, believes that the NCC has moved *too quickly* to adopt what Dataradio considers an obsolescent narrowband data standard, and that further consideration and discussion are needed.⁴³

15. The Commission has begun already to address the NCC's recommendations. On August 2, 2000, the Commission released a *Fourth Notice of Proposed Rule Making*⁴⁴ seeking comment on the NCC Report. In the *Fourth Notice*, the Commission noted its preliminary support for the NCC recommendations regarding certain narrowband data interoperability standards.⁴⁵ Simply put, then, the process for establishing relevant interoperability standards is progressing in a manner comporting with reasoned decision-making and administrative due process.⁴⁶ The opportunity to comment will afford

work within four years of the release of the *First Report and Third Notice*, 14 FCC Rcd. at 197 ¶ 92. Having established this four-year time frame, the Commission in the *First Report* purposely adopted Section 90.547.

³⁹See Public Safety National Coordination Committee, Recommendations to the Federal Communications Commission for Technical and Operational Standards for Use of the 764-776 MHz and 794-806 MHz Public Safety Band Pending Development of Final Rules (Feb. 25, 2000) ("NCC Report").

⁴⁰See APCO Comments at 3; Long Beach Reply Comments at 2; Motorola Comments at 1, 4.

⁴¹Ericsson Reply Comments at 2-4.

⁴²*Id.* at 3.

⁴³Dataradio Reply Comments at 4-5. Regardless of the merits of the NCC Report, we are struck by the fact that Dataradio's Petition, on the one hand, complains about the length of time it will take in arriving at interoperable standards, yet, on the other hand, after the NCC Report was submitted to the Commission, Dataradio complains about the speed in which the NCC arrived at the recommendations contained in the NCC Report. Moreover, Dataradio itself states that it has been participating in the meetings of the NCC and has offered to assist it in developing appropriate interoperable data standards. *Id.* at 6.

⁴⁴Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010; Establishment of Rules and Requirements of Priority Access Service, *Fourth Notice of Proposed Rule Making*, WT Docket No. 96-86, FCC 00-271 (rel. Aug. 2, 2000) (*Fourth Notice*).

⁴⁵*Id.* at ¶¶ 54-55.

⁴⁶We note that, pursuant to the NCC Charter, the NCC was required, within one year of the date of the filing of the Charter, to formulate and submit for Commission review and approval its recommendations for use of the interoperability spectrum, including recommendations for Federal Government users' access, that will allow public

interested parties an opportunity to fully address the substance of the NCC's recommendations. Thus, we believe it is likely that the Commission will make its decision regarding interoperability standards in the not too distant future. We are not persuaded that grant of Dataradio's request at this time will result in a meaningful expedited delivery of 700 MHz band public safety equipment.

IV. CONCLUSION

16. In summary, we believe that the essential and critical nature of public safety communications and the benefits associated with public safety interoperability weigh against granting the waiver in the instant case. As the Commission stated in the *First Report and Third Notice*, "interoperability signifies the crowning achievement of this proceeding."⁴⁷ Therefore, Section 90.547 ensures that, regardless of the primary communications channel being used in the 700 MHz band, public safety interoperability, often required at unpredictable times, can be achieved – but only when equipment designed under standards adopted by the NCC and capable of operating on designated nationwide narrowband interoperability channels approved by the Commission will be permitted for use. The Commission's adoption of Section 90.547 provides a unique opportunity to promote interoperability on the 700 MHz band, whereas granting the Petition would undermine the Commission's efforts in this regard. Therefore, for the reasons stated herein, we find that Dataradio has not demonstrated that it has met the burden for grant of its request for waiver of Section 90.547 of the Commission's Rules.

safety licensees to make use of such spectrum until final rules are developed. See Charter, The Public Safety National Coordination Committee, Section B 4 (Charter filed Feb. 25, 1999) available at <http://www.fcc.gov/wtb/publicsafety/ncc/charter.html>. The NCC met its first year's time-frame requirement because it submitted its recommendations to the Commission on February 25, 2000. The NCC Charter subsequently has been amended (amended Charter filed May 3, 2000).

⁴⁷*First Report and Third Notice*, 14 FCC Rcd. at 156 ¶ 7.

V. ORDERING CLAUSES

17. **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.925, the Emergency Petition for Waiver filed by Dataradio Corporation on December 20, 1999, **IS DENIED**.

18. 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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