

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

In the Matter of )
CREATIVE AIRTIME SERVICES, LLC )
Request for Waiver of Section 90.617 of the )
Commission's Rules to Utilize Certain 900 MHz )
Frequencies on an Itinerant Basis )
FCC File Nos. D137122, D137123,
D137124

ORDER ON RECONSIDERATION

Adopted: December 4, 2000

Released: December 6, 2000

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

I. INTRODUCTION

1. On April 14, 2000, Creative Airtime Services, LLC (Creative) filed a Petition for Reconsideration (Petition) of the March 13, 2000 decision by the Licensing and Technical Analysis Branch (LTAB) of the Public Safety and Private Wireless Division (Division) denying Creative's waiver request and dismissing its applications. For the reasons set forth below, we deny Creative's Petition.

II. BACKGROUND

2. Creative is the licensee of 900 MHz Specialized Mobile Radio ("SMR") Stations KNNX952, KNNX953, and KNNX954. On March 10, 1999, Creative submitted the above-captioned applications seeking to modify the subject station licenses to allow itinerant mobile-only operation on four channels, namely - 939.9750 MHz, 939.9875 MHz, 936.6375 MHz and 936.6625 MHz. In those applications, Creative sought waiver of Section 90.617 of the Commission's Rules, 47 C.F.R. § 90.617, which prohibits use of Business and Industrial/Land Transportation channels in Specialized Mobile Radio

1 Creative Airtime Services, LLC Petition for Reconsideration (filed Apr. 14, 2000) (Petition).

2 Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Creative Airtime Services, LLC (Mar. 15, 2000) (Branch Ruling).

3 Creative Airtime Services, LLC Applications for Modified License (filed Mar. 10, 1999)(FCC File Nos. D137122, D137123 and D137124) (Creative Applications and Waiver Request).

4 Itinerant operation is operation of a radio station at unspecified locations for varying periods of time. A mobile station is intended to be used while in motion or during halts at unspecified points. See 47 C.F.R. § 90.7.

5 Id.

(SMR) systems.<sup>6</sup> In response to its waiver request, the Branch issued a letter dismissing the applications as defective.<sup>7</sup> On April 14, 2000, Creative filed its Petition seeking reconsideration of the Branch Ruling dismissing its applications as defective and denying the waiver request.<sup>8</sup>

3. The Commission's Rules divide the 900 MHz band into four categories -- Business, Industrial/Land Transportation (I/LT), Public Safety, and SMR -- with specific channels designated for each category and with each category having specific eligibility criteria.<sup>9</sup> In the 900 MHz band, the Commission's Rules do not permit 900 MHz SMR licensees to apply for frequencies designated for other categories of licensees.<sup>10</sup>

### III. DISCUSSION

4. Section 90.617 of the Commission's Rules states, in pertinent part, that SMR systems will not be authorized on the channels Creative requested in its applications. In support of its request for waiver of the rule, Creative insists that it will not use the Business or I/LT frequencies requested.<sup>11</sup> Rather, Creative states that it would make the Business and I/LT frequencies available, at no charge, for its customers, who are each Business and I/LT eligibles.<sup>12</sup> Furthermore, Creative asserts that use of these four frequencies would be limited to use on an itinerant basis, primarily for talk-around, mobile-to-mobile communications in situations where use of its SMR system is not otherwise feasible.<sup>13</sup>

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<sup>6</sup> *Id.* In this connection, we note that the subject four frequencies are allotted as Business and Industrial/Land Transportation channels. 47 C.F.R. §§ 90.617(b) and (c).

<sup>7</sup> *See supra* n.2. The Branch determined Creative did not satisfy the Commission's Rules because it did not include evidence of frequency coordination with its applications and selected base stations instead of mobile stations. Additionally, the Branch stated that Creative did not discuss the reason(s) its subscribers could not use the system it currently operates and failed to make a sufficient showing that having end-users apply for the spectrum is overly burdensome.

<sup>8</sup> *See supra* n.1.

<sup>9</sup> 47 C.F.R. §§ 90.613, 90.617.

<sup>10</sup> *See* Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of the Spectrum, PR Docket No. 87-213, *Report and Order*, 5 FCC Rcd 4016, 4023 ¶ 64 (1990) (declining to expand inter-category sharing in the 900 MHz band). By contrast, prior to 1995, in the 800 MHz band, through "intercategory sharing," SMR, Business, I/LT and Public Safety eligibles were permitted to apply for frequencies in categories other than those for which the applicant or licensee was eligible under certain circumstances. *See* 47 C.F.R. §§ 90.615(a) and 90.621(e) (1994). Former Section 90.621(e) of the Commission's Rules contained the criteria for intercategory sharing of channels. To obtain channels in the Public Safety, I/LT and Business categories, the intercategory sharing rules required the applicant to show that there were no frequencies in their own category and no public safety systems were authorized to on those channels under consideration to be shared. *See* 47 C.F.R. § 90.621(e)(1) (1994). Additionally, an SMR applicant could obtain channels in the I/LT and Business categories if the applicant showed that its system was fully loaded and no SMR category frequencies were available. *See* 47 C.F.R. § 90.621(e)(2) (1994).

<sup>11</sup> Petition at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

5. Section 1.925 of the Commission's Rules permits grant of a rule waiver request if the "underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest."<sup>14</sup> Alternatively, an applicant's request for waiver may be granted if "in view of the unique or unusual factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to public interest, or the applicant has no reasonable alternative."<sup>15</sup>

6. Creative argues that grant of a waiver is warranted because its proposal presents unique factual circumstances and it will not use the four frequencies for which it applied; rather, its customers, who are eligibles, will use the subject channels.<sup>16</sup> Creative further argues that because eligibles will use the channels, the actual use of the Business and I/LT channels is consistent with the Commission's Rules.<sup>17</sup> In addition, it asserts that use of these channels would be limited to use on an itinerant basis, primarily for talk-around, mobile-to-mobile communications in situations where use of its SMR system is not feasible.<sup>18</sup> Moreover, Creative argues that requiring each of its customers to apply for the desired frequencies and satisfy all of the requirements of a licensee would be overly burdensome.<sup>19</sup> Creative asserts that affordability of its proposal presents unique circumstances.<sup>20</sup> Lastly, in an effort to demonstrate that there is no reasonable alternative available under existing rules, Creative criticizes the reasonableness of the requirement that each customer independently apply for an authorization to use these frequencies.<sup>21</sup>

7. We conclude that Creative has not made the requisite waiver showing. In this connection, Creative argues that the factual circumstances surrounding its proposal are unique and unusual because its proposal presents an affordable option for its customers.<sup>22</sup> We do not find affordability of the service to be a sufficiently "unique and unusual circumstance."<sup>23</sup> Creative has not explained how its situation would be any different from any other SMR operator that wished to have Business and I/LT channels at its availability for use by its customers. Moreover, while Creative complains that it would be unduly

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<sup>14</sup> 47 C.F.R. § 1.925(a)(3).

<sup>15</sup> *Id.*

<sup>16</sup> Petition at 2; *see also* Creative Applications and Waiver Request at 1-2.

<sup>17</sup> Creative Applications and Waiver Request at 2.

<sup>18</sup> Petition at 2; *see also* Creative Applications and Waiver Request at 1.

<sup>19</sup> Creative Applications and Waiver Request at 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2-3.

<sup>22</sup> Creative Applications and Waiver Request at 1-2.

<sup>23</sup> Cost to the licensee or the licensee's customer alone has not been viewed as a unique or unusual factual circumstance for granting a rule waiver. *See* Country Cousins, Inc., *Order*, 14 FCC Rcd 19351, 19352-53 ¶ 6 (WTB PSPWD 1999) (determining that additional equipment costs is not, by itself, sufficient grounds for granting a waiver); *see also* Application for Review of Association For East End Land Mobile Coverage, *Memorandum Opinion and Order*, 13 FCC Rcd 23868, 23871-72 ¶ 10 (1998) (finding, in part that, an increase in costs to users is not a unique circumstance).

burdensome to require each individual customer to file separate applications for itinerant use of the channel, Creative has provided no information concerning the number of customers who would require use of these channels separate and apart from Creative's SMR channels. We are not persuaded that individual licensing in these circumstances is overly burdensome given that any Business and I/LT eligible that was not receiving service from an SMR licensee and desirous of using the subject frequencies would be required to submit its own application.

#### IV. CONCLUSION

8. We conclude that Creative has not made a sufficient showing that grant of a waiver is warranted under the circumstances presented. We therefore affirm the Branch's decision to deny Creative's waiver request and dismiss the associated applications, and we deny Creative's Petition.

#### V. ORDERING CLAUSES

9. 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 Creative Airtime Services, LLC on April 14, 2000 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, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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