

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

In re Application of	)	
	)	
REEVES REALTY, INC.	)	
	)	FCC File No. D118612
Request for Waiver of 47 C.F.R § 90.617(c)	)	

**ORDER ON RECONSIDERATION**

**Adopted:** January 29, 2001

**Released:** January 31, 2001

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

**I. INTRODUCTION**

1. On January 3, 2000, Reeves Realty, Inc. (Reeves) filed a petition<sup>1</sup> seeking reconsideration of the December 14, 1999, action<sup>2</sup> of the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) denying Reeves's request for waiver of Section 90.617(c) of the Commission's Rules<sup>3</sup> and dismissing its associated application to assign and modify the license for 800 MHz Specialized Mobile Radio Service (SMR) Stations WPBE376 and WNQC444, Dayton, Ohio. For the reasons discussed below, we deny the Petition.

**II. BACKGROUND**

2. On November 12, 1998, Reeves filed a request for waiver of Section 90.617(c) of the Commission's Rules to assign Business Radio Category Station WNQC444 from an affiliate company, P&R Cellular, Inc., to Reeves, thereby incorporating Station WNQC444 into its existing commercial SMR system, Station WPBE376.<sup>4</sup> A waiver was required because Section 90.617(c) prohibited the use of Business Radio Category channels in SMR systems.<sup>5</sup> In its decision, the Branch, relying on a recent *Order*,<sup>6</sup> denied the waiver request and dismissed the application, finding that grant of a waiver to permit the assignment of private land mobile radio service (PLMRS) spectrum to commercial use would undermine

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<sup>1</sup> Reeves Realty, Inc. Petition for Reconsideration (filed Jan. 3, 2000) (Petition).

<sup>2</sup> See Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Audrey P. Rasmussen of O'Connor & Hannon, LLP, dated Dec. 14, 1999 (Branch Letter).

<sup>3</sup> 47 C.F.R. § 90.617(c).

<sup>4</sup> See Petition at 2. Reeves filed its application to modify WPBE376 on December 15, 1998. Application of Reeves Realty, Inc. (FCC File No. 118612) (Application).

<sup>5</sup> 47 C.F.R. § 90.617(c).

<sup>6</sup> See Nextel Communications, Inc., *Order*, 14 FCC Rcd 11,678 (WTB 1999) (*Nextel*).

the intent of the Commission's Rules.<sup>7</sup>

3. Prior to 1995, "inter-category sharing" enabled eligibles for the SMR, Business, Industrial Land Transportation, and Public Safety categories to apply for frequencies in other categories regardless of eligibility criteria under certain circumstances.<sup>8</sup> In April 1995, the Wireless Telecommunications Bureau (Bureau) instituted an "inter-category sharing freeze" that prohibited the filing of applications for inter-category sharing among the aforementioned eligibles.<sup>9</sup> The objective of the inter-category freeze was to prohibit the acceptance of inter-category sharing applications for spectrum by non-eligibles until the Commission resolved eligibility and geographic area licensing issues regarding the 800 MHz band.<sup>10</sup> In December of 1995, the Commission eliminated inter-category sharing for SMR entities.<sup>11</sup>

4. In its Petition, Reeves argues that that the Branch failed to consider unique circumstances in determining whether to grant the waiver to allow the incorporation of a PLMRS channel into its existing commercial SMR operation.<sup>12</sup> Specifically, Reeves makes the following points: (1) the assignment of the license at issue should be considered *pro forma* and accomplished by notification (rather than by application) to the Commission because the same principals own the same percentage of both the assignor company and the assignee company;<sup>13</sup> (2) the Branch's reliance on the *Nextel Order* in denying Reeves's waiver request is incorrect because Reeves is a much smaller company seeking a waiver for only one frequency;<sup>14</sup> (3) because the purpose in eliminating inter-category sharing was to preserve the availability of unused channels, the proposed assignment of an already licensed Business channel poses no threat to the availability of the channels to Business Radio Service eligibles;<sup>15</sup> (4) the waiver request is consistent with the FCC's long term policy of promoting licensee flexibility to respond to market demands;<sup>16</sup> (5) grant of the waiver would increase efficiency of operation;<sup>17</sup> and (6) there may be retroactive application of the filing freeze because at the time of the license grant, the frequency was available for commercial and other

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<sup>7</sup> Branch Letter at 1.

<sup>8</sup> 47 C.F.R. §§ 90.615(a), 90.621(e) (1994).

<sup>9</sup> Inter-Category Sharing of Private Mobile Radio Frequencies in the 806/821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350 (WTB 1995).

<sup>10</sup> *Id.* at 7351-53 ¶ 8.

<sup>11</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1536-37 ¶¶ 138-142 (1995); *see* 47 C.F.R. § 90.621(e)(1) (1996).

<sup>12</sup> Petition at 3.

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.*

uses.<sup>18</sup>

### III. DISCUSSION

5. As an initial matter, Reeves claims that the assignment of the license should be considered to be *pro forma* because the frequency in question is already licensed to an affiliate of Reeves where the same principals own the same percentage of each company.<sup>19</sup> Reeves does not, however, merely seek to transfer the frequency at issue from an affiliate to its parent company. Additionally, the application seeks to “modify” the license for Station WPBE376 by adding the frequency 855.5125 MHz (channel 181).<sup>20</sup> Section 1.929 of the Commission’s Rules is clear that such requests are considered “major,” rather than minor modifications.<sup>21</sup> Moreover, Section 1.947 of the Commission’s Rules states that major modifications “require prior Commission approval.”<sup>22</sup> Consequently, the instant application is not *pro forma* and requires Commission approval.

6. We now address Reeves’s request for waiver of Section 90.617(c) of our Rules. A waiver may be granted where the applicant demonstrates that:

- (i) 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; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>23</sup>

7. We believe that the Branch correctly denied Reeves’s request for a waiver of Section 90.617, and that Reeves failed to establish that a grant of its waiver request was warranted. In this connection, the underlying purpose of Section 90.617(c) of the Commission’s Rules was to “preserve PLMRS frequencies for use by those who meet the eligibility criteria” and “stop the subsequent licensing of

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3. In support of this proposition, Reeves cites to “Report and Order, 13 FCC Rcd 21017, 21057 (1998).” There is no case, however, beginning at 13 FCC Rcd 21017. Additionally, the discussion at page 21057 of 13 FCC Rcd (the *ULS Report and Order*) deals with what modifications the Commission will define as “major” and “minor” for the wireless services. In fact, the *ULS Report and Order* specifically defines as major any modification that adds a frequency or requires frequency coordination -- both of which are present in this case. See Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21057 ¶¶ 61-63 (1998).

<sup>20</sup> Petition at 1; Application.

<sup>21</sup> 47 C.F.R. § 1.929(5), (6). Applications requiring frequency coordination or requesting a frequency for which the applicant is not currently authorized are classified as major modifications.

<sup>22</sup> 47 C.F.R. § 1.947(a).

<sup>23</sup> 47 C.F.R. §§ 1.925(b)(3)(i), (ii).

PLMRS spectrum for SMR operations.”<sup>24</sup> This purpose would have been undermined by granting the requested waiver, despite Reeves’s assertion that the frequency at issue is currently unavailable and therefore, its assignment would not threaten the availability of spectrum for Business Radio Service eligibles.<sup>25</sup> This same argument was made in *Nextel*.<sup>26</sup> In that case, the Bureau specifically stated that Nextel’s request to incorporate PLMRS channels in its SMR system “appear[ed] to be at odds” with the underlying purpose of Section 90.617(c) of the Commission’s Rules.<sup>27</sup> For the same reason, we also reject Reeves’s claim that *Nextel* should not apply because of its comparative size and scope of operations. Further, while grant of the waiver might increase the efficiency of Reeves’s operations,<sup>28</sup> its Petition fails to cite unique or unusual circumstances that cause application of Section 90.617(c) to be inequitable, unduly burdensome, or contrary to the public interest.<sup>29</sup> Moreover, Reeves failed to demonstrate lack of an alternative for obtaining additional capacity for its SMR operations (whether by acquiring spectrum through the auction process, or by partitioning and/or disaggregation).

8. We nonetheless note that subsequent to the filing of Reeves’s Petition, the Commission amended its Rules to allow 800 MHz PLMR licensees to assign or transfer spectrum to CMRS licensees for use in CMRS operations under certain conditions.<sup>30</sup> This fact, however, does not change our conclusion. First, the new rule is not yet in effect.<sup>31</sup> Also, Section 90.617(e), as amended, imposes important restrictions on PLMR licensees seeking to assign spectrum for CMRS use in order to avoid depletion of PLMRS frequencies and to prevent interference to 800 MHz public safety licensees.<sup>32</sup> For example, a licensee that transfers or assigns its license to a CMRS operator is precluded from applying for 800 MHz PLMR spectrum in the same area for one year.<sup>33</sup> In addition, the CMRS operator must notify neighboring 800 MHz public safety licensees and commit to avoiding harmful interference to such licensees.<sup>34</sup> The record before us does not establish whether Reeves would satisfy these requirements.<sup>35</sup>

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<sup>24</sup> *Nextel*, 14 FCC Rcd at 11,690 ¶ 27.

<sup>25</sup> Petition at 4.

<sup>26</sup> *Nextel*, 14 FCC Rcd at 11,690-91 ¶ 29.

<sup>27</sup> *Id.* at 11,690 ¶ 27.

<sup>28</sup> Petition at 5.

<sup>29</sup> 47 C.F.R. 1.925(b)(3)(ii).

<sup>30</sup> Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, FCC 00-403, ¶ 110 (released Nov. 20, 2000) (*BBA R&O*).

<sup>31</sup> *See* 66 Fed. Reg. 33, 33 (2001).

<sup>32</sup> *BBA R&O*, ¶¶ 114-118.

<sup>33</sup> *Id.* ¶ 114. In addition, with respect to licenses the initial application for which was filed on or after the date the *BBA R&O* was adopted, such transfers or assignments may not be requested until five years after the date of the initial license grant. *Id.* ¶¶ 115-16.

<sup>34</sup> *Id.* ¶ 118.

9. Finally, we believe that Reeves's contention that there may be an issue of retroactive application of the Commission's Rules because at the time of the initial license grant the frequency at issue was available to both commercial and non-commercial services is without merit.<sup>36</sup> As noted above, the rules prohibiting inter-category sharing of private channels by SMR licensees were adopted in 1995, prior to the filing of Reeves's application on December 15, 1998.

#### IV. CONCLUSION

10. For the reasons stated herein, we deny Reeves's Petition requesting reconsideration of a denial of a waiver of Section 90.617(c) of the Commission's Rules. We also reiterate that the Branch's decision was correctly made in light of the rules and policies in effect at the time Reeves's application and waiver request were filed. While the Commission has since reexamined numerous licensing issues regarding PLMRS spectrum operations similar to the one raised by Reeves, we believe that it would be inappropriate to grant the Petition, particularly given that the record is devoid of a showing that Reeves meets the important limitations adopted as part of the *BBA R&O* rule changes.

#### V. ORDERING CLAUSES

11. 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 Sections 1.106, 1.925 and 90.617(c) of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.925, and 90.617(c), the petition for reconsideration filed by Reeves Realty, Inc. on January 3, 2000, 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, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>35</sup> If Reeves believes that the new rule allows for the type of assignment Reeves desires, then it should reapply and make the requisite showings.

<sup>36</sup> Petition at 5-6.