

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

In the Matter of Applications of)	
)	
TELECOM SERVICES, INC.,)	FCC File Nos. D147248, D147249
)	
NATIONAL INFORMATION)	FCC File Nos. D147245, D147250
TECHNOLOGIES, INC., and)	
)	
WIRELESS INFORMATION TECHNOLOGIES,)	FCC File Nos. D147246, D147247
INC.)	
)	
For Use of 470-512 MHz Spectrum in Cleveland,)	
Ohio, and Detroit, Michigan)	

ORDER ON RECONSIDERATION

Adopted: October 15, 2001

Released: October 18, 2001

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

1. *Introduction.* We have before us petitions for reconsideration filed by Telecom Services, Inc. (“Telecom”), National Information Technologies, Inc. (“NIT”), and Wireless Information Technologies, Inc. (“WIT”) (collectively “Petitioners”).¹ The Petitioners seek reconsideration of the dismissal of their applications for authorization to use certain frequencies in the 470-512 MHz band in Cleveland, Ohio, and Detroit, Michigan. For the reasons set forth below, we deny the petitions.

2. *Background.* In the early 1970s, frequencies in the 470-512 MHz band, normally assigned to television Channels 14 through 20, were made available for land mobile radio use in eleven cities.² Channels 14 and 15 were allotted to the Cleveland, Ohio, area, and Channels 15 and 16 to the Detroit, Michigan, area, but they were not made available for assignment in these areas because of pending negotiations with Canada on the use of frequencies in this band in border zones.³ Negotiations with Canada on the use of these channels for land mobile radio purposes were never completed. Thus, these channels have remained unavailable for land mobile radio use, and the Commission’s Rules prevent assignment thereof until further order.⁴

3. On September 21, 2000, the Petitioners collectively filed the above-captioned applications for authorization to provide service on frequencies within Channels 14 and 15 in Cleveland,

¹ See Telecom Services, Inc., Request for Reconsideration of Application Dismissal (filed Apr. 5, 2001); National Information Technologies, Inc., Request for Reconsideration of Application Dismissal (filed Mar. 21, 2001); Wireless Information Technologies, Inc., Request for Reconsideration of Application Dismissal (filed Mar. 21, 2001) (Petitions).

² See Amendment of Parts 2, 89, 91, and 93, *First Report and Order*, Docket No. 18261, 23 FCC 2d 325 (1970).

³ See Amendment of Parts 89, 91, and 93 of the Rules to reallocate land mobile channels in the 470-512 MHz band, *Report and Order*, Docket No. 20909, 64 FCC 2d 825, 826 & n.3 (1977).

⁴ See 47 C.F.R. § 90.303 nn. 4 & 5.

and Channels 15 and 16 in Detroit, to entities eligible to be licensed in the Industrial/Business Pool pursuant to Section 90.179 of the Commission's Rules.⁵ The applications were accompanied by requests for a waiver of Section 90.303 of the Commission's Rules,⁶ to allow Petitioners the use of these channels in the Cleveland and Detroit areas. In their requests, Petitioners stated that their technical advisor contacted Industry Canada, the agency charged with overseeing the use of the electromagnetic spectrum in Canada, to inquire as to the possibility of U.S. licensees being assigned these channels. Petitioners stated that Mr. Jack Dadourian, Chief of Broadcast Engineering at Industry Canada, was receptive to the idea and indicated that he would recommend approving Petitioners's request for Canadian clearance, except with respect to Channel 16 in Detroit, because of the possibility of interference to a co-channel television broadcast station forty-five kilometers away at Wheatley, Ontario, Canada.

4. The Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed WIT and NIT's applications and denied the accompanying waiver requests on February 20, 2001, and dismissed Telecom's applications and denied the accompanying waiver requests on March 16, 2001, citing the unavailability of the requested channels until further order of the Commission.⁷ The Branch stated that the required order had yet to be released, and that it had no procedure to coordinate the use of these channels with Canada for land mobile radio purposes pursuant to any formal agreement. It further stated that the waiver requests did not provide a list of alternatives that were considered or show that all alternatives were exhausted prior to applying for the subject frequencies. Finally, the Branch stated that because the applications did not contain any alternative proposals compliant with the Commission's rules, the applications were defective and were consequently dismissed.

5. In their petitions for reconsideration,⁸ Petitioners contend that the Branch's reasons for denial of the waiver requests were inapplicable in the instant cases, reiterating their earlier argument that Canada was willing to approve the requests without requiring implementation of a formal agreement.⁹ Petitioners further contend that if concurrence problems with Canada over use of the referenced channels truly occurred in the past, such problems no longer appeared to exist.¹⁰ Petitioners consequently request that we reconsider the decision denying their applications and requests for a waiver of Section 90.303 of the Commission's Rules, and grant their requests to use frequencies in Channels 14 and 15 in Cleveland, and Channels 15 and 16 in Detroit.¹¹

6. *Discussion.* At issue is whether Petitioners have demonstrated that a waiver of Section 90.303 of the Commission's Rules, to permit them to use the 470-512 MHz band in the Cleveland and Detroit areas, is warranted. Section 1.925 of the Commission's Rules states that rule waivers will not be granted unless an applicant affirmatively 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

⁵ 47 C.F.R. § 90.179.

⁶ 47 C.F.R. § 90.303.

⁷ See National Information Technologies, Inc., *Notice of Application Dismissal*, FCC File No. D147245 (Feb. 20, 2001); National Information Technologies, Inc., *Notice of Application Dismissal*, FCC File No. D147250 (Feb. 20, 2001); Telecom Services, Inc., *Notice of Application Dismissal*, FCC File No. D147248 (Mar. 15, 2001); Telecom Services, Inc., *Notice of Application Dismissal*, FCC File No. D147249 (Mar. 15, 2001); Wireless Information Technologies, Inc., *Notice of Application Dismissal*, FCC File No. D147246 (Feb. 20, 2001); Wireless Information Technologies, Inc., *Notice of Application Dismissal*, FCC File No. D147247 (Feb. 20, 2001).

⁸ WIT and NIT filed their petitions on March 21, 2001. Telecom filed its petition on April 5, 2001.

⁹ Petitions at 1.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2.

of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or the applicant has no reasonable alternative.¹²

7. First, it appears that the referenced frequencies are unavailable for land mobile radio use without causing interference to television reception. The Commission considered making Channels 14 through 16 available in the Cleveland and Detroit areas for land mobile radio use, but concluded that these channels were needed for digital television (DTV).¹³ To this effect, the Commission recently signed a Letter of Understanding (LOU) with the Canadian government concerning DTV service along the United States/Canada border.¹⁴ Thereafter, the Commission allotted Channel 15 in Cleveland and Channel 14 in Detroit to DTV.¹⁵ Potential adjacent channel interference also renders Channel 14 in Cleveland and Channel 15 in Detroit unavailable.¹⁶ Finally, with regard to Channel 16 in Detroit, Petitioners concede that the Canadian government would not agree to such an assignment.¹⁷

8. Even notwithstanding the DTV allotments, Petitioners have not demonstrated unique circumstances warranting grant of a rule waiver. Petitioners argue that a waiver is appropriate to relieve the shortage of land mobile radio spectrum in the subject areas.¹⁸ While we are mindful of the shortage of 470-512 MHz frequencies available for Part 90 operations in the Cleveland and Detroit areas, the unavailability of frequencies in a particular geographic area cannot by itself be considered a unique circumstance.¹⁹ Rather, the hardship resulting from scarce spectrum will be common to all applicants who seek exclusive use of channels in the subject area. The very fact that we are deciding three simultaneously filed petitions for the same relief reinforces our conclusion that Petitioners' situation is not unique. Given that such a request can be made by any prospective applicant in the Cleveland and Detroit areas, we are concerned that grant of a waiver in this case would in effect establish a policy of general applicability.²⁰ We are "especially reluctant to grant a waiver when to do so would 'invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function.'"²¹

9. Finally, we note that the "very essence of a waiver is the assumed validity of the general rule."²² A waiver petition which challenges the basis for a rule, rather than assuming its validity and seeking an exception therefrom, generally ought to be considered through a rulemaking process which

¹² 47 C.F.R. § 1.925.

¹³ See *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, *Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14665 ¶ 165 (1997). The Commission further noted in that proceeding that our spectrum recovery plan might provide relief for any additional land mobile spectrum needs in that market. *Id.*

¹⁴ See U.S. and Canada Reach Agreement on Implementing Digital Television Service Along the U.S./Canada Border, *Press Release* (rel. Sept. 29, 2000).

¹⁵ See 47 C.F.R. § 73.622(b).

¹⁶ See 47 C.F.R. § 73.623(e).

¹⁷ Petitions at 2.

¹⁸ *Id.*

¹⁹ See, e.g., *In the Matter of License Communications Services, Inc.*, *Memorandum Opinion and Order on Reconsideration*, 11 FCC Rcd 4725, 4726 ¶ 8 (1996).

²⁰ See, e.g., *Pacific Microwave Joint Venture*, *Order*, 15 FCC Rcd 11704, 11706 ¶ 6 (WTB PSPWD 2000).

²¹ *Nextel Communications, Inc.*, *Order*, 14 FCC Rcd 11678, 11691 ¶ 31 (WTB 1999) (quoting *Verilink Corp.*, *Memorandum Opinion and Order*, 10 FCC Rcd 8914, 8916 ¶ 6 (1995)).

²² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

permits the rule in question to be directly reevaluated.²³ In attempting to refute the Branch's statement that there is no procedure for Canadian approval by offering the name of an Industry Canada official who will presumably approve their requests, Petitioners are, in effect, challenging the actual validity of the rule. Because the validity of the rule is essentially at issue, the proper resolution necessarily entails use of the rulemaking process, rather than the waiver process. Were we to permit operation on the subject channels for land mobile radio use after so long a period of unavailability, fairness would dictate that specific procedures be established so that all interested persons are afforded the opportunity to fairly compete for the use of these frequencies. Therefore, we conclude that use of the waiver process is inappropriate in the instant case.

10. 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 Petitions for Reconsideration filed by Telecom Services, Inc., on April 5, 2001; Wireless Information Technologies, Inc., on March 21, 2001; and National Information Technologies, Inc., on March 21, 2001 ARE DENIED.

11. 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

²³ See, e.g., In the Matter of CBS Inc. Petition for Special Relief, *Memorandum Opinion and Order*, 87 FCC 2d 587, 593 ¶ 22 (1981).