

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

In the Matter of Application of	)	
	)	
NASSAU COUNTY POLICE DEPARTMENT	)	FCC File No. 0000400529
	)	
For Authority to Construct and Operate a Land	)	
Mobile Radio Communications System in the 500-	)	
506 MHz Band (TV Channel 19) and	)	
Waiver Request for a Public Safety License	)	
Pursuant to Section 337 of the Communications	)	
Act of 1934, as Amended	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 28, 2004**

**Released: June 8, 2004**

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

**I. INTRODUCTION**

1. We have before us two petitions for reconsideration filed on August 22, 2002 by Mountain Broadcasting Corporation (Mountain) and WTXX, Inc. (WTXX) (collectively, the “Petitioners”).<sup>1</sup> The Petitioners seek reconsideration of a July 12, 2002 action<sup>2</sup> by the Wireless Telecommunications Bureau’s former Public Safety and Private Wireless Division (Division)<sup>3</sup> granting a request for waiver filed by the Nassau County Police Department (NCPD) for authority to use certain frequencies in its public safety land mobile radio communications system in Nassau County, New York (Nassau County), pursuant to Section 337 of the Communications Act of 1934, as amended (the Act).<sup>4</sup> As we explain below, the petitions for reconsideration are granted, in part, and denied, in part.

2. Mountain, an independently owned UHF operator and licensee of analog Station WMBC-TV, Newton, New Jersey, originates daily newscasts in English and Korean on Channel 63 throughout the New York City Designated Market Area (DMA).<sup>5</sup> As the permittee of Station WMBC-DT, Mountain is

<sup>1</sup> Mountain Broadcasting Corporation Petition for Reconsideration (filed Aug. 22, 2002) (Mountain Petition); WTXX, Inc. Petition for Reconsideration (filed Aug. 22, 2002) (WTXX Petition) (collectively, the “Petitions”).

<sup>2</sup> Application of Nassau County Police Department, Waiver Request for Waiver for a Public Safety License Pursuant to Section 337 of the Communications Act of 1934, as Amended, *Memorandum Opinion and Order*, 17 FCC Rcd 14252 (WTB PSPWD 2002) (*MO&O*).

<sup>3</sup> The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. *See* Reorganization of the Wireless Telecommunications Bureau, *Order*, FCC 03-291, ¶ 2 (rel. Nov. 25, 2003).

<sup>4</sup> 47 U.S.C. § 337.

<sup>5</sup> Mountain Petition at 2. For more information, *see* <<http://www.wmbctv.com/default.htm>>.

also authorized to operate digital programming on Channel 18 throughout the New York City DMA. WTXX is the licensee of WTXX-TV, Channel 20, in Waterbury, Connecticut.<sup>6</sup>

## II. BACKGROUND

3. On February 28, 2001, NCPD<sup>7</sup> filed a request for waiver and associated application for authority to use certain frequencies in its public safety land mobile radio communications system in Nassau County.<sup>8</sup> Pursuant to Section 337 of the Act, NCPD sought a waiver of certain provisions in Part 90 of the Commission's rules to use frequencies allotted for TV operation.<sup>9</sup> NCPD's then current land mobile radio system consisted of approximately 2,000 radio units (500 mobile and 1,500 portable) operating on eleven channels in the 477-481 MHz band (TV Channel 15).<sup>10</sup> NCPD proposed to construct and operate a new land mobile radio communications system that would operate on frequencies in the 500-506 MHz band (TV Channel 19) throughout Nassau County.<sup>11</sup> The Division placed NCPD's waiver request on public notice on March 7, 2001.<sup>12</sup>

4. After evaluating the technical data submitted by NCPD<sup>13</sup> and in consideration of terrain factors, such as terrain obstruction between Station WMBC-DT and Nassau County, the Division determined that Station WMBC-DT would not provide 41 dBu F(50,90) service to Nassau County.<sup>14</sup> The Division therefore concluded that NCPD's proposed system of base stations and mobile units would not cause interference to Station WMBC-DT. The Division similarly concluded that because of terrain obstruction, Station WTXX-TV will not provide Grade B service to Nassau, and therefore NCPD's

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<sup>6</sup> WTXX Petition at 1. For more information, see <<http://www.tribune.com/about/history.html>>.

<sup>7</sup> NCPD is one of the Nation's ten largest police departments, with over 2,800 officers and approximately 4,000 total staff providing law enforcement and emergency medical services throughout Nassau County. For more information, see NCPD's website at <<http://www.co.nassau.ny.us/police/index.html>>. Nassau County, located on Long Island and near the center of the New York metropolitan area, borders New York City to the west, Suffolk County to the east, and covers over 285 square miles.

<sup>8</sup> Nassau County Police Department Request for Waiver, FCC Form 601, File No. 0000400529 (filed Feb. 28, 2001) (*Waiver Request*). On September 3, 2002, NCPD filed an opposition to the petitions for reconsideration. Nassau County Police Department Opposition to Petitions for Reconsideration, (filed Sept. 3, 2002) (NCPD Opposition). On September 10, 2002, Mountain and WTXX, in separate filings, submitted replies to the NCPD Opposition. Mountain Broadcasting Corporation Reply to Opposition (filed Sept. 10, 2002) (Mountain Reply); WTXX, Inc. Reply in Opposition to Petition for Reconsideration (filed Sept. 10, 2002) (WTXX Reply).

<sup>9</sup> See *id.* Because four base stations of its proposed system would fail to satisfy the requisite 90-mile separation to an adjacent channel TV station, NCPD sought a waiver of Sections 90.303, 90.307, and 90.311 of the Commission's rules, 47 C.F.R. §§ 90.303, 90.307, 90.311.

<sup>10</sup> *Id.* at 3. The number of total calls for service on NCPD's radio system increased 9.4% from 1998 to 1999, and 11.7% from 1999 to 2000. *Id.* Total calls in 1998, 1999, and 2000, respectively, were 630,068, 658,990, and 735,798. *Id.* at n.5.

<sup>11</sup> *Id.* at 1. The proposed system consists of four base stations, thirty trunked 12.5 kHz voice channels, five conventional channels for tactical use, and twelve mobile data channels. *Id.*

<sup>12</sup> Wireless Telecommunications Bureau Seeks Comment On Request For Waiver by Nassau County Police Department To Operate A Public Safety Communications System on 500-506 MHz Frequencies Allocated For Channel 19 Television Operation In The New York Metropolitan Area, *Public Notice*, 16 FCC Rcd 5309 (WTB PSPWD 2001) (*Public Notice*).

<sup>13</sup> NCPD conducted an initial field study as well as a second and more rigorous technical analysis of potential interference to Station WMBC-DT. See *MO&O*, 17 FCC Rcd at 14259 ¶ 15 and n.67.

<sup>14</sup> *MO&O*, 17 FCC Rcd at 14260 ¶ 17.

proposed system would not cause interference to Station WTXX-TV.<sup>15</sup> On July 23, 2002, on finding that NCPD's waiver request satisfies the criteria under Section 337(c) of the Act to obtain a grant of its application to use frequencies allotted for TV operation, the Division granted NCPD's waiver request.<sup>16</sup> On August 13, 2002, the Commission granted the application. The application was granted via the Commission's Universal Licensing System (ULS). NCPD's radio station authorization is designated as Call Sign WPVS875. On August 22, 2002, Mountain and WTXX requested reconsideration of the *MO&O*.<sup>17</sup>

5. Both Mountain and WTXX argue that the Division's technical analysis was flawed. Mountain states that the Division: (1) made an erroneous finding regarding the ability of digital television (DTV) Station WMBC-DT, operating on TV Channel 18, to serve portions of Nassau County; and, (2) failed to condition the grant to NCPD on its protection of Station WMBC-DT's service area.<sup>18</sup> WTXX states that, while it does not necessarily oppose the use of TV Channel 19 by the NCPD, the Division nonetheless erred in its determination that Station WTXX-TV will not provide Grade B service to Nassau County.<sup>19</sup>

6. Mountain asserts that the Division erroneously concluded that NCPD's proposed operation on adjacent TV Channel 19 would not cause interference to Station WMBC-DT operating on TV Channel 18 in Nassau County.<sup>20</sup> Mountain states that the Division incorrectly assumed that, "due to terrain obstructions," the predicted field strength values of Station WMBC-DT would not provide a 41 dB $\mu$  service contour to any part of Nassau County.<sup>21</sup> Citing the technical analysis of its consulting engineer as support, Mountain states that the *MO&O* lacked sufficient information or failed to utilize the appropriate methodology to justify the Division's conclusion.<sup>22</sup> Mountain also states that the Division failed to address the potential interference that NCPD's mobile stations would cause to WMBC-DT's viewers in Queens County.<sup>23</sup> Accordingly, Mountain requests that the Commission condition the grant of NCPD's waiver request so as to protect Station WMBC-DT from any interference and service losses in both Nassau and Queens Counties that may arise from the operation of NCPD's mobile stations.<sup>24</sup>

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<sup>15</sup> *Id.* ¶ 18.

<sup>16</sup> See *MO & O*, *supra* note 2.

<sup>17</sup> See *supra* note 1.

<sup>18</sup> Mountain Petition at 2.

<sup>19</sup> WTXX Petition at 2.

<sup>20</sup> Mountain Petition at 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4-5, Attachment, Technical Statement of David Dickmann, consulting engineer, du Treil, Lundin and Rackley, August 21, 2002 at 2-4 (*Dickmann Statement*).

<sup>23</sup> Mountain Petition at 6, Attachment, *Dickmann Statement* at 5-6 (stating that NCPD relied on an "adjustment factor" that not only may be misrepresentative of the actual antennas to be used by potential WMBC-DT viewers, but also lacks any basis under the Commission's rules).

<sup>24</sup> Mountain Petition at 9. The *Dickmann Statement* contests NCPD's conclusion "that interference from Class A station WEBR-CA, New York, New York would 'mask' predicted interference to WMBC-DT from the NCPD's proposed facilities." *Dickmann Statement* at 3-5. According to the *Dickmann Statement*, NCPD's inclusion of data relating to interference from Station WEBR-CA is erroneous because no interference from Station WEBR-CA to Station WMBC-DT is predicted. *Id.* at 4.

7. Similarly, WTXX also avers that the Division erred in its determination that “Station WTXX-TV will not provide Grade B service to Nassau County.”<sup>25</sup> WTXX therefore urges the Division to rescind its determination on this point and to condition the NCPD’s use of TV Channel 19 with “a requirement that the NCPD act expeditiously to investigate and resolve any WTXX viewer interference complaints in [sic] caused by NCPD’s operations.”<sup>26</sup>

### III. DISCUSSION

8. As an initial matter, we note that neither Mountain nor WTXX filed comments in response to the *Public Notice* released on March 7, 2001.<sup>27</sup> On this basis, NCPD urges dismissal of the petitions for reconsideration for failure to satisfy Section 1.106 of the Commission’s Rules.<sup>28</sup> Specifically, NCPD cites Section 1.106(b)(1) of the Commission’s Rules, which states, in pertinent part, that “[i]f the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”<sup>29</sup> Noting that neither WTXX nor Mountain offers explanation for its failure to participate earlier in the proceeding, NCPD argues that the Petitions should be dismissed. As discussed more fully below, we find that although the Petitioners failed to explain why they could not participate earlier in this proceeding, the public interest would nonetheless be served by addressing the merits of the Petitions.

9. Section 1.106(b)(2) of the Commission’s rules requires that a petitioner for reconsideration either demonstrate that it is a party to the proceeding or explain why it was not possible to participate earlier in the proceeding.<sup>30</sup> Underlying this rule are the dual principles of “finality and exhaustion of administrative remedies.”<sup>31</sup> Interested persons seeking to participate in FCC proceedings are required to join the proceedings at the “earliest opportunity.”<sup>32</sup> In the instant matter, the “earliest opportunity” for filing comments to the proceeding was established by the *Public Notice*.

10. As licensees of record for Station WTXX-TV, TV Channel 20, in Waterbury, Connecticut, and Station WMBC-DT, TV Channel 18, in Newton, New Jersey, respectively, WTXX and Mountain have a cognizable interest in the outcome of NCPD’s waiver request. In this regard, we note that they should have exercised all due diligence to ensure their early participation in the proceeding by

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<sup>25</sup> WTXX Petition at 1, Attachment, Technical Statement of David Dickmann, consulting engineer, du Treil, Lundin and Rackley, August 13, 2002 at 2 (*Dickmann Statement*) (stating that under the Longley-Rice, point-to-point propagation model, the predicted Grade B contour extends over the northeastern corner of Nassau County).

<sup>26</sup> WTXX Reply at 1-2, *supra* note 8.

<sup>27</sup> See *Public Notice*, *supra* note 12. The *Public Notice* requested interested parties to file comments on the *Waiver Request* on or before March 19, 2001 and reply comments on or before March 26, 2001.

<sup>28</sup> NCPD Opposition at 2. See 47 C.F.R. § 1.106.

<sup>29</sup> See 47 C.F.R. § 1.106(b)(1).

<sup>30</sup> 47 C.F.R. § 1.106(b)(1), (2). See *Regionet Wireless License, LLC, Memorandum Opinion and Order*, 17 FCC Rcd 21263, 21266 ¶ 9 (2002) (rejecting Havens’s argument that because he is “suffering serious losses” from the Bureau’s actions, he has an interest at stake and is therefore a party entitled to file a petition for reconsideration under Section 1.106(b)(2)).

<sup>31</sup> See *Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Util. Elec. Co.*, 7 FCC Rcd 4192, 4192 ¶ 6 (1992) (*Heritage Cablevision*) citing *United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C.Cir.1990) (citations omitted).

<sup>32</sup> *Id.*

filing comments in response to the *Public Notice*.<sup>33</sup> In this instance, Section 1.106 requires the Petitioners to demonstrate “good reason why it was not possible” for them to participate at an earlier stage in the proceeding.<sup>34</sup> Because the Petitions lacked an adequate showing of why it was not possible to participate earlier in the proceeding, the Petitions are not in full compliance with the requirements set forth in Section 1.106(b)(1) of the Commission’s Rules and are therefore procedurally defective.<sup>35</sup>

11. In addition we note that, Mountain requests, in the alternative, that we treat its filing as an “informal” request.<sup>36</sup> Section 1.41 provides that a request for Commission action may be submitted informally “[e]xcept where formal procedures are required.”<sup>37</sup> We have previously stated that “where the request for Commission action under Section 1.41 clearly and concisely sets forth the facts relied upon, the regulatory provision governing the license, the interest of the person submitting the request and the relief sought,” we have the necessary authority to consider the request consistent with the public interest.<sup>38</sup>

12. Consequently, while we find that the Mountain Petition is defective with respect to Section 1.106(b)(1) of the Commission’s Rules, we nonetheless believe that the public interest would weigh in favor of treating the Mountain Petition as an informal request, pursuant to Section 1.41 of the Commission’s rules.<sup>39</sup> Additionally, because the WTXS Petition raises similar issues of significant public interest and, notwithstanding the fact that WTXS did not specifically plead that we treat its petition as an informal request, we believe that the public interest would be served by accepting the WTXS Petition as an informal request as well. As a result, either as a reconsideration petition or an informal request for Commission action, based on the information before us, we conclude that it is warranted under the circumstances to address the merits of the Petitions.

13. We have reviewed the Division's July 12, 2002 *MO&O* in light of the totality of facts presented by the Petitioners and conclude that the matter was fairly considered and properly decided. The *MO&O* fully set forth the reasons supporting that decision and we believe that rationale continues to be consistent with the circumstances presented and in the public interest. Notwithstanding our finding of no substantial or material basis to reverse the Division’s decision, we are nonetheless persuaded that a

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<sup>33</sup> See *Weblink Wireless, Inc. Order*, 16 FCC Rcd 9420, 9421 ¶ 6 (WTB 2001) (noting that Weblink had the opportunity to file comments objecting to the constitutionality of the proposed bidding credit rules in the proceedings, but did not do so).

<sup>34</sup> See *Applications of Bravo Cellular, Order*, 15 FCC Rcd 4517, 4517 ¶ 2 (WTB CWD 2000), citing *Algrec Cellular Engineering, Memorandum Opinion and Order and Order on Reconsideration*, CC Docket No. 91-142, 1999 WL 824638, 824638 ¶ 19 (1999).

<sup>35</sup> See, e.g., *Applications of Sagir, Inc., Order*, 15 FCC Rcd 4466, 4467-68 ¶ 4 (WTB CWD 2000) (dismissing petition for reconsideration filed by an interested and aggrieved non-party for failure to demonstrate good cause why it could not participate in earlier stages of the proceeding). See also *Heritage Cablevision, supra* note 31.

<sup>36</sup> See Mountain Petition at 1 n.1; Mountain Reply Petition at 2. Having determined that Mountain failed to satisfy Section 1.106(b), we also reject its reliance on Section 1.106(c). As we stated in *Regionet Wireless, LLC*, Section 1.106(c) only “addresses the circumstances under which an *otherwise proper* petition for reconsideration may rely on facts not previously presented” and does not in itself “affect or provide relief from the requirement of Section 1.106 (b)(1).” 17 FCC Rcd at 21272 ¶10 (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> See *Pacific Gas & Electric Co., Memorandum Opinion & Order*, 17 FCC Rcd 98, 101 ¶ 8 (PSPWD 2001), citing Association of Public Safety Communications Officials International, Inc., Forestry Conservation Communications Association and Chandler Fire Department, *Memorandum Opinion and Order*, 16 FCC Rcd 14926, 14926 ¶ 1, 14929-30 ¶ 9 (WTB PSPWD 2002).

<sup>39</sup> 47 C.F.R. § 1.41.

clarification of that decision is warranted to ensure the protection of other licensed and authorized spectrum users from interference.<sup>40</sup> Further, we believe that adding such clarification by way of conditions to the Division's grant of NCPD's *Waiver Request*, is consistent with and in furtherance of the statutory imprimatur of Section 337(c)(1)(B).<sup>41</sup> This section states, in pertinent part, that "the requested use must be technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference. . . consistent with the public interest."<sup>42</sup>

14. In this connection, we therefore clarify the Division's decision granting NCPD's *Waiver Request* by adding the following conditions: (1) If NCPD's system causes interference to either Station WMBC-DT and its viewers in Nassau County and adjacent Queens County, or Station WTXS-TV and its over-the-air service, NCPD will have to cure the interference; and (2) If NCPD's interference difficulties prove to be insurmountable, NCPD must terminate operation.<sup>43</sup> We believe that this clarification will promote the public interest by encouraging the development of a viable public safety communications network in Nassau County while ensuring the operational integrity of Stations WMBC-DT and WTXS-TV.<sup>44</sup>

#### IV. CONCLUSION

15. For the reasons stated above, we conclude that the Division properly decided to grant the *Waiver Request*, and therefore find no basis to disturb that decision. Our review of the Petitions, however, persuades us to clarify the waiver by adding further conditions consistent with the public interest. Accordingly, as conditions to the original grant of NCPD's waiver request and associated radio authorization, Call Sign WPVS875, NCPD must exercise all reasonable efforts to protect both (1) Station WMBC-DT and its viewers in Nassau County and adjacent Queens County and (2) Station WTXS-TV and its over-the-air service from interference attributable to the operation of NCPD's proposed system on TV Channel 19.<sup>45</sup>

#### V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 309, 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 337(c), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petitions for reconsideration filed by Mountain Broadcasting Corporation and WTXS-TV, Inc., on August 22, 2002, ARE DISMISSED.

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<sup>40</sup> See Applications of First Illinois Cable TV, Inc., *Memorandum Opinion and Order*, 47 FCC.2d 715 (1974) (inserting a condition to a previous grant of a waiver request of the leapfrogging rules so as not to defeat the purpose of the waiver); see generally 47 U.S.C. § 303(r) (authorizing the Commission to prescribe restrictions and conditions "as may be necessary to carry out the provisions of the Act.").

<sup>41</sup> See 47 U.S.C. § 337(c)(1)(B).

<sup>42</sup> *Id.*

<sup>43</sup> The burden remains on NCPD to correct interference at its own expense. We reserve the right to reexamine and amend the conditions at any future time, as appropriate, given changes in technology or deployment of services subject to NCPD's authorization, consistent with the public interest.

<sup>44</sup> See, e.g., DuPage Public Safety Communications, *Memorandum Opinion and Order*, 16 FCC Rcd 12394, 12398 ¶ 11 (WTB-PSPWD rel. June 21, 2001) (conditioning the grant of any license pursuant to a waiver of 47 C.F.R. § 22.621 of the Commission's rules); see 47 U.S.C. § 337(c)(1) (in granting a waiver request, the Commission shall not waive "its regulations regarding harmful interference").

<sup>45</sup> We reserve the right, as discussed below, to reconsider and/or modify this grant, as necessary, in the event that we receive documented instances of interference with upper-band UHF television stations as a result of operations pursuant to the terms of this grant.

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, grant of the *Waiver Request* filed by Nassau County Police Department on February 8, 2001 and associated radio authorization, Call Sign WPVS875, in the above-captioned proceeding, is, on our own motion, subject to the additional conditions that the Nassau County Police Department ensure that Stations WMBC-DT or WTXX-TV are adequately protected from interference.

18. IT IS FURTHER ORDERED that the above grant shall specifically include the following conditions: (1) If NCPD's system causes interference to either Station WMBC-DT and its viewers in Nassau County and adjacent Queens County, or Station WTXX-TV and its over-the-air service, NCPD will have to cure the interference; and (2) If NCPD's interference difficulties prove to be insurmountable, NCPD must terminate operation.

19. 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 Critical Infrastructure Division  
Wireless Telecommunications Bureau