

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

In the Matter of Application of)
)
PROGRESS ENERGY SERVICE COMPANY,) File No. 0000646771
LLC)
)
For a 900 MHz Trunked Industrial/)
Transportation Station License in Zephyrhills,)
Florida, and)
Request for Waiver of Section 90.621(b)(4) of)
the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2004

Released: June 8, 2004

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

1. Introduction. On December 14, 2001, Universal City Development Partners, LP d/b/a Universal Studios Florida (Universal or Petitioner) filed a Petition to Deny (Petition)1 a request to waive Section 90.621(b)(4) of the Commission's Rules submitted by Progress Energy Service Company LLC (Progress).2 Specifically, Universal seeks denial of the waiver request (Waiver Request) and the dismissal of the associated application as it relates to Progress's use of 898/937.6625 MHz and 899/938.4500 MHz for the operation of a private land mobile radio (PLMR) system.3 For the reasons set forth below, we consider Universal's Petition as a request for reconsideration of a Commission action, and we propose to modify Progress's license for Station WPTQ577. We otherwise deny the Petition.

2. Background. Frequency coordination in the PLMR Services is the process by which a private entity certified by the Commission recommends the most appropriate frequencies for applicants in designated radio services.4 In 1986, the Commission adopted frequency coordination rules and procedures in an effort to maximize service to the public by assuring that the assignment and management of the PLMR spectrum is performed in an efficient and effective manner.5 The Commission has stated that accurate information is fundamental to its ability to review effectively the frequency recommendations made by Commission-certified frequency coordinators in connection with the Commission's licensing determinations.6 A fundamental aspect of frequency coordination, in any radio service, is an accurate determination by a Commission-certified coordinator as to whether proposed

1 Universal City Development Partners, LP d/b/a Universal Studios Florida (Universal) Petition to Deny (filed Dec. 14, 2001) (Petition).

2 Progress Request for Waiver of Section 90.621(b)(4) (filed Nov. 14, 2001) (Waiver Request).

3 Petition at 1.

4 Frequency Coordination in the Private Land Mobile Radio Services, Report and Order, PR Docket No. 83-737, 103 FCC 2d 1093 (1986).

5 Id. at 1094-95 ¶ 2.

6 Id. at 1148 ¶ 111, 1150 ¶ 116.

operations could cause harmful interference to existing co-channel or adjacent channel licensees.⁷

3. Section 90.621(b)(4) of the Commission's Rules provides that upon specific request, co-channel stations in the 800 MHz and 900 MHz bands may be separated by less than the required 70 miles (113 km) by meeting certain transmitter effective radiated power (ERP) and antenna height criteria.⁸ The minimum separation permitted under the Commission's rules is 55 miles (88 km).⁹ Applicants seeking to be licensed for stations located at distances less than those prescribed are required to secure a waiver and must submit with each application an interference analysis that shows that co-channel stations would receive the same or greater interference protection than provided in the Rules.¹⁰ Requests for separations for less than 55 miles must also include an analysis of interference potential from mobile transmitters to existing co-channel base station receivers.¹¹ Progress is licensed to operate Station WPTQ577 on frequencies 897/936.4375 MHz, 898/937.6625 MHz and 899/938.4500 MHz.¹² Universal, a nearby co-channel licensee (of Station WNZZ712), complains that Progress's use of 898/937.6625 MHz and 899/938.4500 MHz will result in unacceptable levels of interference to its station operation.¹³

4. In its Petition, Universal seeks denial of Progress's waiver request and dismissal of the underlying application as it relates to Progress's use of 898/937.6625 MHz and 899/938.4500 MHz.¹⁴ Universal contends that Progress failed to meet its burden to demonstrate that, even with the short-spacing, the incumbent licensee would receive just as much protection as it would if the separation distance conformed with the general requirements of Section 90.621(b)(4) of the Rules.¹⁵ In response to Universal's Petition, on April 23, 2002, the Licensing and Technical Analysis Branch (LTAB) of the Wireless Telecommunications Bureau's former Public Safety and Private Wireless Division (PS&PWD),¹⁶ requested that Progress and the certified PLMR frequency coordinator it utilized for its

⁷ See generally American Mobile Telecommunications Association, Inc. and American Trucking Associations, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 12416, 12422-23 ¶¶ 13-15 (WTB PSPWD 2001).

⁸ 47 C.F.R. § 90.621(b)(4).

⁹ *Id.*

¹⁰ *Id.*

¹¹ An applicant seeking such a waiver must also submit with its application a certificate of service indicating that concurrent with the submission of the application to the Commission or a frequency coordinator, all co-channel licensees within the applicable area were served with a copy of the application and all attachments thereto. *Id.*

¹² Progress was granted the license for Station WPTQ577 on November 26, 2001. Such grant was effective on June 12, 2003. By way of background, the effective date of Progress's license had been delayed until resolution of a complaint by RF Data, licensee of Station WPTG203, concerning the use of 896/935.1625 MHz. See Letter from Thomas K. Kurian, President, RF Data Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 25, 2003). Through inadvertence, grant of the license for Station WPTQ577 occurred before resolution of the assertions in Universal's Petition.

¹³ See Petition at 2. Universal was granted the license for Station WNZZ712 on August 17, 2002. The effective date of Universal's license for that station also was August 17, 2002. Station WNZZ712 is licensed to operate on numerous frequencies, including the ones at issue in the Petition, *i.e.*, 898/937.6625 MHz and 899/938.4500 MHz.

¹⁴ Petition at 1-2.

¹⁵ *Id.* at 4.

¹⁶ The Commission reorganized the Wireless Telecommunications Bureau, effective November 13, 2003, and the relevant duties of the former Public Safety and Private Wireless Division (PSPWD) were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414 ¶ 2 (2003).

application, UTC Spectrum Services (UTC), respond to the issues raised in the Petition.¹⁷ Although Progress did not respond to LTAB's correspondence, UTC submitted a letter with an attachment in reply (UTC Letter).¹⁸

5. *Discussion.* Section 1.106(f) of the Commission's Rules¹⁹ requires that a petition for reconsideration shall be filed within thirty days from the date of public notice of the final Commission action, as that date is defined in Section 1.4(b) of these rules,²⁰ and shall be served upon parties to the proceeding. Although Universal's Petition to Deny is not labeled as a petition for reconsideration, it complies with the procedural requirements for a petition for reconsideration because it was filed within thirty days of the grant of Progress's application for Station WPTQ577²¹ and was served upon Progress.²² Also, by not objecting to Universal's pleading or responding to LTAB's letter of April 23, 2002,²³ we believe that Progress has effectively waived any objection to treating Universal's Petition as a petition for reconsideration.²⁴ Nor does UTC in its response of May 22, 2002, object to consideration of the Petition by the Commission.²⁵ Thus, we will regard the Petition as a reconsideration request and will fully consider the arguments and suggestions made by Universal, as well as those offered by UTC.

6. Universal asks that Progress's request for waiver be denied and its application dismissed because the interference analysis proffered by Progress is flawed and inadequate to establish that grant of the waiver will result in the same level of protection to which Universal is entitled.²⁶ Petitioner asserts that the engineering analysis does not specify all the data needed to conduct an interference study in that the "Parameter Sheet" does not list the location of the incumbent's stations or Progress's proposed station, and it does not specify the antenna height above average terrain ("DHAAT") for the proposed transmitter.²⁷ While acknowledging that the missing input values can be "gleaned" from other sources, Universal alleges that the absence of this critical data on the Parameter Sheet makes it difficult to determine whether the analysis was conducted using the proper inputs.²⁸

7. Universal further indicates that Section 90.621(b)(4) of the Rules requires that an interference analysis be conducted assuming 1000 watts ERP for Universal, rather than the 82 watts

¹⁷ Letter from Mary Shultz, Chief, LTAB, PS&PWD, Wireless Telecommunications Bureau, to Donnie Beard, Progress, and Renee M. McIlwain, UTC (dated Apr. 23, 2002).

¹⁸ Letter from Renee M. McIlwain, UTC Spectrum Services to Mike Regiec, Federal Communications Commission (dated May 22, 2002) (*UTC Letter*).

¹⁹ 47 C.F.R. § 1.106(f).

²⁰ 47 C.F.R. § 1.4(b).

²¹ Progress's license grant for Station WPTQ577 occurred on Nov. 26, 2001, and Universal's Petition was filed with the Commission on December 14, 2001.

²² See Application of Radiowave, *Order on Reconsideration*, 16 FCC Rcd 5300, 5303 ¶ 7 (*Radiowave*).

²³ See note 17 *supra*.

²⁴ See *Radiowave*, 16 FCC Rcd at 5303 ¶ 7.

²⁵ See note 18 *supra*.

²⁶ Petition at 4. In support of its position, Petitioner cites Northwest Airlines, Inc., *Order on Reconsideration*, 16 FCC Rcd 2525, 2527 ¶ 5 (WTB PSPWD 2001) (PSPWD affirmed LTAB's decision dismissing the subject license application because a mobile unit interference analysis had not been submitted, and when submitted it was deficient).

²⁷ Petition at 4.

²⁸ Universal indicates that the missing data can be gleaned from Progress's Form 601 and the Commission's Universal Licensing System. *Id.*

indicated on the Parameter Sheet.²⁹ Additionally, Petitioner finds fault with the contour maps, arguing that only one contour is shown for each station, and there is no indication whether it is the station's 40 dBu service contour or its 22 dBu interference contour.³⁰ Since interference potential is determined by whether the interference contour of the proposed station overlaps with the service contour of the incumbent station, Universal submits that the failure to label each contour prevents a clear determination of interference potential.³¹ Universal also alleges that the subject analysis does not demonstrate whether the interference potential from mobile transmitters to existing co-channel base station receivers was considered as required.³² Petitioner also indicates that although Progress indicates that it used a generally accepted terrain-based model ("R6602" curve model) when performing the interference analysis, as required, it is unclear whether the model was appropriately applied.³³

8. In addition, Universal indicates that it conducted an interference analysis for frequency 937.6625 MHz and determined that its radio operations will likely receive harmful interference by Progress's proposed operations.³⁴ Universal submits that its analysis showed that the 22 dBu interference contour of the proposed station would overlap significantly into the 40 dBu of Universal's existing station.³⁵ Finally, it indicates that Progress failed to satisfy the waiver standards of Section 1.925 of the Commission's Rules³⁶ because grant of the waiver would frustrate the underlying purpose of Section 90.621(b)(4), which is to provide co-channel stations, such as Universal, with the same or greater interference protection as would be received under the rule's Short-Spacing Separation Table.³⁷ Moreover, Petitioner submits, Progress has not shown that it does not have any reasonable alternatives to the operations it proposes, as required by the Rules.³⁸

9. In response to the Commission's correspondence, UTC indicates that in the engineering analysis it submitted as Progress's frequency coordinator, it considered stations licensed to Universal at less than 55 miles away.³⁹ Therefore, UTC asserts, the Commission had been provided with a 40/22 dBu contour study showing no overlap.⁴⁰ Further, UTC states that it prepared the contour studies using the R6602 contour model and used licensed ERP values and the appropriate terrain data calculations.⁴¹ UTC also notes that plots displaying two contours per station show the 40 dBu service contour inside the 22 dBu interfering contour.⁴² In an effort to ensure that the Universal system is afforded additional

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ Universal also alleges that the difficulty in determining which contours are shown on the maps is exacerbated by the fact that the maps contain no geographical reference points. *Id.*

³² *Id.*

³³ Universal submits that the contours shown in Progress's analysis were relatively smooth circles, which, even in the generally flat terrain of Florida is unusual. According to Universal, the R6602 factor usually results in contours that are more jagged in appearance. *Id.* at 5-6.

³⁴ *Id.* at 8.

³⁵ *Id.*

³⁶ 47 C.F.R. § 1.925.

³⁷ Petition at 9.

³⁸ *Id.*

³⁹ *UTC Letter* at 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

protection, UTC submits a new contour study with details to support the contour studies included.⁴³ The revised contour study assumes a 1000 watt ERP.⁴⁴ The revised study indicates that the two contours touch one another, but do not overlap.⁴⁵ Thus, UTC believes Progress's system meets the spirit of Section 90.621(b)(4) of the Rules.⁴⁶ Further, UTC acknowledges a failure to include a mobile interference study with the subject application when it was submitted to the Commission.⁴⁷ Therefore, UTC provides the study as an attachment to its letter to the Commission.⁴⁸ UTC also indicates that the results of the study demonstrate that the ERP of the mobile units of Station WPTQ577 licensed to Progress must be reduced (from thirty-five watts) to five watts to ensure that the operation of Universal's Station WNZZ712 receives the required level of protection.⁴⁹

10. Based upon our analysis and the information currently before us, we conclude that the Progress application should not have been coordinated because the proposed operations did not provide the requisite interference protection to Station WNZZ712.⁵⁰ However, we find that cancellation of Progress's license for Station WPTQ577 is unnecessary in the instant case because UTC has proposed changes to the license designed to eliminate harmful interference to Station WNZZ712, licensed to Universal.⁵¹ We believe that Section 316(a)(1) of the Communications Act of 1934, as amended,⁵² provides us with ample authority to resolve this matter.⁵³ As recently indicated by the United States Court of Appeals in *California Metro Mobile Communications, Inc. v. FCC*, Section 316(a) grants the Commission broad power to modify licenses; the Commission need only find that a proposed modification serves the public interest, convenience and necessity.⁵⁴ In this connection, we note that the proposed modification would serve the public interest by allowing for additional communications (*i.e.*, allowing Progress to meet its communications needs) while preventing harmful interference to Universal.⁵⁵

11. As discussed above, the coordination of Progress's application was defective because the interference analysis proffered by Progress was inadequate to establish that grant of the waiver would result in the same level of protection to which Universal is entitled, pursuant to Section 90.621(b)(4) of

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id* at 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See RF Pocketcomm, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 18456, 18458 ¶ 8 (WTB PSPWD 2003) (*Pocketcomm*); Industrial Telecommunications Association, Inc., 16 FCC Rcd 15424, 15427 ¶ 8 (WTB PSPWD 2001) (*ITA*).

⁵¹ See Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 17 FCC Rcd 98, 101 ¶ 9 (WTB PSPWD 2001) (*MO&O*), *aff'd*, Alon Shatzki, Inc., *Memorandum Opinion and Order on Reconsideration*, 17 FCC Rcd 20900 (WTB PSPWD 2002); Alon Shatzki, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 22761 (2003). See also *Pocketcomm*, 18 FCC Rcd at 18458 ¶ 8.

⁵² 47 U.S.C. § 316(a)(1).

⁵³ See *ITA*, 16 FCC Rcd at 15427 ¶ 8.

⁵⁴ *California Metro Mobile Communications, Inc. v. FCC*, No. 02-1370 (D.C. Cir. Apr. 23, 2004) (*California Metro*).

⁵⁵ See *Pocketcomm*, 18 FCC Rcd at 18458 ¶ 9; *ITA*, 16 FCC Rcd at 15427 ¶ 8.

the Commission's Rules. In fact, based on the record before us, without modification of Progress's license authorization, Universal will not be adequately protected. We believe that modifying Progress's license by reducing the ERP for its mobile units, as proposed by UTC, is an appropriate mechanism to prevent harmful interference to Universal's station.⁵⁶ As a result, we find that cancellation of the license is unnecessary. In accordance with Section 1.87(a) of the Commission's Rules,⁵⁷ we will not issue a modification order until Progress has received notice of our proposed action and has had an opportunity to interpose a protest. To protest the modification, Progress must, within thirty days of the release date of this *Memorandum Opinion and Order*, submit a written statement with sufficient evidence to show that the modification would not be in the public interest. The protest must be filed with the Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., Room TW-A325, Washington, D.C. 20554.⁵⁸ If no protest is filed, Progress will have waived its right to protest the modification and will be deemed to have consented to the modification.

12. *Conclusion.* For the reasons stated above, we conclude that the coordination of Progress's license application was defective. Because, nonetheless, a license to Progress was granted, we propose to modify Progress's license for Station WPTQ577 to provide that its mobile units operate at an ERP of five watts in lieu of its current thirty-five watts, in order to protect Universal, a co-channel licensee, from harmful interference.

13. *Ordering Clauses.* 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 to Deny filed by Universal City Development Partners LP d/b/a Universal Studios Florida, on December 14, 2001, IS CONSIDERED a reconsideration request and GRANTED IN PART and DENIED IN ALL OTHER RESPECTS, as indicated herein.

14. IT IS PROPOSED that, pursuant to Sections 4(i) and 316(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 316, and Section 1.87 of the Commission's Rules, 47 C.F.R. § 1.87, the license for Private Land Mobile Radio Services Station WPTQ577 licensed to Progress Energy Service Company, LLC, BE MODIFIED by reducing the authorized ERP of its mobile units from thirty-five to five watts on frequencies 898/937.6625 MHz and 899/938.4500 MHz.

15. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to Progress Energy Service Company, LLC, Attention Donnie Beard, 2610 Wycliff Rd., Raleigh, N.C. 27607, and it shall be sent by regular mail to counsel for Universal City Development Partners, LP d/b/a Universal Studios Florida, Marissa G. Repp, Esq., and David L. Martin, Esq., Hogan & Hartson, L.L.P., 555 13th St. N.W., Washington, D.C. 20004-1109, and to Renee M. McIlwain, UTC Spectrum Services, 200 North Glebe Rd., Suite 1000, Arlington, VA 22203.

⁵⁶ See *ITA*, 16 FCC Rcd at 15427 ¶ 9.

⁵⁷ 47 C.F.R. § 1.87(a).

⁵⁸ This address is proper only for protests submitted by U.S. mail. For hand-delivered or messenger-delivered paper filings, the proper address is 236 Massachusetts Ave., N.E., Suite 110, Washington, D.C. 20002. For documents sent by overnight delivery service other than United States Postal Service Express Mail and Priority Mail, the proper address is 9300 East Hampton Dr., Capitol Heights, MD 20743. For further information, contact the Office of the Secretary at (202) 418-0300 or mdortch@fcc.gov.

16. 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
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