

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

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	FCC File Nos. 0001825347, 0001825356,
)	0001825395, 0001825409, 0001825436, and
)	0001825454
)	
FULTON CONTRACTING COMPANY)	FCC File No. 0001825468
)	
Petitions for Waiver of Sections 90.35 and 90.259)	
of the Commission's Rules to Reclassify Certain)	
Radio Licenses as Co-Primary)	

ORDER

Adopted: September 13, 2004

Released: September 14, 2004

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

1. *Introduction.* In this *Order*, we address the above-captioned applications and associated requests for waiver filed by Exelon Generation Company, LLC and its radio consultant Fulton Contracting Company (collectively, Exelon) on July 30, 2004. Exelon asks us to waive Sections 90.35 and 90.259 of the Commission's Rules to modify its licenses for certain Part 90 Industrial/Business Pool stations in the 217-220 MHz band to make them co-primary with Automated Maritime Telecommunications System (AMTS) stations.¹ For the reasons set forth below, we deny the waiver requests and dismiss the applications.

2. *Background.* The Commission's rules provide that Part 90 operations in the 217-220 MHz band are secondary² to the fixed and mobile services, including AMTS.³ The Commission retained a secondary allocation for Part 90 operations when it allocated the 216-220 MHz band for AMTS in 1981.⁴ An AMTS is a specialized system of public coast stations providing integrated, interconnected

¹ Exelon Generation Company, LLC's Petition for Waiver of Sections 90.35 and 90.259 of the Commission's Rules to Reclassify Certain Radio Licenses as Co-Primary in Order to Protect the Residents of Northern Illinois and Eastern Iowa (filed July 30, 2004) (Waiver Request). On August 26, 2004, Exelon filed supplements to the waiver requests. Supplement (filed Aug. 26, 2004) (Supplement).

² Secondary operations refer to operations that may not cause interference to operations authorized on a primary basis and are not protected from interference from those primary operations. See 47 C.F.R. § 90.7.

³ 47 C.F.R. § 90.259(a)(2).

⁴ Amendment of Part 2 of the Commission's rules Regarding the Allocation of the 216-225 MHz band, *Report and Order*, GEN Docket No. 87-14, 3 FCC Rcd 5287, 5287 ¶ 5 (1988) (citing Amendment of Parts 2, 81, and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875 (1981) (*IWCS Report and Order*)); see Amendment of Parts 2, 81, and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) along the Mississippi River and Connecting Waterways, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678, 686 ¶ 26 (1981). The Commission allocated spectrum for AMTS use on the Mississippi River system in 1981. *IWCS Report and Order*, 84 FCC 2d at 896 ¶ 75. It expanded the authorized service area to the Gulf Intracoastal Waterway in 1982, the Gulf of

(continued....)

marine voice and data communications, somewhat like a cellular phone system, for tugs, barges, and other commercial vessels as they move along a waterway.⁵ In 1997, the Commission adopted rules to permit AMTS public coast stations to provide commercial service to units on land,⁶ as well as maritime vessels.⁷ In 2002, the Commission adopted a geographic area licensing approach for AMTS stations, which expressly contemplated operations in areas with no navigable waterways.⁸

3. The Commission provided that mutually exclusive applications for AMTS geographic licenses would be resolved by competitive bidding.⁹ The auction of geographic licenses for unassigned AMTS spectrum will commence September 15, 2004.¹⁰ Prospective bidders have already filed their short-form applications indicating the licenses on which they may bid,¹¹ and the qualified bidders have been determined.¹²

4. Exelon is an electric utility that operates six nuclear generating facilities in northern Illinois.¹³ As required by the Nuclear Regulatory Commission, Exelon maintains a warning system under

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Mexico in 1984, and navigable waterways nationwide in 1991. *See* Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, RM-5712, 6 FCC Rcd 437, 440 ¶ 27 (1991); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf of Mexico to the Authorized Service Areas of Maritime Mobile Systems Operating in the 216-220 MHz Band, *Report and Order*, GEN Docket No. 84-18, 56 Rad. Reg. 2d (P&F) 1613, 1616 ¶¶ 9-11 (1984); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf Intracoastal Waterway to the Authorized Service Area of Inland Waterways Communications Systems, *Report and Order*, GEN Docket No. 81-822, 51 Rad. Reg. 2d (P & F) 440, 443 ¶ 16 (1982).

⁵ 47 C.F.R. §§ 80.5, 80.385(a)(1); Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 16965 ¶ 24 (1997) (*Public Coast Second Report and Order*).

⁶ Exelon appears to assume that service to units on land is not on a secondary basis. *See* Waiver Request at 13, 18-19. This is not correct. It is true that priority must be afforded to marine-originating communications in the event that insufficient channels are available to serve both marine vessels and units on land. 47 C.F.R. § 80.123(b); *Public Coast Second Report and Order*, 12 FCC Rcd at 16966 ¶ 26. Nonetheless, service to units on land is considered co-primary with service to maritime vessels. *See* Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004: Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, *Public Notice*, 19 FCC Rcd 9518, 9528 (WTB 2004).

⁷ Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6695 ¶ 22 (2002) (*Public Coast Fifth Report and Order*); *see* 47 C.F.R. § 80.123. The Commission recently proposed to permit AMTS stations to also provide private mobile radio service to units on land. *See* Maritel, Inc. and Mobex Network Services, LLC, *Notice of Proposed Rule Making*, FCC 04-171 (rel. July 30, 2004).

⁸ *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6703 ¶ 37, 6718 ¶ 79.

⁹ *Id.* at 6695 ¶ 21.

¹⁰ Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004: Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 6274 (WTB 2004).

¹¹ *See* Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004: Status of FCC Form 175 Applications to Participate in the Auction, *Public Notice*, DA 04-2468 (WTB rel. Aug. 4, 2004).

¹² *See* Automated Maritime Telecommunications System Spectrum Auction: 4 Qualified Bidders, *Public Notice*, DA 04-2721 (WTB rel. Aug. 27, 2004).

¹³ Waiver Request at 5-6. It also maintains a former nuclear generating facility to store spent nuclear fuel. *Id.* at 6.

the control of state and local public safety officials to notify the public in northern Illinois and adjoining areas of Iowa in the event of an emergency.¹⁴ In addition to nuclear incidents, the system also is used to warn the public of dangerous weather and other emergency situations.¹⁵ The system consists of 380 radio-controlled sirens, which are controlled by the following Part 90 Industrial/Business Pool stations licensed to Exelon: WNCF434, Libertyville, Illinois; WNCF435, Morris, Illinois; WNCF436, Cordova, Illinois; WNCL914, Mount Morris, Illinois; WNCL915, Mount Morris, Cordova, Morris, Wayne, and Libertyville, Illinois; WNCL916,¹⁶ and WNMG290.¹⁷ The facilities were constructed between 1990 and 1992. Exelon states that it selected frequencies in the 217-220 MHz band despite the fact that they could be licensed only on a secondary basis because other bands available at the time were congested or not suited for the proposed use, and the risk of interference was deemed low because AMTS licensees could operate only along certain waterways.¹⁸

5. *Discussion.* To obtain a waiver of the Commission's Rules, a petitioner must demonstrate either that the grant would be in the public interest and the underlying purpose of the rule would be frustrated or not served by the application to the present case; or that in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁹ Exelon is concerned that the upcoming auction of AMTS spectrum and subsequent operation on a geographically-licensed basis will render its warning system undependable, thus endangering the public.²⁰ It argues that a waiver making its system co-primary with AMTS operations instead of secondary is therefore in the public interest because leaving its stations secondary to geographically licensed AMTS stations operating away from navigable waterways will lead to interference to its system,²¹ and it has no feasible alternatives.²² It also contends that the equities of the situation favor grant of its waiver request, because it selected the 217-220 MHz band for its system in reliance on the service rules then in effect, which limited AMTS service to maritime vessels.²³ Exelon also asserts that its circumstances are unique because no other licensee in Illinois uses 217-220 MHz frequencies for the protection of life and safety.²⁴ Based on the record before us, we conclude that a waiver is not warranted in the present case.

6. First, the record does not demonstrate that geographic licensing of AMTS stations will result in interference to Exelon's operations. We note that all of Exelon's 217-220 MHz band sites are within 120 kilometers of co-channel incumbent site-based AMTS stations,²⁵ but the record does not

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 8.

¹⁶ Station WNCL916 is a temporary fixed station authorized to operate throughout the northern third of Illinois.

¹⁷ Station WNMG290 is a temporary fixed station authorized to operate throughout Illinois and Iowa.

¹⁸ *Id.* at 9.

¹⁹ 47 C.F.R. § 1.925(b)(3).

²⁰ Waiver Request at 15-16.

²¹ *Id.*

²² Supplement at 2.

²³ Waiver Request at 17-18.

²⁴ Supplement at 3-4.

²⁵ Specifically, the Cordova site is within 120 kilometers of facilities of AMTS Stations WHG723, WHG724, and WHG725; the Libertyville site is within 120 kilometers of facilities of AMTS Stations KPB531 and WHG737; the Morris site is within 120 kilometers of facilities of AMTS Stations KPB431, WHG736, and WHG737; the Mount Morris site is within 120 kilometers of facilities of AMTS Stations WHG724 and WHG736; and the Wayne site is within 120 kilometers of facilities of AMTS Stations KPB531, WHG736, and WHG737.

indicate that Exelon has experienced any interference to date, even though the AMTS service rules require 120 kilometers distance between co-channel stations for co-channel interference protection.²⁶ Thus, the fact that geographically licensed AMTS stations may operate closer to Exelon's sites than the existing site-based stations does not establish that Exelon will incur interference. Also, the AMTS geographic licensee will have ten years from the date its license is granted to complete construction,²⁷ so it does not appear that any change in the status quo is imminent. Moreover, Exelon does not assert that every 217-220 MHz band frequency will always be unusable for its purposes. Because the Commission will continue to license secondary telemetry operations in the 217-220 MHz band even after the AMTS auction, Exelon has the option of obtaining additional 217-220 MHz frequencies on a secondary basis in order to ensure that each station has an open frequency available at all times. In addition, in order to gain additional assurance of interference-free operations, Exelon has the alternative of seeking to obtain additional spectrum rights from the ultimate geographic area licensee through spectrum leasing,²⁸ or through partitioning and disaggregation.²⁹ Exelon also could have chosen to participate in the upcoming AMTS auction. Hence, despite Exelon's assertions to the contrary, other alternatives indeed exist for Exelon to acquire access to 217-220 MHz band spectrum.

7. Further, Exelon has other spectrum alternatives available where its operations would be primary, including frequencies that were not available at the time it initially constructed this system. For example, the 1427-1432 MHz (1.4 GHz) band was reallocated from Government use to non-Government use in 2002,³⁰ and telecommand operations are authorized on those frequencies on a primary basis.³¹ Frequencies also are available in the 450-470 MHz (UHF) band.³² In addition, with the approval of the relevant public safety authorities, Exelon would be eligible for spectrum in the 4.9 GHz public safety band that was transferred from Government use to non-Government use in 1999,³³ or to lease spectrum from public safety entities under spectrum leasing rules adopted in 2004.³⁴

8. Exelon also fails to explain why it must operate on 217-220 MHz frequencies. Exelon states that it considered the 1.4 GHz band, as well as the 800/900 MHz bands, and concluded that use of

²⁶ See 47 C.F.R. § 80.385(b)(1).

²⁷ See 47 C.F.R. § 80.49(a)(3).

²⁸ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, FCC 04-167 (rel. Sept. 2, 2004) (*Secondary Markets Second Report and Order*) (expanding spectrum leasing rules to include AMTS).

²⁹ See 47 C.F.R. § 80.60.

³⁰ See Reallocation of the 216-220 MHz, 1390-1392 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, ET Docket No. 00-221, *Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 368 (2002). The Commission reallocated these bands pursuant to the provisions of the Omnibus Budget Reconciliation Act of 1993 (OBRA-93), Pub. L. 103-66, 107 Stat. 312 (1993), and the Balanced Budget Act of 1997 (BBA-97), Pub. L. 105-33, 111 Stat. 251 (1997).

³¹ 47 C.F.R. § 90.259(b); see Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Report and Order*, WT Docket No. 02-8, 17 FCC Rcd 9980, 10002-03 ¶ 47 (2002).

³² See 47 C.F.R. § 90.267.

³³ See 47 C.F.R. § 90.1203; The 4.9 GHz Band Transferred from Federal Government Use, *Memorandum Opinion and Order and Third Report and Order*, WT Docket No. 00-32, 18 FCC Rcd 9152, 9154 ¶ 7, 9159 ¶ 17 (2003).

³⁴ See generally *Secondary Markets Second Report and Order* (expanding spectrum leasing rules to permit public safety entities to lease spectrum for public safety-related uses).

the spectrum would not be feasible because it would require many more fixed sites in order to provide acceptable coverage.³⁵ However, that the fact that an alternative within the rules would be more expensive to implement does not, by itself, render it inequitable or unduly burdensome such that a waiver is warranted.³⁶ In addition, Exelon concedes that UHF frequencies would operate satisfactorily, but states that it was unable to identify sufficient vacant spectrum in that band (or the VHF or 800/900 MHz bands).³⁷ We are not persuaded by Exelon's showing of unavailability. For example, Exelon has not submitted any engineering study or statement from a certified frequency coordinator demonstrating that no spectrum is available. Exelon merely sets forth the number of licenses granted in these bands throughout the state of Illinois (which includes the Chicago area).³⁸ This information sheds little if any light on whether sufficient frequencies are available in places such as Cordova (population 633), Mount Morris (population 3,013), and Wayne (population 2,137). With respect to these alternatives, we would endeavor to act promptly on any subsequent request from Exelon regarding an option that is consistent with the Commission's rules and policies. In that regard, we note that the Commission's provisions regarding special temporary authority³⁹ could be invoked once Exelon identifies suitable frequencies, either on its own or with the assistance of a Commission-certified frequency coordinator,⁴⁰ if Exelon were to have an immediate need for those frequencies.

9. We also disagree with Exelon's contention that the equities of the situation favor grant of its waiver request. First, Exelon concedes that it was fully aware that the subject licenses were granted only on a secondary basis.⁴¹ Moreover, the Commission has discretion to change its rules when doing so is found to be in the public interest, even if it impacts existing licensees.⁴² The Commission provided Exelon, as well as all secondary Part 90 licensees, with the opportunity to comment on proposed changes to the rules governing AMTS. We note, however, that neither Exelon nor any other secondary Part 90 licensee participated in the proceedings leading to the Commission's 1997 decision to permit AMTS licensees to provide service to units on land or its 2002 decision to license AMTS spectrum by geographic area. In short, by selecting frequencies in the 217-220 MHz band, Exelon received full notice that its authorizations would be secondary.⁴³ Exelon's asserted belief that there was only a slight risk in using secondary facilities for communications associated with nuclear plants and with the protection of "millions of people" was a business decision within Exelon's discretion.

³⁵ Supplement at 2-3.

³⁶ See McDowell Construction, *Order on Reconsideration*, 18 FCC Rcd 1816, 1818 ¶ 6 (WTB PSPWD 2003) (citing Country Cousins, Inc., *Order*, 14 FCC Rcd 19351, 19352-53 ¶ 6 (WTB PSPWD 1999)).

³⁷ Supplement at 2.

³⁸ See *id.*

³⁹ See 47 C.F.R. § 1.931.

⁴⁰ For example, Part 90 frequencies below 512 MHz require frequency coordination. See 47 C.F.R. § 90.175. Some of these frequencies may be coordinated only by the frequency coordinator for the former Power Radio Service, due to its specialized knowledge of the needs of utility companies. See 47 C.F.R. § 90.35(a). Were Exelon to coordinate and obtain a license for such frequencies, it would share the band with like users.

⁴¹ See Waiver Request at 4.

⁴² See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205, 76 S. Ct. 763, 100 L. Ed. 1081 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, 63 S. Ct. 997, 87 L. Ed. 1344 (1943); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319-20 (D.C. Cir. 1995); *WBEN, Inc. v. FCC*, 396 F.2d 601, 617-18 (2d Cir. 1968).

⁴³ As the Commission has stated, "The term 'secondary' signifies that . . . licensees who choose to build facilities . . . do not have exclusive operating rights in such areas, and must accept interference as well as avoiding interference to others." Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, *Order on Reconsideration*, WT Docket No. 97-112, 18 FCC Rcd 13169, 13183 ¶ 43 (2003).

10. We also note that the competitive bidding process for geographic AMTS licenses is well underway. For this reason, Exelon's request is subject to stricter review. The Commission has determined that the state of the competitive bidding process is a relevant factor in determining whether grant of a waiver request to permit use of the spectrum even for public safety purposes is in the public interest.⁴⁴ While spectrum does not *per se* become unavailable once the Commission has initiated the competitive bidding process,

requests received early in the competitive bidding process, before an auction is announced will likely weigh more in favor of a grant than requests received on the eve of an auction. For example, at the rulemaking stage, when we are soliciting comments on whether to auction a particular spectrum band, we may give more weight to the public interest considerations of the public safety applicant than to our concerns about the impact on the auction process. However, once the mechanisms for a particular spectrum auction are in place, beginning with the issuance of a public notice announcing the date of the auction . . . , the competitive bidding process is substantially underway. At this juncture, we believe that accepting [public safety waiver requests] would substantially impair our ability to conduct an orderly auction, on which prospective bidders depend in planning their auction strategies. Consequently, such requests will be subject to stricter review than those received earlier, and we anticipate that only in highly extraordinary circumstances will they be found to satisfy the requirements⁴⁵

As noted above, not only has the Commission announced the date of the AMTS auction, but prospective bidders have already planned their auction strategies and submitted their short-form applications.

11. Finally, we do not agree with Exelon's assertion that it has demonstrated unique or unusual circumstances. A review of our licensing database reveals approximately three hundred stations authorized for secondary operations in the 217-220 MHz band, about two-thirds of which are licensed to state or local government entities. It appears that most of these stations are used for monitoring potable water distribution and wastewater collection and treatment. Such services are primary components of the nation's critical infrastructure,⁴⁶ and arguably are of equal importance to the services provided by Exelon. Thus, because there are many other similarly situated licensees, Exelon's circumstances are not unique or unusual.

12. *Conclusion.* In summary, we conclude, based on the record before us, that Exelon has not demonstrated that waiver of Sections 90.35 and 90.259 is warranted in the present case. Exelon has not shown that primary status for the subject facilities in the AMTS band is either necessary or appropriate. Consequently, we deny the waiver requests and dismiss the pending applications. We are mindful of the public's need for notification in the event of a nuclear incident or other emergency. However, we do not believe that granting Exelon co-primary status in a band where it knowingly and willingly was licensed on a secondary basis is the correct approach. As noted above, Exelon has other options if its licenses in the 217-220 MHz band no longer suit its needs, and we would endeavor to act promptly on any subsequent request from Exelon regarding an option that is consistent with the

⁴⁴ 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, 15 FCC Rcd 22709, 22769 ¶ 133 (2000).

⁴⁵ *Id.* at 22770 ¶ 135; *see also* of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Memorandum Opinion and Order*, WT Docket No. 99-87, 17 FCC Rcd 7553, 7575-76 ¶ 56 (2002).

⁴⁶ Milwaukee Metropolitan Sewerage District, *Order*, 19 FCC Rcd 2623, 2626 ¶ 10 (WTB PSCID 2004) (citing Wireless Telecommunications Bureau Seeks Comment on NTIA Report on Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, *Public Notice*, 17 FCC Rcd 2458, 2459 (WTB PSPWD 2002)).

Commission's rules and policies.

13. For the aforementioned reasons, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the waiver requests filed by Exelon Generation Company, LLC and Fulton Contracting Company on July 30, 2004 ARE DENIED, and the corresponding applications (FCC File Nos. 0001825347, 0001825356, 0001825395, 0001825409, 0001825436, 0001825454, and 0001825468) SHALL BE DISMISSED.

14. 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

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau