

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

In the Matter of the Application of
RYE TELEPHONE COMPANY, INC.
For a Point-to-Point Microwave License Operating
in the 18 GHz Frequency Range
File No. 0001215388

MEMORANDUM OPINION AND ORDER

Adopted: September 21, 2004

Released: September 21, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address Rye Telephone Company, Inc.'s (Rye) request for waiver with respect to Rye's application for a point-to-point fixed microwave service (FMS) license in the 18 GHz range on a primary basis in Colorado. For the reasons stated below, we deny Rye's waiver request. We will allow Rye's application to be processed, subject to the condition that any authorization issued to Rye will be on a secondary basis to Fixed Satellite Service (FSS) and Mobile Satellite Service (MSS) systems.

II. BACKGROUND

2. The Commission has reallocated portions of the 18 GHz band from terrestrial fixed services (FS), including the FMS, to satellite services. To this end, the Commission has adopted certain transition rules. In doing so, the Commission balanced the needs of incumbent FS licensees to continue operating their systems with the need to conserve vacant 18 GHz band spectrum for use by satellite licensees, to provide satellite licensees with the flexibility to establish new services, and to preclude

1 Request by Rye Telephone Company, Inc. for Waiver of the Commission's Rules (filed Feb. 28, 2003) (Waiver Request). See also Public Notice, Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, Report No. 1431 (rel. Mar. 5, 2003).

2 See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3 -17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, Report and Order, IB Docket No. 98-172, 15 FCC Rcd 13430 (2000) (18 GHz Report and Order). The satellite services operating in the 18 GHz band consist of both the FSS and the MSS.

3 See 47 C.F.R. §§ 101.83-101.97. The rules are intended to protect the incumbent FS and FMS licensees in the 18 GHz band "to the maximum extent possible while at the same time providing for the growth of both satellite and terrestrial services." 18 GHz Report and Order, 15 FCC Rcd at 13432 ¶ 2; see also id. at 13470 ¶ 82 (noting that the adopted rules should lead to efficient relocation and thereby serve the public interest).

satellite licensees from bearing any unwarranted additional costs in relocating FS licensees.⁴ Thus, rather than immediately clearing the entire 18 GHz band of the incumbent FS users, the Commission permits the incumbents to continue to occupy portions of the band on a co-primary basis with the FSS and MSS licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁵ FSS and MSS licensees have the option, however, of requiring the FS and FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁶ In addition, we authorize extensions and major modifications of existing FS systems only on a secondary basis to FSS and MSS systems.⁷ Most minor modifications of FS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the FSS or MSS licensees.⁸ The result is that while incumbent FS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status. Also, no new FS licenses will be granted in the 18.58-19.3 GHz portion of the 18 GHz band.⁹

3. Rye is a small local exchange carrier serving approximately 180 customers in rural Colorado.¹⁰ Rye was the licensee of point-to-point microwave Station KYO30, which was authorized to operate a transmit path on 18.585 GHz from Kim, Colorado to Tecolote Mountain, Colorado.¹¹ Due to Rye's inadvertence, the license for this station was allowed to expire in 1990, before Rye could complete construction of the path.¹² In March 1990, Rye sought special temporary authority from the Commission to complete construction and commence operations.¹³ On April 13, 1990, the Commission gave Rye ninety days within which to certify completion of construction of Station KYO30.¹⁴ When Rye failed to certify completion of construction by June 29, 1990, the license for Station KYO30 automatically canceled.¹⁵ Rye now seeks to relicense the facilities formerly licensed under call sign KYO30 to connect to the facilities authorized under the license for Station WLW821.

⁴ See *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

⁵ See 47 C.F.R. §§ 101.85, 101.95; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-67 ¶¶ 61-75. With the exception of incumbent licensees in the 19.26-19.3 GHz band, FS and FMS licensees have until June 8, 2010 – ten years from the adoption of the *18 GHz Report and Order* – to relocate. See *18 GHz Report and Order*, 15 FCC Rcd at 13462-65 ¶¶ 65-72. Incumbent FS and FMS licensees in the 19.26-19.3 have until October 31, 2011 to relocate. See *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, First Order on Reconsideration*, IB Docket No. 98-172, 16 FCC Rcd 19808, 19820-19821 ¶ 25 (2001) (*18 GHz Reconsideration Order*).

⁶ See 47 C.F.R. §§ 101.85(a), 101.89-101.99.

⁷ See 47 C.F.R. §§ 101.83, 101.97. Secondary operations may not cause interference to operations authorized on a primary basis and are not protected from interference from primary operations. Thus, an incumbent operating on a secondary basis must cease operations if it causes interference to an FSS or MSS licensee.

⁸ See 47 C.F.R. § 101.97; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

⁹ See 47 C.F.R. § 101.147(r).

¹⁰ Waiver Request at 1.

¹¹ *Id.*

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

III. DISCUSSION

4. Rye seeks a waiver of Section 101.97(a) of the Commission's Rules to allow its system to be licensed on primary basis. That rule states, in pertinent part, that all extensions to existing FMS systems in the 18.58-19.3 GHz band after June 8, 2000 will be authorized on a secondary basis to FSS and MSS systems.¹⁶ Rye argues that if its transmit path is not licensed on a primary basis, Rye could be forced to discontinue using the path in question were its operations to interfere with a neighboring primary service.¹⁷ If this were to happen, Rye's customers would be prevented from placing 911 calls, as Rye uses the path to deliver 911 calls from its customers to a Public Safety Answering Point.¹⁸ Rye states that, in addition, its customers would be unable to place telephone calls as Rye uses the path -- the only link for both 911 calls and subscriber traffic on Rye's network -- to route incoming and outgoing subscriber traffic, and no other telephone companies serve the area.¹⁹ Forcing Rye's customers to respond to emergencies in a manner other than calling 911, Rye argues, would be contrary to Congress' and the Commission's intent.²⁰ In a supplemental filing,²¹ Rye notes that it has implemented mechanisms to ensure that its regulatory lapse will not be repeated, including partnering with a consulting law firm, updating Rye's internal filing and tracking systems for all licenses, and updating Rye's engineering system to encompass monitoring FCC reporting requirements throughout each of Rye's projects.²² Rye further states that it has no reasonable alternative for providing its services other than through its existing facilities, as the microwave path authorized by Call Sign KYO30 is the only meet point for the community of Kim, Colorado to access 911 and related telephone services.²³ While Rye has considered installing fiber optic cable between Kim and La Junta, Colorado, Rye has found the cost of purchasing and installing such facilities on its own to be prohibitive.²⁴ Rye simply seeks to recreate its path as originally planned, and is not seeking to expand or modify any of the system's technical parameters.²⁵

5. Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is shown that either: (1) the underlying purpose of the rule 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 (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁶ For the reasons discussed below, we grant Rye's waiver request in part, and allow Rye's

¹⁶ 47 C.F.R. § 101.97(a).

¹⁷ Waiver Request at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 3-4. Rye cites Implementation of 911 Act, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Docket No. 92-105 and WT Docket No. 00-110, *Fifth Report and Order and Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 22264 (2001); Implementation of 911 Act, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Docket No. 92-105 and WT Docket No. 00-110, *Fourth Report and Order and Third Notice of Proposed Rulemaking, and Notice of Proposed Rulemaking*, 15 FCC Rcd 17079, 17085 (2000); and *ADF Communications, Inc.*, 14 FCC Rcd 17037 (WTB 1999).

²¹ Supplement to Request for Waiver of FCC Rules (filed Apr. 8, 2004) (Supplement).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 47 C.F.R. § 1.925(b)(3).

application to be processed, subject to the condition that any authorization issued to Rye will be on a secondary basis to Fixed Satellite Service (FSS) and Mobile Satellite Service (MSS) systems.

6. Based on the record before us, Rye has not met its burden of demonstrating that grant of a waiver is warranted to allowing relicensing on Rye's facilities on a primary basis. A licensee's involvement in public safety activities does not by itself justify grant of a waiver after a license is inadvertently allowed to expire.²⁷ Nor can we condone Rye's serious lapses in oversight which allowed its license to expire. Licensees must abide by the Commission's filing deadlines, and are responsible for filing renewal applications and related petitions in a timely fashion.²⁸ A licensee's inadvertent failure to renew its license in a timely manner is not a unique or unusual circumstance²⁹ that would render application of the rule in question inequitable, unduly burdensome, or contrary to the public interest.³⁰ Similarly, Rye's failure to properly certify to the completion of construction of Station KYO30, which led to the cancellation of the license for Station KYO30, cannot be excused.

7. With regard to the question of whether the rule's underlying purpose would not be served or would be frustrated by its application in the instant case, we note Rye's concern that it might have to discontinue using the path in question were its operations to interfere with a neighboring primary service, thus inhibiting Rye's customers from placing 911 calls.³¹ Rye acknowledges, however, that a waiver of the rules is not the only solution to this problem. Rye has considered installing fiber optic cable between Kim and La Junta, Colorado.³² While Rye asserts that it has found the cost of purchasing and installing fiber optic cable between Kim and La Junta, Colorado to be prohibitive were Rye to attempt this on its own,³³ we note that other companies in similar circumstances have long recognized the need to partner with other entities in order to install fiber optic cable.³⁴ Rye offers no explanation of any attempts on its part to do so. Furthermore, Rye has not shown that other microwave frequencies are unavailable. Finally, we note that even if we licensed Rye on a primary basis, it would still have to relocate by June 8, 2010.³⁵

²⁷ Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 ¶ 20 (1991).

²⁸ We note that Rye states that it has implemented procedures to ensure timely filings in the future. *See Supplement, supra*.

²⁹ The presence of unique or unusual circumstances is a prerequisite to relief under the second prong of the Commission's waiver standard. 47 C.F.R. § 1.925(b)(3)(ii). *See also, e.g.*, Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000).

³⁰ *See, e.g.*, Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188 (WTB PSPWD 2001); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693 (WTB PSPWD 2000); Sierra-Plumas Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431 (WTB PSPWD 1999).

³¹ Waiver Request at 3.

³² Supplement.

³³ *Id.*

³⁴ *See* M. Doheny, J. Glaspie, J. Koval, N. Leeming, E. Smyth, *Blinded by the Light!: Creating and Capturing Value in Optical networking at 20-21* (2001), <http://www.ranjaygulati.com/new/research/OPTICAL.pdf>.

³⁵ *See 18 GHz Report and Order*, 15 FCC Rcd at 13462-65 ¶¶ 65-72.

IV. CONCLUSION AND ORDERING CLAUSES

8. We believe the appropriate course of action is to allow Rye to be reauthorized for these facilities on a secondary basis to FSS and MSS stations. Such action will allow Rye to avoid immediate disruption to its operations while it explores alternative options, including partnering with other entities to install a fiber optic cable.³⁶ We further conclude that this action will not adversely affect or impose additional costs on FSS and MSS licensees in the 18 GHz band.

9. Accordingly IT IS ORDERED that pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 101.147(r) of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.147(r), the petition for waiver filed by Rye Telephone Company, Inc. on February 28, 2003 IS DENIED.

10. IT IS FURTHER ORDERED that the licensing staff of the Broadband Division SHALL PROCESS the application filed by Rye Telephone Company on February 28, 2003, File No. 0001215388, in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

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

John J. Schauble
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³⁶ See City of San Diego, *Order on Reconsideration*, 17 FCC Rcd 20331 (WTB PSPWD 2002) (waiver granted to allow relicensing of 18 GHz microwave link on a secondary basis where license had failed to file a timely renewal application and link was used to "provide for the timely access of emergency services.")