

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

In the Matter of)	
)	
DELAWARE, STATE OF)	File No. 0002097654
)	
Request for Waiver of Section 90.621(b)(4) of the)	
Commission's Rules and the Inter-Category)	
Sharing Freeze in the 800 MHz Frequency Band)	

ORDER

Adopted: January 30, 2007

Released: January 31, 2007

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On March 23, 2005, the State of Delaware (Delaware) filed an application for 800 MHz frequencies in Dover, Delaware.¹ In connection with the application, Delaware requested a waiver of Section 90.621(b)(4) of the Commission's rules² and a waiver of the Wireless Telecommunications Bureau's freeze on 800 MHz inter-category sharing³ in order to permit it to utilize 800 MHz Business/Industrial/Land Transportation (B/ILT) channel pairs. For the reasons stated below, we deny the waiver request with respect to Section 90.621(b)(4) and dismiss the waiver request with respect to the freeze on 800 MHz inter-category sharing.

II. BACKGROUND

2. Delaware, a public safety entity, states that there are no 800 MHz public safety channels available for use at its Dover and Felton sites.⁴ Delaware states, however, that it has identified two 800 MHz B/ILT channel pairs at each site that could be used. In order to use these channels, Delaware states that it needs a waiver of the separation distances specified in the 800 MHz short-spacing table of Section 90.621(b)(4)⁵ and the 800 MHz inter-category sharing freeze. Delaware seeks a waiver of Section

¹ The State of Delaware seeks use of the following frequency pairs: 812/857.2375 MHz and 814/859.7875 MHz at its Dover site and 815/860.2625 MHz and 815/860.4375 MHz at its Felton site. See FCC File No. 0002097654 (filed Mar. 23, 2005; amended Dec. 5, 2005, and Dec. 13, 2005).

² 47 C.F.R. § 90.621(b)(4).

³ See Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350 (WTB 1995) (*Inter-Category Sharing Order*).

⁴ See attachment to FCC File No. 0002097654 (Waiver Request).

⁵ In general, the minimum distance separation permitted between co-channel stations is 113 kilometers (70 miles). See 47 C.F.R. § 90.621(b). Section 90.621(b)(4), however, states that co-channel stations may be separated by less than 113 kilometers (70 miles) but not less than 88 kilometers (55 miles) if the proposed station satisfies certain transmitter power and antenna height limits. See 47 C.F.R. § 90.621(b)(4). A table (short-spacing table) indicates needed distance separations between co-channel stations for various transmitter power and antenna height combinations. *Id.*

90.621(d)(4) because the channels proposed for its Dover site fail to meet the minimum mileage separation requirements specified in the table to co-channel Stations WNZT398, Berlin, Maryland, licensed to the Town of Ocean City; WNCE617, Philadelphia, Pennsylvania, licensed to Philadelphia Gas Works; and WPNS980, Wyndmoor, Pennsylvania, and WPZP450, Toms River, Joppa, Maryland, both licensed to Academy Express Inc.⁶ The channels proposed for Delaware's Felton site also fail to meet the minimum mileage separation requirements to co-channel Station WPAJ870, West Grove, Pennsylvania, licensed to County of Chester.⁷

3. Delaware also seeks waiver of the Wireless Telecommunications Bureau (Bureau) freeze on the filing of new applications for inter-category sharing on private land mobile radio service (PLMRS) frequencies in the 800 MHz band in order to use the two 800 MHz B/ILT channel pairs specified in its application.⁸ Delaware submits that there are no frequencies in the Public Safety Radio Category suitable for operation at the proposed locations.⁹

III. DISCUSSION

4. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁰ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹¹ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹² We conclude that Delaware has not demonstrated that its request should be granted under the circumstances presented.

5. Section 90.621(b)(4) states that applicants seeking to be licensed for stations located at distances less than those prescribed in the short-spacing table are required to obtain a waiver and must submit with the waiver an interference analysis showing that existing co-channel stations will receive the same or greater interference protection than that provided in the table.¹³ As part of its application,

⁶ See Waiver Request. Delaware's proposed Dover station will be short-spaced to co-channel Stations WNZT398 and WNCE617 on frequency pair 812/857.2375 MHz and to Stations WPNS980 and WPZP450 on frequency pair 814/859.7875 MHz.

⁷ See Waiver Request. Delaware's proposed Felton station will be short-spaced to co-channel Station WPAJ870 on frequency pairs 815/860.2625 MHz and 815/860.4375 MHz.

⁸ See *Inter-Category Sharing Order*, 10 FCC Rcd at 7353 ¶ 9. As a general matter, applicants are licensed on frequencies in the category or categories for which they meet the eligibility criteria. However, Section 90.621(e) of the Commission's rules permits "inter-category sharing" whereby applicants that are eligible for licensing in the 800 MHz Public Safety, or B/ILT categories, can be licensed on channels outside of their respective categories if no channels are available in the category for which the applicant is eligible. See 47 C.F.R. § 90.621(e)(1). The Bureau imposed the suspension to preserve the regulatory landscape, pending the successful resolution of spectrum allocation issues in the 800 MHz Band raised by the public safety community. 10 FCC Rcd at 7352 ¶ 7.

⁹ See Letter from Richard R. Reynolds, APCO's Frequency Advisor – Delaware, to Federal Communications Commission, Wireless Telecommunications Bureau (Dec. 13, 2005).

¹⁰ 47 C.F.R. § 1.925(b)(3)(i).

¹¹ 47 C.F.R. § 1.925(b)(3)(ii).

¹² *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

¹³ See 47 C.F.R. § 90.621(b)(4).

Delaware submitted a co-channel interference study to support its use of the proposed channels.¹⁴ The Delaware study used the actual Effective Radiated Powers (ERP) for Stations WNZT398, WNCE617, WPNS980, WPZP450 and WPAJ870.¹⁵ The rules, however, require short-spacing interference studies to be conducted assuming the existing stations are operating with 1000 watts ERP.¹⁶ Thus, Delaware's contour studies are inconsistent with the Commission's rules and are, therefore, defective.

6. Our staff has performed a contour overlap analysis with all existing stations operating at 1000 watts ERP. With regard to the Dover site, our analysis indicates that Delaware's proposed 22 dB μ V/m F(50,10) contour will overlap the 40 dB μ V/m F(50,50) contour of Station WNCE617. Further, our analysis shows that at the Felton site, Delaware's proposed 22 dB μ V/m F(50,10) contour will overlap the 40 dB μ V/m F(50,50) contour of Station WPAJ870. Because the short-spacing table in Section 90.621(b)(4) is based on non-overlap of a proposed station's 22 dB μ V/m F(50,10) contour with the 40 dB μ V/m F(50,50) contour of existing co-channel stations, we find that Delaware has failed to demonstrate that its proposal will provide existing stations with the same or greater interference protection than that provided by the requirements set forth in the short-spacing table.¹⁷ We also note that Delaware's filing includes no other basis to support providing less protection to these short-spaced stations than provided for under the Commission's rules.¹⁸ Therefore, based on the information provided, we deny Delaware's request for waiver of Section 90.621(b)(4). Furthermore, because we are denying Delaware's request for waiver of Section 90.621(b)(4), we need not consider, and thus dismiss as moot, its request for waiver of the inter-category sharing freeze.

IV. CONCLUSION

7. For the reasons stated herein, we deny Delaware's request for waiver of Section 90.621(b)(4) of the Commission's rules and dismiss as moot its request for waiver of the inter-category sharing freeze.

V. ORDERING CLAUSES

8. Accordingly, 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 request for waiver of Section 90.621(b)(4) of the Commission's rules filed by the State of Delaware, on March 23, 2005, IS DENIED, and its request for waiver of the inter-category sharing freeze IS DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED that application FCC File No. 0002097654 SHALL BE DISMISSED in accordance with this decision.

¹⁴ See Waiver Request at 3.

¹⁵ See Waiver Request at 7-14; ERPs are listed as: 200 watts for Station WNZT398, 360 watts for WNCE617, 500 watts for Station WNS980 and 16 watts for Station WPAJ870.

¹⁶ See footnote 3 of Short-Spacing Separation Table in 47 C.F.R. § 90.621(b)(4). Footnote 3 states, in pertinent part: "All existing stations are assumed to operate with 1000 watts ERP." *Id.*

¹⁷ See footnote 2 of Short-Spacing Separation Table in 47 C.F.R. § 90.621(b)(4). Footnote 2 states, in pertinent part: "Distances shown [between stations in the Short-Spacing Separation Table] are derived from the R-6602 curves and are based upon a non-overlap of the 22 dBu (F50,10) interference contour of the proposed station with the 40 dBu (F50,50) contour of the existing station(s)." *Id.*

¹⁸ The separation between co-channel systems may be less than the separation defined in the short-spacing table if an applicant submits with its application letters of concurrence indicating that the applicant and each short-spaced co-channel licensee agree to accept any interference resulting from the reduced separation. See 47 C.F.R. § 90.621(b)(5).

10. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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