

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

In the Matter of Application of the	)	
	)	
CITY OF EMERYVILLE, CALIFORNIA	)	File No. 0001265256
	)	
For Modification of the License of Station	)	
WNYA218 and Request for Waiver of Section	)	
90.209 of the Commission's Rules		

**ORDER ON RECONSIDERATION**

**Adopted: January 30, 2007**

**Released: January 31, 2007**

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

**I. INTRODUCTION**

1. On January 20, 2003, the City of Emeryville, California (Emeryville) filed the above-captioned application to modify its license for 800 MHz Station WNYA218, accompanied by a request for waiver of Section 90.209 of the Commission's Rules to allow operation of its currently licensed system with a wider emission mask (Waiver Request). On March 31, 2004, the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau (Division) denied Emeryville's waiver request and dismissed its application for modification of license because it found that Emeryville did not submit sufficient information in support of its requested waiver.<sup>1</sup>

2. On April 28, 2004, Emeryville filed a Petition for Reconsideration of the Division *Order*.<sup>2</sup> In the petition, Emeryville maintains that its waiver request is both in the public interest and without alternative.<sup>3</sup> For the reasons discussed below, the Public Safety and Homeland Security Bureau<sup>4</sup> is granting Emeryville a temporary waiver of the rules to permit the proposed operation until six months after 800 MHz band reconfiguration is completed in Northern California (NPSAC Region 6).

**II. BACKGROUND**

3. Emeryville is licensed to operate on National Public Safety Planning Advisory Committee (NPSAC) frequency 867.1875 MHz from two fixed locations in Alameda County, California.<sup>5</sup> Emeryville states that it operates a mobile data system on this frequency that is

<sup>1</sup> See City of Emeryville Request for Waiver of Section 90.209 of the Commission's Rules, *Order*, 19 FCC Rcd 6152 (PSCID, WTB 2004) (Order).

<sup>2</sup> Petition for Reconsideration filed April 28, 2004 (Petition).

<sup>3</sup> See Petition at ¶ 6.

<sup>4</sup> Authority for handling 800 MHz band reconfiguration issues has been transferred from the Wireless Telecommunications Bureau to the Public Safety and Homeland Security Bureau. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

<sup>5</sup> See Station License WNYA218.

essential to the city's police activities. Currently, the radios on the system operate at a data rate of 9,600 bits-per-second (bps). Emeryville seeks to modernize its mobile data communications system using new equipment that will sustain data rates of up to 43.2 kilobits per second (Kbps). According to Emeryville, the higher data throughput will enable it to transmit more efficiently such information as police reports, mug shots, and vehicle location.<sup>6</sup> However, Emeryville believes that transmitting at the higher speed requires a different emission designator and bandwidth than is presently permitted under the rules. Emeryville therefore requests a waiver of the bandwidth restrictions in Section 90.209 of the Commission's rules.<sup>7</sup> NPSPAC Region 6 (Northern California) has reviewed the proposed operation and supports the waiver request.<sup>8</sup>

### III. DISCUSSION

4. On reconsideration, we conclude that a temporary waiver is warranted. However, to implement its proposed operation, Emeryville does not require a waiver of Section 90.209 of the Commission's rules, as requested in its petition, but does require a waiver of a different rule, Section 90.210<sup>9</sup>, which it did not address in its petition. Accordingly, we are waiving the relevant provisions of Section 90.210 *sua sponte*.

5. Emeryville does not require a waiver of Section 90.209 in order to use its proposed 20 kHz bandwidth and 20K0F2D emission designator<sup>10</sup> - those parameters are permitted by Section 90.209. However, Emeryville does require a waiver of Section 90.210(h) of the rules, governing the emission mask for 800 MHz NPSPAC frequencies. There are two emission masks applicable to public safety operations in the 800 MHz band - Emission Mask G<sup>11</sup> and Emission Mask H.<sup>12</sup> Operation on NPSPAC frequencies requires the more stringent Emission Mask H. This "tighter" emission mask minimizes adjacent channel interference in the NPSPAC band and is required because NPSPAC frequencies are spaced every 12.5 kilohertz, whereas the other 800 MHz public safety channels are spaced every 25 kHz. Based on our prior experience with the characteristics of the type of equipment Emeryville proposes, we believe it cannot meet the more stringent Emission Mask H requirements at the data rates it proposes. Accordingly, a waiver of Section 90.210(h) is required if Emeryville is to implement its system as proposed.

6. Section 1.925(b)(3) of the Commission's rules<sup>13</sup> allows us to grant a waiver when the waiver proponent shows that: (i) the underlying purpose of the rule(s) would not be served or

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<sup>6</sup> Petition at ¶ 2.

<sup>7</sup> 47 C.F.R. § 90.209. *See* Waiver Request at 1.

<sup>8</sup> *See* Memorandum from Art McDole, Chair, Review and Revision Committee of the Northern California NPSPAC Region 6 to APCO/AFC/FCC, dated March 28, 2003. NPSPAC frequencies are assigned through the regional planning process. *See* 47 C.F.R. § 90.621(g).

<sup>9</sup> 47 C.F.R. § 90.210.

<sup>10</sup> The maximum bandwidth permitted by the emission designator 20K0F2D can be discerned from the numbers and characters comprising the designator: 1) "20K0" represents the maximum frequency bandwidth of the emission, in this case, 20.0 kHz; 2) the "F" shows that the emission is frequency modulated; 3) the "2" shows that the emission is a digital modulation, modulated subcarrier signal; and 4) the "D" shows that the information transmitted over the signal is comprised of data, telemetry, and telecommand information. *See* 47 C.F.R. § 90.207.

<sup>11</sup> *See* 47 C.F.R. § 90.210(g).

<sup>12</sup> *See* 47 C.F.R. § 90.210(h).

<sup>13</sup> 47 C.F.R. § 1.925(b)(3).

would be frustrated by application to the instant case and that a grant of the requested waiver would be in the public interest; or (ii) in view of the 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.<sup>14</sup>

7. The underlying purpose of the emission masks specified in Section 90.210 of the Commission's rules is to permit reasonable and practical information transfer, without the need for excessively expensive filters and consistent with avoiding interference to adjacent channel stations.<sup>15</sup> Emeryville states that it has performed a review "to analyze the potential for interference with adjacent channels . . . [and that this review] revealed that the channels adjacent to Emeryville are located in Orange and Los Angeles Counties . . . 820km [distant]."<sup>16</sup> It also notes that NPSPAC Region 6 has approved the proposal.<sup>17</sup> However, we are disinclined to grant a permanent waiver based on the current adjacent channel station environment described by Emeryville. Doing so could preclude future licensees' access to the adjacent NPSPAC channels.

8. However, we believe that Emeryville has established that a limited, temporary waiver is in the public interest. Thus, we are allowing Emeryville to operate with the less stringent Emission Mask G, but only until the conclusion of 800 MHz rebanding in the Northern California region. Once rebanding occurs, public safety licensees will have access to an average of 4.5 MHz of non-NPSPAC spectrum vacated by ESMR licensees moving to the upper segment of the 800 MHz band.<sup>18</sup> Therefore, post-rebanding, Emeryville would have the opportunity to apply for a non-NPSPAC channel and if its application is granted would no longer require waiver of the emission mask rules.

#### IV. DECISION

9. We are granting Emeryville a conditional waiver of the Emission Mask H requirements and will allow it to operate, temporarily, using Emission Mask G. However, for the reasons noted *supra*, the waiver will expire six months after 800 MHz band reconfiguration is completed in Northern California (Region 6).<sup>19</sup> If, at the end of the six-month period, Emeryville, with due diligence, has not been able to acquire a channel where Emission Mask G is permitted, it may request an extension of this waiver. However, it would face a heavy burden<sup>20</sup> to show that the public interest would be served despite the potential limitation an extended waiver would have on future use of adjacent NPSPAC channels by other licensees in the San Francisco Bay area.

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<sup>14</sup> *Id.*

<sup>15</sup> Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10076, 10117 ¶ 81 (1995).

<sup>16</sup> Petition at ¶5.

<sup>17</sup> *See supra* n.8.

<sup>18</sup> *See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 at ¶ 11 (2004).

<sup>19</sup> This approach is consistent with a similar waiver previously granted to York County, South Carolina. *See County of York, South Carolina, Order*, DA 06-1662 21 FCC Rcd 9526 (PSCID WTB 2006). The Commission will announce by public notice when reconfiguration is completed in the Region.

<sup>20</sup> *See WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) *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). *See also Birach Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414 (2003).

**V. ORDERING CLAUSES**

10. IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the petition for reconsideration filed by the City of Emeryville, California IS GRANTED IN PART to the extent indicated above.

11. IT IS FURTHER ORDERED that Emeryville's application SHALL BE PROCESSED consistent with this *Order* and the Commission's Rules.

12. IT IS FURTHER ORDERED that the license issued pursuant to the application, SHALL CONTAIN the following condition: "Authority to operate with Emission Mask G terminates six months after 800 MHz band reconfiguration is completed in NPSPAC Region 6."

13. 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

Michael J. Wilhelm  
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