

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

In the Matter of
Implementing a Nationwide, Broadband,
Interoperable Public Safety Network in
the 700 MHz Band
Development of Operational, Technical and
Spectrum Requirements for Meeting Federal,
State and Local Public Safety Communications
Requirements Through the Year 2010
PS Docket No. 06-229
WT Docket No. 96-86

ORDER

Adopted: June 20, 2008

Released: June 20, 2008

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On July 31, 2007, the Commission adopted a Second Report and Order, which revised the rules governing the 700 MHz band. Among other things, in the Second Report and Order the Commission redesignated 10 megahertz of public safety 700 MHz spectrum (at 763-768/793-798 MHz) for the purpose of establishing a nationwide, interoperable broadband public safety communications network. In order to accommodate this broadband allocation, the Commission eliminated wideband channels altogether, and consolidated the public safety narrowband channels so that they are now located at 769-775 MHz and 799-805 MHz. Subject to certain conditions and limitations, the Commission determined that the Upper 700 MHz Band D Block licensee would pay the costs associated with relocating public safety narrowband operations to the consolidated channels. To both minimize the costs of relocating narrowband operations and facilitate the deployment of a nationwide public safety broadband network, the Commission prohibited authorization, whether pursuant to individual license or State License, of any new narrowband operations outside of the consolidated narrowband channel blocks as of August 30, 2007, and cautioned that any equipment deployed outside of the consolidated channel blocks after August 30, 2007, would be ineligible for relocation funding.

1 Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, Second Report and Order, 22 FCC Rcd 15289 (2007) (Second Report and Order).

2 Id. at 15407-08 ¶¶ 325-326.

3 Id. at 15409 ¶ 329.

4 Id. at 15411 ¶ 336. The Commission has subsequently initiated a comprehensive proceeding to revisit its decisions concerning the 700 MHz public/private partnership. See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, Second Further Notice of Proposed Rulemaking, FCC 08-128 (rel. May 14, 2008).

5 Second Report and Order at 15412 ¶ 339.

2. On October 23, 2007, the State of New York (New York) filed a request for a limited waiver of the requirement that all new 700 MHz narrowband public safety operations must be deployed on the consolidated narrowband channels, effective August 30, 2007.⁶ Specifically, New York requests a waiver, pursuant to Section 1.925 of the Commission's rules⁷, of the new 700 MHz public safety band plan, as applied to its statewide 700 MHz license, call sign WPTZ779, and limited to the U.S./Canadian border region⁸ within New York State so that New York can deploy and operate narrowband facilities within that border region in conformance with the current U.S./Canada coordination agreement governing the use of the 700 MHz band, Arrangement G.⁹ New York requests that its waiver apply until such time as Arrangement G is amended or replaced with a successor agreement to allow narrowband deployment within the border region that is more consistent with the revised public safety band plan adopted in the *Second Report and Order*.¹⁰ New York further asserts that any costs associated with retuning its narrowband equipment deployed after August 30, 2007, to meet the new band plan following adoption of a new U.S./Canada coordination agreement, will be borne entirely at New York's sole expense.¹¹ For the reasons stated below, we grant New York's Waiver Request, subject to the conditions stated herein.

II. DISCUSSION

3. Section 1.925 states that 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 requested waiver would be in the public interest; 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,¹² or the applicant has no reasonable alternative.¹³ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁴

⁶ See State of New York, Request for Waiver of 700 MHz Narrowband Public Safety Channel Allotments in Canadian Border Region, PS Docket No. 06-229, WT Docket 96-86 (filed Oct. 23, 2007) (Waiver Request). This document may be accessed online via the Commission's Electronic Comment Filing System, http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi, under PS Docket No. 06-229 or WT Docket No. 96-86.

⁷ 47 C.F.R. § 1.925.

⁸ Specifically, the region within U.S. territory that lies between Line A, as defined in Section 90.7 of the Commission's rules, and the U.S./Canada border. See 47 C.F.R. § 90.7.

⁹ Sharing Arrangement Between the Department of Industry of Canada and the Federal Communications Commission of the United States of America Concerning the Use of the Frequency Bands 764 to 776 and 794 to 806 MHz by the Land Mobile Service Along the Canada-United States Border, Arrangement G Land Mobile (Public Safety Services (June 20, 2005)) ("Arrangement G"). This document is available on the Commission's web site at http://www.fcc.gov/ib/sand/agree/files/can-nb/764_806.pdf.

¹⁰ See Waiver Request at 3.

¹¹ See *id.* In this regard, New York notes that its "700/800 MHz system operates with M/A-COM radio equipment that provides for over-the-air reprogramming of subscriber units, so future frequency shifts to conform to the new band plan will not require any significant expenditures." *Id.* Further, New York states that "[w]hile modification to certain elements of some base stations may be required, the State does not intend to seek reimbursement for these costs." *Id.* at n.6.

¹² 47 C.F.R. § 1.925(b)(3)(i).

¹³ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁴ See *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 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).

4. On November 14, 2007, the Commission adopted and released an Order that granted the Commonwealth of Virginia, Virginia State Police (Virginia) limited interim waiver relief to enable Virginia to continue to deploy new narrowband facilities outside of the consolidated narrowband channels.¹⁵ In this Order, the Commission found that it is in the public interest to “provide interim waiver relief for continued deployment outside of the consolidated narrowband channels where there has been a showing of potential public harm and there is evidence of a comprehensive 700 MHz deployment plan that predates August 30, 2007 for which equipment has been received and/or deployed.”¹⁶ Although the underlying circumstances of New York’s case are distinguishable from Virginia’s, we believe these criteria should guide our evaluation of the New York Waiver Request.

5. In its Waiver Request, New York explains that it is in the process of deploying a statewide wireless network to provide interoperable communications for public safety throughout New York State, using both 800 MHz and 700 MHz spectrum (pursuant to the new band plan adopted in the *Second Report and Order*).¹⁷ New York further explains that it has begun to deploy its statewide network in several areas near the Canadian border, with substantial deployment planned for 2008.¹⁸ New York’s ability to meet its deployment schedules is hampered, however, because the band plan implemented within the U.S./Canada border region under Arrangement G is premised upon the original 700 MHz public safety band plan that was reconfigured by the *Second Report and Order*. Specifically, the only frequencies designated for narrowband operations common to both the new band plan reflected in New York’s statewide 700 MHz license and the band plan still in effect in the U.S./Canada border region pursuant to Arrangement G are the 773-775 MHz and 803-805 MHz bands. Because these overlapping frequencies fall entirely within TV channels 64 and 69, however, they will be unusable in most of the U.S./Canada border region until the use of these channels by Canadian TV stations is discontinued under Canada’s DTV transition.¹⁹ Such discontinuance is not scheduled to occur until August 31, 2011.²⁰ Further, within the U.S./Canada border region, the remaining portions of New York’s licensed frequencies, at 769-773 MHz and 799-803 MHz, are reserved for wideband operations under Arrangement G,²¹ which the Commission prohibited in the *Second Report and Order*, except as authorized under a limited and conditioned waiver process.²²

6. We find that grant of the Waiver Request would be in the public interest. Absent waiver relief, New York would be unable to continue deployment of, as described, a “critical new public safety radio system that will greatly enhance interoperability and communications capability for first responders in the State of New York.”²³ As New York further explains, it “is in the process of deploying a Statewide

¹⁵ Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, *Order*, 22 FCC Rcd 20290 (2007) (*Virginia Order*).

¹⁶ *Id.* at ¶ 7.

¹⁷ See Waiver Request at 2.

¹⁸ See *id.*

¹⁹ Currently, narrowband deployments within the border region must operate on a noninterference basis with respect to, and must accept any interference received from, Canadian TV stations operating on these channels. See 47 C.F.R. § 90.533; Arrangement G, Section 4.4.

²⁰ See Broadcasting Public Notice CRTC 2007-53 (May 17, 2007), found at <<http://www.crtc.gc.ca/archive/ENG/Notices/2007/pb2007-53.htm>>.

²¹ See Arrangement G, Annex A (Channeling Plan).

²² See *Second Report and Order* at 15459-62 ¶¶ 489-496 (codified at 47 C.F.R. § 90.1432(a)).

²³ Waiver Request at 1-2.

Wireless Network (“SWN”) that will provide interoperable communications for public safety agencies throughout New York.”²⁴ Thus, public harm may result from New York’s inability to deploy narrowband operations within the U.S./Canada border region, due to the specific channel assignments that Arrangement G imposes. Further, we note that the public safety broadband allocation (at 763-768/793-798 MHz) would not be impaired by granting New York’s request, as there is no ability to deploy broadband operations within the U.S./Canada border region under the current band plan set forth under Arrangement G.²⁵ Finally, we observe that, because New York asserts that it will bear all costs associated with retuning its 700 MHz system equipment deployed within the U.S./Canada border region to the new band plan once a successor agreement to Arrangement G is put into effect,²⁶ granting New York’s Waiver Request will not add any costs related to narrowband relocation.

7. Accordingly, we determine that the public interest would be served by allowing New York to continue to deploy narrowband operations on the former narrowband channels within the U.S./Canada border region, in conformance with Arrangement G, as conditioned below, until a successor agreement is completed and put into effect to harmonize 700 MHz public safety land mobile operations inside the U.S./Canada border region with the new band plan and service rules adopted in the *Second Report and Order*. The following conditions apply: (1) New York must make any modifications necessary to timely conform with the band plan and other requirements ultimately specified in the successor agreement(s) to Arrangement G regarding the use of this band, at New York’s sole expense; and (2) New York’s operations within the U.S./Canada border region on channels presently allocated for public safety broadband are accorded secondary status.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 301, 303, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303, and 332, and Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, that the Request for Waiver filed by the State of New York is GRANTED subject to the conditions set forth in this ORDER, and THIS ORDER in PS Docket No. 06-229 and WT Docket No. 96-86 is ADOPTED.

9. 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

Derek K. Poarch
Chief
Public Safety and Homeland Security Bureau

²⁴ *Id.* at 2.

²⁵ Under Arrangement G, the 764-768 MHz and 794-798 MHz bands are variously designated for narrowband or wideband use. *See* Arrangement G, Annex A (Channeling Plan).

²⁶ *See* Waiver Request at 3.