

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

In the Matter of)
COUNTY OF OCEAN, NEW JERSEY) File Nos. 0003047481, 0003047654
Request for Waiver of Sections 90.303, 90.305,)
90.307, 90.309, and 90.311 of the Commission's)
Rules)

ORDER

Adopted: August 31, 2009

Released: August 31, 2009

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

I. INTRODUCTION

1. The County of Ocean, New Jersey (Ocean County or the County) filed two applications to modify its licenses for public safety Stations WIL552 and WPXC650. Attached to each application is a request for waiver of Sections 90.303, 90.305, 90.307, 90.309, and 90.311 of the Commission's rules to use, for public safety communications purposes, twelve frequency pairs from the UHF Television (TV) Channel 15 band (476-482 MHz). Ocean County seeks waiver relief pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act) or, in the alternative, Section 1.925 of the Commission's rules. As further detailed below, we find that Ocean County has failed to meet the criteria for a waiver under Section 337 of the Act. However, Ocean County has met the requisite showing meriting a waiver pursuant to Section 1.925 of the Commission's rules. Accordingly, we grant Ocean County's request for waiver to modify its existing licenses to permit it to use the specified frequencies in the TV Channel 15 band spectrum, as conditioned herein.

II. BACKGROUND

2. The County reports that its population as of the year 2000 was 510,916, and that during the summer months its population increases by approximately 200,000 from its year-round population due to the influx of vacationers. The County is home to two military installations, a nuclear power plant, and three major highways that traverse the County. A large portion of the County borders the Atlantic

1 See File Nos. 0003047481 and 0003047654 (filed May 31, 2007). File No. 0003047481 pertains to call sign WIL552, and File No. 0003047654 pertains to call sign WPXC650.

2 See 47 C.F.R. §§ 90.303, 90.305, 90.307, 90.309, and 90.311.

3 See Exhibit 1, Request for Waiver of Sections 90.303, 90.305, 90.307, 90.309 and 90.311 of the Commission's Rules (Waiver Request). The applications request frequency pairs 476/479.3125, 476/479.3875, 476/479.4375, 476/479.4875, 476/479.5375, 476/479.5875, 476/479.7125, 476/479.7375, 476/479.9375, 477/480.2625, 478/481.4625 and 478/481.6125 MHz.

4 See 47 U.S.C. § 337(c).

5 47 C.F.R. § 1.925.

6 See Waiver Request at 4 (citing Census 2000, US Census Bureau, March 2001).

7 See Waiver Request at 4.

Ocean, subjecting the County to “hurricanes and other severe weather events that can place a strain on its public safety resources.”⁸ Ocean County notes that “it is critical that Ocean County and the communities within and around it have effective, interoperable public safety communications.”⁹

3. Approximately ten years prior to its May 31, 2007 filing, Ocean County established a simulcast trunking system “to provide ubiquitous communications for the County and its constituent public safety agencies which include: (a) 23 local fire departments, (b) 9 municipal police departments, (c) 12 local EMS agencies, (d) the County’s Sheriff’s Office, (e) the County’s Prosecutor’s Office and (f) the Countywide Strike Force.”¹⁰ The system is currently licensed under Conventional Public Safety Station WIL552 and Trunked Public Safety Station WPXC650, and has been operating on frequencies within the UHF TV Channel 20 band (506-512 MHz).

4. Ocean County states that since its system began operations, it has been subject to periodic interference from distant TV stations due to atmospheric ducting, which occurs under certain weather conditions.¹¹ Specifically, the County states that “[s]ince the system was placed in service, it has received harmful interference from [TV Channel 20] station WTXX-TV in Waterbury, Connecticut,” and that it “has also experienced more severe interference from [digital TV (DTV) Channel 20] station WCVB-DTV in Boston, Massachusetts.”¹² The County states that “[t]his interference has been sporadic in nature, occurring primarily during periods when ‘Atmospheric Ducting’ conditions exist.”¹³ Due to the digital nature of DTV Station WCVB’s transmissions, the County avers that “interference from WCVB-DTV has been severe enough that it has effectively rendered the County’s UHF-T band trunking system inaccessible to its users for hours at a time.”¹⁴ In support of these statements, Ocean County has provided documentation of multiple ducting interference incidents since 2002 that adversely affected its public safety communications system.¹⁵

5. The County proposes to add the requested frequencies in the TV Channel 15 band to its current licenses in order to “give [the County] operational flexibility” to provide an alternate set of usable frequencies should ducting interference occur in the TV Channel 20 band.¹⁶ The County states that while it “contemplates some of the same interference patterns on Channel 15 that it has experienced on Channel

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ Waiver Request at 2. According to the County, “[t]he Countywide Strike Force is an operational division of the County Prosecutor’s Office and is responsible for combating narcotics rings and other criminal activities requiring a coordinated law enforcement response.” *Id.* at 2, note 2.

¹¹ *Id.* at 2. Atmospheric ducting is defined as “the atmospheric trapping of [an] ... RF signal in the boundary area between two air masses, hot air over cold air or vice versa. Ducting of [an] ... RF signal is caused by an atmospheric anomaly known as *temperature inversion*. Ducting is an anomaly of nature that can affect how well RF propagates through a given area. If the ground temperature is 30°F up to 2000 feet, and then there is a layer of ice cold or very hot air, the RF signal could be trapped between these two air masses and propagate for as long as the duct exists. The duct could go on for hundreds or even thousands of miles...Ducting is undesirable in RF propagation design, but also unavoidable.” Clayton, Jade, *Illustrated Telecom Dictionary*, McGraw-Hill (3rd Ed. 2001), pp. 38-39. *See also* Tomasi, Wayne, *Electronic Communications Systems – Fundamental through Advanced*, Prentice Hall (4th Ed. 2001).

¹² Waiver Request at 2.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ *See* File Nos. 0003047481 and 0003047654, Attachment C, Ocean County Interference Documentation, prepared by V-COMM, L.L.C.

¹⁶ Waiver Request at 16.

20, between the two channels[,] enough frequency pairs should remain available at all times in order to ensure reliable communications.”¹⁷ Ocean County “agrees to accept its license with a condition that its sites at Toms River, New Egypt, Tuckerton, Barnegat and Pasadena, New Jersey do not interfere with existing TV stations, and TV stations that are the subject of proposed and granted allocations as of the date the instant application is filed.”¹⁸

6. The Commission’s rules provide that frequencies allocated in the 470-512 MHz band (TV Channels 14-20) are available for assignment to private land mobile radio service (PLMRS) stations, including public safety stations, on a geographically-shared basis with TV broadcast stations in thirteen urbanized areas of the United States.¹⁹ The frequencies sought for use by Ocean County are part of TV Channel 15, which is available for PLMRS use in the New York, New York/Northeast New Jersey urbanized area.²⁰

7. Under the rules governing PLMRS/TV sharing in the 470-512 MHz band, PLMRS base stations must be located within 50 miles (80 kilometers) of the geographic centers of the urban areas listed in Section 90.303.²¹ Ocean County requests a waiver of Sections 90.303 and 90.305(a) because “its Toms River, New Egypt, Tuckerton, Barnegat, and Pasadena, New Jersey antenna sites . . . are not located within the New York City/Northeast New Jersey Urbanized Area” where Channel 15 band (476-482 MHz) frequencies are allocated for PLMRS operation.²² It also requests a waiver of Section 90.307(d)²³ to allow its proposed base stations to be short-spaced to adjacent-channel Class A TV Station WTSD-CA, Philadelphia, Pennsylvania, operating on TV Channel 14.²⁴ The County submitted a letter of concurrence from Priority Communications Ministries, Inc., licensee of TV Station WTSD-CA, expressing “no objection to the grant of applications by the FCC.”²⁵ Finally, Ocean County requests a waiver of Section 90.309 (Table D)²⁶ to allow three of its proposed base stations to be short-spaced to co-channel TV Station WLYH-TV, Lancaster/Lebanon, Pennsylvania.²⁷ We note that as of June 12, 2009, Station WLYH-TV has vacated TV Channel 15 as a result of the DTV transition, and therefore, a waiver of Section 90.309 Table D is not necessary. Thus, Ocean County only requires waivers of Sections 90.303, 90.305(a), and 90.307(d).

¹⁷ *Id.*

¹⁸ *Id.* at 20-21.

¹⁹ 47 C.F.R. Part 90, Subpart L. A list of the urbanized areas is provided in 47 C.F.R. § 90.303.

²⁰ 47 C.F.R. §§ 2.106 n.NG66, 90.303, 90.311.

²¹ 47 C.F.R. § 90.303.

²² Waiver Request at 12. Two other sites in this system (Lakewood and Jackson, New Jersey) are within 80 miles of the New York City/Northeast New Jersey coordinates and do not need waiver of Sections 90.303 and 90.305(a). *See id.* at 13.

²³ 47 C.F.R. § 90.307(d).

²⁴ *See* File Nos. 0003047481 and 0003047654, attached Engineering Study in Support of Request for Waiver (Engineering Study) at 11, 21.

²⁵ *See* File Nos. 0003047481 and 0003047654, attached Letter from Rev. Steve Hane, Priority Communications Ministries, Inc., to Federal Communications Commission (dated August 7, 2008).

²⁶ 47 C.F.R. § 90.309, Table D.

²⁷ *See* Engineering Study at 26. Table D is applicable to cases involving TV Channel 15 in New York. *See* 47 C.F.R. §§ 90.307, 90.309.

8. On April 9, 2009, the Public Safety and Homeland Security Bureau (Bureau) released a public notice to seek comment on Ocean County's request.²⁸ Motorola, Inc. and Ocean County filed comments in support of the request.²⁹ No parties opposed the waiver request.

III. DISCUSSION

9. Section 337(c) of the Act provides that, in connection with an application by an "entity seeking to provide public safety service," the Commission "shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services ..." if the Commission finds that:

- "no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;"
- "the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;"
- "the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;"
- "the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and"
- "granting such application is consistent with the public interest."³⁰

We note that an applicant's failure to meet any one of the five criteria constitutes sufficient cause for the Commission to deny a request for waiver under Section 337(c).³¹

10. As an initial matter we find that since the County is seeking to modify existing public safety service licenses, it is an "entity seeking to provide public safety services" as required by Section 337(f) of the Act.³² However, as detailed more fully below, we find that the County has not demonstrated

²⁸ See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed by Ocean County, New Jersey to Modify Its Public Safety Communications System by Adding Frequencies from the UHF Television Channel 15 Band (476-482 MHz), *Public Notice*, 24 FCC Rcd 4170 (PSHSB 2009).

²⁹ See Comments of Motorola, Inc. (filed April 30, 2009); Comments of Ocean County, New Jersey (filed April 29, 2009) (Ocean County Comments).

³⁰ 47 U.S.C. § 337(c).

³¹ See South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998); Township of Cinnaminson, New Jersey, *Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (2007) (*Cinnaminson*), citing University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (2001). See also Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (footnotes omitted).

³² 47 U.S.C. § 337(f).

that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” as required by subsection 337(c)(1)(A) of the Act.³³

11. Ocean County’s engineering firm performed a study of public safety channels in the VHF (150-170 MHz), UHF (450-470 MHz), 800 MHz (809-816 MHz, pre-rebanding), and NPSPAC public safety spectrum.³⁴ The County’s engineering firm asserts that it “was unable to find any allocation within these Public Safety allocations that could be licensed at all of Ocean County’s sites.”³⁵ Ocean County’s engineering firm “also conducted a study with respect to UHF-T Band Channel 19 [500-506 MHz],” which overlaps approximately half of Ocean County’s area and is allocated for PLMRS use within 80 kilometers of the Philadelphia, Pennsylvania coordinates listed in Section 90.303.³⁶ Ocean County states that its engineering firm “was unable to locate any spectrum within the UHF-T Band Channel 19.”³⁷

12. We note that since the waiver request was filed, TV broadcasters have vacated TV Channels 52 through 69 in the 700 MHz band as a result of the June 12, 2009 conclusion of the DTV transition.³⁸ The Region 28 700 MHz Plan, which includes provisions for Ocean County, is now pending before the Commission and allots eleven 25 kHz voice channels for entities in Ocean County.³⁹ The County asserts that “11 voice channels [in the 700 MHz band] will not be sufficient to meet its current and future trunking needs.”⁴⁰ However, we note that the Region 28 Plan includes provisions for spectrum efficiency. Specifically, the Region 28 Plan states, “the number of channels granted will be based on the number of justified talk paths not RF channels ... [t]hus, a 12.5 kHz channel is assumed to provide 2 talk paths and a 25 kHz channel 4 talk paths.”⁴¹ Accordingly, under this plan, the County’s request for twelve channels could be accommodated by twelve talk paths, or just three 25 kHz channels, in the 700 MHz band. In its Comments, the County argues that “11 channels have been allocated for all users in the Ocean County region,” and thus, “there is no assurance that the County would be able to license any of the channels.”⁴² The County’s argument is based on conjecture alone and thus not persuasive for

³³ 47 U.S.C. § 337(c)(1)(A).

³⁴ See Engineering Study at 8. See also File Nos. 0003047481 and 0003047654, Attachment B, Engineering Study of Available VHF UHF and 800 Channels, County of Ocean, New Jersey, prepared by V-COMM, L.L.C.

³⁵ Engineering Study at 8.

³⁶ Waiver Request at 8; see 47 C.F.R. §§ 90.303, 90.305(a).

³⁷ Waiver Request at 8.

³⁸ In the DTV Delay Act, Congress extended the date for the completion of the nationwide DTV transition from February 17, 2009 to June 12, 2009. See DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009). Accordingly, subject to the DTV Delay Act, the Commission extended the analog license terms and adjusted the construction permits for the full power television stations on February 13, 2009. See Implementation of the DTV Delay Act, Report and Order and Sua Sponte Order on Reconsideration, MB Docket No. 09-17, 24 FCC Rcd 1607 (2009).

³⁹ See Regional Planning Committee 28 700 MHz Plan, WT Docket No. 02-378, at p. 111 (filed Jan. 27, 2009) (Region 28 Plan); Public Safety and Homeland Security Bureau Seeks Comment on Region 28 (Delaware, Southern New Jersey and Eastern Pennsylvania) 700 MHz Regional Plan, Public Notice, PS Docket No. 06-229, WT Docket No. 02-378, DA 09-1074 (PSHSB Rel. May 14, 2009).

⁴⁰ Waiver Request at 10.

⁴¹ Region 28 Plan at 31.

⁴² Ocean County Comments at 6.

purposes of meeting the requirements of Section 337.⁴³ Accordingly, we find that the Region 28 Plan could offer sufficient capacity for Ocean County's operations in the 700 MHz band.⁴⁴

13. In its Comments, the County states, "[w]hen Ocean County began its planning to resolve the interference problems . . . , the DTV transition in the 700 MHz band was still years away and too distant in the future to factor into its planning."⁴⁵ The County continues, "[t]his was still the case when the above-captioned applications were filed in May, 2007, almost 2 years in advance of the original DTV transition date and more than 2 years in advance of the revised June 12, 2009 DTV transition date."⁴⁶ The County cites the Bureau's *Los Angeles County* order, in which the Bureau granted a waiver to Los Angeles County to operate on frequencies in the Channel 15 band (476-482 MHz), for the proposition that "the Commission has recognized that the 700 MHz public safety band does not represent a viable alternative for a public safety entity seeking to modify an existing communications system as part of its long term planning."⁴⁷ Ocean County asserts that it "is similarly situated with Los Angeles County."⁴⁸ The length of planning in advance of the DTV transition, however, was not the only factor considered with respect to Los Angeles County's request. In *Los Angeles County*, the Bureau also relied on the fact that the 700 MHz band did not provide sufficient spectrum capacity for Los Angeles County to operate a single platform system.⁴⁹ By contrast, we find above that the Region 28 Plan in the 700 MHz band could offer sufficient capacity for Ocean County's proposed UHF-T Band operations.⁵⁰

14. The Commission has previously apprised Section 337 applicants that "the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services."⁵¹ Consistent with the Commission's position, the Bureau and the Wireless Telecommunications Bureau have routinely rejected the argument that an applicant must only show either the unavailability of frequencies in its preferred public safety band or, conversely, the unsuitability of

⁴³ The County also does not address whether it may obtain access to any 700 MHz narrowband channels licensed to the State of New Jersey.

⁴⁴ We note that although the Region 28 plan remains pending, the County could seek authority to operate on 700 MHz general use spectrum by requesting special temporary operating authority. See Public Safety and Homeland Security Bureau Announces an Extension of the Deadline for 700 MHz Regional Planning Committees to Amend 700 MHz Narrowband Plans from November 23, 2007 to January 31, 2008, PS Docket No. 06-229, WT Docket No. 96-86, *Public Notice*, 22 FCC Rcd 19461 (PSSSB 2007).

⁴⁵ Ocean County Comments at 5.

⁴⁶ *Id.*

⁴⁷ *Id.* at 5-6, citing County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18400 ¶ 22 (PSSSB 2008) (*Los Angeles County*).

⁴⁸ Ocean County Comments at 6.

⁴⁹ *Los Angeles County*, 23 FCC Rcd at 18398-99 ¶ 20.

⁵⁰ Unlike Los Angeles County, Ocean County does not propose a single platform system to replace disparate systems in other bands. Ocean County maintains several licenses with frequencies in the low VHF (30-50 MHz), high VHF (150-170 MHz), UHF (450-470 MHz), and the UHF TV Channel 20 bands. See licenses with FCC Registration Number (FRN) 0003322856.

⁵¹ In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted); see also H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) ("Conference Report") ("spectrum must not be immediately available on a frequency already allocated to public safety services.").

frequencies in other public safety bands, for purposes of satisfying Section 337(c) of the Act.⁵² Based on the totality of the facts before us, we cannot find that no public safety spectrum is immediately available to satisfy the requested public safety service use.

15. Because Ocean County has failed to satisfy one of the five criteria under Section 337; specifically, that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” we need not address its arguments regarding the remaining four criteria in order to find that Ocean County cannot obtain waiver relief pursuant to the statute.⁵³

16. However, even though Ocean County does not meet the requirements of Section 337 of the Act, that does not foreclose our consideration of its alternative request for waiver relief pursuant to Section 1.925 of the Commission’s rules.⁵⁴ The ability of the Commission to waive its rules stems from the Commission’s plenary authority under the Act to take the actions necessary to achieve the Commission’s over-arching statutory purposes, which include “promoting safety of life and property through the use of radio communication.”⁵⁵ Thus, Section 1.925 of the rules provides the Commission the necessary flexibility to achieve its statutory objective of safeguarding life and property by considering an applicant’s request for waiver relief under the criteria of this rule section, including a public interest finding.⁵⁶ From our review of the record in this case, we find that Ocean County has provided sufficient information for us to consider whether waiver relief is justified under Section 1.925 of the Commission’s rules.

17. 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;⁵⁷ or (ii) in view of unique or unusual factual circumstances of the instant case, application

⁵² See County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167-68 ¶ 6 (PSHSB PD 2007); State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002) (*Ohio*); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000) (*Tennessee DOT*).

⁵³ See, e.g., Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, Bureau did not address remainder); New Hampshire Department of Transportation (NHDOT), *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, Bureau noted that it “need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.”).

⁵⁴ *Balanced Budget Act Report and Order* at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. See also Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & fn.30 (2007) (noting that “[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules.”).

⁵⁵ County of Granite, Montana, *Order*, 24 FCC Rcd 5704, 5712 ¶17 (PSHSB 2009), citing 47 U.S.C. § 151 (denied waiver relief under Section 337 but granted waiver relief under Section 1.925). However, consideration of a Section 1.925 waiver request does not predetermine that we will grant relief. See, e.g., *Tennessee DOT* at 24650 ¶ 12 (finding that applicant had not met its burden of showing that Section 1.925 waiver relief is justified); *New Hampshire DOT* at 19442-43 ¶¶ 10-11 (making similar findings). Generally, we have not proceeded to consider whether waiver relief is warranted under Section 1.925 when public safety entities have submitted vague and insufficiently specific information. See *Cinnaminson* at 4585-86 ¶ 7 (applicant did not make any assertions specific to the requested frequency pair); City of Richmond, Virginia, *Order*, 21 FCC Rcd 14384, 14390 ¶ 15 (2006) (granting limited waiver relief under Section 337 but further finding that the applicant did not provide sufficient information about all of its proposed sites or implementation schedule to evaluate its request concerning the entire economic area).

⁵⁶ See 47 C.F.R. §§ 1.925(b)(3)(i)-(ii).

⁵⁷ See 47 C.F.R. § 1.925(b)(3)(i).

of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁵⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁵⁹ We evaluate the Waiver Request under the first prong of the waiver standard below.

18. *Sections 90.303 and 90.305(a)*. Section 90.305(a) requires PLMRS base stations operating in the 470-512 MHz band to be located within 50 miles (80 kilometers) of the geographic centers of urbanized areas listed in Section 90.303.⁶⁰ Section 90.305(b) permits associated mobile units to operate within forty-eight kilometers (thirty miles) of the base station.⁶¹ The Commission established the mileage restrictions in this rule, combined with other minimum distance separation criteria between PLMR stations and TV stations, to protect over-the-air broadcast operations on TV Channels 14-21 located outside of the designated urbanized areas from harmful interference from PLMRS systems operating in the 470-512 MHz band.⁶² In 2001 the Commission observed that combining the parameters of Sections 90.305(a) and (b) creates a circular area with an 80-mile (128-kilometer) radius where PLMRS stations may operate on a primary basis.⁶³ At that time, the Commission determined that “new and pending applicants seeking a waiver of Section 90.305 whose area of operation extends outside the 80-mile area could negatively impact the availability of DTV spectrum for television stations.”⁶⁴ However, now that the DTV transition has concluded, and full-power DTV stations are settled into their final channel allotments, we believe that concerns on the impact of the availability of DTV spectrum are less of a factor than they were in 2001.⁶⁵ As indicated above, Ocean County has obtained concurrence from the licensee of the only affected broadcaster, TV Station WTSD-CA.⁶⁶ Ocean County also provides an engineering analysis that shows non-overlapping contours to demonstrate that its operations would not interfere with Station WTSD-CA.⁶⁷ Further, Ocean County agrees not to interfere with existing TV licensees, and we shall condition the grant accordingly.⁶⁸ Given these circumstances, we believe that the purpose of the Section 90.305(a) would not be undermined by a waiver in the present case. However, our analysis does not end here, as Commission precedent requires additional conditions in certain situations.

⁵⁸ See 47 C.F.R. § 1.925(b)(3)(ii).

⁵⁹ *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).

⁶⁰ 47 C.F.R. § 90.305(a).

⁶¹ 47 C.F.R. § 90.305(b).

⁶² See Amendment of Parts 2, 89, 91, and 93; geographic reallocation of UHF-TV Channels 14 through 20 to the land mobile radio services for use within the 25 largest urbanized areas of the United States; Petition Filed by the Telecommunications Committee of the National Association of Manufacturers To Permit Use of TV Channels 14 and 15 by Land Mobile Stations in the Los Angeles Area, Docket No. 18261, *First Report and Order*, 23 FCC 2d 325, 342-343 ¶¶ 42, 46 (1970).

⁶³ See *Goosetown Enterprises, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 12792, 12795 ¶ 9 (2001) (*Goosetown*).

⁶⁴ *Goosetown*, 16 FCC Rcd at 12797 ¶ 13. In this regard, we note that the proposed Tuckerton base station is 131.1 kilometers from the geographic center of New York and outside the area where PLMRS operations are primary.

⁶⁵ At the same time, we are mindful that the Commission has yet to set any deadline for low power and translator TV stations to transition to digital operations.

⁶⁶ See note 25, *supra*.

⁶⁷ See Engineering Study at 21-22.

⁶⁸ Waiver Request at 20-21.

19. The Commission stated in its 2001 *Goosetown* decision that “[i]f an applicant that proposes to operate [in the 470-512 MHz band] further than 80 miles from the geographic center sufficiently demonstrates that grant of a waiver is warranted, its operation would be secondary to current and future full power and low power TV stations.”⁶⁹ However, Ocean County states that it “is unable to accept a grant that would require it to accept the potential for harmful interference from any future TV station allocation that is not yet proposed (and may not even be proposed for a number of years) due to the adverse consequences that this type of condition could cause to the County’s necessary use of this spectrum.”⁷⁰ The Commission policy requiring secondary operations established in *Goosetown* is applicable to those PLMRS operations outside 80 miles/128 kilometers from the city center coordinates. Accordingly, notwithstanding the County’s position that it could not accept a grant that could result in secondary status, we must require, consistent with Commission precedent, that any of the County’s TV Channel 15 PLMRS operations beyond 80 miles/128 kilometers from the New York City/Northeast New Jersey coordinates be secondary to both current and future full power and low power TV stations, in order to adequately protect current and future DTV reception.⁷¹ This requirement applies to the operation of the County’s Tuckerton base station and any mobile operation that occurs beyond 80 miles/128 kilometers from these coordinates. At the same time, we believe that there is a low likelihood that Ocean County will have to deal with unanticipated interference from future TV stations given the already-congested nature of the TV broadcast spectrum in the New York/New Jersey area.

20. *Section 90.307(d)*. Section 90.307(d) requires that PLMRS base stations be separated from adjacent channel TV stations by at least 90 miles (145 kilometers).⁷² The purpose of Section 90.307(d) is “to protect adjacent channel TV stations from interference caused by PLMRS mobile units operating in or near the TV station’s coverage area.”⁷³ Ocean County’s base stations range from 72.4 to 91.7 kilometers, less than the minimum distance, from TV Station WTSD-CA operating on TV Channel 14. The Commission has stated that “[a]ny applicant seeking a waiver to operate outside the 80-mile area must demonstrate that it would provide full protection to any existing full-power or low-power TV station, including allotments and pending applications for such statements, at the time the waiver is filed.”⁷⁴ As previously noted, to demonstrate that the County would not cause interference to WTSD-CA, the County has provided a letter of concurrence from the station licensee⁷⁵ and has provided a contour overlap analysis to show that the County’s interfering contours would not overlap the WTSD-CA service contour.⁷⁶ In light of this analysis and the concurrence letter, we conclude that Ocean County will protect TV Station WTSD-CA from interference and that the purpose of rule section 90.307(d) would not be undermined by a grant of waiver in the present case.

21. *Public interest*. Ocean County argues that “its law enforcement officers, fire fighters, EMS providers, and citizens are placed in danger every time the radio communications system becomes non-operational due to . . . harmful interference” caused by atmospheric ducting.⁷⁷ The County has also submitted documentation showing that its system has been subject to multiple ducting interference

⁶⁹ *Goosetown*, 16 FCC Rcd at 12797-8 ¶ 13.

⁷⁰ Waiver Request at 21.

⁷¹ This condition supersedes Ocean County’s accepted condition as described in para. 5 *supra* with respect to the Tuckerton site.

⁷² See 47 C.F.R. § 90.307(d).

⁷³ County of Dauphin, Pennsylvania, *Order*, 22 FCC Rcd 8628, 8631 ¶ 10 (PSHSB PD 2007).

⁷⁴ *Goosetown*, 16 FCC Rcd at 12797 ¶ 13.

⁷⁵ See note 25, *supra*.

⁷⁶ Engineering Study at 22.

⁷⁷ Waiver Request at 19-20.

incidents since 2002 that adversely affected its public safety communications system.⁷⁸ Given this historical record, and the fact that ducting interference is caused by weather conditions beyond the County's control, we find that there is a substantial risk that the County's system will continue to experience incidents of harmful ducting interference. Because of the critical importance to the County of maintaining continuous public safety communications capability, we find that it is in the public interest to enable the County to use TV Channel 15 band frequencies when its TV Channel 20 band frequencies are rendered unusable due to ducting interference.⁷⁹ Based on the record before us, and given that Section 1 of the Act states that one of the Commission's over-arching purposes is to "promot[e] safety of life and property through the use of ... radio communication,"⁸⁰ we conclude that the public interest will be promoted by affording Ocean County's public safety community the necessary spectrum to enable it to protect the lives and property in its care.

22. In addition, we find that grant of the County's waiver request will preserve interoperability between the County and its various agencies and municipalities.⁸¹ Notwithstanding the availability of 700 MHz band spectrum, we find it in the public interest to grant use of TV Channel 15 spectrum to Ocean County because "Ocean County has already established a county-wide communications system operating in the UHF-T Band," and the County has found that additional UHF-T Band spectrum "best suited its needs for an interoperable public safety communications system without having to scrap its existing infrastructure and equipment."⁸² Furthermore, a grant will "promote interoperability with of the County's system with its neighboring jurisdictions," specifically, "the neighboring Counties of Burlington, Monmouth, and Camden [which] utilize (or have committed to utilize) UHF spectrum for local government and/or public safety communications."⁸³ Accordingly, we conclude that a decision to grant the instant applications and the Waiver Request, as conditioned, is consistent with the public interest.

IV. CONCLUSION

23. Based upon the record before us, we find that Ocean County has met the requirements for waiver pursuant to Section 1.925 of the Commission's rules. Accordingly, we grant Ocean County's request for waiver to modify its existing licenses to permit it to use the specified frequencies in the TV Channel 15 band spectrum. However, we condition the authorizations as follows:

(a) The following operations on TV Channel 15 band spectrum (476-482 MHz) are secondary to current and future full power and low power TV stations: (i) The Tuckerton base station (location 3 on Station WIL552); and (ii) any mobile unit that travels beyond 128 kilometers from the New York City/Northeast New Jersey coordinates listed in 47 C.F.R. § 90.303.

(b) The following sites operating on TV Channel 15 band spectrum (476-482 MHz) may not interfere with existing TV stations: Toms River, New Egypt, Barnegat, and Pasadena, New Jersey (locations 1 and 4 on Station WIL552 and locations 1 and 2 on Station WPXC650, respectively) and TV stations that are the subject of proposed and granted allocations as of May 31, 2007.

⁷⁸ See note 15, *supra*.

⁷⁹ See *id.* at 20.

⁸⁰ 47 U.S.C. § 151.

⁸¹ See *id.*

⁸² Ocean County Comments at 7.

⁸³ Waiver Request at 17.

V. ORDERING CLAUSES

24. 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, that the Request for Waiver of the Commission's Rules, associated with File Nos. 0003047481 and 0003047654, filed by the County of Ocean, New Jersey on May 31, 2007 is GRANTED subject to the condition listed in this *Order*, and the same file numbers SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

25. 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

Thomas J. Beers
Chief, Policy Division
Public Safety and Homeland Security Bureau