

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

In the Matter of)
BALDWIN FIRE DISTRICT, NEW YORK) File No. 0003023736
Request For Waiver Pursuant to Section 337(c) of)
the Communications Act of 1934, as Amended,)
and Section 1.925 of the Commission’s Rules, to)
Operate a Public Safety Communications System)
Using Television Channel 19 and Part 22 Trunked)
Mobile Frequencies)

ORDER

Adopted: September 14, 2009

Released: September 14, 2009

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

I. INTRODUCTION

1. The Baldwin Fire District, New York (“Baldwin,” or “the District”), filed an application and request for waiver to use certain non-public safety frequencies for public safety communications. Specifically, Baldwin seeks to use two frequencies in the TV Channel 19 band (500-506 MHz) and two frequencies allocated for assignment under Part 22 of our rules for trunked mobile operations. Baldwin seeks waiver pursuant to Section 337(c) of the Communications Act of 1934, as amended (“the Act”), or, alternatively, Section 1.925 of the Commission’s rules. As further detailed below, we find that Baldwin has failed to meet the criteria for a waiver under Section 337 of the Act. However, Baldwin has met the requisite showing meriting a waiver pursuant to Section 1.925 of the Commission’s rules. Accordingly, we grant Baldwin’s waiver request subject to the conditions specified herein.

II. BACKGROUND

2. Baldwin is located approximately twenty-five miles from New York City and “serves three (3) communities near the south shore of Long Island, New York – Baldwin, Oceanside, and Rockville Centre.” Baldwin maintains that its existing operations in the 30-50 MHz band are “subject to significant interference,” because it is in a “region congested with numerous public safety providers” and due to its “proximity to other fire departments and battalions and numerous transmitter sites for

1 See File No. 0003023736 (filed May 9, 2007, amended May 10, 2007, May 25, 2007, Aug. 3, 2007, Dec. 13, 2007, and April 9, 2008) and associated Amended Request for Waiver, filed December 13, 2007 (Waiver Request).

2 Specifically, Baldwin seeks to use frequencies 502.525, 505.525, 479.0625, and 479.1625 MHz. See Waiver Request at 4.

3 47 U.S.C. § 337(c).

4 47 C.F.R. § 1.925.

5 Id. at 1.

commercial wireless communications providers.”⁶ Further, Baldwin states that its “46.10–46.20 MHz dispatch/operations channel as well as fireground channel [46.30 MHz] it shares with Nassau County are excessively loaded and fail to provide coverage across the District’s service area.”⁷ Baldwin states that on several occasions, its “lack of coverage prevented radio transmissions in critical, potentially life-endangering situations.”⁸

3. According to Baldwin, its vendors “suggested that its [interference] problems were caused by, among other things, a lack of repeater sites.”⁹ These vendors suggested “digital simulcast technology as the appropriate solution.”¹⁰ However, because “simulcasting requires relatively interference-free frequencies”¹¹ and, given the level of interference affecting Baldwin’s dispatch and fireground channels, Baldwin proposes to construct a new system.¹² Baldwin states that the proposed system would “provide redundant, ubiquitous coverage throughout the combined service areas of Baldwin and its neighbors for whom it would provide dispatch service.”¹³ Specifically, the proposed system would have “one (1) pair of 12.5 kHz bandwidth channels (502/505.5250 MHz) dedicated to voice dispatch operations.”¹⁴ The proposed system would also have “two (2) 12.5 kHz bandwidth simplex channels (479.0625 and 479.1625 MHz) dedicated to fireground operations.”¹⁵

4. Absent a waiver, the four frequencies requested by Baldwin are not available for assignment to public safety entities under Part 90 of the Commission’s rules.¹⁶ Specifically, TV Channel 19 is allocated to private land mobile radio (PLMR) service in the Philadelphia, Pennsylvania urbanized area, but not in the New York/Northeast New Jersey urbanized area where Baldwin is located.¹⁷ Thus, frequency pair 502/505.5250 MHz, which is within the TV Channel 19 Band, is not allocated for PLMR use at Baldwin’s location. In addition, Baldwin’s operations would be located less than the minimum spacing requirement of ninety miles from adjacent DTV Channel 20 Station WTXS, Waterbury, Connecticut, and adjacent DTV Channel 18 Station WMBC-DT, Montclair, New Jersey.¹⁸ Next, Part 22 of the Commission’s rules allocates frequencies 479.0625 and 479.1625 MHz for trunked public mobile service, while Part 20 of the Commission’s rules states that operations on these frequencies shall be

⁶ *Id.* at 3. Baldwin’s existing system is Station KEB486.

⁷ Waiver Request at 3. “Fireground” frequencies are used at the scene of a fire.

⁸ Waiver Request at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 47 C.F.R. Part 90.

¹⁷ *See* 47 C.F.R. §§ 90.303, 90.305.

¹⁸ *See* 47 C.F.R. § 90.307(d). Baldwin is 53.5 kilometers (33.2 miles) from the digital facilities of Station WMBC-DT. Baldwin is 131.3 kilometers (81.5 miles) from the digital facilities of Station WTXS, which commenced digital operation on TV Channel 20 on June 12, 2009. Station WTXS operated in analog on TV Channel 20 prior to that date.

regulated as commercial mobile radio service.¹⁹ Accordingly, Baldwin requests waiver of Sections 20.9(a)(6), 22.651, 90.303, 90.305(a), and 90.307(d) of the Commission's rules to allow it to conduct public safety operations on these frequencies.²⁰

5. On May 25, 2007, Baldwin obtained Special Temporary Authority (STA) under call sign WQGY612 to operate on all four of the requested frequencies on a secondary, noninterference basis. On December 14, 2007, the Public Safety and Homeland Security Bureau (Bureau) placed Baldwin's waiver request and associated application on public notice.²¹ Comments were filed by WTXX Inc. (WTXX), licensee of Station WTXX; and Mountain Broadcasting Corporation (Mountain), licensee of Station WMBC-DT.²² Reply comments were filed by Baldwin and the National Public Safety Telecommunications Council (NPSTC).²³

6. In their comments, both WTXX and Mountain state that Baldwin's filing lacks any technical analysis with regard to their TV stations.²⁴ Both commenters state that Baldwin relies entirely on the technical information submitted by the Nassau County Police Department (NCPD),²⁵ which obtained a waiver in 2002 to operate on TV Channel 19 spectrum.²⁶ Therefore, both commenters argue that any grant must be conditioned on the same terms as NCPD's waiver.²⁷ Moreover, both commenters argue that Baldwin should provide its own technical analysis of the PLMR/TV spacing rules.²⁸ WTXX argues that "[w]hile there are many reasons the Bureau should insist that the application be amended to provide this information, one of the most important is that it will ensure that Baldwin Fire Department understands that providing interference protection to WTXX is not just an afterthought."²⁹ Mountain asserts that "because Baldwin has proposed to locate its base stations and mobiles and portable units inside of WMBC-DT's 41 dBμ contour within Nassau County, there is significant probability that interference to WMBC-DT will result."³⁰

¹⁹ See 47 C.F.R. §§ 22.651, 20.9(a)(6).

²⁰ Waiver Request at 5.

²¹ See Public Safety and Homeland Security Bureau Seeks Comment on a Request for Waiver Filed by the Baldwin Fire District, New York to Operate a Public Safety Radio System Using Television Channel 19 and Part 22 Trunked Mobile Frequencies, *Public Notice*, 22 FCC Rcd 21588 (PSHSB 2008) (*Public Notice*).

²² See Comments of WTXX Inc., filed January 4, 2008 (WTXX Comments); Opposition of Mountain Broadcasting Corporation, filed January 4, 2008 (Mountain Comments).

²³ See Reply Comments of Baldwin Fire District, filed January 14, 2008 (Baldwin Reply Comments); Reply Comments of the National Public Safety Telecommunications Council, filed January 14, 2008 (NPSTC Reply Comments).

²⁴ See WTXX Comments at 1, Mountain Comments at 3.

²⁵ See WTXX Comments at 1, Mountain Comments at 3-4.

²⁶ See Nassau County Police Department, *Memorandum Opinion and Order*, 17 FCC Rcd 14252 (WTB PSPWD 2002) (*NCPD 2002 MO&O*).

²⁷ See WTXX Comments at 1, Mountain Comments at 4.

²⁸ See WTXX Comments at 2, Mountain Comments at 6.

²⁹ WTXX Comments at 2.

³⁰ Mountain Comments at 8.

7. In reply comments, Baldwin states that it “does not expect that its operations will cause any more interference to broadcast reception than the operations already permitted by the FCC and, in any case, hereby agrees to the same conditions imposed on the Nassau County Police Department.”³¹ Baldwin notes that it “has been using channel 19 spectrum pursuant to special temporary authority (“STA”) for approximately six (6) months, and NCPD and Syosset Fire District have also been operating on channel 19 spectrum with no reports of harmful interference from the Broadcasters.”³² Baldwin states that its “base stations are . . . further from adjacent broadcast operations than NCPD.”³³ Baldwin states that “there is no intelligent basis why the FCC may not rely on its prior decision in the NCPD 2004 Order to conclude that Baldwin — whose operations are further from the Broadcasters than NCPD — will not cause harmful interference to the Broadcasters.”³⁴

8. NPSTC “takes no position with regard to [the broadcasters’] comments.”³⁵ NPSTC responds to the 700 MHz inquiry in the *Public Notice* by stating its belief that “channels in the UHF and VHF bands must continue to be available for public safety under the Commission’s waiver processes.”³⁶ NPSTC avers that “[w]aiver decisions allowing access to non-public safety bands when they were not used have provided an immeasurable contribution to improved response and more efficient use of the spectrum.”³⁷ NPSTC contends that “the Commission’s suggestion to deny access to channels otherwise available on the premise that 700 MHz will satisfy the needs of public safety is wrong.”³⁸ In the New York area, NPSTC states that “[t]he number of channels needed far exceed the availability, even if 700 MHz narrowband voice channels were available today.”³⁹ NPSTC argues that “[o]nly when the 700 MHz channels are available and ready for assignment should the 700 MHz band be considered an element in the waiver process.”⁴⁰ NPSTC “urges the Commission to reexamine its decisions that a [S]ection 337(c) waiver is contingent upon an agency showing the lack of channels in all public safety frequency bands” because “[s]uch a policy undermines interoperability.”⁴¹ NPSTC also states that such a policy “ignores that in many areas, communications are predominant in a particular band,” and “[c]ompatible systems operating within the same band present significant cost and other efficiencies for interoperability.”⁴²

9. On February 21, 2008, Mountain submitted late-filed reply comments, where it “reiterates its concerns . . . that Baldwin . . . failed to demonstrate that its proposed facility will not interfere with over-the-air viewership of WMBC-DT in Nassau County, New York, which is within

³¹ Baldwin Reply Comments at 2. See Nassau County Police Department, *Memorandum Opinion and Order*, 19 FCC Rcd 10088, 10093 ¶ 14 (WTB PSCID 2004).

³² Baldwin Reply Comments at 3.

³³ *Id.* at 4.

³⁴ *Id.* at 6.

³⁵ NPSTC Comments at 5.

³⁶ *Id.*

³⁷ *Id.* at 6.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8.

⁴² *Id.*

WMBC-DT's protected 41 dBμ noise-limited contour."⁴³ Mountain is "concerned that both the Commission and Baldwin failed to provide notification to Mountain that the proposed facility was being constructed pursuant to a grant of Special Temporary Authority."⁴⁴ Mountain requests several non-interference conditions in the event the Waiver Request is granted.⁴⁵ Finally, Mountain requests that "the Commission release a Public Notice indicating that [a grant to Baldwin] has no precedential value and that any public safety or commercial entities seeking to utilize frequencies associated with a channel either shared by, or adjacent to, WMBC-DT (whether via STA or permanent authorization) must provide Mountain with an engineering study depicting predicted interference to Station WMBC-DT at least sixty (60) days' [sic] prior to implementing any facility."⁴⁶

10. On January 13, 2009, Baldwin indicated that it was "attempting to address the concerns raised regarding potential interference to broadcast operations."⁴⁷ On February 24, 2009, Mountain forwarded to the Commission a letter of consent to the grant of Baldwin's application subject to a condition that "Baldwin is obligated to promptly eliminate any condition of interference caused to television station WTXX-TV within its Grade B contour or digital television WMBC-DT within [its] 41 dBu DTV service contour, and if Baldwin's interference difficulties prove to be insurmountable, Baldwin must terminate its operations."⁴⁸ On May 15, 2009, WTXX forwarded to the Commission a co-signed letter of consent to the grant of Baldwin's application,⁴⁹ in which Baldwin agreed to the following conditions:

⁴³ Mountain Reply Comments at 1.

⁴⁴ *Id.*

⁴⁵ *See id.* at 2. Mountain requests the following limitations on Baldwin's operations within WMBC-DT's protected service area:

(1) Baldwin would have responsibility to cure, at its sole expense, all interference suffered by WMBC-DT's viewers as a result of Baldwin's operations, irrespective of the location from which WMBC-DT's signal originates; (2) if Baldwin cannot cure such interference, Baldwin must immediately terminate operations; (3) Baldwin must accept all interference from WMBC-DT, irrespective of the location from which WMBC-DT's signal originates; and (4) in the event Baldwin seeks any future modifications to its facility, it must first provide sixty (60) days' notice to Mountain and must specifically request a new and separate waiver of the Commission's rules. Such waiver would not only have to demonstrate why the public interest would be served by further encroachment on WMBC-DT's previously-authorized service area but also must be accompanied by an engineering study that sufficiently explains the extent of interference that WMBC-DT would suffer.

Id. at 2; *see* Opposition to Amendment filed by Mountain Broadcasting Corporation, filed May 9, 2008.

⁴⁶ Mountain Reply Comments at 2-3.

⁴⁷ Letter from Russell H. Fox, counsel to Baldwin Fire District, to Erika Olsen, Office of Chairman Kevin Martin, Federal Communications Commission (dated Jan. 13, 2009). The letter accompanied approximately 165 letters from individual Baldwin residents, members of the Baldwin Fire Department, and representatives of neighboring agencies to the FCC Chairman in support of Baldwin's application and waiver request.

⁴⁸ *See* Letter from Joon S. Joo, President, Mountain Broadcasting Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated February 24, 2009) (Mountain Consent Letter).

⁴⁹ *See* Letter from Richard Graziano, Vice President and General Manager, WTXX Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated April 27, 2009) (agreed and accepted by the Baldwin Fire District, New York, signed by Douglas D. Weidman, dated May 6, 2009) (WTXX Consent Letter).

(i) [Baldwin agrees to] correct, at its own expense, all interference cause by its proposed Channel 19, operations to the current and future operations of WTXX-TV/DT's transmitter sites. WTXX shall notify Baldwin, within thirty (30) days, if the FCC approves a request to relocate its transmitter site(s).

(ii) If such interference cannot be cured, Baldwin must immediately terminate its Channel 19, land mobile operations.

(iii) Baldwin agrees to accept all interference to its proposed Channel 19 land mobile operations from WTXX-TV/DT's current analog operations as well as WTXX-TV/DT's future digital operations on Channel 20 regardless of the location(s) of WTXX-TV/DT's transmitter site(s) including, without limitation, any interference from WTXX-TV/DT to Baldwin's Channel 19 land-mobile operations caused by ducting due to the atmospheric conditions along the coastline.

(iv) Baldwin agrees to provide sixty (60) days notice to WTXX prior to seeking modifications of its Channel 19 land mobile operations proposed in the above-referenced application, and such a modification request must contain a new and separate request to waive the Commission's Rules, including an engineering analysis demonstrating the extent of impermissible interference predicted to WTXX-TV/DT. The foregoing notwithstanding, Baldwin shall not be obligated to submit a waiver request or an engineering analysis for any modification considered 'minor' under the FCC's rules.⁵⁰

III. DISCUSSION

11. Section 337(c) of the Act provides that the Commission "shall waive . . . its regulations implementing th[e] Act (other than its regulations regarding harmful interference) to the extent necessary to permit" entities "seeking to provide public safety services" to use unassigned spectrum not allocated to public safety if the Commission makes five specific findings: (i) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use; (ii) 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; (iii) 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; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.⁵¹

12. When considering waiver requests filed pursuant to Section 337(c) of the Act, we must first determine whether the applicant is an "entity seeking to provide public safety services."⁵² The Act defines public safety services as "services – (A) the sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided – (i) by State or local government entities; or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider."⁵³ Baldwin is "a local government entity," and it "employs firefighters to protect the health and

⁵⁰ *Id.* at 1-2 (brackets added).

⁵¹ 47 U.S.C. § 337(c).

⁵² *See* 47 U.S.C. § 337(f).

⁵³ *Id.*

welfare of its citizens.”⁵⁴ Based on the information before us, Baldwin is an entity that provides public safety services.

13. Next, we consider whether Baldwin’s petition satisfies the specific showing requirements mandated by Section 337(c) of the Act. 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).⁵⁵

14. Based on our review of the record, we find that Baldwin has not demonstrated that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” pursuant to subsection 337(c)(1)(A).⁵⁶ With regard to this prong, Baldwin relies on earlier decisions where the Commission determined that there are no channels available for public safety entities in the New York metropolitan area, including “the geographic area that Baldwin serves.”⁵⁷ As further support, Baldwin states that it seeks frequencies in the 470-512 MHz band “to guarantee minimal disruption when transferring to new channels,” and because “the majority of public safety entities in the New York City area currently operate in the 470-512 MHz band.”⁵⁸ According to Baldwin, the requested public safety service use is to conduct voice dispatch and fireground operations that are interoperable with a majority of New York City-area public safety entities that operate in the 470-512 MHz band.⁵⁹

15. Baldwin correctly notes that no VHF, UHF, or 800 MHz band public safety channels are immediately available in the New York metropolitan area. We note, however, that the orders cited by Baldwin were adopted at a time when the 700 MHz band was not as developed as it is today. Moreover, a previous finding of insufficient public safety channel availability in an area, while relevant, does not address changes in the spectrum landscape over time that must be considered. While it may have been reasonable for Baldwin to exclude the availability of the 700 MHz band from its initial analysis, we must consider its application in light of recent developments. Since Baldwin first filed its application in 2007, broadcasters have vacated the 700 MHz band as a result of the June 12, 2009 conclusion of the DTV transition. In addition, the Bureau recently approved the Region 8 (New York Metropolitan Area) 700 MHz Regional Plan.⁶⁰ Accordingly, Section 337 compels us to consider the 700 MHz public safety

⁵⁴ Waiver Request at 6.

⁵⁵ See South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998) (*South Bay*); Township of Cinnaminson, New Jersey, *Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (PSHSB 2007) (*Cinnaminson*), citing University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 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).

⁵⁶ 47 U.S.C. § 337(c)(1)(A).

⁵⁷ See Waiver Request at 7, citing Seven Public Safety Agencies in the New York Metropolitan Area, Proposal to Use Part 22 Paging Frequencies Pursuant to Section 337(c) of the Communications Act of 1934, *Order*, 19 FCC Rcd 15355 (WTB PSCID 2004); Attorney General’s Office of the State of New Jersey, *Order*, 20 FCC Rcd 10109 (WTB PSCID 2005).

⁵⁸ Waiver Request at 7-8.

⁵⁹ See *id.* at 4, 8.

⁶⁰ See Public Safety and Homeland Security Bureau Approves Region 8 (New York Metropolitan Area) 700 MHz Regional Plan, PS Docket No. 06-229, WT Docket No. 02-378, DA 09-1009 (PSHSB rel. May 4, 2009).

channels to be immediately available and ready for assignment, and we reject NPSTC's arguments to the contrary.⁶¹

16. 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.”⁶² Consistent with the Commission's position, the Bureau and the Wireless Telecommunications Bureau have 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 frequencies in other public safety bands, for purposes of satisfying Section 337(c) of the Act.⁶³ Thus, because Baldwin has not shown the unavailability of 700 MHz public safety frequencies by way of amendment to its pending application, we find that it has not satisfied subsection 337(c)(1)(A). Having made this finding, we need not address its arguments regarding the remaining four criteria.⁶⁴

17. However, our finding that Baldwin does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose our consideration of Baldwin's alternative request for waiver relief pursuant to Section 1.925 of the Commission's rules.⁶⁵ 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.”⁶⁶ Section 1.925 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 according to the standards that an applicant must meet under the rule.⁶⁷ From our

⁶¹ See, e.g., County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18398 ¶ 19 (PSHSB 2008) (disagreeing with NPSTC's assertion that the 700 MHz band should be considered after the DTV transition date).

⁶² 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.”).

⁶³ 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*).

⁶⁴ 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.”).

⁶⁵ See Ocean County, New Jersey, *Order*, DA 09-1976 (PSHSB PD) (rel. Aug. 31, 2009) at 7 ¶ 16. *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 & n.30 (WTB Mobility Div.) (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.”).

⁶⁶ 47 U.S.C. § 151; see also 47 U.S.C. §§ 154(i), 303(r).

⁶⁷ See 47 C.F.R. 1.925 (providing that “[t]he Commission *may* waive specific requirements of the rules upon its own motion or upon request”) (emphasis added). See 47 C.F.R. § 1.925(b)(3)(i)-(ii) (setting forth the criteria).

review of the record in this case, we find that Baldwin has presented sufficient information for us to consider whether waiver relief is justified under Section 1.925.

18. 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 waiver would be in the public interest;⁶⁸ 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.⁶⁹ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁷⁰ Based on the information before us, we conclude that a grant of Baldwin's waiver request is warranted under the first prong of the waiver standard. We proceed with analyses of each rule for which Baldwin requests waiver.

19. *Section 90.307(d)*. The purpose of the 90-mile spacing requirement is to protect adjacent channel TV stations from interference caused by mobile units operating in or near the TV station's coverage area.⁷¹ Because Baldwin's proposed base stations would be located less than 90 miles from Stations WTXX and WMBC-DT,⁷² Baldwin requires a waiver of Section 90.307(d) in order to operate on TV Channel 19 band frequencies 502/505.525 MHz. Baldwin notes that NCPD previously obtained a waiver to operate on TV Channel 19 spectrum under call sign WPVS875.⁷³ Baldwin states that when the Commission granted NCPD's waiver, it found that NCPD's proposed operations would not cause harmful interference to broadcast stations operating on TV Channels 18, 19, and 20.⁷⁴ Accordingly, Baldwin asserts that its "use of TV channel 19 spectrum will only exceed the use of TV channel 19 spectrum already approved for Nassau County primarily over the Atlantic Ocean and not in the direction of any television station."⁷⁵ On April 9, 2008, Baldwin submitted an amendment to show that its 21 dB μ interfering contour would fall completely within NCPD's interfering contour.

20. As threshold matter, we note that while the 21 dB μ interfering contour is acceptable for predicting interference between UHF land mobile stations, Baldwin's reliance on the 21 dB μ interfering contour to predict interference from PLMR stations to TV or DTV stations is misplaced.⁷⁶ We are concerned in particular with Mountain Station WMBC-DT. In 2006, after the NCPD grant but prior to Baldwin's application, Mountain relocated its transmitter further east and closer to Nassau County,⁷⁷

⁶⁸ 47 C.F.R. § 1.925(b)(3)(i).

⁶⁹ 47 C.F.R. § 1.925(b)(3)(ii).

⁷⁰ *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).

⁷¹ *See County of York, Pennsylvania, Order*, 19 FCC Rcd 24425, 24427 ¶ 7 (WTB PSCID 2004).

⁷² *See supra* note 18.

⁷³ *See* Waiver Request at 8.

⁷⁴ *Id.* *See NCPD 2002 MO&O*, 17 FCC Rcd at 14260 ¶¶ 17-18.

⁷⁵ Waiver Request at 9.

⁷⁶ The 21 dB μ interfering contour is accepted for predicting interference between UHF land mobile stations only. *See* 47 C.F.R. § 90.187(b)(2)(iii).

⁷⁷ *See* Baldwin Reply Comments at 5. *See also* File No. BLCDDT-20060803AMO, granted Sept. 14, 2006.

which resulted in contour overlap with NCPD's operations. While the Commission has not adopted rules for land mobile stations in the 470-512 MHz band to protect DTV stations,⁷⁸ Section 90.545 of the Commission's rules provides adequate guidelines.⁷⁹ The rule specifies that the minimum desired to undesired ratio is -23 dB at the equivalent Grade B contour (41 dB μ V/m) of the DTV station.⁸⁰ Thus, the correct interfering contour is 64 dB μ V/m rather than the 21 dB μ interfering contour relied upon by Baldwin. Our independent analysis reveals that Baldwin's 64 dB μ V/m interfering contour would overlap the equivalent Grade B contour of Station WMBC-DT. Our analysis also indicates that Baldwin's 64 dB μ V/m interfering contour would expand into new areas (within WMBC-DT's service contour) not previously covered by NCPD's 64 dB μ V/m interfering contours.

21. Although the results of our analysis underscore a heightened potential for new interference caused by Baldwin's proposed operations to Station WMBC-DT, we find this concern alleviated based on the fact that both Mountain and WTXX have consented to grant of the application subject to certain conditions.⁸¹ Accordingly, as outlined in para. 33 *infra*, we impose the requested conditions on grant of Baldwin's request. In addition, we note that as a result of the DTV transition, WTXX-TV has terminated analog operations on Channel 20 and WTXX-DT has been using Channel 20 for digital operations since June 12, 2009. Therefore, we adjust the conditions to take into account the passing of the DTV transition. Based on the foregoing analysis, we conclude that underlying purpose of Section 90.307(d) would not be served by application to the present case.

22. As an ancillary matter, we consider Mountain's request in its late-filed reply comments that "the Commission release a Public Notice indicating that [a grant to Baldwin] has no precedential value and that any public safety or commercial entities seeking to utilize frequencies associated with a channel either shared by, or adjacent to, WMBC-DT (whether via STA or permanent authorization) must provide Mountain with an engineering study depicting predicted interference to Station WMBC-DT at least sixty (60) days' [sic] prior to implementing any facility."⁸² We decline to do so. However, we take this opportunity to acknowledge the potential for interference between PLMR stations and protected TV stations, and the need for case-by-case analysis with respect to any waiver request.

23. *Sections 90.303, 90.305(a)*. Section 90.305 provides that PLMR base stations operating in the 500-512 MHz band (which constitutes TV Channels 19 and 20) may be located not more than 50 miles (80 kilometers) from the geographic centers of urbanized areas listed in Section 90.303; and that associated mobile units must operate not more than 30 miles (48 kilometers) from the base station, thus creating a circular area with a radius of 80 miles (128 kilometers) within which PLMR stations may operate on a primary basis and shall be afforded interference protection from TV stations.⁸³ The

⁷⁸ NPSTC has petitioned the Commission to commence such a rulemaking proceeding, and the Consumer & Governmental Affairs Bureau placed NPSTC's rulemaking petition on public notice. *See* Petition for Rulemaking by the National Public Safety Telecommunications Council, Petition for Rulemaking to Amend the Land Mobile-TV Sharing Rules in the 470-512 MHz Band (dated Feb. 13, 2009). *See also* Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed, *Public Notice*, Report No. 2887, RM-11527 (rel. Apr. 7, 2009).

⁷⁹ *See* 47 C.F.R. § 90.545.

⁸⁰ 47 C.F.R. § 90.545(a)(2).

⁸¹ *See* Mountain Consent Letter; WTXX Consent Letter; *supra* para. 10.

⁸² Mountain Reply Comments at 2-3.

⁸³ *See* 47 C.F.R. §§ 90.303, 90.305(a), (b).

Commission established these mileage restrictions, 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 caused by PLMR systems operating in the 470-512 MHz band.⁸⁴ Baldwin requests a waiver of Sections 90.303 and 90.305(a) because “the District proposes to use the Dispatch Channels further than 50 miles from Philadelphia.”⁸⁵

24. In the 2001 *Goosetown* decision, the Commission stated that it would be “more inclined to consider favorably requests for waiver of Section 90.305(a) when the applicant proposes to contain its area of operation within 80 miles of the geographic center of the urban area in question.”⁸⁶ Such operation, the Commission stated, “would not adversely impact television stations because television stations are already required to protect land mobile stations operating within that area.”⁸⁷ The Commission continued, “[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.”⁸⁸ The Commission determined for such applicants, “operation would be secondary to current and future low power TV stations.”⁸⁹

25. Because Baldwin’s proposed base stations are located more than 80 miles from the Philadelphia coordinates, Baldwin is subject to more stringent interference protection showings under *Goosetown*.⁹⁰ As discussed above, Baldwin has obtained concurrences from both affected TV stations, subject to certain conditions. We find that a waiver subject to these conditions is warranted with the additional condition that Baldwin’s operation be secondary to current and future full power and low power TV stations, consistent with *Goosetown*. In light of these concurrences and conditions, we find that current and future TV and DTV reception will be adequately protected from Baldwin’s operations. Accordingly, we find that the purpose of Sections 90.303 and 90.305(a) would not be served by application to the present case.

26. *Sections 20.9(a)(6) and 22.651*. The underlying purpose of Section 22.651 is to reserve certain frequencies—including frequencies 479.0625 and 479.1625 MHz—“for assignment to transmitters providing trunked public mobile service” in certain urbanized areas.⁹¹ A search of our licensing records indicates that no Part 22 common carrier operations are licensed in the New York

⁸⁴ 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).

⁸⁵ Waiver Request at 15.

⁸⁶ *Goosetown Enterprises, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 12792, 12797 ¶ 13 (2001) (*Goosetown*).

⁸⁷ *Id.*; see 47 C.F.R. §§ 73.623(e), 74.709.

⁸⁸ *Goosetown*, 16 FCC Rcd at 12797 ¶ 13.

⁸⁹ *Id.* at 12798 ¶ 13.

⁹⁰ Baldwin’s three sites are located 152.6, 154.0, and 152.1 kilometers (94.8, 95.7, and 94.5 miles), respectively, from the Philadelphia coordinates.

⁹¹ 47 C.F.R. § 22.651.

metropolitan area on frequencies 479.0625 or 479.1625 MHz or on the adjacent frequencies.⁹² Further, no Part 22 licensees filed comments to the *Public Notice*. Because the subject Part 22 frequencies are already licensed to PLMR public safety entities in the New York-Northeastern New Jersey urbanized area, as discussed below, the frequencies cannot be used by Part 22 common carrier entities on an exclusive basis in the same urbanized area.⁹³ Because Baldwin would not cause harmful interference to any Part 22 entities, the underlying purpose of Section 22.651 would not be served by application to the present case, as the subject frequencies are already not available, as a practical matter, for use by Part 22 entities under Section 22.651.

27. Section 20.9(a)(6) presumes that operations on frequencies 479.0625 and 479.1625 MHz are regulated as commercial mobile radio services.⁹⁴ This regulatory structure obviously is not applicable to or appropriate for operations by public safety licensees. Because we find that it is in the public interest to grant a waiver of Section 22.651 to Baldwin to use frequencies 479.0625 and 479.1625 MHz for public safety purposes, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its application to the present case.

28. *Adjacent and co-channel licensees.* We note that Syosset, New York (Syosset) is a co-channel public safety licensee on all four frequencies sought by Baldwin,⁹⁵ and the County of Somerset, New Jersey (Somerset), is both a co-channel licensee and an adjacent channel licensee with respect to particular frequencies, as described below. Although these frequencies are not normally available for PLMR entities under Part 90, these incumbent public safety entities obtained the frequencies through prior waivers. We therefore examine whether grant of the requested waiver to Baldwin would cause harmful interference to these incumbents. In such a scenario, generally accepted engineering practices require an examination of the relationship between a new PLMR applicant and neighboring PLMR incumbents under the Part 90 interference protection rules and PLMR policies.

29. First, we examine the co-channel relationships with Syosset and Somerset that would be created by grant of the requested waiver to Baldwin. Section 90.313(c) provides that a “frequency pair may be reassigned at distances 64 km. (forty mi.), ...or more from the location of base stations authorized on that pair...”⁹⁶ On May 2, 2007, Syosset signed a letter of concurrence supporting Baldwin’s use of frequencies 502.525 and 505.525 MHz.⁹⁷ Baldwin states that “there are no other co-channel users within 100 km.”⁹⁸ Baldwin concludes that it “will not cause harmful interference to Somerset’s operations.”⁹⁹

⁹² The New York-Northeastern New Jersey metropolitan urbanized area is defined as an 80 kilometer circle around the center coordinates listed in Section 22.657(a). See 47 C.F.R. § 22.657(a). Baldwin is included in this urbanized area.

⁹³ As a matter of policy, the Commission would typically only assign a trunked mobile channel listed under § 22.651 to a Part 22 applicant if that channel was previously unoccupied in that urban area.

⁹⁴ See 47 C.F.R. § 20.9(a)(6).

⁹⁵ See call signs WQEH796 and WPYJ816.

⁹⁶ 47 C.F.R. § 90.313(c).

⁹⁷ See File No. 0003023736, attached letter from Giovanni Graceffa, Chairman, Syosset Fire District, to Federal Communications Commission (dated May 2, 2007).

⁹⁸ Waiver Request at 9.

⁹⁹ *Id.*

On July 7, 2007, Syosset signed a second letter of concurrence supporting Baldwin's use of frequencies 479.0625 and 479.1625 MHz.¹⁰⁰

30. Somerset is also a co-channel licensee with mobile unit operation on frequency 479.0625 MHz. Baldwin observes that "Somerset is a co-channel licensee on 479.0625 MHz under call signs WPPB311, WQBL360 and WQBL367."¹⁰¹ Although the western edge of Baldwin's mobile operating area is less than 40 miles from two of Somerset's base stations, Baldwin observes that the 21 dB μ V/m F(50,10) interference contour from a mobile at the edge of the operating area does not overlap any 39 dB μ V/m F(50,50) service contour of Somerset.¹⁰² Based on our engineering analysis, we conclude that Baldwin's proposed operations would neither cause harmful interference to, nor experience harmful interference from, these incumbent co-channel PLMR licensees.

31. Second, we examine the adjacent channel relationship with Somerset that would be created by grant of the requested waiver to Baldwin. Baldwin observes that Somerset "is authorized under the call signs WIL900 and WPVM588 to use channels 25 kHz wide, 12.5 kHz adjacent to [frequency pair 502/505.525 MHz] ... proposed for use by Baldwin."¹⁰³ Baldwin states that all of the base station sites specified on that authorizations held by Somerset are greater than 40 miles from Baldwin.¹⁰⁴ Since the Land Mobile Communications Council (LMCC) Consensus¹⁰⁵ is intended to analyze interference between adjacent channel stations spaced closer than 40 miles, we find the proposed spacing sufficient to preclude the need for further analysis. Our analysis of the Commission's licensing database indicates that all other adjacent channel licensees in the vicinity use 11.25 kHz bandwidth, and thus, there would be no bandwidth overlap from Baldwin's 11.25 kHz bandwidth operation. The lack of bandwidth overlap also precludes the need for a TSB-88 analysis under the LMCC Consensus criteria.¹⁰⁶ Therefore, we conclude that Baldwin's proposed operations would neither cause harmful interference to, nor experience harmful interference from, incumbent adjacent channel PLMR licensees.

32. *Public Interest.* In addition to finding that the relevant rules would not be undermined by a grant of the waiver request, our analysis under the first prong of the waiver standard requires a finding that grant of the waiver would be in the public interest.¹⁰⁷ Baldwin states, "[i]f the FCC permits Baldwin to implement its simulcast system, other fire services on Long Island will likely seek to coordinate their operations with Baldwin's."¹⁰⁸ We find it significant that granting the instant request would facilitate

¹⁰⁰ See File No. 0003023736, attached letter from Giovanni Graceffa, Chairman, Syosset Fire District, to Federal Communications Commission (dated July 7, 2007).

¹⁰¹ Waiver Request at 10.

¹⁰² See *id.*

¹⁰³ *Id.* at 9. Somerset has authority for frequency pairs 502/505.5125 and 502/505.5375 MHz. See licenses for Stations WIL900 and WPVM588.

¹⁰⁴ *Id.* The 40-mile distance originates from Section 90.313(c) of the Commission's rules. "A frequency pair may be reassigned at distances 64 km. (40 mi.)... or more from the location of base stations authorized on that pair without reference to loading at the point of original installation." See 47 C.F.R. § 90.313(c).

¹⁰⁵ See Letter from Larry A. Miller, President, Land Mobile Communications Council to Daniel B. Phythyon, Esq. Acting Chief, Wireless Telecommunications Bureau (dated Sept. 10, 1997), attached Frequency Selection Procedures, 12.5 kHz Offset Assignments at 470-512 MHz.

¹⁰⁶ See *id.*

¹⁰⁷ See 47 C.F.R. § 1.925(b)(3)(i).

¹⁰⁸ Waiver Request at 14.

mutual aid and promote interoperability with neighboring agencies.¹⁰⁹ We also find that the proposed system would further the public interest by affording Baldwin's firefighters and staff with the necessary spectrum to allow Baldwin to protect the lives and property in its care. Specifically, the proposed system would better enable Baldwin to meet "the growth in demand for the District's fire, rescue and emergency services" due to "the combination of rapid expansion and an aging residential population."¹¹⁰ Indeed, Section 1 of the Act defines one of the Commission's over-arching purposes as "promoting safety of life and property through the use of radio communication."¹¹¹ We therefore conclude that granting the waiver and application as conditioned herein is consistent with the public interest.

IV. CONCLUSION

33. Based on the record before us, we find that grant of Baldwin's waiver request, subject to the conditions herein, is warranted and consistent with the public interest. The grant of Baldwin's request is subject to the following conditions:¹¹²

- (i) Baldwin must correct, at its own expense, all interference suffered by WMBC-DT and WTXX-DT's viewers as a result of Baldwin's Channel 19 operations, irrespective of the locations from which WMBC-DT and WTXX-DT's signals originate.
- (ii) If Baldwin cannot cure such interference, Baldwin must immediately terminate its Channel 19 land mobile operations.
- (iii) Baldwin must accept all interference to its Channel 19 land mobile operations from WMBC-DT digital operations on Channel 18 and WTXX-DT's digital operations on Channel 20, irrespective of the locations from which WMBC-DT and WTXX-DT's signals originate, including, without limitation, any interference from WTXX-DT caused by ducting due to the atmospheric conditions along the coastline.
- (iv) Baldwin must provide sixty (60) days notice to Mountain Broadcasting Corporation and WTXX, Inc. prior to seeking modifications of its Channel 19 land mobile operations. For major modifications as defined under Section 1.929 of the Commission's rules,¹¹³ such a modification request must contain a new and separate request to waive the Commission's rules, including an engineering analysis demonstrating the extent of interference predicted to WMBC-DT and WTXX-DT.
- (v) Baldwin's land mobile operations on Channel 19 band frequencies are secondary to current and future full power and low power TV stations.¹¹⁴

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 1-2.

¹¹¹ 47 U.S.C. § 151.

¹¹² *See supra* para. 10 for WTXX's requested conditions. *See also* Mountain Reply Comments at 2.

¹¹³ 47 C.F.R. § 1.929.

¹¹⁴ *See Goosetown*, 16 FCC Rcd at 12798 ¶ 13.

V. ORDERING CLAUSES

34. 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 Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the request for waiver associated with the captioned application filed by the Baldwin Fire District, New York, on May 10, 2007, as amended, IS GRANTED, subject to the conditions specified herein, and File No. 0003023736 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

35. 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