

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

In the Matter of
SYOSSET FIRE DISTRICT, NEW YORK
Request For Waiver Pursuant to Section 337(c) of
the Communications Act of 1934, as Amended
File No. 0003065700

ORDER

Adopted: September 7, 2010

Released: September 7, 2010

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

I. INTRODUCTION

1. The Syosset Fire District, New York ("Syosset," or "the District") filed an application to modify its public safety license, Station WPYJ816, by adding frequency 473.1375 MHz and deleting frequency 473.2000 MHz. Because the Commission's rules allocates frequency 473.1375 MHz for commercial radio purposes, Syosset seeks a waiver of the Commission's rules, pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act), to use the frequency for public safety communications. For the reasons stated herein, we grant Syosset's waiver request.

II. BACKGROUND

2. The Commission's Wireless Telecommunications Bureau previously granted Syosset waivers of the Commission's rules, pursuant to Section 337(c) of the Act, which authorized Syosset to operate Station WPYJ816 on non-public safety frequencies, including a non-standard "offset" frequency, 473.2000 MHz. When Syosset filed the instant application it stated that it "is aware that Westchester County (Westchester), New York, has submitted an application to the FCC, file number 0003004004, to utilize frequency . . . 473.2000 MHz as part of its new 'T-Band' system." Syosset opined that

1 See File No. 0003065700 (filed June 11, 2007, amended June 19, 2007, November 25, 2008, and December 2, 2008, and June 2, 2010) and attached "Description of the Application and Request for Waiver" (Waiver Request), "Description of Amendment" (Description), and "Supplement to Request for Waiver" (Supplement). As of the latest amendment, Syosset has deleted other modifications previously requested on the application. Syosset observes that frequency 473.2000 MHz "is now used by Westchester County." See Description at 1.

2 47 U.S.C. § 337(c).

3 See generally Description and Supplement.

4 See Syosset Fire District, Memorandum Opinion and Order, 18 FCC Rcd 16635 (WTB PSPWD 2003) (2003 Order) (granting authority to operate on several non-public safety frequencies in the 470-512 MHz band) and Syosset Fire District, Memorandum Opinion and Order, 21 FCC Rcd 585 (WTB PSCID 2006) (2006 Order) (granting authority to operate on 473.2000 MHz). Frequency 473.2000 MHz is considered an "offset" frequency because it is not specifically designated as a channel in Section 22.651 of the rules, but rather is offset by 12.5 kHz from designated channels 473.1875 MHz and 473.2125 MHz. See 47 C.F.R. § 22.651.

5 See Waiver Request at 1; see also File No. 0003004004, filed on April 24, 2007. "T-Band" refers to the 470-512 MHz band.

“[a]lthough the Syosset operations and the Westchester operations might be able to co-exist, Syosset would prefer to move to different mobile channels.”<sup>6</sup> The Commission’s Public Safety and Homeland Security Bureau (the Bureau) based a subsequent grant of a waiver to provide Westchester the authority to operate on frequency 473.2000 MHz in part on its finding that “Syosset Fire District has a pending application and waiver request seeking, *inter alia*, to delete frequency 473.2000 MHz from its license so that Westchester may use the frequency.”<sup>7</sup>

3. Syosset seeks to add frequency 473.1375 MHz to “create a natural three megahertz pairing with Syosset’s repeater on 470.1375 MHz.”<sup>8</sup> However, because the Commission’s rules allocate frequency 473.1375 MHz for commercial mobile radio service,<sup>9</sup> this frequency is not generally available for public safety use. Syosset, therefore, seeks waiver of Sections 22.651 and 20.9(a)(6) of the rules to use 473.1375 MHz for public safety communications purposes.<sup>10</sup> In support of its application, Syosset provides a frequency coordination letter from the Forestry Conservation Communications Association, an FCC-certified public safety frequency coordinator.<sup>11</sup>

4. On April 9, 2009, the Bureau placed the waiver request and associated application on public notice.<sup>12</sup> To assist in its analysis of the waiver request under Section 337(c) of the Act, the Bureau sought comment on whether frequencies in the 700 MHz public safety band would provide Syosset a viable alternative to frequency 473.1375 MHz, particularly in light of the then-approaching June 12, 2009 digital television transition date, and the Commission’s actions in facilitating a nationwide, interoperable public safety network.<sup>13</sup> Only Motorola, Inc. (Motorola) filed comments, which were in support of the waiver.<sup>14</sup>

### III. DISCUSSION

5. 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:

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<sup>6</sup> See Waiver Request at 1.

<sup>7</sup> See County of Westchester, New York, *Order*, 22 FCC Rcd 19872, 19875 ¶ 9 & n.28 (PSHSB PD 2007).

<sup>8</sup> See Waiver Request at 2.

<sup>9</sup> See 47 C.F.R. § 22.651. See also 47 C.F.R. § 20.9(a)(6) (which provides that the Commission regulates Part 22 frequencies as commercial mobile radio service frequencies).

<sup>10</sup> See Supplement at 1 and Waiver Request at 2.

<sup>11</sup> See File No. 0003065700, attached Letter from James A. Lundsted, National Frequency Coordinator Forestry Conservation Communications Association, to Mr. Tracy Simmons, Federal Communications Commission (dated June 19, 2007).

<sup>12</sup> See Public Safety and Homeland Security Bureau Seeks Comment on a Request for Waiver Filed by Syosset Fire District, New York to Modify Its Public Safety Station WPYJ816 Using a Part 22 Trunked Mobile Frequency, *Public Notice*, 22 FCC Rcd 21588 (PSHSB 2008) (*Public Notice*).

<sup>13</sup> See *id.* at 2.

<sup>14</sup> See Comments of Motorola, Inc, filed April 30, 2009 (Motorola Comments).

- “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.”<sup>15</sup>

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).<sup>16</sup>

6. When considering requests under Section 337, we must first find that the applicant is an “entity seeking to provide public safety services.”<sup>17</sup> Our analysis here is aided in part by the Wireless Telecommunications Bureau’s former Public Safety and Critical Infrastructure Division’s previous finding that Syosset is an entity that provides public safety services.<sup>18</sup> We find nothing in the record since that time to disturb that determination.

7. Based on our review of the record, we find that Syosset 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).<sup>19</sup> Syosset asserts that “the Commission may conclude, based on Syosset’s previous waiver requests and the FCC’s own past decisions that ... there is no other spectrum available to meet Syosset’s public safety requirements.”<sup>20</sup> However the Wireless Telecommunications Bureau made the decisions cited by Syosset at a time when the 700 MHz band was not as developed as it is today. While it may have been reasonable for Syosset to exclude the availability

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<sup>15</sup> 47 U.S.C. § 337(c).

<sup>16</sup> 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).

<sup>17</sup> Section 337(f) of the Act defines the term “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-government 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.” 47 U.S.C. § 337(f).

<sup>18</sup> See *2006 Order*, 21 FCC Rcd at 588-9 ¶ 7.

<sup>19</sup> 47 U.S.C. § 337(c)(1)(A).

<sup>20</sup> See Waiver Request at 2, citing *2003 Order* and *2006 Order*.

of the 700 MHz band from its initial analysis, we must consider its application in light of recent developments. Since Syosset first filed its application in 2007, the status of the 700 MHz band has changed significantly. Specifically, the date by which broadcasters must vacate the 700 MHz band has passed,<sup>21</sup> and the Bureau has approved the 700 MHz Regional Plan for Region 8 (New York Metropolitan Area, which includes Syosset).<sup>22</sup> Therefore, we find that there are 700 MHz public safety channels immediately available and ready for assignment.<sup>23</sup> Since Syosset has not amended its pleadings to address these developments, it has not shown the unavailability of 700 MHz public safety frequencies and therefore does not satisfy Subsection 337(c)(1)(A) of the Act. Because Syosset has failed to satisfy one of the five criteria; specifically, that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” it cannot obtain waiver relief pursuant to Section 337 of the Act and we need not address its arguments regarding the remaining four criteria.<sup>24</sup>

8. However, Commission precedent makes clear that our finding that Syosset does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose consideration of its request for waiver relief pursuant to Section 1.925 of the Commission’s rules.<sup>25</sup> Rather, the Bureau’s ability to undertake a waiver analysis pursuant to that section rests on the Commission’s plenary authority under the Act to make rules and regulations necessary to achieve the Commission’s over-arching statutory purposes, including “promoting safety of life and property through the use of radio communication.”<sup>26</sup> From our review of the record in this case, we find that, despite its failure to meet the first criterion for

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<sup>21</sup> In the DTV Delay Act that was enacted on February 11, 2009, 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, MB Docket No. 09-17, *Report and Order and Sua Sponte Order on Reconsideration*, 24 FCC Rcd 1607 (2009).

<sup>22</sup> *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, 24 FCC Rcd 5317 (PSHSB 2009).

<sup>23</sup> *See, e.g.*, County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18398 ¶ 19 (PSHSB 2008).

<sup>24</sup> *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) (*New Hampshire DOT*) (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.”).

<sup>25</sup> *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.”).

<sup>26</sup> County of Granite, Montana, *Order*, 24 FCC Rcd 5704, 5712 ¶ 17 (2009) *citing* 47 U.S.C. § 151. However, consideration of a Section 1.925 waiver request does not predetermine that we will grant relief. *See, e.g.*, State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24650 ¶ 12 (WTB 2000) (*Tennessee DOT*) (finding that applicant had not met its burden of showing that Section 1.925 waiver relief is justified); *New Hampshire DOT*, 14 FCC Rcd 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*, 22 FCC Rcd 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).

receiving Section 337 waiver relief, Syosset has provided us with sufficient information for us to consider whether waiver relief is justified under Section 1.925 of the rules. Although Syosset did not seek waiver relief pursuant to Section 1.925, we find it in the public interest to consider its request pursuant to Section 1.925 on our own motion.

9. 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;<sup>27</sup> 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.<sup>28</sup> An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.<sup>29</sup> Based on the information before us, we conclude that a grant of the Waiver Request is warranted under the first prong of the waiver standard. We proceed with analyses of each rule for which Syosset requests waiver.

10. *Section 22.651.* The underlying purpose of Section 22.651 is to reserve certain frequencies—including frequency 473.1375 MHz—“for assignment to transmitters providing trunked public mobile service” in certain urbanized areas.<sup>30</sup> A search of our licensing records reveals no Part 22 common carrier operations (or public safety entities operating pursuant to waiver) licensed on frequency 473.1375 MHz, or on adjacent frequencies in the New York metropolitan area.<sup>31</sup> Previously, the Commission authorized Pagex Company to operate on frequency 473.1375 MHz under call sign KNKB898, Congers, New York, but this authorization terminated on March 9, 2005.<sup>32</sup> No Part 22 common carrier entities had applied for frequency 473.1375 MHz in the New York metropolitan area during the more than two years between the termination of Station KNKB898 and Syosset's filing on June 11, 2007. Further, no Part 22 common carrier entities filed comments to the *Public Notice*. Due to the significant passage of time without any common carrier interest in the subject frequency, and because Syosset would not cause harmful interference to any incumbent entity, including Part 22 entities, we conclude that the underlying purpose of Section 22.651 would not be served by its application to the present case.

11. *Protection of Co-Channel and Adjacent Channel Licensees.* While the Commission's Part 22 rules do not require a showing of interference protection for incumbent public safety licensees operating on Part 22 spectrum by waiver, we have the discretion to apply land mobile interference protection criteria.<sup>33</sup> We exercise this discretion to fulfill our due diligence to examine whether Syosset would cause harmful interference to these public safety entities or any other entities. We now analyze the

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<sup>27</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>28</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>29</sup> *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).

<sup>30</sup> 47 C.F.R. § 22.651.

<sup>31</sup> 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). Syosset is located in this urbanized area.

<sup>32</sup> See license for Station KNKB898.

<sup>33</sup> See, e.g., Baldwin Fire District, New York, *Order*, 24 FCC Rcd 11857, 11868 ¶ 28 (PSHSB PD 2009).

impact of Syosset's proposed operation on co-channel and adjacent channel entities. Section 90.313(c) provides that a "frequency pair may be reassigned at distances 64 km ... or more from the location of base stations authorized on that pair ..."<sup>34</sup> We have verified that there are no licensed co-channel facilities within 64 kilometers of Syosset's proposed base stations.<sup>35</sup> Therefore, the application satisfies the co-channel separation requirements of Section 90.313(c).<sup>36</sup>

12. We also find that the Fire District's proposed operations will not cause harmful interference to adjacent channel entities. Garden City Park Fire District, New York is currently pursuing an application for lower-adjacent frequency 473.1250 MHz using 11.25 kHz bandwidth.<sup>37</sup> The City of Bayonne, New Jersey is currently pursuing an application for upper adjacent frequency 473.1500 MHz using 11.25 kHz bandwidth.<sup>38</sup> There would be no overlap of spectrum, since both parties and Syosset would operate with 11.25 kHz bandwidth.<sup>39</sup> Thus, we find that Syosset's proposed operations would not cause harmful interference to either incumbent co-channel or adjacent channel entities.

13. *Public Interest.* Our analysis under the first prong of the waiver standard also requires a finding that grant of the waiver would be in the public interest.<sup>40</sup> Notwithstanding the availability of the 700 MHz band, we find it in the public interest to allow Syosset to use frequency 473.1375 MHz because it would allow Syosset to use its existing UHF T-Band infrastructure for the new frequency. We agree with Motorola that a grant "will allow Syosset to continue providing essential public safety services and will not cause harmful interference to other spectrum users entitled to interference protection."<sup>41</sup> We also note that the public interest is also served by Syosset's return of frequency 473.2000 MHz since that "would make it possible for Westchester and Syosset to operate with no chance of mutual interference."<sup>42</sup>

14. *Section 20.9(a)(6).* This rule presumes that paging frequencies will be treated as common carriage services and regulated as commercial mobile radio services.<sup>43</sup> This regulatory structure obviously is not applicable to nor appropriate for frequencies used by public safety licensees. Because we find that it is in the public interest to grant a waiver of Section 22.651 to Syosset to use frequency 473.1375 MHz, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its application to the present case, and that granting waiver of Section 20.9(a)(6) is consistent with the public interest for the same reasons described above.

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<sup>34</sup> 47 C.F.R. § 90.313(c).

<sup>35</sup> There are no facilities licensed to operate on frequency 473.1250 MHz within 100 kilometers of either base station. On frequency 473.1250 MHz, the County of Somerset, New Jersey operates Stations WPPB311, WQBL360, and WQBL367. The Fire District's sites are no closer than 68 kilometers to any Somerset location.

<sup>36</sup> *Id.*

<sup>37</sup> See File No. 0003074060 (filed June 18, 2007, amended July 2, 2007, Sept. 25, 2007, Oct. 26, 2007, Feb. 5, 2009, Apr. 2, 2009, Apr. 3, 2009, Sept. 10, 2009, and Oct. 5, 2009).

<sup>38</sup> See File No. 0003808598 (filed Apr. 15, 2009, as amended June 12, 2009 and Aug. 18, 2009).

<sup>39</sup> See File No. 0003065700, as amended June 2, 2010. Syosset amended its application to reduce proposed bandwidth from 20 kHz to 11.25 kHz. *Id.*

<sup>40</sup> See 47 C.F.R. § 1.925(b)(3)(i).

<sup>41</sup> Motorola Comments at 4.

<sup>42</sup> *Id.*

<sup>43</sup> See 47 C.F.R. § 20.9(a)(6).

**IV. CONCLUSION**

15. Based on the record before us, we find that grant of Syosset's waiver request, subject to the conditions herein, is warranted and consistent with the public interest. Accordingly, we grant the waiver request.

**V. ORDERING CLAUSES**

16. 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 Syosset Fire District, New York, on June 11, 2007, as amended, IS GRANTED, and File No. 0003065700 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

17. 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