



Federal Communications Commission
Washington, D.C. 20554

May 11, 2011

Mr. John Logan
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1050 Connecticut Avenue, NW
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Washington, DC 20036

DA 11-856

RE: Request for Extension of Time to Construct Public Safety Trunked Station WQDR764, City of Summit, New Jersey; Petition for Reconsideration; and Request to Stay

Dear Mr. Logan:

This letter addresses a petition for reconsideration (“Petition”) and a Request for Stay (“Request”) filed by the City of Summit, New Jersey (“Summit”).¹ The Petition requests reconsideration of the decision by the Public Safety and Homeland Security Bureau (“Bureau”), to dismiss Summit’s request to extend the construction period for Public Safety Trunked Radio Station WQDR764, City of Summit, New Jersey. In connection with its Petition, Summit also filed a Request to stay the dismissal of its request to extend the construction period for WQDR764 pending resolution of its Petition.² For the reasons discussed below, we grant Summit’s Petition with respect to the Bureau’s action on Summit’s extension request to the extent indicated herein, and we dismiss as moot Summit’s Request for stay.

Summit holds a license for a public safety radio communications system using four frequency pairs from the Part 22 spectrum allocation in the 470-512 MHz band under call sign WQDR764. The Wireless Telecommunications Bureau’s former Public Safety and Critical Infrastructure Division initially authorized use of Summit’s Part 22 channels by waiver granted in 2005³ pursuant to Section 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 337(c). The Bureau’s Policy Division authorized Summit’s request to swap frequency pair 476/479.2125 MHz for a different Part 22 frequency pair 476/479.1625 MHz by waiver granted in June 2010.⁴ As a result, Summit is currently authorized to operate on four Part 22 frequency pairs, 476/479.0375, 476/479.1375, 476/479.1875, and 476/479.1625 MHz.

Under Section 90.155(a) of the Commission’s rules, Summit had a one-year period following the initial grant date of Station WQDR764 to construct and place the station into operation.⁵ In 2006, and pursuant to the Commission’s extended implementation (“slow growth”) rules, Summit requested and subsequently obtained a three-year extension in which to construct and place its system into operation,

¹ See File No. 0004238416 (May 7, 2010, amended on May 17, 2010) (Extension Request); Petition for Reconsideration filed by the City of Summit (June 17, 2010) (Petition); Supplemental Information (January 19, 2011) (Supplement).

² Separately, Summit also urged that we grant its pending application to modify the license for Station WQDR764 from a trunked radio service (YW) to a conventional mode (PW). The application also sought to add a new base station repeater at Murray Hill, New Jersey. See File No. 0004512973 (Nov. 30, 2010). The application was dismissed on February 4, 2011. See Dismissal Notice 5105831 (dated Feb. 4, 2011).

³ See City of Summit, New Jersey, *Order*, 20 FCC Rcd 16181 (WTB PSCID 2005) (2005 *Order*).

⁴ See City of Summit, New Jersey, *Order*, 25 FCC Rcd 8189 (PSHSB Policy 2010) (2010 *Order*). See 47 C.F.R. § 1.925.

⁵ See 47 C.F.R. § 90.155(a). The license for Station WQDR764 was issued October 17, 2005, so the first construction deadline was October 17, 2006.

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i.e., until May 15, 2009.⁶ In 2009, Summit obtained another one-year extension of its construction period, *i.e.* until May 31, 2010.⁷ On May 7, 2010, Summit requested a one-year extension; in response the Bureau asked Summit to clarify its proposed buildout deadline and advised Summit that a waiver of Section 90.629 of the Commission's rules would be required.⁸ On May 17, 2010, Summit requested a waiver to allow a further one-year extension of its construction period, *i.e.* until May 31, 2011, citing a lack of financing.⁹

By letter dated May 20, 2010, the Bureau dismissed Summit's extension request, concluding that Summit failed to justify an extension.¹⁰ The Bureau further concluded that Summit had not demonstrated a commitment to funding and constructing the radio facility.¹¹ The Bureau suggested that Summit file a new application to re-license the facility after it was in a position to meet the construction requirements.¹²

On May 28, 2010 Summit filed a request to stay any action cancelling its authorization for WQDR764, and or deleting the channels from the Commission's licensing database.¹³ Summit asked the Commission to refrain from such action until it had considered Summit's then-forthcoming Petition and any other review available under the rules.¹⁴

On June 17, 2010, Summit filed its Petition, and requested grant of its pending extension for Station WQDR764.¹⁵ In support of the requested relief, Summit claims to provide new information concerning the circumstances underlying its failure to construct, its commitment to completing construction, and the critical need for its proposed communications system. Summit explains that its failure to construct its radio system within the five-year construction period was due to extenuating circumstances.¹⁶ Summit states that it was financially unable to proceed with its proposed trunked system project due to lack of initial investment, declining revenues, and a State of New Jersey mandate to implement a series of improvements to Summit's Public Safety Answering Point/9-1-1 infrastructure and equipment.¹⁷ While Summit acknowledges that Federal grants in the amount of \$1,230,000 were in place to implement these frequencies as part of a larger consolidation of 911 and E911 radio services, the need to coordinate the project with neighboring jurisdictions further delayed the project.¹⁸ Summit advises that

⁶ See File No. 0002588217 (May 1, 2006) (Request to be Converted to Slow Growth). See 47 C.F.R. § 90.629 (extended implementation period). Summit's license expressly stated that "[f]ailure to certify annually as to station construction commitments will terminate the authority for the extended implementation period and will require complete system construction within six months of the first missed annual certification date."

⁷ See File No. 0003828562 (May 5, 2009) Extension Request at 1. We note that Summit was granted a one-year construction period (*i.e.* until June 25, 2011) relative to frequency pair 476/479.1625 MHz.

⁸ See Notice of Return Reference No. 4979406 (May 14, 2010) citing 47 C.F.R. §§ 1.925(b)(3)(i-ii) and 90.629.

⁹ See note 1 at Extension Request. In connection with its extension request, Summit asked for a waiver of sections 1.946(d) and 90.629 of the Commission's rules addressing construction and coverage requirements. *Id.*

¹⁰ See Notice of Dismissal Reference No: 4980931 (May 20, 2010) (Dismissal Letter).

¹¹ *Id.*

¹² *Id.*

¹³ See File No. 0004238416 at Request for Stay (May 28, 2010).

¹⁴ *Id.*

¹⁵ Petition at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

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it has now completed coordination of the radio consolidation project with its partners: Berkeley Heights, New Providence and the Township of Millburn.¹⁹ Summit also states that it has obtained concurrence from adjacent and co-channel licensees in order to avoid potential interference.²⁰ Summit submits that there are no longer any financial or logistic challenges remaining to implement this system.²¹

Summit further advises that it has since acquired radios capable of being reprogrammed to include frequencies from call signs WQDR764 and WIK881.²² Summit states that it requested and received a proposal from Motorola, Inc. (“Motorola”) to perform the base station simulcast infrastructure installation, reprogram the subscriber units and otherwise deploy the system so that all UHF frequencies pairs are used and compliant with the Commission’s narrowband mandate.²³ Further, Summit states that Motorola has represented that it could complete this project by May 31, 2011, if it commenced in January 2011 and that Summit has adequate funds to pay Motorola and its technical advisors to deploy the system and commence operations.²⁴ Summit also adds that it intends to “move the frequencies within WQDR764 and WIK881 into a conventional mode license to serve the jurisdictions of Summit, New Providence and Berkeley Heights and the fire service of the Township of Millburn.”²⁵

As an initial matter, we conclude that the Bureau correctly found, based on the information then before it, that Summit’s initial extension request provided no unique circumstance or substantial showing that would have warranted grant of the requested relief. The record before the Bureau reflected that Summit had been licensed for nearly five years pursuant to multiple prior construction extensions, failed to meet its construction commitments, expressed limited commitment to utilizing the subject Part 22 frequencies and provided no assurance that it would implement its authorization. Further, Summit attributed its failure to construct to lack of financial resources and delays in coordinating its radio consolidation project with neighboring jurisdictions.²⁶ Summit provided no other reason as to why it had not met its construction commitments. To the extent that Summit’s failure to construct was caused by budget uncertainty and changing project scope, Summit must bear the responsibility for that failure because Summit accepted its license on the condition that it construct, and lack of financial resources and coordination delays may not be used to excuse Summit’s lack of progress.²⁷ In light of these factors, we find that the Bureau’s analysis of Summit’s extension request was proper.

Nonetheless, Summit’s Petition purports to present new information that now demonstrates sufficient cause for the Bureau to grant of the extension request. Section 1.106(c) of the Commission’s rules provides that a Petition for Reconsideration relying new facts may be entertained only if the facts relate to events that occurred or circumstances that have changed since the last opportunity to present

¹⁸ Extension Request at 1; Supplement at 5.

¹⁹ *Id.*

²⁰ *Id.* at 2-4.

²¹ *Id.* at 4.

²² Petition at 3.

²³ Supplement at 4. Summit states that Motorola has represented that it could complete this project by May 31, 2011. *Id.*

²⁴ *Id.*

²⁵ *Id.* As noted above, Summit has filed a modification application to convert Station WQDR764 from a trunked to conventional station. The application was dismissed on February 4, 2011.

²⁶ Petition at 1-2.

²⁷ See 47 C.F.R. § 1.946(e)(2).

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such matters; the facts were not known to the petitioner, and could not reasonably have been learned, prior to such opportunity; or the public interest requires consideration of the facts.²⁸ Because denial of the requested relief would implicate Summit's proposed public safety radio system and by extension the safety of the public at large, we believe that the public interest will be served by consideration of the new information presented by Summit.²⁹ We now turn to whether grant of a construction extension is warranted in light of the new information.

The updated record reflects that Summit's overall goals are to upgrade and consolidate its public safety communications resources and achieve interoperability with New Jersey's statewide system. We find that these goals would clearly serve the public interest. The Commission previously determined that Summit requires four channel pairs comprised of frequencies reserved under Sections 22.621 and 22.651 "in order to promote effective public safety communications."³⁰ Specifically, the Commission previously noted Summit's contention that allowing it to use frequencies reserved under Sections 22.621 and 22.651 would "cure deficiencies in the existing public safety radio systems and provide interoperability among Summit's fire, police, EMS, and other departments," and would "assist the State of New Jersey's initiative to increase domestic preparedness through pervasive interoperability."³¹ The Commission found that authorizing Summit to use Part 22 frequencies would further the public interest "by affording Summit's public safety community the necessary spectrum to allow it to protect the lives and property in its care."³² To this end, the Commission observed that Section 1 of the Communications Act, as amended, defines one of the Commission's over-arching purposes as "promoting safety of life and property through the use of ... radio communication."³³ The Commission also found it significant that granting Summit's initial request for frequencies under Sections 22.621 and 22.651 could "promote interoperability capability among the public safety community in the New York City metropolitan area."³⁴

We find that all of these prior determinations apply equally to the instant Petition. The record further reflects that the Federal government has committed \$1,230,000 in the proposed system as part of a larger consolidation of public safety radio services and that Summit has acquired radios capable of being reprogrammed to incorporate its frequencies, as well as obtained a proposal from Motorola to implement these frequencies within a four month period. Further, all channels will be fully engaged and operating across four jurisdictions, contributing significantly to improved communications quality and expanded interoperability. Additionally, Summit has obtained all the concurrences Summit claimed that it was lacking before. The additional time will allow the important objectives of consolidating of 911 and communications resources, implementing of New Jersey State 911 standards and the Commission's narrowband mandate, of which the frequencies in WQDR764 have an integral part. This new information demonstrates Summit's continuing commitment to constructing Station WQDR764, and its need for the license to serve its public safety mission. Based on the cumulative circumstances described in the record, we conclude that it would be in the public interest to provide Summit a further opportunity to construct and implement this critical public safety communications system. Accordingly, we grant Summit's request for an extension of the construction deadline relative to frequency pairs: 476/479.0375,

²⁸ See 47 C.F.R. § 1.106(c).

²⁹ See, e.g., *Southwest Central Dispatch, Order on Reconsideration*, 17 FCC Rcd 15633, 15636 ¶ 7 (WTB PSPWD 2002).

³⁰ *2005 Order*, 20 FCC Rcd 16185 ¶ 11; *2010 Order*, 25 FCC Rcd 8189 ¶ 13.

³¹ *Id.*

³² *Id.*

³³ *Id.* (citing 47 U.S.C. § 151).

³⁴ *Id.*

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476/479.1375, and 476/479.1875 MHz.³⁵

Construction of these three frequency pairs licensed under Station WQDR764 must be completed by September 30, 2011.³⁶ While we grant Summit's request, we note that Summit had been licensed for these frequencies for more than five years, yet failed to meet its construction commitments. Although Summit consistently notified the Commission of its compliance with its yearly construction commitments under its previously approved extended implementation plans and we acknowledge that extended implementation can be warranted, we must remain cognizant of the need for scarce spectrum resources to be promptly placed into service. Nevertheless, based on the totality of circumstances presented, we find it is in the public interest to grant Summit an extension until September 30, 2011, which is consistent with Motorola's four month schedule for completing construction.³⁷ We further advise Summit that no further extensions will be considered unless Summit demonstrates that failure to construct is due to an unforeseeable circumstance beyond Summit's control.

Accordingly, IT IS ORDERED, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by the City of Summit, New Jersey, on June 17, 2010, as supplemented on January 19, 2011, IS GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED, that the City of Summit's request for an extension of the construction deadline for Public Safety Trunked Station WQDR764 IS GRANTED *i.e.* until September 30, 2011.

IT IS FURTHER ORDERED, that the City of Summit's request for a stay of the termination for Public Safety Trunked Station WQDR764 IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the request for waiver filed by the City of Summit, New Jersey on May 17, 2011, in connection with application File No. 0004238416 IS GRANTED, and the application SHALL BE PROCESSED consistent with the Commission's Rules and this letter.

³⁵ Because frequency pair 476/479.1625 MHz was added to Station WQDR764 on June 25, 2010 with a one year construction period, the construction deadline for this frequency pair is June 25, 2011.

³⁶ We note that if Summit fails to complete construction by the new deadline, the license will be cancelled. 47 C.F.R. § 90.629(c). Summit will not be entitled to the additional six-month period set forth in Section 90.629(c), as that provision applies only when the Commission terminates authority for an extended implementation, and not when an extended implementation period expires by its own terms.

³⁷ 47 C.F.R. § 90.629(c) (licensees may request amendments to their implementation commitments and "[i]f the Commission approves the requested amendments to a licensee's implementation commitments, the licensee's extended implementation authority will remain in effect.").

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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

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