

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

In The Matter of
State of New York
Metropolitan Transportation Authority Police
Department
Request For Extended Implementation
File No. 0005375300

ORDER

Adopted: November 30, 2012

Released: November 30, 2012

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

I. INTRODUCTION

1. On November 16, 2012, the State of New York Metropolitan Transportation Authority Police Department (MTAPD) submitted a request for extension of its "slow growth" authority relative to two channels of its proposed new 800 MHz communications system. MTAPD also requests waiver of Section 90.629 of the Commission's rules which limits extended authorizations to five years (Waiver Request). MTAPD proposes that, if the extension of its "slow growth" authority is granted, it will complete construction of the two channels by January 31, 2017. For the reasons set out below, we find that MTAPD has shown good cause for grant of its requested waiver and extend the completion date for the two channels to January 31, 2017.

II. BACKGROUND

2. Frequencies 808/853.2625 MHz and 808/853.8375 MHz were initially licensed to the MTAPD which assigned the frequencies to the New York State Office of Interoperable and Emergency Communications, for use in the New York Statewide Wireless Network (SWN), a statewide system in which MTAPD would participate. The SWN was only partially constructed when the New York State Office of Interoperable and Emergency Communications, terminated the contract with the system vendor. The MTAPD successfully requested re-assignment of the channels but the relevant authorization expires in December, 2012 leaving insufficient time for MTAPD to construct and activate its system.

3. MTAPD represents that it has completed a preliminary design of its proposed system and has identified sites and calculated coverage from those sites. It estimates that the complete system - comprised of more than the two channels requested - will cost \$110 million, \$ 93 million of which is already committed, with the remainder to be provided in the Metropolitan Transit Authority's 2015-2019

1 47 C.F.R. § 90.629.

2 Waiver Request at 1.

3 Id.

4 Id.

Capital Program.⁵ MTAPD has proposed a project timetable which contemplates the system will be fully operational in January, 2017.⁶

III. DISCUSSION

4. Section 90.629 of the Commission's rules governing extended implementation of proposed facilities makes no provision for extension of the five-year maximum construction period that the rule allows for. The Commission's limited construction periods are intended to deter "spectrum warehousing" whereby parties hold licenses to the exclusion of others that could sooner provide service.⁷ Accordingly, in order to obtain its requested extension of its "slow growth" authority, MTAPD must justify waiver of Section 90.629.

5. The Commission will grant a waiver request if the waiver proponent shows that: "(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."⁸

IV. DECISION

6. Here, we analyze MTAPD's waiver request with reference to the second prong of the waiver standard – whether there exist unique or unusual factual circumstances that would make strict application of Section 90.629 inequitable, unduly burdensome or contrary to the public interest. MTAPD's assignment of its frequencies to the SWN, and SWN's cancellation of the contract for its partially constructed system constitute an unusual set of facts that would render strict application of the rule both burdensome and contrary to the public interest. Denial of the waiver request would burden MTAPD because, absent the waiver, it would have to retain its existing communications system which MTAPD represents does not provide "public safety-grade" service.⁹ We find no evidence of spectrum warehousing by MTAPD, it has funding assurances for the greater part of its new system,¹⁰ and MTAPD has presented a reasonable schedule for system completion. Accordingly, there are adequate public interest grounds for grant of the requested waiver.

7. We note that MTAPD has requested a waiver for only two channels of several channels for which it is licensed in the 800 MHz band, presumably because of the imminent expiration of the license for the two channels. The instant waiver, however, should not be construed to capture the other channels in MTAPD's system. Any extension of "slow growth" authority for channels not covered by this *Order* must, if necessary, be requested separately by MTAPD.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Cf.* Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Notice of Proposed Rule Making*, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990).

⁸ 47 C.F.R. § 1.925. On waiver standards generally, see *Northeast Cellular Telephone Co. v. FCC.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest") citing *WAIT Radio v. FCC.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

⁹ Waiver Request at 1.

¹⁰ *Id.* at 2.

V. ORDERING CLAUSES

8. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; 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, IT IS ORDERED that the Request for Extension of "Slow Growth" Authorization and Request for Waiver to the Extent Required filed by the State of New York Metropolitan Transportation Authority Police Department on November 16, 2012 IS GRANTED to the extent discussed herein.

9. IT IS FURTHER ORDERED, that the construction period for the 808/853.2625 MHz and 808/853.8375 MHz facilities authorized in FCC Call Sign WQCZ325 IS EXTENDED until January 31, 2017.

10. 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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