

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 Nos. 0005375295, 0005375296,
0005375297, 0005375298, 0005375299,
0005375301, 0005375302, 0005375303,
0005375304

ORDER

Adopted: December 6, 2012

Released: December 6, 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 "slow growth" authority for its 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). On November 30, 2012, we issued an Order approving the requested extension for one of MTAPD's licenses: WQCZ325. The instant Order approves the requested extensions for MTAPD's remaining nine licenses. MTAPD proposes that, if the extension of its "slow growth" authority is granted, it will complete construction at all sites and its system will be fully operational, 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 implementation date for the remaining nine licenses, 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 (New York), for use in the New York Statewide Wireless Network (SWN), a statewide

1 See Letter from Lieutenant Robert Howell, Metropolitan Transportation Police Department re Request for Extension of "Slow Growth" Authorization and Request for Waiver to the Extent Required (Nov. 16, 2012) (Waiver Request) attached to FCC File Nos. 0005375295, 0005375296, 0005375297, 0005375298, 0005375299, 0005375300, 0005375301, 0005375302, 0005375303, and 0005375304 (filed Aug. 13, 2012 amended Nov. 16, 2012).

2 47 C.F.R. § 90.629 (applicants may request up to five years for constructing and placing a system into operation).

3 See State of New York and Metropolitan Transportation Authority/Police Department, Order, DA 12-1919 (PSHSB PLD rel. Nov. 30, 2012).

4 The remaining nine licenses include: WQCY454, WQCZ321, WQCZ322, WQCZ323, WQCZ324, WQCZ326, WQCZ327, WQCZ328, and WQCZ329.

5 Waiver Request at 2. MTAPD proposes to complete system construction in December 2015 and to be fully operational in January 2017. Id.

system in which MTAPD would participate.⁶ The SWN was only partially constructed when New York, terminated the contract with the system vendor.⁷ The MTAPD successfully requested re-assignment of the channels but the relevant implementation period 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.⁸ It estimates that the complete system 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 Capital Program.⁹ MTAPD has proposed a project timetable which contemplates the system will be fully operational in January, 2017.¹⁰

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.¹¹ 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."¹²

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 unforeseen need to cancel 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.¹³ We find no evidence of spectrum

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *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).

¹² 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).

¹³ Waiver Request at 1.

warehousing by MTAPD, it has funding assurances for the greater part of its new system,¹⁴ and MTAPD has presented a reasonable schedule for system completion. Accordingly, there are adequate public interest grounds for grant of the requested waiver.

V. ORDERING CLAUSES

7. 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.

8. IT IS FURTHER ORDERED, that the extended implementation period for frequencies 808/853.2625 MHz and 808/853.8375 MHz, authorized in Federal Communications Commission licenses, Call Signs WQCY454, WQCZ321, WQCZ322, WQCZ323, WQCZ324, WQCZ326, WQCZ327, WQCZ328, and WQCZ329 IS EXTENDED until January 31, 2017.

9. 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

Michael J. Wilhelm
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¹⁴ *Id.* at 2.