

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

In the Matter of)	
)	
Third District Enterprises, LLC)	File Nos. 0004819360
Applications for New 800 MHz Stations in)	0004819368
Los Angeles and San Diego Counties, California;)	
Requests for Waiver of the)	
Wave 4 Freeze on New Applications and)	
Section 90.621 of the Commission’s Rules)	

Order

Adopted: February 22, 2012

Released: February 22, 2012

By the Assistant Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 28, 2011, Third District Enterprises, LLC (Third District) filed the above-captioned applications for new conventional Industrial/Land Transportation 806-821/851-866 MHz (GO) stations, along with requests for waiver of the Commission’s freeze on filing new applications pending reconfiguration of the 806-824/851-869 MHz band (800 MHz band), and waiver of the co-channel separation requirements provided in Section 90.621 of the Commission’s rules.¹ For the following reasons, we deny the waiver requests and dismiss the applications.

II. BACKGROUND

2. On July 18, 2011, Federal Express Corporation (FedEx) filed applications to cancel its licenses for Stations WPUS566 and WPIE390 located in Southern California.² In particular, the license for Station WPUS566 authorized conventional Industrial/Land Transportation (GO) operations on frequency pair 815/860.3375 MHz on Sunset Peak in Los Angeles County, California. The license for Station WPIE390 authorized conventional Industrial/Land Transportation (GO) operations on frequency pair 812/857.4000 MHz on Polamar Mountain in San Diego County, California. The cancellations were accepted the following day, on July 19, 2011.³

3. Nine days later, on July 28, 2011, Third District filed its applications for new conventional Industrial/Land Transportation 806-821/851-866 MHz (GO) licenses, proposing to operate on the same frequencies and from the same locations that had previously been authorized under FedEx’s cancelled licenses. In particular, Third District’s application file number 0004819368 seeks authority to operate on frequency pair 815/860.3375 MHz on Sunset Peak in Los Angeles County, California, and

¹ FCC File Nos. 0004819360 and 0004819368, filed by Third District Enterprises, LLC, Att. “Request for Rule Waivers” (July 28, 2011) (Waiver Requests).

² FCC File Nos. 0004805372 (WPUS566) and 0004805483 (WPIE390), filed by Federal Express Corporation (July 18, 2011).

³ ULS Reference Nos. 5189244 (WPUS566) and 5189252 (WPIE390) Notice of License Cancellation (July 19, 2011).

Third District's application file number 0004819360 seeks authority to operate on frequency pair 812/857.4000 MHz on Palomar Mountain in San Diego County, California.⁴

4. In July 2004, the Commission mandated reconfiguration of the 800 MHz band to eliminate interference to public safety communications in the band.⁵ To accomplish reconfiguration effectively and with limited adverse affect on licensees, the Commission determined that band reconfiguration would be implemented by National Public Safety Planning Advisory Committee (NPSPAC) region.⁶ To maintain a stable spectral status quo during reconfiguration of each region, the Commission concluded that a freeze on accepting 800 MHz applications for new licenses during the reconfiguration process would be appropriate.⁷ In particular, immediately upon release of the public notice announcing the start of the negotiation period in a region,⁸ the Commission no longer accepts applications for new licenses, changes in frequencies of existing facilities, or coverage increases for areas in the NPSPAC region and areas within 70 miles of the borders of the NPSPAC region.⁹ The Commission further determined that the freeze on applications would last 30 working days after the completion of the negotiation period for a given region.¹⁰

5. The Transition Administrator (TA), which oversees the reconfiguration process, has assigned each of the NPSPAC regions to one of four basic "prioritization waves" with staggered starting dates for implementing reconfiguration.¹¹ Under the TA's approved plan, the fourth wave (Wave 4) consists of 12 NPSPAC regions, all of which share a border with either Canada or Mexico.¹² In relevant part, five Wave 4 NPSPAC regions share a border with Mexico, including Region 5 (Southern California),¹³ where Third District proposes to locate its new stations. In addition to the designation of

⁴ Third District's proposed site on Palomar Mountain would be located at 33-18-30.1 N, 116-50-23.1 W, and its proposed site on Sunset Peak would be located at 34-11-17.0 N, 117-42-19.0 W, the same locations that were authorized under the licenses for Stations WPIE390 and WPUS566, respectively.

⁵ In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) (*800 MHz Report and Order*); see also, In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*); In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, WT Docket No. 02-55, 20 FCC Rcd 16015 (2005) (*800 MHz Memorandum Opinion and Order*).

⁶ *800 MHz Report and Order*, 19 FCC Rcd at 14977, ¶ 11 and 15075, ¶ 201.

⁷ *Id.* at 15078, ¶ 204.

⁸ See *id.* at 15076, ¶ 201 (stating that 30 days before the start date of reconfiguration in a region, the Commission will issue a public notice initiating a three-month voluntary negotiation period for that region, and if voluntary negotiations do not yield an agreement, the parties are required to enter into a three-month mandatory negotiation period).

⁹ *Id.* at 15078, ¶ 204, modified, *800 MHz Supplemental Order*, 19 FCC Rcd at 25159, ¶ 87; Wireless Telecommunications Bureau Outlines Application Freeze Process for Implementation of 800 MHz Band Reconfiguration, *Public Notice*, 20 FCC Rcd 8905, 8906 (PSCID WTB 2005) (*Application Freeze Public Notice*).

¹⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204.

¹¹ *Id.* at 15075, ¶ 201; Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, *Public Notice*, 20 FCC Rcd 5159, 5159 (WTB 2005) (*TA Plan Public Notice*). Under the initial Regional Prioritization Plan, the first wave (Wave 1) was scheduled to commence on June 27, 2005, the second wave (Wave 2) on October 3, 2005, the third wave (Wave 3) on January 3, 2006, and Wave 4 on April 3, 2006. *Id.* at 5159-60.

¹² *TA Plan Public Notice*, 20 FCC Rcd at 5160.

¹³ The other NPSPAC regions that share a border with Mexico are Region 3 (Arizona), Region 29 (New Mexico), Region 50 (Central Western Texas), and Region 53 (Southern Texas).

NPSPAC regions along the Mexico border, under protocols the United States has with Mexico, all operations in the 800 MHz band within the Mexico border region, defined as the area that falls within 110 km (68.4 miles) of the U.S./Mexico border, must comply with international agreements currently in effect.¹⁴ The negotiations to modify the agreements between the United States and Mexico as a result of reconfiguration have been ongoing for several years and continue to this day.¹⁵ Until the negotiations are finalized, reconfiguration in Wave 4 NPSPAC regions that also fall within the Mexico border region cannot be completed.¹⁶

6. To maintain a stable spectrum environment for purposes of reconfiguration, the freeze on accepting 800 MHz applications in the Wave 4 NPSPAC regions was initiated on June 2, 2006.¹⁷ Because negotiations between the United States and Mexico have lasted longer than originally anticipated, the Commission has extended both the start date for reconfiguration in the Wave 4 NPSPAC regions that border Mexico, and the period during which the acceptance of applications is suspended in those regions. The suspension period was in effect in the U.S./Mexico NPSPAC border regions when Third District filed its applications,¹⁸ and is currently scheduled to end on May 14, 2012.¹⁹

7. Third District proposes to operate its facilities in Wave 4 NPSPAC Region 5, and, as a result, requests a waiver of the freeze on the acceptance of applications in that region.²⁰ Third District

¹⁴ See *800 MHz Report and Order*, 19 FCC Rcd at 15063, ¶ 176 (noting that “[the United States] agreements with Mexico and Canada establish a distance beyond which U.S. licensees need not consider border stations when selecting 800MHz channels” and further explaining that “[t]he distance is 140 km (87 mi.) and 110 km (68.4 mi.) from the border for Canada and Mexico, respectively”); 47 C.F.R. § 90.619(a) (providing that all operations in the 800 MHz Band within 110 km (68.4 miles) of the U.S./Mexico border (‘Mexico border region’) shall be in accordance with international agreements between the U.S. and Mexico”).

¹⁵ In adopting its new 800 MHz band plan, the Commission recognized that the plan would be inconsistent in some respects with international agreements in effect at that time. *800 MHz Report and Order*, 19 FCC Rcd at 14986, ¶ 25; see *id.* at 15061, ¶ 175 (noting that the existing border plans contained in Section 90.619 of the Commission’s rules have evolved from periodic negotiations with Canada and Mexico and have been adjusted from time to time). As a result, the Commission acknowledged that implementing the band plan in areas of the United States bordering Mexico and Canada would require modifications to international agreements for use of the 800 MHz band in the border areas. *Id.* at 14986, ¶ 25.

¹⁶ The Commission has afforded the TA flexibility in the timing of band reconfiguration to accommodate agreements with border countries, and has acknowledged the start date for implementing reconfiguration in Wave 4 regions could be delayed pending conclusion of negotiations between the United States and Canada and Mexico. *TA Plan Public Notice*, 20 FCC Rcd at 5160, n.8.

¹⁷ See Wireless Telecommunications Bureau Announces That 800 MHz Band Reconfiguration for Non-NPSPAC Channels Will Commence July 3, 2006, in the NPSPAC Regions Assigned to Wave 4, *Public Notice*, 21 FCC Rcd 6267, 6268 (WTB June 2, 2006) (announcing that the reconfiguration process for non-NPSPAC channels would start July 3, 2006) (*Application Freeze Public Notice*). The June 2, 2006 public notice announced that, effective immediately, “we are freezing the filing of 800 MHz applications for non-NPSPAC channels in Wave 4.” *Id.* at 6268-69.

¹⁸ See Public Safety and Homeland Security Bureau Extends 800 MHz Rebanding Negotiation Period for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Mexico Border, *Public Notice*, 26 FCC Rcd 9408, 9408 (PSHSB rel. June 30, 2011) (extending the filing freeze on new applications in the U.S.-Mexico border region until November 16, 2011).

¹⁹ Public Safety and Homeland Security Bureau Extends 800 MHz Rebanding Negotiation Period for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Mexico Border, *Public Notice*, WT Docket No. 02-55, DA 11-2087 (PSHSB rel. Dec. 29, 2011).

²⁰ Waiver Requests at 1-2. The Southern California counties included in Wave 4 are Imperial, Kern, Los Angeles, Orange, Riverside, San Bernadino, San Diego, San Luis Obispo, Santa Barbara, and Ventura. *TA Plan Public Notice*, 20 FCC Rcd at 5161, Appendix.

argues that the freeze is unnecessary because reconfiguration has not begun in Region 5; the applications do not “disturb the landscape” for reconfiguration in the region; and the Commission has already granted similarly situated applications.²¹ Acknowledging that the locations of its proposed stations are within 88 km (55 miles) of two stations currently licensed on the same frequencies to Nextel of California, Inc., Third District also requests waiver of Section 90.621(b) of the Commission’s rules,²² which sets forth the minimum separation requirements between co-channel stations in the 800 MHz band.²³ Nextel of California, Inc. (Nextel of California), a wholly owned subsidiary of Sprint Nextel Corporation (collectively “Sprint Nextel”) filed an opposition on December 9, 2011, asking the Commission to deny Third District’s applications and waiver requests.²⁴ Third District replied on December 19, 2011.²⁵

III. DISCUSSION

8. We initially deny Third District’s request for waiver of the Commission’s freeze on accepting new applications in the 800 MHz band because it has not met either prong of the Commission’s standard for granting waivers. We may grant a waiver request, pursuant to Section 1.925 of the Commission’s rules, if it is shown that: (1) the underlying purpose of the rule 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 (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁶

9. Third District first asserts the Commission should modify its decision on when to initiate a freeze on applications in Southern California so that the suspension period begins only after reconfiguration actually commences in that region. Third District argues that “[b]ecause the rebanding process has not begun, there is no need to unnecessarily retain the spectrum landscape in place – that landscape should be retained only when rebanding actually begins.”²⁷ Acknowledging that “no rebanding will occur”... “[u]ntil there is an agreement between Mexico and the United States,” Third District concludes that “the use of spectrum is unnecessarily suspended.”²⁸ We reject this argument as an untimely petition for reconsideration. Section 1.429 of the Commission’s rules requires petitions for reconsideration of a final action taken in a rulemaking proceeding to be filed within 30 days of the date of public notice of the action.²⁹ Moreover, Section 1.106 of the Commission’s rules imposes the same 30-day filing deadline for non-rulemaking actions.³⁰ The Commission’s *800 MHz Report and Order* establishing the freeze on applications upon the announcement that negotiations are scheduled to begin in

²¹ Waiver Requests at 1-2.

²² 47 C.F.R. § 90.621(b).

²³ Waiver Requests at 2-3.

²⁴ Opposition of Nextel of California, Inc. to Third District Enterprises, LLC Request for Waiver, filed by Sprint Nextel Corporation (Dec. 9, 2011) (Opposition). In footnote 3 of its Opposition, Sprint Nextel states that “Exhibit A lists the Sprint Nextel Licensees that would be impermissibly short-spaced by Third District’s applications.” *Id.* at 4, n.3. After realizing it inadvertently omitted the exhibit, Sprint Nextel filed Exhibit A to its Opposition on January 10, 2012. Opposition of Nextel of California, Inc. to Third District Enterprises, LLC Request for Waiver Exhibit A, filed by Sprint Nextel Corporation (Jan. 10, 2012) (Opposition Exhibit A).

²⁵ Reply to Opposition, filed by Third District Enterprises, LLC (Dec. 19, 2011) (Reply).

²⁶ 47 C.F.R. § 1.925(b)(3)(i)-(ii).

²⁷ Waiver Requests at 1.

²⁸ *Id.*

²⁹ 47 C.F.R. § 1.429.

³⁰ *Id.* § 1.106(f).

a NPSPAC region was released on August 6, 2004, and appeared in the Federal Register on November 22, 2004.³¹ The freeze on accepting applications for Wave 4 NPSPAC regions was initiated June 2, 2006. In either case, Third District's argument that the freeze on applications should not be imposed until reconfiguration actually begins in NPSPAC Region 5 is late by several years.

10. Third District further argues that grant of its applications would not counter the purpose underlying the Commission's decision to suspend the filing and processing of applications because its applications seek the same authority afforded FedEx under FedEx's licenses, which were cancelled after initiation of the freeze. In particular, Third District contends that the purpose of the freeze is "to prevent the constant change of the spectrum landscape while rebanding is taking place"³² and that even if "the Commission wished to freeze the spectrum landscape for rebanding purposes" before reconfiguration begins, its applications do "not disturb that landscape."³³ Noting that it has "applied to use the frequencies under the precise parameters for which FedEx was previously authorized," Third District concludes that while its applications "may represent a new use of these frequency assignments for Third District, it does not represent any change in the use of the frequency assignments during virtually the entire time that the freeze on 800 MHz applications in Southern California has been in effect."³⁴

11. We disagree. First, contrary to Third District's claim, the Commission did not "freeze the spectrum landscape for rebanding purposes" or initiate the freeze "to prevent the constant change of the spectrum landscape *while rebanding is taking place*." Rather, the Commission imposed a freeze on the acceptance of new 800 MHz applications to ensure "a stable spectral status quo" in each particular NPSPAC region.³⁵ In particular, the Commission suspended acceptance of new applications, in this proceeding, to ensure a sufficient amount of spectrum would remain available for reconfiguration in any given NPSPAC region.³⁶ This is common practice when the Commission announces it intends to change the licensing scheme for a given service. The Commission's purpose in freezing the acceptance of applications in its proceedings is to stabilize spectrum inventory upon announcement of a change to its licensing rules to ensure spectrum will be sufficiently available to meet its ultimate objectives. In each proceeding, the Commission therefore determines the appropriate time for initiating a freeze. For example, in proceedings where the Commission has announced its intent to change a licensing regime from site-based to geographic area licensing, it has initiated freezes on accepting applications for the given service as early as the notice of proposed rulemaking stage.³⁷ In the 800 MHz proceeding, the

³¹ 69 Fed.Reg. 67823 (Nov. 22, 2004).

³² Waiver Requests at 1.

³³ *Id.*

³⁴ *Id.*

³⁵ *800 MHz Supplemental Order*, 19 FCC Rcd at 25159, ¶ 87.

³⁶ See Public Safety and Homeland Security Bureau Provides Guidance for Public Safety Licensee with Regard to License Application and Special Temporary Authorization Procedures and Payment of Frequency Relocation Costs for Public Safety Facilities Added During 800 MHz Band Reconfiguration, *Public Notice*, 21 FCC Rcd 14658, 14658 (PSHSB 2006) (stating that "[t]o preserve the spectrum landscape, [the Commission] provided for a freeze on 800 MHz applications during negotiations in each wave").

³⁷ See, e.g., In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3136, ¶ 139 (1996) (stating that "[b]ecause of the fundamental changes we are proposing in our paging licensing rules, we are suspending acceptance of new applications for paging channels as of the adoption date of the *Notice*," ... "[w]e believe that after the public has been placed on notice of our proposed rule changes, continuing to accept new applications under the current rules would impair the objectives of this proceeding," i.e., "to transition to a geographic licensing approach through competitive bidding").

Commission rejected a request to impose a freeze across the entire band for a multi-year period.³⁸ Instead, concerned that a blanket freeze across all regions at one time would have adverse effects on company business plans, the Commission found a middle ground by deciding to initiate suspension periods, by region, based on its determination of when reconfiguration would start in a given region.³⁹ In this case, the Commission did just that for Wave 4, but has had to extend the suspension period pending final agreements between the United States and Mexico.

12. Moreover, the Commission has stated that the TA must have a stable spectrum environment in which licensees are not allowed to change channels or expand their coverage.⁴⁰ While the Commission has allowed certain exceptions to the application freeze, it did not provide an exception to the freeze on accepting 800 MHz applications to allow for the filing of new applications where an incumbent licensee has cancelled a license during the suspension period. In fact, Third District has not shown that it meets any of the exceptions to the application freeze. Third District is not an incumbent licensee filing an application to modify an existing station to implement band reconfiguration, and it is not an incumbent licensee filing an application that neither changes the frequency nor expands the coverage area assigned to an existing station.⁴¹ Nor is Third District an incumbent licensee renewing a license or a party filing an application to assign or transfer a licensed station.⁴²

13. Finally, Third District asserts the freeze only applies to spectrum “cleared through the 800 MHz band reconfiguration process, i.e., either because Nextel has abandoned the spectrum or the incumbent licensee has been relocated by the Transition Administrator pursuant to a frequency relocation agreement with Nextel,” and that “[t]here is nothing in the Commission’s regulations or the applicable rulemaking orders to suggest that the freeze applies to spectrum that is abandoned outside the scope of the reconfiguration process.”⁴³ Third District confuses post-reconfiguration eligibility rules with the scope of the application freeze. Contrary to Third District’s assertions, the Commission imposed the freeze on accepting applications for new licenses on all 800 MHz frequencies in a given region pending the completion of the negotiation period under the reconfiguration process.⁴⁴

14. In this case, when FedEx cancelled its licenses for Stations WPUS566 and WPIE390, the spectrum associated with those licenses was returned to the Commission and is now part of its unlicensed 800 MHz spectrum inventory. Unlicensed spectrum held by the Commission is made available to the TA as replacement spectrum during the reconfiguration process, whether that spectrum was unlicensed before initiation of a suspension period or whether it became unlicensed during the suspension period upon cancellation of a license by Sprint Nextel or any other licensee. Moreover, we agree with Sprint Nextel that the Southern California NPSAC Region 5 is “both limited in available 800 MHz channels and

³⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204.

³⁹ *Id.*

⁴⁰ *800 MHz Memorandum Opinion and Order*, 20 FCC Rcd at 16057, ¶ 97.

⁴¹ *See 800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204 (stating that the freeze does not include modification applications filed to implement band reconfiguration or modification applications that do not change the frequency or expand the coverage area of existing systems).

⁴² *Application Freeze Public Notice*, 21 FCC Rcd at 6269 (reiterating that “the freeze does not apply to modification applications filed to implement 800 MHz band reconfiguration, modification applications filed that do not change an 800 MHz frequency or expand an 800 MHz station’s existing coverage area (e.g., administrative updates), assignments/transfers, or renewal-only applications”).

⁴³ Reply at 2.

⁴⁴ *800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204; *800 MHz Supplemental Order*, 19 FCC Rcd at 25159, ¶ 87.

heavily congested.”⁴⁵ We find that grant of Third District’s applications would be contrary to the purpose of the Commission’s application freeze in the 800 MHz band. Grant of Third District’s applications would reduce the amount of spectrum currently available for reconfiguration in the already congested Wave 4 NPSPAC border Region 5.

15. Finally, we reject Third District’s argument that the Commission must grant its applications because the Commission has granted similarly situated applications. Third District contends that because the Commission has granted other applications “seeking the use of 800 MHz channels in Southern California after the FCC announced that it was suspending the acceptance of 800 MHz applications,” it must also grant its applications.⁴⁶ To support its argument, Third District lists seven licenses granted during the Wave 4 suspension period – two granted in December 2009,⁴⁷ and five granted in April 2010.⁴⁸

16. We acknowledge that the applications for these licenses were granted in error in large part because of staff confusion at that time over which areas – entire NPSPAC regions or the Mexico border region – were affected by the freeze on applications.⁴⁹ We also note that frequency coordinators process applications that seek licenses for 800 MHz channels that are subject to a freeze and that do not include requests for waiver of the application freeze. Immediately upon discovering the problem, Mobility Division management created a “processing utility” that now assists staff in determining whether an application falls within the scope of the freeze. While we make every effort to ensure applications are processed correctly, sometimes errors do occur, and we correct those errors as we become aware of them and will continue to do so. Regardless, as the Commission has previously held, an erroneous grant of a license to a previous applicant is not grounds for granting a pending, in this case Third District’s, application.⁵⁰

⁴⁵ Opposition at 3.

⁴⁶ Waiver Requests at 1-2.

⁴⁷ FCC File No. 0004053127 (WQLD476), filed by Laing Electronics (Dec. 3, 2009) and FCC File No. 0004053211 (WQLD477), filed by Mobile Relay Associates (Dec. 3, 2009) (both granted December 14, 2009).

⁴⁸ FCC File No. 0004192319 (WQLR888), filed by Mobile Relay Associates (Apr. 6, 2010) (granted April 12, 2010); FCC File No. 0004207603 (WQLT274), filed by Mobile Relay Associates (Apr. 12, 2010) (granted April 20, 2010); FCC File No. 0004207604 (WQLT275), filed by Laing Electronics (Apr. 12, 2010) (granted April 20, 2010); FCC File No. 0004220500 (WQLV273), filed by Fisher Wireless Services Inc. (Apr. 21, 2010) (granted April 30, 2010); and FCC File No. 0004219378 (WQLV269), filed by Day Management Corp dba Day Wireless Systems (Apr. 23, 2010) (granted April 30, 2010).

⁴⁹ We note that, as already discussed, not all counties included in the NPSPAC border regions are included in the Mexico border region.

⁵⁰ See *In re Application of Quinnipiac College, Hamden, Connecticut for a Construction Permit to Modify the Facilities of Noncommercial Educational FM Station WQAQ*, *Memorandum Opinion and Order*, 8 FCC Rcd 6285, 6286, ¶ 12 (1993) (*Quinnipiac College*) (stating that we have previously held that prior erroneous grants of waivers of Commission requirements by staff will be given no precedential weight); *In the Matter of Mobilcom Pittsburg, Inc. et al.*, *Memorandum Opinion and Order*, 18 FCC Rcd 23053, 23059, ¶ 13, n.57 (PSPWD WT B 2003) (stating that an error in granting an application provides no basis for continuing to grant applications that are inconsistent with Commission rules or policies ... and that the appropriate course of action is to consider whether to take some action with respect to the affected license or licensee) (citing *In the Matter of Applications of Warren C. Havens*, *Memorandum Opinion and Order*, 17 FCC Rcd 17527, 17532, ¶ 11 (2002) (affirming that an error in granting applications would provide no basis for granting the petitioner’s applications) (citing *Quinnipiac College*, 8 FCC Rcd at 6286, ¶ 12).

17. We further note that not all 800 MHz applications filed within the suspension period for the Wave 4 U.S./Mexico NPSPAC regions have been granted. Most have not.⁵¹ Of particular note, on February 16, 2010, several months before Third District filed its applications, Exxon Communications Company (Exxon) filed an application to modify its license for trunked Industrial/Land Transportation 806-821/851-866 MHz (YO) Station WPXY896 located in Los Angeles County.⁵² The application sought authority to add frequency pairs that had been surrendered to the Commission after FedEx cancelled its licenses for Stations KNEC210 and KNDH606.⁵³

18. In its waiver request, Exxon explained that it had obtained coordination of the frequencies through Enterprise Wireless Alliance, confirming that the channels were not currently authorized for use by any other party within a 70-miles radius of its proposed site, and its understanding was that the channel pairs were “not designated for assignment to any other party (as replacement channels) for purposes of 800 MHz rebanding.”⁵⁴ Exxon’s application, however, was dismissed by letter dated September 25, 2010, explaining that:

⁵¹ For example, Worth Resources filed an application on May 21, 2009, along with a request for waiver of the Wave 4 freeze on 800 MHz applications, seeking authority to operate in Los Angeles county on frequency pairs 811/856.8375 and 813/858.8625 MHz. FCC File No. 0003847230, filed by Worth Resources (May 21, 2009). The request for waiver was denied and the application dismissed on August 4, 2009. ULS Reference No. 4890484 (File No. 0003847230) Notice of Dismissal (Aug. 4, 2009). The letter denying Worth Resources’ request for waiver explained that “[w]hile there is no impact to existing licensed stations, the frequencies requested may be needed to accommodate the reconfiguration of existing licensees. Given that the Mexico band plan is not finalized, the Commission does not know how licensees in L.A. will be impacted by the final band plan. Your proposed new operation would frustrate the intended purpose of the freeze which is to create a stable environment to plan and execute rebanding along the U.S.-Mexico border. Since your waiver request is denied, your application is deemed defective and is hereby dismissed.” *Id.*

Applications seeking authority to operate in the Wave 4 Southern California Region 5 on 800 MHz band frequencies that were processed through frequency coordination without requests for waiver of the application freeze have also been dismissed. *See, e.g.*, FCC File No. 0004224045, filed by Day Management Corp dba Day Wireless Systems (Los Angeles County) (Apr. 26, 2010) (dismissed as defective by letter dated July 3, 2010, stating that “[t]he request violates the application filing freeze instituted by DA 06-1183 on June 2, 2006 and recently extended by DA 10-1229 on June 30, 2010”); FCC File No. 0004638387, filed by Coachella Valley Water District (Imperial County) (Mar. 3, 2011) (dismissed as defective by letter dated April 16, 2011, stating that “[o]n March 31, 2011, the Wireless Bureau released Public Notice DA 11-583, which extends the freeze on new 800 MHz applications in the wave 4 region. The application is in conflict with the freeze, and hereby dismissed”); FCC File No. 0004809109, filed by Automobile Club of Southern California (Riverside, Orange, San Bernadino, Ventura, and Los Angeles Counties) (July 20, 2011) (dismissed as defective because the applicant did not amend its application as directed in the return letter, which stated “[t]his application is returned because it is proposing new 800 MHz operations within 70 miles of NPSPAC region 5,” and that because “[t]here is a freeze on the filing of 800 MHz applications in NPSPAC region 5, by Public Notice DA 10-1888, the applicant must request a waiver of the freeze”); and FCC File No. 0005041986, filed by Knox LaRue, Jr. (Kern County) (Jan. 23, 2012) (dismissed as defective by letter dated January 27, 2012, explaining that the application is “[d]ismissed pursuant to Section 1.934(d) as the proposed operation is within a freeze area (citing Public Notice DA 11-2087)).

⁵² FCC File No. 0004126322, filed by Exxon Communications Company, Att. “Request for Waiver” (Feb. 16, 2010) (Exxon Waiver Request).

⁵³ Exxon Waiver Request at 5, n.4. The license for Station KNEC210, authorized to operate on frequency pair 811/856.8625 MHz, was cancelled on January 14, 2009, FCC File No. 0003700457, filed by Federal Express Corporation (Jan. 13, 2009); and the license for Station KNDH606, authorized to operate on frequency pair 813/858.8625 MHz, was cancelled on November 18, 2009, FCC File No. 0004035076, filed by Federal Express Corporation (Nov. 17, 2009). Exxon’s application sought authority to add both frequency pairs to its license for Station WPXY896.

⁵⁴ *Id.* at 5.

Your waiver request of the Wave 4 filing freeze is contradictory to the purpose of the freeze which is to preserve spectrum for reconfiguration along the U.S.-Mexico border. Specifically, the frequencies which are requested and which became available as a result of the license cancellations by Federal Express Corporation may be needed for the reconfiguration process of other licensees. The spectrum congestion in the Los Angeles area makes such reconfigurations even more difficult.⁵⁵

While Exxon's application proposed to operate in a location different from those authorized under FedEx's cancelled licenses, the spectrum associated with the cancelled licenses was returned to the Commission to be included in the inventory made available for Wave 4 reconfiguration.

19. Accordingly, we conclude that Third District has failed to demonstrate that the underlying purpose of the Commission's freeze on accepting new applications in the 800 MHz band pending reconfiguration would be frustrated by application of the freeze in this case. In addition, Third District has not described any unique or unusual factual circumstances that would warrant waiver of the freeze. We therefore deny its request for waiver.

20. Even if Third District provided a basis on which to grant waiver of the freeze on accepting new 800 MHz applications in Wave 4 NPSAC Region 5, we deny its request for waiver of the Commission's minimum separation requirements for 800 MHz stations. We first note that Third District proposes to operate on frequency pair 812/857.4000 MHz at a location that falls within the Mexico border region. Section 90.619(a) of the Commission's rules provides that channels 231-710 authorized in the Mexico border region are offset 12.5 kHz lower in frequency than those frequencies specified in Section 90.613 of the Commission's rules.⁵⁶ Base frequency 857.4125 MHz is assigned channel number 367 under Section 90.613.⁵⁷ As a result, Third District's proposal to operate on base frequency 857.4000 MHz in the Mexico border region is co-channel with non-border region base frequency 857.4125 MHz. Because Third District proposes to operate on frequency pair 815/860.3375 MHz at a location outside the Mexico border region, the offset requirement of Section 90.619(a) does not apply. Base frequency 860.3375 MHz is assigned channel number 484 under Section 90.613.⁵⁸

21. Section 90.621(b)(4) of the Commission's rules provides that an applicant's proposed station in the 800 MHz band may be separated by less than 113 km (70 miles) by meeting certain power and antenna height combinations provided in the "Short-Spacing Separation Table" included in the rule section.⁵⁹ The minimum separation permitted between an applicant's proposed station and incumbent stations is, however, 88 km (55 miles).⁶⁰ Third District acknowledges in its waiver request that the location of its proposed station would be closer to two stations currently licensed to Nextel of California than the distance allowed under the rules.⁶¹ According to Third District, Nextel of California's station authorized under call sign WPSW921 to operate on frequency pair 812/857.4125 MHz is located 77.5 km (48 miles) from Third District's proposed co-channel station.⁶² In addition, Nextel of California's station

⁵⁵ ULS Reference No. 5027699 (File Number 0004126322) (Sept. 25, 2010).

⁵⁶ 47 C.F.R. § 90.619(a).

⁵⁷ *Id.* § 90.613.

⁵⁸ *Id.*

⁵⁹ *Id.* § 90.621(b)(4).

⁶⁰ *Id.*

⁶¹ Waiver Requests at 2.

⁶² *Id.*

authorized under call sign WPBQ920 to operate on frequency pair 815/860.3375 MHz is located 49.8 km (31 miles) from Third District's proposed co-channel station.⁶³ Sprint Nextel agrees with these distance calculations.⁶⁴

22. Even though its proposed stations would violate the minimum distances required, Third District argues that its request for waiver should be granted because Nextel of California's stations should not be afforded protection under the minimum distance rules. To support its argument, Third District first notes that "[b]ecause FedEx preceded Nextel's use of these channels, Nextel was authorized pursuant to the Commission's short-spacing rules."⁶⁵ Third District then asserts that Section 90.621(b)(6) of the Commission's rules provides "that when a licensee is short-spaced, the new licensee (in this case Nextel) cannot object when the incumbent user relocates its facilities, so long as the incumbent licensee's station does not extend its 22 dBu contour beyond its maximum 22 dBu contour."⁶⁶

23. We agree that Section 90.621(b)(6) of the Commission's rules addresses the situation where a co-channel 800 MHz station has been authorized as short-spaced, and the incumbent licensee of a station operating within the short-spaced distance wishes to modify its license. The rule section allows the incumbent licensee to modify its facilities as long as the modification does not extend its 22 dBu contour beyond its maximum 22 dBu contour in the direction of the short-spaced station.⁶⁷ We do not agree, however, that Section 90.621(b)(6) has any applicability at all in this proceeding. On the other hand, Section 90.621(b)(4) of the Commission's rules does.

24. Relying on Section 90.621(b)(6), Third District contends that because it "proposes to use the frequencies exactly as FedEx did, Nextel will experience no greater interference from its operations than it experienced from FedEx," and that "Nextel, as the short-spacing entity, should have no expectation of co-channel protection greater than it would have if FedEx remained the licensee."⁶⁸ Even though it acknowledges that it is not the incumbent licensee,⁶⁹ Third District's argument asks that we afford it, as an applicant for a new license, the same protections afforded an incumbent licensee authorized to operate on the same frequencies in the same locations. Third District, however, is not an incumbent licensee for purposes of Section 90.621(b)(6) or for any other purpose in this proceeding. Third District has not filed an application to modify an existing station license. Rather, FedEx would have been allowed before cancelling its licenses, as the incumbent licensee, to modify its stations so long as the modification did not extend beyond its 22 dBu contour in the direction of Sprint Nextel's stations. Third District, as a mere applicant, has no legal right or authority afforded under Section 90.621(b)(6) of the Commission's rules.

25. We also reject Third District's argument that the purpose of Section 90.621(b)(6) "is to not enrich the new licensee by giving it more rights than it had by short-spacing an incumbent licensee."⁷⁰

⁶³ *Id.*

⁶⁴ Opposition Exhibit A at 2-3. Sprint Nextel provides distance calculations for several stations that it considers would be short-spaced by the grant of Third District's application for frequency pair 812/857.4000 MHz. *Id.* at 2. With respect to Station WPSW921, Sprint Nextel calculates the distance between stations at 77.6 km. *Id.* Sprint Nextel's distance calculation for base station WNBQ920 is the same as that provided by Third District – 49.8 km. *Id.* at 3.

⁶⁵ Waiver Requests at 2.

⁶⁶ *Id.*

⁶⁷ 47 C.F.R. § 90.621(b)(6).

⁶⁸ Waiver Requests at 3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2-3.

Third District broadly contends that “application of the short-spacing rules, which are designed to protect existing licensees, is unnecessary in this case” and that “[t]o the contrary, if the short-spacing rules are applied, Nextel would receive a windfall – it would receive greater protection than it bargained for when it short-spaced FedEx.”⁷¹ Third District’s claimed purpose of Section 90.621(b)(6) is inaccurate and unfounded. The purpose of the rules provided in Section 90.621(b) is to protect the interference rights between an incumbent licensee and a new applicant in the 800 MHz band.⁷² Section 90.621(b)(6), in particular, protects the interference rights of both an incumbent licensee and a licensee authorized to operate within the minimum separation distance allowed with regard to the incumbent, while allowing the incumbent to modify its station operations.

26. If, however, the co-channel interference environment changes because an incumbent licensee cancels its license, Section 90.621(b) does not penalize the licensees remaining in the area affected by the cancellation. Rather, any so-called benefit received by those incumbent licensees is incidental and conveys no right to third parties, like Third District, to restore the interference status quo that existed before the license was cancelled. Thus, dismissal of Third District’s applications would not result in some sort of unjust enrichment or unauthorized windfall to Sprint Nextel or any other incumbent licensee operating in the area. Moreover, because we are denying Third District’s waiver requests and dismissing its applications, we do not address, at this time, Sprint Nextel’s claim that, because of rules that apply after completing reconfiguration in a NPSPAC region, granting Third District’s applications would result in a windfall for Third District.⁷³

27. As already discussed, once FedEx cancelled its licenses, the spectrum associated with those licenses was returned to the Commission. Any party seeking authority to operate where the cancelled licenses had been authorized to operate would be required to comply with the minimum separation requirements set forth in Section 90.621(b). In this case, Third District has made no attempt to comply with the requirements of Section 90.621(b)(4). Even though it acknowledges that its proposed stations would violate the minimum separation requirements, it has not submitted along with its request for waiver any statement as to whether either application is submitted for consideration under the Short-Spacing Separation Table, any type of interference analysis relevant to showing whether any co-channel stations would receive the same or greater interference protection provided in the Short-Spacing Separation Table, or any relevant analysis of interference potential from mobile transmitters to any

⁷¹ *Id.* at 3.

⁷² See In the Matter of Improving Public Safety Communications in the 800 MHz Band; new 800 MHz Band Plan for Puerto Rico and the U.S. Virgin Islands, *Order*, 25 FCC Rcd 15901, 15902, ¶ 5 (PSHSB 2010) (stating the “[t]he underlying purpose of Section 90.621(b) of the Commission’s rules is to prevent inter-station interference”).

⁷³ See Opposition at 5. In particular, Sprint Nextel states that “after completion of band reconfiguration in the region, Sprint Nextel must surrender its licenses for channels below 817/862 MHz, including the licenses that would be co-channel and entitled to short-spacing protection from Third District’s . . . applications if these licenses are not utilized in the reconfiguration of other licensees.” *Id.* Citing Section 90.617 of the Commission’s rules, 47 C.F.R. § 90.617, Sprint Nextel further claims that once it “surrenders the licenses for the interleaved channels below 815/860 MHz, only Public Safety Category applicants are eligible to apply for Sprint Nextel vacated channels for a period of three years after the release of a public notice announcing the completion of band reconfiguration in the region, and only Public Safety and Critical Infrastructure Industry Categories are eligible for three to five years after the release of a public notice announcing the completion of band reconfiguration in the region.” *Id.* Sprint Nextel concludes that “grant of the waiver and Third District’s application would likely reduce the amount of 800 MHz spectrum available to Public Safety applicants post-reconfiguration” and “[t]hus Third District, rather than Sprint Nextel, would be the entity receiving a windfall and unjust enrichment.” *Id.*

existing co-channel base station receivers.⁷⁴ In addition, Third District did not serve a copy of its applications on Nextel of California upon submission of its applications as required by the rule.⁷⁵

28. Accordingly, we further conclude that Third District has failed to demonstrate that the underlying purpose of Section 90.621(b) of the Commission's rules would be frustrated by application of the rule in this case. In addition, Third District has not described any unique or unusual factual circumstances that would warrant waiver of the minimum separation requirements for 800 MHz band stations. We therefore deny its request for waiver.

29. Finally, we find that, contrary to Third District's assertions, Sprint Nextel has standing to file its opposition. Citing Section 90.621(b)(6) of the Commission's rules once again, Third District argues that "the licensing of identical facilities to a new licensee entity is tantamount to a modification of the existing station without increasing the 22dBu contour in the direction of the incumbent's facilities,"⁷⁶ and that "[i]nsofar as Nextel would have no valid objection to such a modification, it likewise lacks standing to oppose the captioned applications."⁷⁷

30. We disagree. The grant of Third District's applications would have an adverse affect on Sprint Nextel because grant of the applications, as filed, would result in unacceptable levels of interference to at least two stations licensed in the area to incumbent licensee Nextel of California.⁷⁸ Third District is a new applicant required to protect Sprint Nextel's operations according to existing interference protection criteria. Sprint Nextel therefore meets the requirements of a party in interest in this proceeding. In addition, because Third District did not serve Sprint Nextel with copies of its applications as required by Section 90.621(b)(4) of the Commission's rules, the 30-day filing period for oppositions does not apply.⁷⁹ We therefore accept Sprint Nextel's Opposition as filed in a timely manner.

IV. ORDERING CLAUSES

Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131, 0.331, and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, the requests for waiver filed by Third District Enterprises, LLC in association with File Nos. 0004819360 and 0004819368 on July 28, 2011, ARE DENIED.

IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.131, 0.331, and 1.934, of the

⁷⁴ 47 C.F.R. § 90.621(b)(4).

⁷⁵ *Id.*

⁷⁶ Reply at 2.

⁷⁷ *Id.*

⁷⁸ See In the Matter of Applications of Commco Technology, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 19485, 19487, ¶ 6 (PSPWD WTB 2001) (finding the petitioner had standing because grant of a renewal application would cause an overlap in service areas causing the petitioner to have to limit its operations to protect the renewal station from interference).

⁷⁹ See 47 C.F.R. § 90.621(b)(4) (requiring applicants seeking a waiver of the minimum separation requirements for 800 MHz band stations to submit with their application a certificate of service indicating that, concurrent with the submission of the application to the Commission, all co-channel licensees within the applicable area were served with a copy of the application and all attachments, and further providing that "[l]icensees thus served" may file an opposition to the application with 30 days from the date the application was filed with the Commission). Third District's applications do not include a certificate indicating that it served Sprint Nextel with the applications along with the submission of its applications, and Third District does not dispute the omission.

Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.934, the applications for new licenses, File Nos. 0004819360 and 0004819368, filed by Third District Enterprises, LLC on July 28, 2011, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cyndi Thomas
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Wireless Telecommunications Bureau