

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

In the Matter of)
)
County of Gilpin, Colorado) File No. 0003731945

ORDER ON RECONSIDERATION

Adopted: April 9, 2012

Released: April 9, 2012

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

I. INTRODUCTION

1. The County of Gilpin, Colorado (Gilpin or County) filed a Petition for Reconsideration (Petition)¹ of the decision by the Licensing Branch (Licensing Branch) of the Public Safety and Homeland Security Bureau's Policy and Licensing Division to dismiss the County's application for authorization to operate on VHF Public Coast Station Channels 25 and 84. Pursuant to Section 1.106 of the Commission's rules,² and for the reasons stated below, we grant the Petition in part and deny it in part. Specifically, we grant the Petition with respect to Channel 25 and reinstate the application to the extent that Gilpin requests Channel 25. Further, with respect to Channel 25, we grant a waiver of the antenna height limit specified by Section 90.20(g)(3)(ii). However, we deny Gilpin's Petition with respect to Channel 84.³

II. BACKGROUND

2. On February 9, 2009, Gilpin filed an application for VHF public coast station (VPC) frequency pairs on Channels 25 and 84 to deploy a regional system with Clear Creek County, an adjacent county.⁴ Gilpin also filed a waiver request with respect to both channels for relief from the antenna height limitation in Section 90.20(g)(3)(ii).⁵ By letter dated February 25, 2009, the Licensing Branch

¹ Petition for Reconsideration, filed March 2, 2009 (Petition).

² 47 C.F.R. § 1.106.

³ See File No. 0003731945, "Supplemental Statement and Waiver Request" (Waiver Request). Gilpin requested waiver of Section 90.20(g)(5)(ii). Prior to the filing of Gilpin's application, the Commission redesignated Section 90.20(g)(5)(ii) as Section 90.20(g)(3)(ii). See *In the Matter of Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems*, WT Docket No. 04-344, *Second Report and Order*, 23 FCC Rcd 13711 (2008) (*AIS Second Report and Order*); *Erratum*, 24 FCC Rcd 3241, 3244-45 (2009) (*AIS Second Report and Order Erratum*); *recon. denied on other grounds*, Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, *Memorandum Opinion and Order*, 26 FCC Rcd 8122 (2011). See 47 C.F.R. § 90.20(g)(3)(ii).

⁴ See File No. 0003731945. Channel 84 consists of the frequency pair 157.225 and 161.825 MHz. Channel 25 consists of the frequency pair 157.250 and 161.850 MHz. See 47 C.F.R. §§ 80.371(c)(1)(i), 90.20(g)(2).

⁵ See Waiver Request.

dismissed Gilpin's application without prejudice, effective February 24, 2009, because "the requested channels are no longer assigned to the Public Safety Pool."⁶

3. On March 2, 2009, Gilpin filed the Petition seeking reinstatement of its application. Gilpin noted that while the Commission had reallocated Channel 84 from the Public Safety Radio Pool, it did not reallocate Channel 25.⁷ Gilpin argued that because only Channel 84 was reallocated, Gilpin should be allowed to remove Channel 84 from its application, "leaving a valid application for Channel 25."⁸ Gilpin further requested that the Commission consider assigning Channel 84 by waiver.⁹

III. DISCUSSION

4. The sole issue before us is whether the Licensing Branch acted properly in dismissing Gilpin's application for Channels 25 and 84. We agree that it is in the public interest to reconsider the dismissal of Gilpin's application for Channel 25. In the 2008 *Automatic Identification Systems (AIS) Second Report and Order*, the Commission redesignated Channel 84 from the Part 90 Public Safety Radio Pool to Part 80 for VPC communications.¹⁰ As Gilpin correctly notes, when the Commission took this action, it retained Channel 25 in the Public Safety Radio Pool.¹¹ We therefore find that the Licensing Branch's dismissal of Gilpin's application with respect to Channel 25 was in error, and we reinstate Gilpin's application to the extent that it requests Channel 25.

5. Having reinstated Gilpin's application for Channel 25, we also consider Gilpin's request for waiver of the antenna height limit under Section 90.20(g)(3)(ii).¹² Pursuant to the first prong of Section 1.925 of the Commission's rules,¹³ we find that the request for waiver is warranted because application of this rule would not serve the underlying purpose of the rule. The specific purpose of the antenna height limit is to protect incumbent coast station, public safety, and private land mobile licensees on maritime frequencies from interference.¹⁴ Gilpin has proposed contours for its operation on Channel 25 that it contends will avoid interference to (1) co-channel Public Safety licensees and (2) VHF Public

⁶ Letter from Public Safety and Homeland Security Bureau, FCC, Gettysburg, PA, to Steven Watson, County of Gilpin, CO (Feb. 25, 2009).

⁷ See Petition at 1; see *AIS Second Report and Order*, 23 FCC Rcd at 13724-25 ¶ 20 & n.91, 13734 ¶ 45.

⁸ Petition at 1.

⁹ *Id.*

¹⁰ See *AIS Second Report and Order*, 23 FCC Rcd at 13724 ¶¶ 19-20; *AIS Second Report and Order Erratum*, 24 FCC Rcd at 3241, 3244. See 47 C.F.R. §§ 80.371(c)(1)(i), 90.20(g)(2)(ii); 74 Fed. Reg. 23329 (2009). The Commission similarly redesignated Channel 85. See *id.*

¹¹ Sections 90.20(g)(2)(i)-(ii) formerly designated both Channels 25 and 84 in the Public Safety Radio Pool under Part 90. The Commission redesignated Channel 84 for VPC maritime use under Part 80 and revised Section 90.20(g)(2) to reflect only Channel 25 as designated under Part 90 for public safety use. See *AIS Second Report and Order*, 23 FCC Rcd at 13724 ¶ 20; *AIS Second Report and Order Erratum*, 24 FCC Rcd at 3241, 3244. See 47 C.F.R. §§ 80.371(c)(1)(i), 90.20(g)(2), (2)(i)-(ii); 74 Fed. Reg. 23329 (2009). See 47 C.F.R. §§ 80.371(c)(1)(i), 90.20(g)(2)(ii).

¹² 47 C.F.R. § 90.20(g)(3)(ii) (requiring that "[a]ntenna height (HAAT) must not exceed 122 meters (400 feet) for base stations . . ."). Commission rules specify that an applicant may be licensed on the channel pair for Channel 25 in excess of the specified limits if the applicant seeks a waiver of the limits and submits an interference analysis demonstrating that protected co-channel entities would receive the required level of protection. See 47 C.F.R. § 90.20(g)(3)(vi).

¹³ See 47 C.F.R. § 1.925(b)(3)(i).

¹⁴ See 47 C.F.R. §§ 90.20(g)(2)(i), (3)(iii).

Coast Station Service Areas (VPCSA) where the proposed channels are not allocated for Public Safety use.¹⁵ Based on our independent engineering analysis of Gilpin's proposal, we find it to be technically accurate and to demonstrate that grant of the waiver will not cause interference.

6. We are not persuaded, however, by Gilpin's request to reinstate and grant its application for Channel 84 by waiver. When Gilpin filed its original application in February 2009, the Commission had already suspended acceptance of public safety applications for Channel 84.¹⁶ Gilpin did not seek a waiver at the time to allow consideration of its application after the cut-off date, and therefore has presented no basis for reconsideration of the Branch's dismissal of this portion of the application. Moreover, even if we consider this portion of the Petition as a new waiver request rather than a petition for reconsideration, Gilpin has failed to satisfy the waiver standard under either of the two prongs set forth in Section 1.925.¹⁷

7. Under the first prong, a petitioner must show that "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."¹⁸ Gilpin claims that it "came as a . . . surprise" when the Commission cut off public safety applications for reallocated channels on the same day that it released the *AIS Second Report and Order*, but Gilpin concedes that it "miss[ed] the required filing date."¹⁹ In fact, Gilpin filed several months after the cut-off date and has failed to show how waiver of the cut-off would serve the public interest.²⁰ Specifically, we are not persuaded by Gilpin's assertion that a waiver is justified because it will provide "needed interoperability" for Gilpin and Clear Creek County "to install a regional interoperability system."²¹ Gilpin does not show that this interest outweighs the Commission's interest in ensuring an orderly transition to use of Channel 84 by VPC licensees pursuant to Section 80.371(c). In the *AIS Second Report and Order*, the Commission found that redesignating Channel 84 was necessary to provide VPC licensees with a replacement channel for Channel 87B, which the Commission had redesignated for AIS use.²² In view of the Commission's objectives, we find that accepting Gilpin's application with respect to Channel 84 would disrupt such a transition. Therefore, we find that Gilpin has presented no basis for waiver relief under this prong of Section 1.925.

¹⁵ See Waiver Request, Attachments 1, 3.

¹⁶ See *AIS Second Report and Order*, 23 FCC Rcd at 13724 ¶ 20 n.91 (similarly treating applications for Channel 85). See also 47 C.F.R. § 90.20(g)(2)(ii).

¹⁷ See 47 C.F.R. § 1.925(b)(3)(i)-(ii).

¹⁸ See 47 C.F.R. § 1.925(b)(3)(i).

¹⁹ Petition at 1.

²⁰ Regarding Gilpin's assertion that the Commission's suspension of applications from public safety entities for VPC Channels 84 "came as a . . . surprise", we find that Gilpin had sufficient notice of the Commission's proposal to redesignate the channel in inland VPCSA for VPC use. In 2006, the Commission sought comment "on whether, in the event [the Commission] designate[s] Channel 87B for exclusive AIS use nationwide, it would be appropriate to redesignate any of these set-aside channels [Channels 25, 84, and 85] for VPC use in order to avoid a negative impact on inland VPCSA licensees." See In the Matter of Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, *Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order*, 21 FCC Rcd 8892 8934-35 ¶ 60 & n.298 (2006).

²¹ Petition at 1.

²² See *AIS Second Report and Order*, 23 FCC Rcd at 13725 ¶ 21.

8. Under the second prong of Section 1.925, a petitioner must show that “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.”²³ Gilpin asserts that it “unsuccessfully attempted to reach sharing agreements with other licensees in the area” and that its inability to do so demonstrates that “it has no reasonable alternative in the immediate future to install a VHF interoperability system.”²⁴ However, the mere assertion that Gilpin unsuccessfully attempted to reach sharing agreements does not conclusively demonstrate that it has exhausted all alternatives for additional spectrum in order to implement its planned system. We therefore conclude that Gilpin has failed to justify a waiver under the second prong of Section 1.925. We urge Gilpin to work with its frequency coordinator, Forestry Conservation Communication ASOC, to explore its options.

IV. ORDERING CLAUSES

9. Accordingly, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s rules, 47 C.F.R. §1.106, we GRANT IN PART to the extent indicated, and OTHERWISE DENY, the Petition for Reconsideration filed by the County of Gilpin, Colorado on March 2, 2009.

10. We further RETURN TO PENDING STATUS File No. 0003731945, to the extent indicated herein, for further processing consistent with this Order and the Commission’s rules.

11. Accordingly, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.3 and 1.925 of the Commission’s rules, 47 C.F.R. §§ 1.3, 1.925, we also GRANT the Waiver Request, filed by the County of Gilpin, Colorado on February 9, 2009, associated with File No. 0003731945, to the extent indicated herein.

12. We take this action 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 and Licensing Division
Public Safety and Homeland Security Bureau

²³ See *id.* § 1.925(b)(3)(ii).

²⁴ *Id.* at 1.