

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

In the Matter of)
)
BATH TOWNSHIP, OHIO) File No. 0005353918
)
Application for Modification of License of Station)
Call Sign WNRM987)
)

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2013

Released: May 17, 2013

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

I. INTRODUCTION

1. Hereby, we deny a Petition for Reconsideration (Petition) filed by Bath Township, Ohio (Bath) of dismissal of its application for modification of license to increase the effective radiated power (ERP) of station call sign WNRM987 from 40 watts to 125 watts.

II. BACKGROUND

2. Bath is licensed in the 800 MHz band and subject to 800 MHz rebanding.¹ It represents that it “has completed the rebanding of its infrastructure, and is currently cleaning up the administrative details to enable closing to occur.”² In the course of rebanding, Bath effected an upgrade from an analog FM system to a Project 25 digital system. It contends that it lacks adequate in-building coverage from the new system, a contention that it attributes to a “change in Bath’s geography since its analog system was constructed.”³ Lacking the funds to build additional infrastructure to solve its in-building coverage problem, Bath elected the “timely and economical solution” of increasing ERP from 40 watts to 125 watts at its current site. Accordingly, Bath filed an application for modification of license including a consent letter from Sprint Nextel Corporation “and a statement that Bath’s coverage area would not increase.”⁴ The Commission dismissed Bath’s modification application, noting that a freeze on applications that expanded a station’s coverage contour was in effect and that “[c]learly raising the ERP from 40 watts to 125 watts increases the contour.”⁵ Bath, however, argues that it “does not have a need to expand its coverage in terms of distance from its existing transmitter site, but only to provide better coverage within

¹ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *et al.*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 (2004); Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004), review denied sub nom. Mobile Relay Associates v. FCC, 457 F.3d 1 (D.C. Cir. 2006); Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005); Second Memorandum Opinion and Order, 22 FCC Rcd 10467 (2007). See also Kay v. FCC, No. 06-1076 (D.C. Cir. filed Feb. 24, 2006) (holding additional appeals in abeyance).

² Petition for Reconsideration filed November 16, 2012. (Petition) at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.* quoting Commission return letter, Oct. 17, 2012.

its existing coverage area.”⁶

3. Bath represents that “the Bureau misinterprets the Commission’s freeze policy.”⁷ It argues that the initial purpose of the October 10, 2008 freeze on the submission of 800 MHz applications was “to create a stable spectral status quo during frequency reconfiguration.”⁸ Then, when the Commission extended the freeze on October 12, 2012, it stated that the extension was merited because:

some relocating licensees in the U.S. Canada border region have yet to conclude FRAs with Sprint, and most border region licensees have yet to complete their retunes. Accordingly, to preserve currently vacant channels for use by these licensees and avoid potential licensing conflicts that could delay rebanding we have determined that temporarily extending the freeze is in the public interest.⁹

4. Thus, Bath argues, “the Bureau extended the licensing freeze for a reason *other than* the reason cited by the Commission for having the freeze in the first place.”¹⁰ This, Bath contends, means that there “is absolutely no reason for the freeze to continue in the Canadian Border area other than in Washington State.”¹¹ It alleges that “the continuation of that freeze is contrary to the Commission’s intention in imposing the freeze and there is no valid rationale for holding public safety licensees hostage for more than four years.”¹²

5. Bath also argues that its application “is consistent with the Commission’s purpose for the freeze” because it has “absolutely zero impact on the TA’s ability to perform its frequency allocation work.” It also contends that the Commission “has always permitted 800 MHz licensees to move within their 800 MHz interference contour calculated at full power, despite the presence of any freeze, as such actions do not impact the licensing landscape.”¹³ Bath contends, therefore, that its “application is consistent with the rationale for the Commission’s imposition of the freeze.”¹⁴

III. DISCUSSION

6. Bath’s contention that 800 MHz licensees may move anywhere within their interference contour is plainly irrelevant and Bath’s citation to Section 90.621(b)(6) is unavailing. It is only “[a]pplications that have no effect on frequency or coverage (e.g., administrative updates, assignments/transfers, and renewal-only applications) [that] are exempt from the freeze.”¹⁵ Bath’s application clearly has an “effect . . . on coverage.” One cannot increase ERP from 40 watts to 125 watts,

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Id.* citing Third District Enterprises, LLC, *Order*, 27 FCC Rcd 1980 (WTB 2012).

⁹ Petition at 3-4 *quoting* Public Safety and Homeland Security Bureau Extends 800 MHz Application Freeze for Wave 4 Border Area Licensees Along the U.S.-Canada Border, *Public Notice*, 27 FCC Rcd 12340 (PSHSB 2012)(*October 12 Freeze Extension*).

¹⁰ Petition at 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 5, *citing*, e.g., 47 C.F.R. § 90.621(b)(6)(emphasis in original).

¹⁴ *Id.* at 5.

¹⁵ *October 12 Freeze Extension*, 27 FCC Rcd at 12341. (Emphasis supplied.)

all other things being equal, without increasing coverage.¹⁶ Thus Sprint's statement that "the increased ERP does not expand the contour of [Bath's] existing 800 MHz station WNRM987"¹⁷ is wrong as a matter of elementary physics.

7. It may be that Bath does not have a "need to expand its coverage"¹⁸ but only seeks to improve in-building coverage. Nonetheless, its application for increased power expands Bath's coverage contour contrary to the stricture of the *October 12, Freeze Extension*, and, therefore, was properly dismissed. Bath's reliance on Section 90.621(b)(6) of the Commission's rules¹⁹ is misplaced. The rule merely says that a short-spaced station, relative to another station that was short-spaced, may modify its facilities as long as the station's 22 dBu interference contour does not extend beyond the 22 dBu interference contour calculated based on maximum permitted ERP and antenna height. The cited rule does not override the *October 12 Freeze Extension* which affects all applications for increased coverage independent of whether those applications specify facilities that remain within the "full facilities" 22 dBu interference contour.

8. The *October 12 Freeze Extension* pointed Bath to a means of achieving its desired in-building coverage improvement:

for good cause shown, licensees may seek Special Temporary Authorization (STA) to expand their facilities or add channels during the freeze, based on an appropriate showing of public interest need as described in the Bureau's December 2006 *STA Guidance Public Notice*.²⁰

Inexplicably, Bath did not submit such a public interest need showing with its application, and chose instead to have the application dismissed and then to engage in a collateral attack on the *October 12 Freeze Extension* in the context of a petition for reconsideration of the dismissal of Bath's application.²¹

9. Bath's contention that the freeze is no longer required, except in Washington State, is incorrect. Rebanding is still progressing in the Canada border area. In the course of rebanding, some licensees have encountered interference, others have identified unforeseen combiner issues, both of which circumstances have necessitated frequency changes. Thus, the *October 12 Freeze Extension* is consistent with the purpose the Commission articulated when it first imposed the freeze: "to create a stable spectral status quo during frequency reconfiguration."²² Frequency reconfiguration is not complete in the Canada border, and it will not be until all stations are operating on their replacement frequencies. Moreover, we are not persuaded by Bath's strained argument that there is an inconsistency between the "maintain a stable spectral status quo" rationale underlying the freeze first imposed and the stated rationale of the *October 12 Freeze Extension*, i.e. "to preserve currently vacant channels for use by [relocating] licensees and avoid potential licensing conflicts that could delay rebanding." Indeed, the two rationales are

¹⁶ See, e.g., 47 C.F.R. § 73.699

¹⁷ Letter from Kyle Entz, Manager, Regulatory Affairs, Sprint Nextel Corp. to Public Safety and Homeland Security Bureau, Federal Communications Commission, dated April 6, 2012.

¹⁸ Petition at 2.

¹⁹ 47 C.F.R. § 90.621(b)(6).

²⁰ *October 12 Freeze Extension*, 27 FCC Rcd at 12341, citing Public Safety and Homeland Security Bureau Provides Guidance for Public Safety Licensees 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 (PSHSB 2006).

²¹ See Petition at 1-2.

²² See *supra* n.8.

complementary, not contradictory as Bath claims.

IV. DECISION

10. Bath could have sought Special Temporary Authorization pursuant to the *2006 STA Guidance Public Notice*; it could have sought waiver of the *October 12 Freeze Extension*. Instead, it chose to file an application inconsistent with the *October 12 Freeze Extension*, had that application properly rejected by the Bureau, and then attempted to litigate the *bona fides* of the *October 12 Freeze Extension* in the context of a petition for reconsideration of the application dismissal. Bath's resources would better have been spent by re-filing its application accompanied by a showing of need for an STA or a request for waiver.²³ Bath's application was properly dismissed pursuant to the *October 12 Freeze Extension* and its arguments to the contrary lack merit.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, that the petition for reconsideration filed November 16, 2012 by Bath Township, Ohio IS DENIED.

12. 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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²³ Any such filing from Bath will be considered on its merits; this *Memorandum Opinion and Order* should not be construed as advance approval of such a filing.