

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

In the Matter of)	
)	
CITY AND COUNTY OF SAN FRANCISCO)	FCC File Nos. 0005765176, 0005765178
)	and 0005765185
Request for Waiver and Extended Implementation)	
for Trunked Public Safety Stations WQKE739,)	
WQKE988 and WQMJ646)	

ORDER

Adopted: June 27, 2013

Released: June 27, 2013

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

I. INTRODUCTION

1. In this *Order*, we grant a request for waiver of Section 90.629 of the Commission's rules¹ filed by the City and County of San Francisco (San Francisco) on May 3, 2013 seeking to increase the extended implementation period for Trunked Public Safety Stations WQKE739, WQKE988 and WQMJ646.²

II. BACKGROUND

2. In 2008, the Public Safety and Homeland Security Bureau (Bureau) announced the availability of Sprint-vacated spectrum in the 809-809.5/854-854.5 MHz Band.³ In announcing the availability of Sprint-vacated spectrum, the Bureau emphasized that, due to the limited availability of these channels during the period of exclusive eligibility, "requests for extended implementation pursuant to Section 90.629 of the Commission's rules will be subject to a high level of scrutiny and will not be routinely granted."⁴

3. On April 21, 2009 and April 24, 2009, the Bureau authorized San Francisco to operate facilities under call signs WQKE739 and WQKE988, respectively, using five Sprint-vacated 800 MHz channels released pursuant to the *Vacated Spectrum Public Notice*.⁵ On August 24, 2010, the Bureau

¹ 47 C.F.R. § 90.629. (Applicants requesting frequencies for either trunked or conventional operations may be authorized a period of up to five (5) years for constructing and placing a system in operation in accordance with certain criteria.)

² See Request for Waiver of Section 90.629 - Extended Implementation Plan attached to File Nos. 0005765176, 0005765178 and 0005765185 (filed May 3, 2013)(Waiver Request).

³ Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Channels Relinquished by Sprint Nextel Corporation in the 809-809.5/854-854.5 MHz Band, WT Docket No. 02-55, *Public Notice*, 23 FCC Rcd 18343, 18344 (PSHSB 2008)(*Vacated Spectrum Public Notice*).

⁴ 47 C.F.R. § 90.629.

⁵ See FCC File Nos. 0003789143 (Mar. 27, 2009) and 0003799924 (Apr. 7, 2009). San Francisco is authorized to operate on frequencies 809/854.1125 MHz, 809/854.2375 MHz, 809/854.3125 MHz, 809/854.3875 MHz, and 809/854.4625 MHz.

authorized San Francisco to operate facilities on 700 MHz public safety narrowband spectrum under call sign WQMJ646.⁶

4. On March 24, 2010, San Francisco sought extended implementation for 800 MHz stations WQKE739 and WQKE988.⁷ On April 16, 2010, the Bureau dismissed the extended implementation applications for stations WQKE739 and WQKE988.⁸

5. On May 14, 2010, San Francisco filed a Petition for Reconsideration (Petition) arguing that the project in which the Sprint-vacated spectrum will be used is funded, is on schedule to be completed in approximately three years, and is essential for its public transportation system.⁹ In its Petition, San Francisco noted that the new communications system will replace its existing T-Band system.¹⁰ The Bureau granted San Francisco's reconsideration Petition on July 23, 2010 and authorized San Francisco's extended implementation plan for stations WQKE739 and WQKE988. That extended implementation authorization will expire on June 30, 2013.¹¹ San Francisco's extended implementation deadline to construct 700 MHz station WQMJ646 also expires on June 30, 2013.

6. San Francisco has filed two annual reports concerning the construction status of stations WQKE739, WQKE988 and WQMJ646. In the first annual report, San Francisco reported that the San Francisco Municipal Transportation Agency (SFMTA) was negotiating a contract with a vendor and expected that final contract award would be made by August 2011.¹² In the second annual report, San Francisco stated that vendor contract negotiations were not concluded until March 2012 and that the SFMTA Board had authorized contract award in April 2012. In its second report, San Francisco, contemplated completing construction by May 2014.¹³

7. On May 3, 2013, San Francisco filed the instant request for waiver seeking a revised extended implementation deadline of October 2, 2015 for stations WQKE739, WQKE988 and WQMJ646.¹⁴ In its waiver request, San Francisco states that the "San Francisco Municipal Transportation Agency . . . is in the final process of implementing the SFMTA Replacement Radio System."¹⁵ San Francisco notes that "[t]his multi-faceted communications network spans many different frequency bands and communications networks working to provide efficient and effective voice and data

⁶ See FCC File No. 0004289701 (Jun. 21, 2010).

⁷ See FCC File Nos. 0004184946 and 0004184956 (Mar. 24, 2010).

⁸ See Notice of Dismissal Reference Nos. 4969993 and 4969994 dated April 16, 2010.

⁹ Petition for Reconsideration filed May 14, 2010 by the City and County of San Francisco.

¹⁰ *Id.* at 2-4.

¹¹ See City and County of San Francisco, *Order*, 25 FCC Rcd 10057 (PSHSB 2010).

¹² See Annual Report for stations licensed under WQKE739, WQKE988 and WQMJ646 (dated June 16, 2011) attached to FCC File Nos. 0004773424, 0004773425 and 0004773408 (Jun. 20, 2011).

¹³ See Annual Report for stations licensed under WQKE739, WQKE988 and WQMJ646 (dated June 18, 2012) attached to FCC File Nos. 0005266759, 0005266777 and 0005266784 (Jun. 18 2012).

¹⁴ As part of its waiver request, San Francisco included a master implementation schedule highlighting the various licenses and applications that comprise the radio replacement project. For purposes of responding to San Francisco's waiver request, we limit our decision to stations WQKE739, WQKE988 and WQMJ646.

¹⁵ Waiver Request at 1.

operations.”¹⁶ It states that “due to the size, complexity, and budgeting for this system [it] is seeking to modify its extended implementation (“EI”) plan.”¹⁷ Because construction of these stations “will exceed the allowable 5-year [implementation] schedule by just a few months,” San Francisco states that “SFMTA also seeks a waiver of [47 C.F.R. § 90.629], and other applicable rules as required, in order to successfully implement and cut-over the entire SFMTA operation onto the new network.”¹⁸

8. In support of its waiver request, San Francisco provides “the final program schedule, an affirmation that these dates are contractually binding with the Prime Contractor [Harris Corporation], and, further, confirmation that the Radio Replacement Program is fully funded.”¹⁹ With regard to stations WQKE739, WQKE988 and WQMJ646, San Francisco states that “SFMTA will begin on-air operations by December 2, 2013 and be completed by May 31, 2014.”²⁰ San Francisco submits that “500+ User units” will be placed in service in May 2014.²¹ However, it does not anticipate that its system will fully meet the channel loading requirements of Section 90.631(b) of the Commission’s rules²² until October 2, 2015. It therefore requests a waiver of the “five-year limitation with final system construction (infrastructure and limited subscriber unit testing) of May 31, 2014 and full user transition by October 2nd, 2015.”²³ Finally, San Francisco certifies that the project budget for the SFMTA Radio Replacement project is fully funded (\$116 million) and that over \$13 million has been expended on the project to date.²⁴

III. DISCUSSION

9. To obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: (i) 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 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,²⁵ or the applicant has no reasonable alternative.²⁶ As discussed below, we find that the arguments supporting grant of San Francisco’s extended implementation plan are persuasive and that the grant of the waiver request is warranted.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ *Id.* at 7-8.

²¹ *Id.* at 5.

²² 47 C.F.R. § 90.631(b).

²³ *Id.* at 7-8.

²⁴ *See id.* at Appendix B: Letter to Michael J. Wilhelm, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, FCC from Sonali Bose, Chief Financial Officer, San Francisco Municipal Transportation Agency (dated Apr. 25, 2013).

²⁵ 47 C.F.R. § 1.925(b)(3)(i).

²⁶ 47 C.F.R. § 1.925(b)(3)(ii).

10. San Francisco has committed to complete infrastructure construction, place more than 500 user units in service, and complete final system construction (infrastructure and limited subscriber unit testing) by May 31, 2014. It requests, however, that it be given until October 2, 2015 to complete transition of all users to the new system, thereby to meet the channel loading requirements of Section 90.631(b) of the Commission's rules.²⁷

11. We see no indication that San Francisco is "warehousing" the spectrum authorized under station call signs WQKE739, WQKE988 and WQMJ646.²⁸ Rather, San Francisco has shown to our satisfaction that it will use that spectrum in a new regional system, and already has taken concrete steps toward implementing it, *e.g.*, developing an implementation schedule, awarding a contract, certifying funding and expending substantial funds on this project. We therefore believe that the underlying purpose of Section 90.629 – preventing the warehousing of spectrum to the exclusion of other potential users – would not be frustrated by grant of the requested waiver until October 2, 2015.

12. The record reflects that San Francisco's overall goals are to satisfy SFMTA's voice, data and capacity needs and replace its outdated system. We find that San Francisco has demonstrated that these objectives are consistent with the public interest. Because denying the requested relief would have serious implications on the proposed SFMTA regional system, we grant San Francisco its requested extension relative to stations WQKE739, WQKE988 and WQMJ646.

13. San Francisco also states that it has two pending applications for 800 MHz non-NPSPAC channels, file numbers 0005734398 and 0005734399, which have not yet been processed by the Bureau. Each such application has, as an attachment, the instant waiver request. To the extent these two pending applications are otherwise acceptable for filing, we will reach the request for extended implementation at such time as the applications are processed.

IV. ORDERING CLAUSES

14. Accordingly, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i); and Sections 1.925 and 90.629 of the Commission's rules, 47 C.F.R. § 1.925 and 90.629, the Request for Waiver of Section 90.629 and Extended Implementation Plan filed by the City and County of San Francisco is GRANTED to the extent discussed herein.

15. IT IS FURTHER ORDERED that FCC File Nos. 0005765176, 0005765178 and 0005765185 SHALL BE PROCESSED to the extent described herein.

16. 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
Deputy Chief, Policy Division
Public Safety and Homeland Security Bureau

²⁷ 47 C.F.R. § 90.631(b).

²⁸ See 47 C.F.R. § 90.629. See also Private Land Mobile Radio Rules, Part 90 Amended, PR Docket Nos. 79-191, 79-334, 79-107, 81-703, *Second Report and Order*, 90 FCC 2d 1281, 1300 (1982).