

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

In the Matter of)	
)	
CITY OF WEST PALM BEACH, FLORIDA)	File No. 0005394330
)	
Request for Waiver of the Commission's Rules to)	
Modify Conventional Public Safety Station)	
WNKD520)	

ORDER

Adopted: January 16, 2013

Released: January 16, 2013

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

I. INTRODUCTION

1. In this *Order*, we address the above-captioned application and waiver request filed by the City of West Palm Beach, Florida (West Palm Beach) which proposes to add a new site to its license for public safety station WNKD520.¹ West Palm Beach seeks a waiver of the application procedures for licensing spectrum vacated by Sprint Nextel Corporation (Sprint), *i.e.* it seeks to expand its use of frequency 858.1125 MHz before the date the frequency becomes available for licensing through the Commission's Vacated Channel Search Engine (the date on which the channel would normally become available for public safety use). For the reasons stated below, we deny West Palm Beach's waiver request and dismiss its application without prejudice. We advise West Palm Beach, however, that it may apply for frequency 858.1125 MHz under the vacated spectrum application and licensing procedures beginning on January 17, 2013.

II. BACKGROUND

2. West Palm Beach's license for station WNKD520 "covers two radio channels whose repeaters are located in the downtown area."² West Palm Beach states that the "two transmit frequencies 860.2125 MHz [and] 858.1125 MHz are assigned to Public Safety and used on a regular basis by Police Officers."³ West Palm Beach claims "the City's layout has changed dramatically in the past 20 years, showing a substantial growth in the Western communities."⁴ It asserts that this growth necessitates relocation of the two transmitters to a new tower site approximately six to seven miles west of the existing location.⁵ West Palm Beach intends to make the new location the primary station location with the existing location serving as a backup site should the new primary location fail.⁶ West Palm Beach submits that there have been no transmission related issues since the channel was first activated at its

¹ See Letter from the City of West Palm Beach to Federal Communications Commission (dated Mar. 5, 2012) (Waiver Request) attached to FCC File No. 0005394330 (filed Sep. 14, 2012) *re* WNKD520.

² Waiver Request at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

current location in 2004.⁷ West Palm Beach states that it retained the Association of Public-Safety Communications Officials-International, Inc. (APCO) to run a propagation study on the frequencies for the new location because of a conflict with facilities licensed to Sprint Nextel Corporation.⁸ APCO determined that 858.1125 MHz was not available for licensing at the new location.⁹

3. As part of 800 MHz band reconfiguration, Sprint is required to vacate channels in stages in the interleaved segment of the 800 MHz band as a function of rebanding progress in each NPSPAC Region.¹⁰ Once vacated, former Sprint channels become available for licensing to eligible public safety entities.¹¹ The Public Safety and Homeland Security Bureau (Bureau) issues a public notice specifying the date on which eligible entities may apply for Sprint-vacated channels.¹² The Bureau maintains a Vacated Channel Search Engine (VCSE) which eligible entities may use to search for available vacated channels to license in their geographic area.¹³

4. The channel West Palm Beach seeks to license (858.1125 MHz) is currently licensed to Sprint on an Economic Area (EA) basis in BEA031 (Miami-Fort Lauderdale FL).¹⁴ The channel will become available for licensing to public safety entities throughout Florida on January 17, 2013.¹⁵ Only then will the Bureau begin accepting applications for licensing of Sprint-vacated channels in the 809.5-8105/854.5-860 MHz (Channels 251-470) portion of the 800 MHz band¹⁶ Applications filed for channels

⁷ *Id.*

⁸ *Id.*

⁹ See Letter from Carol DiCaro, AFC Processor, APCO International, Inc., to FCC (dated Sept. 6, 2012) attached to FCC File No. 0005394330.

¹⁰ Improving Public Safety Communications in the 800 MHz Band, Relinquishment By Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, *Order*, 23 FCC Rcd 15966 (2008).

¹¹ See 47 C.F.R. § 90.617(g). Vacated channels are exclusively available for licensing to public safety eligible entities for three years after release and to public safety and Critical Infrastructure Industry eligible entities from three to five years after release. After five years, vacated channels return to their original pool category. *Id.*

¹² See 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, *Public Notice*, 23 FCC Rcd 18343 (PSHSB 2008) (*Vacated Spectrum PN Round 1*); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Certain Channels Relinquished by Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, *Public Notice*, 24 FCC Rcd 13236 (PSHSB 2009) (*Vacated Spectrum PN Round 2*); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Certain Channels Relinquished by Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, *Public Notice*, 25 FCC Rcd 16038 (PSHSB 2010) (*Vacated Spectrum PN Round 3*); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures For Channels in Non-Border Regions Relinquished by Spring Nextel Corporation in the 809.5-815/854.5-860 MHz Band, WT Docket 02-55, *Public Notice*, DA 12-1839 (PSHSB rel. Nov. 27, 2012) (*Vacated Spectrum PN Round 4*).

¹³ See Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Establish New 800 MHz Vacated Channel Search Engine for Identifying Vacated Channels in the 800 MHz Interleaved Band That Will Be Available for Licensing to Public Safety and Critical Infrastructure Industry Entities, *Public Notice*, 23 FCC Rcd 16481 (PSHSB, WTB 2008).

¹⁴ The BEA Economic Areas are delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce February 1995 and extended by the Federal Communications Commission, 62 FR 9636 (March 3, 1997).

¹⁵ *Vacated Spectrum PN Round 4*.

¹⁶ *Id.*

in the 809.5-815/854.5-860 MHz (Channels 251 – 470) portion of the band before January 17, 2013 will be dismissed.¹⁷ West Palm Beach filed its license modification application on September 14, 2012, well before the January 17, 2013 filing date, but requests a waiver to allow it to operate on frequency 858.1125 MHz at the new location specified in its license modification application. It acknowledges that the requested modification will expand the station's coverage "beyond the boundaries of its existing incumbent channel footprint,"¹⁸ and understands that Sprint has not yet surrendered frequency 858.1125 MHz in the BEA031 market.¹⁹ Therefore, West Palm Beach requests a waiver.

5. In support of its waiver request, West Palm Beach states that "incumbent has obtained RPC [Regional Planning Committee] (Region 7) approval for this application, including licensing of 858.1125 MHz at Location 3."²⁰ It advises that it "will accept a conditional license on this frequency at the requested location, pending Sprint's surrender of the channels in the expanded coverage areas."²¹ Finally, West Palm Beach states that "[g]rant of this waiver is in the public interest."²²

III. DISCUSSION

6. 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 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.²³

7. As noted above, the channel at issue will become available for licensing to public safety entities throughout Florida on January 17, 2013. The Bureau issued a public notice announcing application and licensing procedures for channels relinquished by Sprint. The Public Notice ensures that all public safety entities have an equal opportunity to apply for vacated spectrum. By granting West Palm Beach's waiver request, however, we would frustrate the underlying purpose of the Public Notice. Additionally, we find that West Palm Beach's "substantial growth" over the last twenty years is neither a unique nor unusual factual circumstance warranting that might otherwise warrant a waiver of the rules. All public safety licensees in the region are likely affected by some varying amount of growth. Furthermore, West Palm Beach has a readily available reasonable alternative; it may apply for frequency 858.1125 MHz on or after January 17, 2013. In sum, based on the information before us, we find that West Palm Beach failed to satisfy the Commission's waiver criteria. We therefore deny the waiver request and dismiss the associated application without prejudice.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to 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, that the Waiver Request filed by the City of West Palm Beach, Florida with respect to application FCC

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 47 C.F.R. §§ 1.925(b)(3)(i-ii). 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).

File No. 0005394330 IS DENIED.

9. IT IS FURTHER ORDERED that the Policy and Licensing Division of the Public Safety and Homeland Security Bureau SHALL DISMISS, WITHOUT PREJUDICE, application FCC File No. 0005394330 in accordance with this *Order* and the Commission's rules.

10. 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 and Licensing Division
Public Safety and Homeland Security Bureau