

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

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

ORDER ON RECONSIDERATION

Adopted: June 18, 2014

Released: June 18, 2014

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

I. INTRODUCTION

1. We have before us a petition for reconsideration filed on March 23, 2012, by Third District Enterprises, LLC (Third District).¹ On July 28, 2011, Third District filed the above-captioned applications for new conventional Industrial/Land Transportation 806-821/851-866 MHz (GO) licenses, along with requests for waiver of the Commission’s freeze on accepting 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.² The petition seeks reconsideration of an Order released by the Mobility Division (Division) on February 22, 2012, denying the requests for waiver and dismissing the applications.³ For the following reasons, we dismiss Third District’s petition as defective.

II. BACKGROUND

2. As fully described in the Division Order, in July 2004, the Commission reconfigured the 800 MHz band to eliminate interference to public safety communications in the band.⁴ To accomplish reconfiguration effectively and with limited adverse effect on licensees, the Commission determined that

¹ Petition for Reconsideration, filed by Third District Enterprises, LLC (Mar. 23, 2012) (Petition).

² FCC File Nos. 0004819360 and 0004819368, filed by Third District Enterprises, LLC, Atts. “Requests for Rule Waivers” (July 28, 2011).

³ In the Matter of Third District Enterprises, LLC Applications for New 800 MHz Stations in 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, 27 FCC Rcd 1980 (WTB MD 2012) (Division Order).

⁴ 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); 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).

band reconfiguration would be implemented by National Public Safety Planning Advisory Committee (NPSPAC) region.⁵ To maintain a stable spectral status quo during reconfiguration of each region, the Commission concluded that a freeze on accepting 800 MHz applications during the reconfiguration process would be appropriate.⁶ In particular, immediately upon release of the public notice announcing the negotiation period in a region,⁷ the Commission would no longer accept applications for new facilities, 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.⁸

3. The Transition Administrator (TA), who oversees the reconfiguration process, assigned each of the NPSPAC regions to one of four basic “prioritization waves” with staggered starting dates for implementing reconfiguration.⁹ 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.¹⁰ In relevant part, five Wave 4 NPSPAC regions share a border with Mexico, including Region 5 (Southern California),¹¹ where Third District proposed to locate its new stations. The freeze on accepting 800 MHz applications for non-NPSPAC channels in the Wave 4 NPSPAC regions was initiated on June 2, 2006.¹²

4. In addition to the designation of 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.¹³ The negotiations to modify the agreements

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

⁶ *Id.* at 15078, ¶ 204.

⁷ *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).

⁸ *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 (WTB PSCID 2005) (*Application Freeze Public Notice*). The Commission further determined that the freeze on applications would last 30 working days after the completion of mandatory negotiations for a given region. *800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204.

⁹ *800 MHz Report and Order*, 19 FCC Rcd 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*). The TA plan provided April 3, 2006, as the start date for Wave 4 regions. *TA Plan Public Notice*, 20 FCC Rcd at 5159.

¹⁰ *TA Plan Public Notice*, 20 FCC Rcd at 5160.

¹¹ The other NPSPAC regions that share a border with Mexico are Region 3 (Arizona), Region 29 (New Mexico), Region 50 (Central Western Texas (Midland Area)), and Region 53 (Southern Texas (San Antonio Area)).

¹² On June 2, 2006, the Wireless Telecommunications Bureau issued a public notice announcing July 3, 2006, as the date on which reconfiguration would begin for non-NPSPAC channels in the NPSPAC regions assigned to Wave 4. 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) (*Wave 4 Reconfiguration Public Notice*). The public notice further announced that, “effective immediately, we are freezing the filing of 800 MHz applications for non-NPSPAC channels in Wave 4.” *Id.* at 6268-69.

¹³ *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 800 MHz 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”).

between the United States and Mexico as a result of reconfiguration were ongoing for several years,¹⁴ culminating in the signing on June 8, 2012, of an amended Protocol for the 800 MHz band along the U.S.-Mexico border.¹⁵ Prior to issuing its public notice announcing the newly amended U.S.-Mexico Protocol, the Public Safety and Homeland Security Bureau (PSHSB) had extended the application freeze for Wave 4 NPSPAC regions along the U.S.-Mexico border to August 14, 2012.¹⁶ In its public notice announcing the signing of the amended U.S.-Mexico Protocol, the PSHSB further extended the filing freeze on new applications in the five NPSPAC regions along the U.S.-Mexico border as well as locations within 70 miles of the border of these regions until PSHSB established a rebanding timeline for the region and specified a date by which it could again begin accepting applications.¹⁷ Notably, the suspension period was in effect in the NPSPAC regions along the U.S.-Mexico border when Third District filed its applications.

5. After issuing a notice of proposed rulemaking,¹⁸ PSHSB released a report and order on April 1, 2013, adopting a reconfigured channel plan for the 800 MHz band along the U.S.-Mexico border based on the allocation plan in the newly amended U.S.-Mexico Protocol.¹⁹ On August 16, 2013, PSHSB released a public notice announcing August 23, 2013, as the start date for the 30-month transition period for rebanding along the U.S.-Mexico border.²⁰ Having announced the August 23, 2013 date, PSHSB furthermore extended the freeze on accepting 800 MHz applications through the entire transition period.²¹

¹⁴ In adopting its new 800 MHz band plan, 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. *800 MHz Report and Order*, 19 FCC Rcd at 14986, ¶ 25. As a result, the Commission afforded the TA flexibility in the timing of band reconfiguration to accommodate agreements with border countries, and 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.

¹⁵ Public Safety and Homeland Security Bureau Extends Voluntary 800 MHz Rebanding Negotiation Period for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Mexico Border Pending Establishment of Negotiation Timetable, *Public Notice*, 27 FCC Rcd 7312 (PSHSB 2012) (*U.S.-Mexico Protocol Public Notice*).

¹⁶ 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*, 27 FCC Rcd 3067, 3067 (PSHSB 2012) (*U.S.-Mexico Freeze Extension Public Notice*).

¹⁷ *U.S.-Mexico Protocol Public Notice*, 27 FCC Rcd at 7313.

¹⁸ In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Fourth Notice of Proposed Rule Making*, WT Docket No. 02-55, 27 FCC Rcd 9563 (PSHSB 2012). The rulemaking sought comment on a post-rebanding channel plan based on the newly amended U.S.-Mexico Protocol, as well as planning, mandatory negotiation, and mediation timelines for licensees along the U.S.-Mexico border. *Id.*

¹⁹ In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Fifth Report and Order*, WT Docket No. 02-55, 28 FCC Rcd 4085 (PSHSB 2013) (*800 MHz Fifth Report and Order*).

²⁰ Public Safety and Homeland Security Bureau Announces That the 30-Month Transition Period for 800 MHz Band Reconfiguration in Regions Along the U.S.-Mexico Border Will Commence on August 23, 2013, *Public Notice*, 28 FCC Rcd 12290, 12290 (PSHSB 2013) (*Timetable Public Notice*) (citing *800 MHz Fifth Report and Order*, 28 FCC Rcd at 4102, ¶ 53 (stating that “the transition period for rebanding along the U.S.-Mexico border will begin 60 days after the effective date of the *Fifth Report and Order*”). The *800 MHz Fifth Report and Order* appeared in the Federal Register on April 23, 2013, establishing an effective date for the order as June 24, 2013. 78 Fed.Reg. 23853 (Apr. 23, 2013). Thus, the transition period for rebanding along the U.S.-Mexico border commenced 60 days later on August 23, 2013.

²¹ *Timetable Public Notice*, 28 FCC Rcd at 12292. In response to commenters’ concerns that a longer transition period may be needed, PSHSB stated that it would evaluate progress as of the 18th month of the transition period to determine whether additional time is needed based on circumstances beyond licensees’ control. *800 MHz Fifth Report and Order*, 28 FCC Rcd at 4102, ¶ 54.

In particular, PSHSB stated that the Commission would not accept 800 MHz applications in the NPSAC regions along the U.S.-Mexico border, including Region 5, as well as applications for facilities located within 70 miles of the NPSAC region borders, until February 24, 2016.²²

6. PSHSB also reiterated, in its August 16, 2013 public notice, the Commission's decision that the freeze applies only to applications for new facilities or modification applications that involve a change of frequency or expand a station's existing coverage area, and that applications that do not affect frequency or coverage, including administrative updates, assignments or transfers of control, and renewal-only applications, are not subject to the freeze.²³ We note that the Commission further determined that the freeze does not include modification applications filed to implement band reconfiguration.²⁴ Even those modification applications, however, filed to implement reconfiguration, which do change frequencies, will not be accepted if they propose to expand the coverage area of an existing system.²⁵ PSHSB further reiterated that special temporary authorizations (STAs) and the Commission's waiver process were available under certain circumstances to avoid prejudice to licensees during the reconfiguration process.²⁶

7. While the U.S.-Mexico negotiations were ongoing, on July 18, 2011, Federal Express Corporation (FedEx) filed applications to cancel its 800 MHz licenses for Stations WPUS566 and WPIE390 located in Southern California.²⁷ The cancellations were accepted the following day, on July 19, 2011.²⁸ On July 28, 2011, Third District filed its applications proposing to operate on the same frequencies and from the same locations that had previously been authorized under FedEx's cancelled licenses.²⁹ As already explained, Third District proposed to operate its facilities in Wave 4 NPSAC Region 5, and, as a result, requested a waiver of the freeze on the acceptance of 800 MHz applications in that region. Acknowledging that the locations of its proposed stations were within 88 km (55 miles) of two stations currently licensed on the same frequencies to Nextel of California, Inc. (Nextel of

²² *Timetable Public Notice*, 28 FCC Rcd at 12292.

²³ *Id.*

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

²⁵ *800 MHz Memorandum Opinion and Order*, 20 FCC Rcd at 16057-58, ¶ 98.

²⁶ *Timetable Public Notice*, 28 FCC Rcd at 12293. PSHSB explained that incumbent licensees on pre-rebanding channels proposing to expand coverage or add a new channel during the freeze may seek STAs based upon appropriate showings of public interest need. *Id.* In addition, incumbent licensees on post-rebanding channels proposing to expand coverage or add a new channel during the freeze may apply for permanent authorization provided they include a request for waiver of the freeze with their application. In either case, licensees must include a concurrence letter from the TA along with their STA request or application and waiver request. *Id.*

²⁷ FCC File Nos. 0004805372 (WPUS566) and 0004805483 (WPIE390), filed by Federal Express Corporation (July 18, 2011).

²⁸ ULS Reference Nos. 5189244 (WPUS566) and 5189252 (WPIE390) Notice of License Cancellation (July 19, 2011).

²⁹ In particular, Third District's application file number 0004819368 sought authority to operate a new conventional Industrial/Land Transportation 806-821/851-866 MHz (GO) license on frequency pair 815/860.3375 MHz on Sunset Peak in Los Angeles County, California – the same frequencies previously authorized under the canceled FedEx license for Station WPUS566 – and Third District's application file number 0004819360 sought authority to operate a new conventional Industrial/Land Transportation 806-821/851-866 MHz (GO) license on frequency pair 812/857.4000 MHz on Polamar Mountain in San Diego County, California – the same frequencies previously authorized under the canceled FedEx license for Station WPIE390. In addition, 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.

California), Third District also requested waiver of Section 90.621(b) of the Commission's rules,³⁰ which sets forth the minimum separation requirements between co-channel stations in the 800 MHz band.

8. The *Division Order* denied both requests for waiver for each application because Third District did not meet either prong of the Commission's standard for granting the requests.³¹ Third District primarily argued in its waiver requests that because its applications sought the same authority afforded under FedEx's licenses, grant of the applications would not impede the rebanding process or disturb the spectrum landscape for rebanding purposes. The *Division Order* rejected this argument explaining that when FedEx cancelled its licenses, the spectrum associated with those licenses was returned to the Commission as part of its unlicensed 800 MHz spectrum inventory.³² The *Order* further explained that 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 a suspension period upon cancellation of a license by Sprint Nextel or any other licensee.³³ Moreover, the *Division Order* found that petitioner's applications did not fall within any of the Commission's exceptions to the freeze afforded incumbent licensees.³⁴

9. To support its contention that the applications did not "disturb the landscape" for reconfiguration in the region, Third District argued that the underlying purpose of the Commission's decision to suspend the filing and processing of applications was to "prevent the constant change of the spectrum landscape while rebanding is taking place." Third District further argued that because reconfiguration had not begun in NPSPAC Region 5 pending a new agreement with Mexico, the freeze on applications should not be imposed until reconfiguration actually began in that region. The *Division Order* rejected Third District's argument as a late-filed petition for reconsideration of the Commission's decision in 2004, in its *800 MHz Report and Order*, to initiate a freeze on 800 MHz applications upon issuance of a public notice announcing the commencement of the negotiation period for a region.³⁵ The *Division Order* further explained that the Commission imposed a freeze on the acceptance of applications in a region to ensure "a stable spectral status quo" so that a sufficient amount of spectrum would be made available for reconfiguration in that region.³⁶

10. The *Division Order* also rejected Third District's argument that the Commission must grant its applications because the Commission had granted similarly situated applications. As the *Division Order* explained, and as the Commission has previously held, an erroneous grant of a license to a previous applicant is not grounds for granting pending, in this case Third District's, applications.³⁷ The *Division Order* therefore concluded that grant of Third District's applications would be contrary to the Commission's freeze on accepting applications for new licenses in the 800 MHz band.³⁸

³⁰ 47 C.F.R. § 90.621(b).

³¹ *Division Order*, 27 FCC Rcd at 1983, ¶ 8 and 1991, ¶ 28.

³² *Id.* at 1985, ¶ 14.

³³ *Id.*

³⁴ *Id.* at 1985, ¶ 12.

³⁵ *Id.* at 1983-84, ¶ 9. The *Division Order* also rejected the argument as a late-filed petition for reconsideration of the actual initiation of the freeze on accepting applications for Wave 4 NPSPAC regions on June 2, 2006. *Id.*

³⁶ *Id.* at 1984, ¶ 11 and 1985, ¶ 13. The *Division Order* also explained that the decision to freeze the acceptance of applications is common practice when the Commission announces it intends to change the licensing scheme for a given service. *Id.* at 1984, ¶ 11.

³⁷ *Id.* at 1986, ¶ 16.

³⁸ *Id.* at 1985, ¶ 14.

11. Finally, the *Division Order* rejected Third District's argument that it should be afforded the protections allowed under Section 90.621(b)(6) of the Commission's rules. That rule section permits an incumbent licensee that has been short-spaced by a "new" licensee to relocate its facilities as long as the incumbent licensee's station does not extend its 22 dBu contour beyond its maximum 22 dBu contour.³⁹ In this case, Nextel of California obtained licenses for stations that operated within the minimum separation distance allowed under the Commission's short-spacing rules with respect to FedEx's licenses for Stations WPUS566 and WPIE390. Acknowledging that it was not an incumbent licensee, Third District claimed that granting its applications would serve the purpose of Section 90.621(b)(6), which, according to Third District, was to not enrich the "new" licensee, in this case Nextel of California, by giving it more rights than it had by short-spacing an incumbent licensee. Third District argued that Nextel of California should have no expectation of co-channel protection greater than it would have if FedEx remained the licensee.

12. Rejecting Third District's claimed purpose of the rule section as inaccurate and unfounded, the *Division Order* explained that the purpose of Section 90.621(b)(6), in particular, is to protect 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.⁴⁰ The *Division Order* concluded that Third District, as a mere applicant, had no legal right or authority under Section 90.621(b)(6).⁴¹ The *Division Order* further found that 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 in the area,⁴² and that Third District had made no attempt to comply with the short-spacing requirements of Section 90.621(b)(4) of the Commission's rules.⁴³

13. In response to the denial of its waiver requests and dismissal of its applications, Third District filed its petition on March 23, 2012. On April 2, 2012, Nextel of California, a wholly-owned subsidiary of Sprint Nextel Corporation (collectively "Sprint Nextel"), filed an opposition in a timely manner asking the Commission to deny Third District's petition for reconsideration.⁴⁴ Third District filed a reply on April 16, 2012,⁴⁵ after the filing deadline, and a motion to accept the late filing.⁴⁶

³⁹ 47 C.F.R. § 90.621(b)(6).

⁴⁰ *Division Order*, 27 FCC Red at 1990, ¶ 25.

⁴¹ *Id.* at 1989, ¶ 24.

⁴² *Id.* at 1990, ¶ 26.

⁴³ *Id.* at 1990-91, ¶ 27 (citing 47 C.F.R. § 90.621(b)(4)). In particular, the *Division Order* stated that Third District did not submit along with its requests for waiver any statements as to whether either application was 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 existing co-channel base station receivers. *Id.* In addition, Third District did not serve a copy of its applications on Nextel of California upon submission of its applications as required by Section 90.621(b)(4). *Id.*

⁴⁴ Opposition of Nextel of California, Inc. to the Third District Enterprises, LLC Petition for Reconsideration, filed by Sprint Nextel Corporation (Apr. 2, 2012).

⁴⁵ Reply to Opposition to Petition for Reconsideration, filed by Third District Enterprises, LLC (Apr. 16, 2012) (Reply).

⁴⁶ On April 12, 2012, Third District filed a motion for extension of time to file its reply. Motion for Extension of Time, filed by Third District Enterprises, LLC (Apr. 12, 2012). Sprint Nextel, the only other party in this proceeding, did not oppose the motion. The filing deadline for Third District's reply was April 12, 2012, and the reply was submitted four days late because Third District's counsel was unexpectedly diverted by other pressing matters. No objection having been raised by Sprint Nextel, Third District's motion is granted and its reply accepted.

III. DISCUSSION

14. We dismiss Third District's petition as defective because the arguments presented in the petition do not comply with the procedural requirements of Section 1.106(c) of the Commission's rules. Under that rule section, a petition for reconsideration that relies on new facts or arguments may be granted only if the facts or arguments "relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters" or "the petition relies on facts or arguments unknown to the petitioner until after its last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity."⁴⁷ The designated authority may also determine that consideration of new facts or arguments is in the public interest.⁴⁸ A petition for reconsideration that simply reiterates arguments that were previously considered and rejected, however, will be dismissed.⁴⁹

15. In its petition, Third District continues to present arguments to support its claim that because the "footprint for the proposed stations were totally within the footprint of licenses only recently surrendered by FedEx," ... "the proposed facilities would not change the status quo or otherwise upset the stability of the spectrum environment for purposes of 800 MHz band reconfiguration."⁵⁰ We again note that incumbent licensees may voluntarily cancel a license to implement reconfiguration and, as an exception to the freeze, incumbent licensees may file modification applications to change frequencies to implement reconfiguration. Third District now argues that the Commission also intended to allow a "new applicant" to file under Commission waiver procedures an application that seeks authority to operate on 800 MHz spectrum, where the application is filed soon after the spectrum on which it proposes to operate becomes unlicensed for reasons other than implementing reconfiguration during a period in which the freeze is in place. Third District also contends that because its applications propose to operate within the authority previously allowed under the "recently" cancelled FedEx licenses, the applications should be treated as if FedEx assigned its licenses to Third District, rather than cancelling them.

16. We find that Third District's petition does not rely on any new facts at all or on any circumstances that have changed since it filed its waiver requests. The petition does not present any arguments that were unknown to Third District before filing its waiver requests or that were related to events or circumstances that changed after Third District filed its waiver requests. Rather, the arguments Third District presents in its petition simply extend the debate on matters that were previously considered and rejected in the *Division Order*. It is well established that "rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken."⁵¹ Accordingly, we dismiss Third District's petition as defective under Section 1.106(c) of the Commission's rules.

⁴⁷ 47 C.F.R. § 1.106(c)(1) (referencing *id.* § 1.106(b)(2)).

⁴⁸ *Id.* § 1.106(c)(2).

⁴⁹ In re Applications of WWIZ, Inc., Lorain, Ohio, *Memorandum Opinion and Order*, 37 F.C.C. 685, 686, ¶ 2 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*).

⁵⁰ Petition at 1.

⁵¹ *WWIZ*, 37 F.C.C. at 686; see In re Applications of Carolyn S. Hagedorn, *Memorandum Opinion and Order*, 11 FCC Rcd 16951696, ¶ 11 (1996) (finding that staff did not err in refusing to consider new facts in applicant's petition for reconsideration, even where the facts arguably were an "expansion" of matters raised in the initial application); In the Matter of Samuel Moses PR; Kevin R. Nida, and James A. Kay, Jr., *Order on Partial Reconsideration*, 25 FCC Rcd 8389, 8391, ¶ 5 (WTB 2010) (rejecting petitioner's argument that new facts may be added to the record on reconsideration if the facts constitute "variation, amplification, or clarification" of previous arguments).

17. Even if its petition were not defective, the arguments Third District presents in its petition do not meet the Commission's waiver standard or show that its applications should otherwise be granted upon reconsideration. The text of the *800 MHz Report and Order*, which announced the application freeze, is at the heart of this dispute and so bears quoting at some length. In its decision, the Commission stated that:

[W]e will freeze 800 MHz applications for a region when we issue the *Public Notice* announcing the date when voluntary negotiation of relocation agreements must be concluded. This freeze will last until thirty working days after the completion of mandatory negotiations for a given Region. However, such a freeze would not include the modification applications filed to implement band reconfiguration. Moreover, we will do everything possible to minimize the effect the incremental freezes may have on incumbent licensees and new applicants, and direct the Transition Administrator to make accommodations in the implementation plan that will avoid such adverse effects. Moreover, we will not freeze the acceptance of modification applications that do not change the frequency or expand the coverage area of existing systems. Finally, we remind potentially affected parties of the availability of the Commission's waiver process and Special Temporary Authorizations when needed in order to avoid prejudice to any applicant during the band reconfiguration process.⁵²

18. Five months later in its *800 MHz Supplemental Order*, referencing the statement just quoted, the Commission reiterated its decision to impose the freeze on the acceptance of new 800 MHz applications and expanded the area in which the freeze applied. In particular, the Commission stated that:

To ensure a stable spectral status quo in a particular NPSPAC region, we concluded that we would freeze the acceptance of new 800 MHz applications beginning when we issue the *Public Notice* announcing the date when voluntary negotiation of relocation agreements must be concluded in that region until thirty working days after the completion of mandatory negotiations in that region. We now recognize, however, that the spectrum environment in a NPSPAC region can be affected by stations up to seventy miles from the region boundaries. Accordingly, the referenced *Public Notice* freezing the acceptance of applications will apply to systems within, and up to seventy miles outside, the boundaries of the NPSPAC region.⁵³

Finally, nearly every public notice addressing the Wave 4 application freeze after the Commission issued its orders in 2004, reiterates these policies. In particular, each states that immediately upon release of the public notice specifying the negotiation period for a NPSPAC region, the Commission will no longer accept applications for new facilities or modification applications that involve a change of frequency or expand a station's existing coverage area, and that applications that do not affect frequency or coverage, including administrative updates, assignments of authorizations or transfers of control, and renewal-only applications, are not subject to the freeze.⁵⁴

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

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

⁵⁴ See e.g., *Timetable Public Notice*, 28 FCC Rcd at 12292; *U.S.-Mexico Protocol Public Notice*, 27 FCC Rcd at 7313; *U.S.-Mexico Freeze Extension Public Notice*, 27 FCC Rcd at 3067-68; 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 17127, 17127-28 (PSHSB 2011); *id.*, 26 FCC Rcd 13526, 13526 (PSHSB 2011); *id.*, 26 FCC Rcd 9408, 9408-09 (PSHSB 2011); *id.*, 26 FCC Rcd 4999, 4999-5000 (PSHSB 2011); *id.*, 25 FCC Rcd 17861, 17861-62 (PSHSB 2010); *id.*, 25 FCC Rcd 13697, 13697-98 (PSHSB 2010); *id.*, 25 FCC Rcd 8403, 8403-04 (PSHSB 2010); *id.*, 25 FCC Rcd 3244, 3244-45 (PSHSB 2010); *id.*, 24 FCC Rcd 14774, 14774-75 (PSHSB 2009); *id.*, 24 FCC Rcd 12177, 12177-78 (PSHSB 2009); *id.*, 23 FCC Rcd 18353, 18353-54 (PSHSB 2008); *id.*, 23 FCC Rcd 14162, 14162-63 (PSHSB 2008); *id.*, 23 FCC Rcd 10177, 10177-78 (PSHSB 2008); Public Safety and Homeland Security Bureau Extends Negotiation Period Between Sprint Nextel and Border Area Non-NPSPAC Licensees in Wave 4, Stage 1 of 800 MHz Band Reconfiguration, *Public Notice*, 22 FCC Rcd 17348, 17348 (PSHSB 2007); *id.*, 22 FCC Rcd 11658, 11658-59 (PSHSB 2007); *id.*, 22 FCC Rcd

(continued....)

19. Third District's first argument relies on two words extracted from the Commission's discussion on the 800 MHz application freeze. Citing the Commission's reference in the *800 MHz Report and Order* to minimizing the effects the freeze may have on "new applicants," Third District asserts that the Commission "both envisioned and mandated" the processing of 800 MHz applications filed by "new applicants" under its waiver procedures for spectrum that becomes unlicensed during a suspension period for reasons other than implementation of reconfiguration.⁵⁵ We disagree. In deciding to "do everything possible to minimize the effect the incremental freezes may have on incumbent licensees and new applicants," the Commission stated that it would "not freeze the acceptance of modification applications that do not change the frequency or expand the coverage area of existing systems."⁵⁶

20. As Third District acknowledges, because they also do not change the frequency or expand the coverage area of an existing system, assignment of authorization or transfer of control applications are included among the exceptions to the freeze.⁵⁷ As Third District further acknowledges, the language "new applicants," on which it so heavily relies, takes into account those assignment and transfer of control applications, both of which, we note, are filed by an incumbent licensee and a new applicant – the assignee or transferee.⁵⁸ Importantly, while both types of applications involve "new applicants," neither involves a change in frequency or expands the coverage area of an existing system operating on licensed spectrum. Third District's applications involve not only a new applicant, but seek authority to operate new facilities on currently unlicensed 800 MHz spectrum. Third District fails to show how its cited reference to "new applicants" would include an application seeking authority to operate on unlicensed 800 MHz spectrum when the Commission has specifically stated that the freeze applies to new 800 MHz applications.

21. For the same reasons, we reject Third District's argument that "in terms of any potential impact on the 800 MHz reconfiguration process, there is no difference between" Third District's applications and FedEx assigning its licenses to Third District.⁵⁹ In particular, petitioner argues that

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6543, 6543-44 (PSHSB 2007); Public Safety and Homeland Security Bureau Announces That 800 MHz Band Reconfiguration Will Commence February 1, 2007, in the NPSPAC Regions Assigned to Wave 4 for NPSPAC Channels, *Public Notice*, 21 FCC Rcd 15046, 15047-48 (PSHSB 2006); Public Safety and Homeland Security Bureau Announces Extension of Negotiation Period Between Sprint Nextel and Border Area Non-NPSPAC Licensees in Wave 4, Stage 1 of 800 MHz Band Reconfiguration, *Public Notice*, 21 FCC Rcd 14990, 14991, n.8 (PSHSB 2006); *Wave 4 Reconfiguration Public Notice*, 21 FCC Rcd at 6268-69; and *Application Freeze Public Notice*, 20 FCC Rcd at 8906.

We note that, in its *800 MHz Report and Order*, the Commission expressly delegated authority to the Wireless Telecommunications Bureau's then Public Safety and Critical Infrastructure Division (PSCID) to approve, among other things, the TA's reconfiguration plan and to issue public notices announcing the start date for the negotiation period in each NPSPAC region. *800 MHz Report and Order*, 19 FCC Rcd at 15075-77, ¶ 201. Under a reorganization in 2006, many PSCID duties, including delegated authority for handling 800 MHz band reconfiguration issues, were transferred from the Wireless Telecommunications Bureau to the Public Safety and Homeland Security Bureau. In the Matter of Establishment of the new Public Safety and Homeland Security Bureau and Other Organizational Changes, *Order*, 21 FCC Rcd 10876 (2006).

⁵⁵ Petition at 2-4.

⁵⁶ *800 MHz Report and Order*, 19 FCC Rcd at 15078, ¶ 204. In its reply, Third District further contends that "the plain language of the Report and Order makes clear that the [modification application] exclusion is not limited to applications by incumbents," but that the plain language clearly contemplates "new applicants." Reply at 2-3.

⁵⁷ See Reply at 2 (stating that the Commission has allowed "assignment of license applications" as an exception, in addition to modification applications filed by incumbent licensees that do not change frequency or expand the coverage area of an existing system, "where someone other than the incumbent licensee is permitted to acquire new (for it) 800 MHz authority notwithstanding the freeze").

⁵⁸ See *id.*

⁵⁹ Petition at 3.

“there is no significant difference between an application by a proposed assignee and an applicant such as Third District in this case. In both cases, the incumbent licensee is giving up authority that is being assumed by a new applicant. Third District’s ‘new’ applications have no greater or lesser impact on the reconfiguration process than had they been applications for consent to assignment of the same authority. There is no lawful basis for treating the two types of applications differently.”⁶⁰ We agree with Third District that in granting an assignment application, the incumbent licensee is giving up authority that is immediately assumed by a “new applicant.” That, however, is not the case in this proceeding. As the *Division Order* explained, once FedEx cancelled its licenses, the 800 MHz spectrum authorized under those licenses was returned to the Commission, in this case to be included in the spectrum inventory made available to the TA for reconfiguration.⁶¹ Unlike an assignment application, Third District is seeking authority to operate on unlicensed spectrum currently held by the Commission, not licensed spectrum held by an incumbent licensee.

22. We also reject Third District’s argument that the *Division Order* denied its waiver requests “on the technicality that, although there would be no change in frequency or coverage, the identity [of] the licensee holding the authority would change.”⁶² Third District contends that because it “does not seek any authority that was not previously held by FedEx” that “[t]here can be no serious contention that the legal or public interest expediencies change with the identity of the licensee.”⁶³ This argument mischaracterizes the *Division Order*’s decision. The *Division Order* properly dismissed the applications not based on a “technicality,” but because, in each application, a new applicant sought new licensing authority to operate stations on unlicensed 800 MHz spectrum in violation of the Commission’s freeze on applications in the heavily congested Wave 4 NPSAC Region 5 along the U.S.-Mexico border, and Third District failed to show how those applications met the Commission’s waiver requirements.

23. Importantly, contrary to Third District’s assertions, its applications do not merely involve a change in identity of the licensee. Rather, its applications run counter to the legal and public interest considerations regarding imposition of the freeze on 800 MHz applications because the Commission holds the unlicensed spectrum on which Third District seeks authority to operate. As already discussed, the *Division Order* explained that unlicensed 800 MHz 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 a suspension period upon cancellation of a license by Sprint Nextel or any other licensee.⁶⁴ Moreover, the ability to be a Commission licensee is neither a mere technicality nor does this Commission consider licensees to be interchangeable or fungible. Third District has repeatedly argued that its applications are in substance no different from assignment of authorization applications. We note that the primary review of assignment or transfer of control applications involves the “new applicant’s” qualifications to be a licensee, including its ownership structure.⁶⁵

24. In addition, stating that there is no indication in the rulemaking record that the Commission considered the effect of licenses being voluntarily cancelled for reasons other than voluntary or mandatory relocations, Third District argues that the *Division* “goes beyond the scope of its delegated authority by (a) imposing a policy not envisioned by the Commission, and (b) refusing to implement the

⁶⁰ *Id.*; Reply at 3.

⁶¹ *Division Order*, 27 FCC Rcd at 1985, ¶ 14.

⁶² Petition at 2.

⁶³ *Id.* at 5, n.15.

⁶⁴ *Division Order*, 27 FCC Rcd at 1985, ¶ 14; see *In the Matter of San Diego Metropolitan Transit System and San Diego Transit Corporation, California, Request for Waiver of the 800 MHz Wave 4 Application Freeze Along the U.S./Mexico Border, Order*, 28 FCC Rcd 936, 938 ¶ 7 (PSHSB 2013) (*SDTC Order*) (stating same).

⁶⁵ See 47 C.F.R. § 1.948 (setting forth rules for assignment of authorization and transfer of control applications).

policy the Commission both envisioned and mandated,” which, according to Third District, is to allow applications filed by new applicants for new licenses under the Commission’s waiver procedures.⁶⁶ Petitioner essentially argues we must allow its applications because the Commission did not expressly exclude its applications. Third District, however, cites no authority for this argument and we find it unpersuasive.

25. In fact, we find the *Division Order* fully implements the Commission’s policy as it has been explained repeatedly since the freeze on accepting 800 MHz applications was imposed. As previously discussed, the Commission’s orders and subsequent public notices clearly state that the freeze on accepting applications during the reconfiguration process applies to new 800 MHz applications, while providing for limited types of exceptions to implement reconfiguration or in an effort to minimize adverse effects from the freeze.⁶⁷ Even to the extent the list of exceptions could be considered illustrative rather than exhaustive, none of the exceptions to the Commission’s freeze on accepting 800 MHz applications involves the grant of a new license to a new applicant for a station that would operate on 800 MHz spectrum that, shortly before the application was filed, became unlicensed for reasons other than implementing reconfiguration during a period in which the freeze was in place. We find the *Division Order* properly interpreted the scope of the freeze on accepting 800 MHz applications and its exceptions and was correct in not creating a new exception to accommodate Third District.

26. For the same reasons, we reject Third District’s argument that the Commission provided inadequate notice of the scope of the application freeze. Third District contends that the *Division Order* “effectively holds that the freeze creates a cut-off rule barring filings like [its] applications” and that “an application cut-off rule is legally invalid and ineffective in the absence of clear public notice to potentially interested parties of precisely what is being cut off.”⁶⁸ To support this contention, Third District argues that if Commission staff granted similarly situated applications because of confusion and if frequency coordinators processed new applications without waiver requests, “then there surely has not been adequate public notice sufficient to legally bar the filing of such applications.”⁶⁹ Moreover, in its reply, Third District asserts that grant of similar applications was “not error in the first place ... because the plain language of the Report and Order as discussed provides for such applications.”⁷⁰ Third District concludes that “[t]he summary dismissal of [its] applications, filed in good faith reliance on the statements in the Report and Order as well as prior actions on similar applications, without clear public notice that such applications are barred, was arbitrary, capricious, and an inequitable failure of due process.”⁷¹

27. Again, we disagree. We believe the Commission has provided sufficient notice in defining the scope of the freeze on accepting 800 MHz applications during the reconfiguration process. A fair reading of the Commission’s statements in the *800 MHz Report and Order* as well as its subsequent statements regarding the freeze would put a reader on notice that the Commission would not consider, as an exception to the freeze, applications to operate new facilities on 800 MHz spectrum that becomes unlicensed for reasons other than implementing reconfiguration while the freeze on filing 800 MHz applications is in effect, and if filed, absent an adequate showing under its waiver procedures, the Commission would dismiss the application.

⁶⁶ Petition at 3-4.

⁶⁷ See *supra* nn. 52-54 and accompanying text.

⁶⁸ Petition at 4.

⁶⁹ *Id.*

⁷⁰ Reply at 3-4.

⁷¹ *Id.* at 4.

28. As we have discussed, the Commission has reiterated many times that the freeze applies to applications for new facilities, or modification applications that involve a change of frequency or expand a station's existing coverage area, and that applications that do not affect frequency or coverage, including administrative updates, assignments or transfers of control, and renewal-only applications, are not subject to the freeze. Based on these statements, Third District knew or should have known what the Commission expected of it in terms of the types of applications the Commission would allow during the suspension period in Wave 4 NPSPEC regions along the U.S.-Mexico border. In addition, contrary to Third District's assertion, the applications it cites as "similarly situated," and that were granted before Third District filed its applications, were in fact granted in error. We find the *Division Order* was correct in concluding, based on what the Commission has previously held, an erroneous grant of a license to a previous applicant is not grounds for granting pending, in this case Third District's, applications.⁷²

29. We further note that Third District appears to infer some significance from the fact that it filed its applications within the 30 day period after FedEx canceled its licenses. While in its petition, Third District recognizes that the acceptance of the cancellation of FedEx's licenses "was final and no longer subject to reconsideration or review,"⁷³ petitioner states in its reply that it filed its applications "well prior to the license cancellations having become final."⁷⁴ Third District further contends that it is inaccurate to state that once FedEx cancelled its licenses, the spectrum was returned to the Commission because its "applications were filed well in advance of the FedEx license cancellations having become final pursuant to Section 405 of the Communications Act, 47 U.S.C. § 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106."⁷⁵ While Section 405 of the Communications Act of 1934, as amended, and Commission rules would afford FedEx, the former incumbent licensee, a 30-day period during which it could have sought reconsideration of the acceptance of its decision to cancel its licenses, neither the statute nor Commission rules afford Third District any reconsideration or other rights at all during that 30-day period.

30. Finally, we reject Third District's argument regarding the Commission's minimum separation requirements afforded Nextel of California's incumbent stations. Once again, Third District contends that "allowing Nextel to enjoy the windfall benefits of the FedEx license cancellations is inconsistent and unjustifiably discriminatory."⁷⁶ In particular, Third District argues that "[o]ne cannot, as the Bureau has done, argue on the one hand that the freeze creates an absolute requirement that any abandoned spectrum or area reverts automatically to the Commission, while on the other hand contending that the same abandonment increases the scope of Nextel's authorization."⁷⁷ Third District further argues

⁷² *Division Order*, 27 FCC Rcd at 1986, ¶ 16. In fact, the *Division Order* discusses the fact that most applications for new facilities filed during a suspension period as well as applications that were processed through frequency coordinators without waiver requests have been dismissed, *id.* at 1987, ¶ 17 and n.51, including the dismissal of an application filed by Exxon Communications Company (Exxon) on February 16, 2010, *id.* at 1987-88, ¶¶ 17-18. In that case, Exxon filed an application to modify its existing station in Southern California to add frequency pairs that had been surrendered to the Commission after FedEx cancelled two licenses and for which it had obtained frequency coordination. The Exxon application was dismissed on September 25, 2010, well before Third District filed its waiver requests, because Exxon's application contradicted the purpose of the Commission's application freeze. *Id.* at 1987-88, ¶¶ 17-18. See *SDTC Order*, 28 FCC Rcd at 938, ¶ 8 (finding that grant of the applicant's request for waiver of the freeze on 800 MHz applications, where the application sought authority to operate on spectrum returned to the Commission and that became part of its unlicensed 800 MHz spectrum inventory after an incumbent licensee cancelled its license, to be contrary to the purpose of the Commission's freeze in the 800 MHz band).

⁷³ Petition at 2-3.

⁷⁴ Reply at 1-2.

⁷⁵ *Id.* at 5, n.19.

⁷⁶ *Id.* at 5.

⁷⁷ Petition at 5.

that “[t]he effect of disallowing [its] applications, therefore, is to effectively expand the authorized coverage area of Nextel’s authorizations” and that “Nextel will enjoy the benefit of an increased footprint for an indefinite period of time.”⁷⁸

31. Third District appears to believe that the cancellation of FedEx’s licenses somehow automatically increased the coverage area of Nextel of California’s co-channel licenses. The only way in which Nextel of California’s coverage area would expand into the now unlicensed 800 MHz spectrum resulting from the cancellation of FedEx’s licenses is if Nextel of California filed a modification application, and a modification application that expands an existing station’s coverage area is not permitted under the Commission’s policies regarding the freeze on 800 MHz applications in NPSPAC Region 5. We agree with the *Division Order*’s conclusion that 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.⁷⁹ While the coverage area of Nextel of California’s stations does not increase as a result of the cancellation of FedEx’s licenses, Third District acknowledges that its proposed stations would fall within the minimum separation distance allowed under Commission rules. As a result, Third District was obligated to meet the requirements of Section 90.621(b)(4) of the Commission’s rules. As the *Division Order* explained, Third District made no attempt to do so.⁸⁰

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.131, 0.331, and 1.106 of the Commission’s rules, 47 C.F.R. §§ 0.131, 0.331, 1.106, the petition for reconsideration filed on March 23, 2012, by Third District Enterprises, LLC in association with File Nos. 0004819360 and 0004819368 IS DISMISSED as defective.

FEDERAL COMMUNICATIONS COMMISSION

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⁷⁸ Reply at 4-5.

⁷⁹ *Division Order*, 27 FCC Rcd at 1990, ¶ 26.

⁸⁰ *Id.* at 1990, ¶ 27.