

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

In the Matter of)
)
NEXGEN COMMUNICATIONS) File Nos. 0006595632 and 0006595633
CORPORATION)
)
Request for Waiver of Section 90.621(e)(2)(ii) of)
the Commission’s Rules)

ORDER

Adopted: June 18, 2015

Released: June 18, 2015

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

1. *Introduction.* We have before us two applications filed by Nexgen Communications Corporation (Nexgen) seeking 806-816/851-861 MHz (800 MHz) band Business/Industrial/Land Transportation (B/ILT) Pool frequencies, and an associated request for waiver of Section 90.621(e)(2)(ii) of the Commission’s Rules,¹ which permits a licensee to use 800 MHz B/ILT spectrum for commercial operation but only after a five-year holding period.² For the reasons set forth below, we grant the waiver request in part and deny it in part. Specifically, we grant the waiver request with respect to application File No. 0006595633 but deny it with respect to application File No. 0006595632.

2. *Background.* As part of the rebanding of the 800 MHz band to resolve interference between commercial and public safety systems, the Commission created the Expansion (815-816/860-861 MHz) and Guard (816-817/861-862 MHz) Bands in order to provide spectral separation between commercial licensees operating Enhanced Specialized Mobile Radio systems above 817/862 MHz and public safety licensees operating below 815/860 MHz.³ Expansion Band (EB) spectrum is designated mostly for Specialized Mobile Radio (SMR) stations.⁴ Guard Band (GB) spectrum is in the General Pool,⁵ and thus is available for Public Safety, B/ILT, and SMR operations.⁶ EB/GB channels become available for licensing when the Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau (the Bureaus) announce that the required level of clearing has been achieved in that National Public Safety Planning Advisory Committee (NPSPAC) region.⁷

3. In 2012, the Bureaus announced that the required level of clearing had been achieved in eleven NPSPAC regions, including Regions 22 (Minnesota) and 45 (Wisconsin), and applications for

¹ 47 C.F.R. § 90.621(e)(2)(ii).

² Nexgen Communication Corporation, Request for Waiver (filed Dec. 24, 2014) (Waiver Request).

³ See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15053-55 ¶¶ 154-58 (2004).

⁴ See 47 C.F.R. § 90.617(b), (d).

⁵ See 47 C.F.R. § 90.615.

⁶ See Creation of Interstitial 12.5 KHz Channels in the 800 MHz Band Between 809/817/854-862 MHz, *Notice of Proposed Rulemaking*, WP Docket No. 15-32, 30 FCC Rcd 1663, 1675 n.95 (2015).

⁷ See Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, 23 FCC Rcd 15966, 15972-73 ¶ 17 (2008).

EB/GB channels in those regions would be accepted for filing beginning in January 2013.⁸ In January 2013, Nexgen filed applications for five GB channels in Minneapolis, Minnesota,⁹ and six EB and GB channels in New Berlin, Wisconsin.¹⁰ The applications were granted in September 2013 under Call Signs WQSD808 and WQSD983, respectively.

4. Nexgen states that it purchased trunked radio equipment to construct Station WQSD983, and scheduled deployment for the end of August 2014.¹¹ It also states that the initial user on the system was to be a transportation company with a large fleet of vehicles.¹² In August 2014, after the equipment had been delivered and was being staged for installation, Smartcomm, LLC filed an informal objection, arguing that the application for Station WQSD983 was coordinated and granted in error, because New Berlin is in Waukesha County, Wisconsin, which is part of Region 54 (Chicago), where rebanding had not been completed, rather than Region 45.¹³ Nexgen states that it searched for potential replacement frequencies on which the purchased equipment could be deployed but found no available SMR frequencies in the area,¹⁴ so it canceled the license for Station WQSD983 in November 2014.¹⁵

5. In December 2014, Nexgen filed application File No. 0006595632 requesting three B/ILT Pool channels at a second site in Minneapolis, and application File No. 0006595633 requesting one B/ILT Pool channel at the New Berlin site and one at a location about sixteen miles away in Milwaukee. Section 90.621(e)(2)(ii) provides that 800 MHz B/ILT licensees may request license modification to authorize use of the channels for commercial operation,¹⁶ but not until five years after grant of the authorization.¹⁷ With both applications, Nexgen requests a waiver of Section 90.621(e)(2)(ii) to permit it to convert the channels to commercial operation without a five-year holding period.¹⁸ Regarding the first application, Nexgen states that Station WQSD808 operates from a high site, so a second location is needed to provide reliable in-building coverage in the Minneapolis urban core.¹⁹ Regarding the second application, Nexgen states that the two sites will allow it to utilize equipment purchased for Station WQSD983 and meet the needs of its already-identified customer.²⁰

6. *Discussion.* 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

⁸ See Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce the Completion of 800 MHz Band Reconfiguration in Certain NPSPAC Regions, *Public Notice*, WT Docket No. 02-55, 27 FCC Rcd 14775, 14780 (PSHSB/WTB 2012).

⁹ FCC File No. 0005608536.

¹⁰ FCC File No. 0005609079.

¹¹ See Waiver Request at 1.

¹² See *id.*

¹³ See Letter dated Aug. 22, 2014 from M. Rob Somers, General Counsel, Smartcomm, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission.

¹⁴ See Waiver Request at 1-2.

¹⁵ See FCC File No. 0006537164.

¹⁶ 47 C.F.R. § 90.621(e)(2).

¹⁷ 47 C.F.R. § 90.621(e)(2), (e)(2)(ii).

¹⁸ Application File No. 0006595632 also requests a General Category frequency, for which Nexgen does not need a waiver.

¹⁹ See Waiver Request at 2.

²⁰ See *id.*

application to the present case and that 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.²¹ We conclude that grant of the waiver request is warranted with respect to application File No. 0006595633, but not with respect to application File No. 0006595632.

7. Nexgen acted in reasonable reliance on the Commission's grant of its initial New Berlin application. The fact that the grant was in error came to light almost a year later, after Nexgen purchased equipment and identified an initial customer. Nexgen then voluntarily canceled the license, and tried without success to find available SMR frequencies on which to provide the contemplated service. Under these unusual circumstances, we conclude that a waiver is appropriate to enable Nexgen to utilize the equipment and provide the service that had been arranged in reliance on the erroneously granted application.²² We therefore grant the waiver request with respect to application File No. 0006595633.

8. The erroneous grant of the initial New Berlin application, however, has nothing to do with Nexgen seeking to provide better in-building coverage in Minneapolis. Nexgen suggests that a waiver is warranted under the first prong of the waiver test because it would not frustrate the purpose of the five-year holding period, which Nexgen asserts is to deter speculative trafficking in 800 MHz B/ILT spectrum.²³ This is a purpose of the rule,²⁴ but the reason that the Commission sought to deter trafficking was "to ensure that these channels will continue to be initially licensed only to entities that will use them for [private land mobile radio] communications."²⁵ Initially assigning 800 MHz B/ILT channels to Nexgen (or any other SMR licensee seeking improved coverage) for commercial communications would frustrate this purpose.²⁶ We therefore deny the waiver request with respect to application File No. 0006595632.

9. *Conclusion.* We scrutinize 800 MHz applications and waiver requests in order to ensure that channels are assigned only to eligible users for designated purposes.²⁷ Under the unusual circumstances presented in this case, however, we conclude that Nexgen has demonstrated that a waiver of the five-year holding period in Section 90.621(e)(2) is warranted in part. We grant the waiver request with respect to application File No. 0006595633, but deny it with respect to application File No. 0006595632.

10. Accordingly, IT IS ORDERED that, pursuant to Sections 2 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the request for waiver filed by Nexgen Communications Corporation on December 24, 2014 IS GRANTED IN PART and DENIED IN PART as set forth above, and applications File Nos.

²¹ 47 C.F.R. § 1.925(b)(3).

²² See Star Development Group, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 13127, 13129-30 ¶¶ 6-8 (2002); City of Lewisville, Texas, *Memorandum Opinion and Order*, 11 FCC Rcd 16638, 19641 ¶ 10 (1996); Tyrone Brown, *Letter*, 13 FCC Rcd 14021, 14022-23 (WTB AIAD AFMAB 1998).

²³ See Waiver Request at 3.

²⁴ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22762 ¶ 114 (2000).

²⁵ *Id.* at 22763 ¶ 115; see also Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Memorandum Opinion and Order*, WT Docket No. 99-87, 17 FCC Rcd 7553, 7573 ¶ 48 (2002).

²⁶ See Advanced Metrocomm, Inc., *Order*, 25 FCC Rcd 13078, 13079 ¶ 6 (WTB MD 2010).

²⁷ See, e.g., Wake Forest Baptist Hospital, *Order on Reconsideration*, 30 FCC Rcd 3705, 3706 ¶ 6 (WTB MD 2015); Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce the Completion of 800 MHz Band Reconfiguration in Certain NPSAC Regions and the Availability of Additional Sprint Vacated Channels, *Public Notice*, WT Docket No. 02-55, 29 FCC Rcd 16290, 16297-98 (PSHSB/WTB 2014).

0006595632 and 0006595633 SHALL BE PROCESSED in accordance with this *Order*.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau