

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

In the Matter of)
NEW MEXICO, STATE OF) FCC File Nos. 0006843507 and 0006799890
Request for Waiver of Section 90.529(b)(1) of the)
Commission's Rules)

ORDER

Adopted: June 26, 2015

Released: June 26, 2015

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

I. INTRODUCTION

1. In this Order, we grant the State of New Mexico (New Mexico) a waiver of Section 90.529(b)(1) of the Commission's rules to permit the acceptance of its late-filed interim "substantial service" showing for its license for 700 MHz state channels under call sign WPTZ778. Section 90.529(b)(1) requires licensees of state channels to certify, by June 13, 2014, that they were providing or prepared to provide substantial service to one-third of their population or territory. New Mexico, however, filed its substantial service showing on June 16, 2015. New Mexico, thus seeks a waiver of the June 13, 2014 deadline to permit the acceptance of its late-filed substantial service showing. We note that New Mexico previously filed a similar waiver request seeking an extension of time to meet its substantial service deadline. For the reasons discussed below we grant New Mexico's waiver request and dismiss as moot, New Mexico's earlier-filed extension request.

II. BACKGROUND

2. New Mexico holds a license permitting it to operate on state channels in the 700 MHz band under call sign WPTZ778. The state channels consist of ninety-six channel pairs (12.5 kHz bandwidth) within the public safety narrowband segment of the 700 MHz band that are reserved for use by each state, territory, district or possession (state licensees).

3. In order to ensure efficient use of the state channels, the Commission established a five-year interim and a ten-year final benchmark for state licensees to provide specified levels of "substantial service" within their statewide license areas. Section 90.529(b)(1) of the Commission's rules specifies

1 47 C.F.R. § 90.529(b)(1).

2 See FCC File No. 0006843507 (New Mexico's Schedule K Filing) and associated attachments.

3 FCC File No. 0006799890 (May 12, 2015).

4 See call sign WPTZ778.

5 47 C.F.R. § 90.531(b)(5).

6 "Substantial service" is defined as the construction and operation of facilities on state channels which is "sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." See 47 C.F.R. § 90.529(c).

June 13, 2014 as the due date for state licensees to file their interim five-year benchmark showing.⁷ By this date, state licensees were to certify that they were providing or prepared to provide substantial service to one-third of their population or territory.⁸

4. Prior to the June 13, 2014 deadline, the Public Safety and Homeland Security Bureau (Bureau) issued a *Public Notice* providing state licensees guidance on how to demonstrate compliance with the interim substantial service benchmark.⁹ To facilitate staff review of substantial service showings, the Bureau provided examples of specific information to submit for review, including the type of public safety service being provided, a list of which state channels are used in the state system, and the percentage of population or territory served by the composite footprint of the state system.¹⁰ On June 16, 2015, New Mexico filed its request for waiver of the June 13, 2014 deadline.¹¹

5. In its request for waiver, New Mexico claims it missed the filing deadline because of a “management gap” created by the departure of an employee responsible for managing call sign WPTZ778.¹² Nonetheless, upon discovering that it had missed the deadline, New Mexico proceeded to purchase equipment on June 9, 2015 to be installed at Sandia Peak.¹³

6. Furthermore, New Mexico demonstrated that, having purchased the required equipment, it is now prepared to provide substantial service to one-third of its population.¹⁴ New Mexico also states that it is aggressively working to formulate a state-wide land mobile radio modernization plan in which the 700 MHz public safety band will play a key role.¹⁵ Once the purchased equipment and systems are deployed, New Mexico will provide substantial service to over 39% of its population.¹⁶

III. DISCUSSION

7. 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

⁷ 47 C.F.R. § 90.529(b)(1). *See also* Service Rules Governing Public Safety Narrowband Operations in the 769-775/799-805 MHz Bands, WT Docket 96-86, *Declaratory Ruling*, 26 FCC Rcd 10895, 10896 ¶ 5 (2011) (*Declaratory Ruling*); *Order*, 27 FCC Rcd 15010 (PSHSB 2012) (conforming section 90.529(b) of the FCC’s rules regarding the substantial service deadlines for state-licensed 700 MHz public safety narrowband channels to comport with the deadlines specified in the Commission’s *Declaratory Ruling*).

⁸ *See* 47 C.F.R. § 90.529(b)(1). For the ten-year benchmark, state licensees must certify that they are providing or are prepared to provide substantial service to two-thirds of their population or territory. The due date for the ten-year benchmark showing is June 13, 2019. *See* 47 C.F.R. § 90.529(b)(2).

⁹ Public Safety and Homeland Security Bureau Provides Guidance to 700 MHz Narrowband State Licensees Regarding Interim Substantial Service Benchmark Showing Due on June 13, 2014, *Public Notice*, 29 FCC Rcd 3706 (PSHSB 2014).

¹⁰ *Id.* For purposes of reviewing interim benchmark showings by state licensees, the Bureau stated that it “will consider coverage on any state channel in a state licensee’s system sufficient to establish coverage for purposes of defining the licensee’s composite footprint.” *Id.* at note 9.

¹¹ *See* attachment to New Mexico’s Schedule K Filing labeled “Waiver Expedited Action Requested” (Waiver Request).

¹² *Id.*

¹³ *See* attachment to New Mexico’s Schedule K Filing labeled “Supporting Documentation for WPTZ778 (buildout requirements)” (Buildout Statement). *See also* attachment to New Mexico’s Schedule K Filing labeled “Proof of Equipment Purchase” (Equipment Receipt).

¹⁴ Buildout Statement at 3-4. *See also* attachment to New Mexico’s Schedule K Filing labeled “Coverage Map -110 dBm Threshold” (Coverage Map).

¹⁵ Waiver Request.

¹⁶ Buildout Statement at 3-4.

present case, and that a grant of the waiver would be in the public interest;¹⁷ 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.¹⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁹ Based on the record before us, we find that New Mexico has shown that its request should be granted under the first prong of the waiver standard.

8. The underlying purpose of the substantial service requirement is to ensure efficient use of state channels including service to “rural, remote and insular areas.”²⁰ To this end, Section 90.529(b)(1) establishes a deadline for state licensees to certify that they are meeting the interim benchmark by providing or being prepared to provide substantial service to one third of their population or territory.²¹ A state licensee is deemed “prepared” to provide substantial service if it certifies that a radio system has been approved and funded by the deadline date.²² The Commission’s rules also recognize that state licensees that do not meet the interim substantial service benchmark, *e.g.*, because they have failed to construct or receive funding for any facilities by the deadline, will be subject to license cancellation or modification.²³ As noted above, the Bureau provided state licensees guidance on how to demonstrate that they met the interim substantial service showing.²⁴

9. Consistent with the Commission’s rules and policies as well as the Bureau’s guidance, Commission staff has reviewed New Mexico’s filing and determined that, because New Mexico purchased a 700 MHz base station repeater and supporting equipment, it is now “prepared” to provide “substantial service” to more than one-third of its population.²⁵ New Mexico indicates that it intends to install the base station repeater at Sandia Peak.²⁶ Once operational, the base station repeater will serve more than 39% of its population.²⁷ Thus, New Mexico needs a waiver solely because it failed to purchase this equipment prior to the June 13, 2014 deadline.

10. Consequently, under the circumstances presented, we find that granting New Mexico a waiver of Section 90.529(b)(1) would not frustrate the underlying purpose of the rule because it is now “prepared” to satisfy the interim benchmark and provide “substantial service” to more than one-third of its population.²⁸ In particular, we found persuasive New Mexico’s statements about aggressively working

¹⁷ 47 C.F.R. § 1.925(b)(3)(i).

¹⁸ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff’d*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broad. Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁰ See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19869 ¶ 62 (2000) (*Third R&O*). See also State of Iowa, *Order*, 29 FCC Rcd 11899, 11900 (PSHSB Oct. 8, 2014) ¶ 7 (granting Iowa a conditional waiver of the substantial service requirement).

²¹ See 47 C.F.R. § 90.529(b)(1).

²² See 47 C.F.R. § 90.529(c).

²³ See 47 C.F.R. §§ 90.529(d) and (e).

²⁴ See *supra* ¶ 4.

²⁵ See Buildout Statement at 3-4. See also Coverage Map.

²⁶ *Id.* New Mexico purchased a Motorola GRT 8000 base station repeater. See Equipment Receipt.

²⁷ Buildout Statement at 4.

²⁸ *Id.*

to formulate a plan to modernize its state-wide land mobile radio system using spectrum from the narrowband segment of the 700 MHz band.²⁹ In this regard, we note that New Mexico is the type of rural state that the Commission expected to benefit from its decision establishing the state channels.³⁰ On the other hand, absent a waiver of the June 13, 2014 deadline specified in Section 90.529(b)(1), New Mexico would lose its license for the state channels and would be unable to provide upgraded service to its population in the near future which would frustrate the underlying purpose of the rule. Although the rules contemplate that recovered state license spectrum would fall under the administration of the relevant regional planning committee,³¹ we note that at the present time, Region 29, is just beginning the regional planning process.³²

11. Furthermore, we find that the public interest is served by granting New Mexico a waiver of Section 90.529(b)(1) and allowing it to retain its license for the state channels. The Commission established a geographic area licensing scheme for all state licensees so that each state or territory would have latitude to plan and develop shared wide-area networks under a substantially streamlined licensing process.³³ As noted above, absent a waiver of Section 90.529(b)(1), New Mexico would lose its geographic-area based state license and would have to potentially reapply to license the spectrum for statewide use.³⁴ Consequently, we find it in the public interest to grant New Mexico's request for a waiver of Section 90.529(b)(1) so that it can continue to deploy a wide-area network under a substantially streamlined licensing process thereby enhancing the safety of life and property in New Mexico.

12. Finally, we remind New Mexico that this is only an interim benchmark and that its final benchmark for "substantial service" is June 13, 2019.³⁵ We expect New Mexico to file its next showing prior to that deadline. At that time, we will perform a more rigorous analysis of New Mexico's progress in building out its state-wide network in order to determine whether or not it should continue to hold its license for the state channels.

IV. ORDERING CLAUSES

13. 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 State of New Mexico IS GRANTED. We instruct staff to process the associated Schedule K application, FCC File number 0006843507, accordingly.

14. 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 request for extension of time filed by the State of New Mexico under FCC File No. 0006799890 IS DISMISSED AS MOOT.

15. 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.

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²⁹ See Waiver Request.

³⁰ See *supra* note 19.

³¹ See 47 C.F.R. § 90.529(d) and (e).

³² See Public Safety and Homeland Security Bureau Announces Region 29 (New Mexico) Public Safety Regional Planning Committee to Hold 700 MHz Meeting, WT Docket 02-378, *Public Notice*, DA 15-682 (PSHSB rel. Jun. 10, 2015).

³³ *Third R&O*, 15 FCC Rcd at 19869 ¶ 57.

³⁴ See 47 C.F.R. § 90.529(d) and (e).

³⁵ See 47 C.F.R. § 90.529(b)(2).

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