

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

In the Matter of)
James R. Nash) File No. 0007191828
Request for Waiver to Operate with an Authorized)
Bandwidth Greater than Six Kilohertz on)
Frequency 158.1225 MHz)

ORDER

Adopted: November 22, 2016

Released: November 23, 2016

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

1. Introduction. We have before us the above-captioned application and request for waiver of section 90.35(c)(33) of the Commission’s rules,1 filed by James R. Nash (Nash) on behalf of Cedar Grove Farm. Nash seeks authority to operate an Industrial/Business (I/B) communications system on frequency 158.1225 MHz with a bandwidth exceeding six kilohertz.2 For the reasons set forth below, we deny the waiver request.

2. Background. Nash operates conventional I/B Pool Station WPMS844 with base stations in Virginia and Maryland. He states that Cedar Grove Farm has operations from Richmond to Baltimore, and recently made a substantial investment to upgrade the aging VHF radio system that it uses to conduct its business and protect the safety of its employees.3 After a problem was encountered with one of the new channels, Cedar Grove Farm had difficulty finding an available replacement mobile frequency due to the proximity to the Washington, D.C., region.4 Frequency 158.1225 MHz eventually was identified, but section 90.35(c)(33) limits operation on that frequency to an authorized bandwidth of six kilohertz. In order to be compatible with the Cedar Grove Farm system, Nash seeks to operate with 11K2F3E and 8K10F1E emissions.5 Consequently, Nash seeks a waiver of section 90.35(c)(33). Nash asserts that the proposed use will not cause harmful interference to other spectrum users.6

3. The Wireless Telecommunications Bureau’s Mobility Division (Division) sought comment on Nash’s request.7 On September 19, 2016, Pros RF filed comments asserting that Nash overlooked several available frequencies that are not subject to the bandwidth limitation in section

1 47 CFR § 90.35(c)(33).

2 See File No. 0007191828 (filed Mar. 17, 2016, amended Mar. 18, May 23, July 13, and Oct. 17, 2016), Request for a waiver to operate with an authorized bandwidth greater than 6 kHz on frequency 158.1225 MHz for license WPMS844 (Waiver Request).

3 Id. at 1-3.

4 Id. at 3.

5 Id.

6 See id. at 5.

7 See Wireless Telecommunications Bureau Seeks Comment on James Nash Request for Waiver to Operate with an Authorized Bandwidth Greater than Six Kilohertz on Frequency 158.1225 MHz, Public Notice, 31 FCC Rcd 9800 (WTB MD 2016).

90.35(c)(33), and which are not assigned to any licensee on an exclusive basis.⁸ Nash responded on October 17, 2016 that the frequencies identified by Pros RF were not available as a practical matter, because they require the concurrence of the Power coordinator, the Utilities Telecom Council (UTC), which would not be forthcoming given that the frequencies were used by other licensees in the general vicinity.⁹ On October 21, 2016, Pros RF filed an application, which was coordinated by UTC, seeking authorization for operation on the frequencies identified by Pros RF of the number of mobile units requested by Nash with the technical parameters requested by Nash in the area requested by Nash.¹⁰ The Pros RF application was granted on November 3, 2016,¹¹ whereupon Pros RF replied to Nash's response and offered to assign any of the identified frequencies for Nash's use.¹²

4. *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 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.¹³ We conclude that Nash has met neither prong, so we deny the waiver request.

5. First, Nash's assertion that frequency 158.1225 MHz should not be emission-limited because it is spaced in the 7.5-kilohertz band plan and is not protecting a closer adjacent frequency¹⁴ is incorrect. Frequency 158.1225 MHz is emission-limited in order to protect lower-adjacent paging frequency 158.10 MHz,¹⁵ which has a bandwidth of 20 kilohertz,¹⁶ from interference.¹⁷ Second, we agree with Pros RF that Nash made an insufficient showing that no frequencies for which no waiver is needed were available. That frequencies require the Power coordinator's concurrence does not by itself render them unavailable. Denial of concurrence cannot be assumed, for the Power coordinator is permitted to

⁸ Comments by Pros RF (filed Sept. 19, 2016) (viewable in the Universal Licensing System under File No. 0007191828). Pros RF identified frequencies 158.1375 MHz, 158.1525 MHz, 158.1675 MHz, 158.190 MHz, 158.2275 MHz, and 158.2875 MHz.

⁹ Response to RF Pros Objection (filed Oct. 17, 2016) (viewable in the Universal Licensing System under File No. 0007191828).

¹⁰ FCC File No. 0007511154.

¹¹ Given that it appears that Pros RF may have filed this application solely to corroborate its assertion that the identified frequencies were available for assignment, rather than as a sincere proposal to use the spectrum, the Division rescinded the grant on November 21, 2016, and returned the application for Pros RF to provide additional information regarding its intentions.

¹² Second Comment by Pros RF (filed Nov. 3, 2016) (viewable in the Universal Licensing System under File No. 0007191828).

¹³ 47 CFR § 1.925(b)(3).

¹⁴ See Waiver Request at 4.

¹⁵ Frequency 158.10 MHz is assigned in the Washington-Baltimore Basic Economic Area to Redi-Call Communications Company under Call Sign WPZG603.

¹⁶ See 47 CFR § 22.531.

¹⁷ See *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 10076, 10101, para. 57 (1995) ("In instances where a lower frequency adjacent channel is not allocated to the private land mobile radio services, we are creating an interleaved channel 7.5 kHz lower than the existing PLMR channel. This interleaved channel will be designated for 6.25 kHz bandwidth operation only in order to minimize the potential of interference to these other services.").

deny concurrence “only when grant of the underlying application would have a demonstrable, material effect on safety.”¹⁸ Based on the record before us, we conclude that Nash has not presented sufficient facts to meet the standard for grant of the requested waiver. We therefore deny the waiver request, and will process the application accordingly.

6. Accordingly, IT IS ORDERED pursuant to sections 4(i), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), and 303(r), and section 1.925 of the Commission’s rules, 47 CFR § 1.925, that the Request for Waiver filed by James R. Nash on July 13, 2016, in conjunction with application FCC File No. 0007191828 IS DENIED, and application FCC File No. 0007191828 SHALL BE PROCESSED in accordance with this *Order* and the Commission’s rules.

7. 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

¹⁸ 47 CFR § 90.175(b)(2). Contour overlap alone is not a sufficient basis to refuse concurrence. *Specialized Mobile Radio, Inc.*, Order, 30 FCC Rcd 10227, 10227, para. 2 (WTB MD 2015) (citing *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services*, Fifth Memorandum Opinion and Order, 16 FCC Rcd 416, 419, para. 8 (2000)).