

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

In the Matter of)
SAN DIEGO, COUNTY OF) File Nos. 0008642975, 0008642976,
Request for Waiver of Section 90.621(b)(5)) 0008642979
of the Commission's Rules)

ORDER

Adopted: August 29, 2019

Released: August 29, 2019

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

I. INTRODUCTION

1. In this Order we grant a request by the County of San Diego, California (San Diego) for waiver of Section 90.621(b)(5) of the Commission's rules to allow it to submit a letter of concurrence from a short-spaced licensee that lacks the requisite certification that the licensee is constructed and operational.

II. BACKGROUND

2. San Diego has filed three applications seeking to add seven base stations to its trunked 800 MHz private land mobile radio system. It proposes to operate each of its new base stations on thirty-eight 800 MHz channels including channel 854.8875 MHz. If licensed on channel 854.8875 MHz, all seven of San Diego's proposed base stations would be located less than the required 113-kilometer distance to co-channel station, call sign KNIV764, licensed to Third District Enterprises, LLC (Third District).

3. San Diego includes with its applications a letter from Third District concurring with the short-spacing. Third District does not state in its letter, however, that it is constructed and operating on the short-spaced channel. Therefore, San Diego seeks a waiver of Section 90.621(b)(5) of the

1 See ULS applications no. 0008642975, 0008642976, 0008642979, filed May 15, 2019 (San Diego Applications). See also document attached to the San Diego Applications on April 30, 2019 labeled "San Diego Waiver Request" (Waiver Request).

2 San Diego Applications.

3 San Diego's proposed base stations would be located between 73 and 100 kilometers from Location 2 on Third District's call sign KNIV764. Generally, an applicant seeking to license a base station in the 800 MHz band must maintain a 113 km distance to previously licensed co-channel base stations but may seek to operate at a distance less than 113 km if the applicant meets certain technical criteria specified in a short-spacing table. See 47 CFR § 90.621(b)(4). However, an applicant may seek to license a base station at a distance less than that specified in the short-spacing table if the applicant includes a letter of concurrence from each short-spaced incumbent. See 47 CFR § 90.621(b)(5).

4 Letter from Anna Holmes, Telecommunications Technician 3, San Diego County, Sheriff's Wireless Services Division and James Kay, manager of Third District Enterprises, LLC, to FCC at 1 (Apr. 23, 2019) (attached to San Diego Applications) (Third District Letter of Consent).

Commission's rules, which requires that "[e]ach letter from a [concurring] co-channel licensee must certify that the system of the concurring licensee is constructed and fully operational."⁵

4. In support of its waiver request, San Diego argues that, although Third District is the licensee of record for channel 854.8875 MHz, it has shut off operations on the short-spaced channel and therefore cannot attest, as required by our rules, that it is "constructed and fully operational" on the channel.⁶ San Diego notes that if its waiver request is granted, the "radio channel will provide improved public safety coverage for police, fire, EMS and local government agencies in San Diego and Imperial Counties."⁷

III. DISCUSSION

5. 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;⁸ 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.⁹ We conclude San Diego's request for waiver of Section 90.621(b)(5) should be granted under the first prong of the waiver standard.

6. The underlying purpose of the certification requirement in Section 90.621(b)(5) is to "deter trafficking of licenses."¹⁰ That underlying purpose is not a factor here because Third District was directed to discontinue operation on frequency 854.8875 MHz by the Public Safety and Homeland Security Bureau (Bureau), as part of the 800 MHz rebanding program.¹¹ The Bureau took this action because Third District's continued operation on that frequency would have blocked several 800 MHz public safety licensees from retuning their facilities to replacement channels.¹² Because the discontinuance was necessitated by rebanding, the Bureau authorized Third District to remain non-operational until its assigned post-rebanding replacement channels became available, at which point it would be required to resume operations on the new channels by a date set by the 800 MHz Transition Administrator.¹³

7. Until this transition is complete, Third District remains the licensee of record for channel 854.8875 MHz, but it is unable to represent in its letter that its station is constructed and fully

⁵ 47 CFR § 90.621(b)(5).

⁶ *Id.*

⁷ *Id.*

⁸ 47 CFR § 1.925(b)(3)(i). *See also, WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (holding that the FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (holding that waiver of the Commission's rules may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question).

⁹ 47 CFR § 1.925(b)(3)(ii).

¹⁰ *Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Sys. Upon Concurrence from Co-Channel Licenses*, PR Docket 90-34, Report and Order, 6 FCC Rcd 4929, 4930, para. 10 (1991). *Erratum*, 6 FCC Rcd. 6650 (PRB 1991).

¹¹ Letter from Michael J. Wilhelm, Deputy Chief, Public Safety and Homeland Security Bureau Policy and Licensing Division, FCC, to Russell H. Fox, Esq. and James Goldstein, Esq., at 1 (Nov. 12, 2014) (Notification of Long-Term Discontinuance).

¹² *Id.* at 1.

¹³ *Id.* at 2.

operational.¹⁴ These circumstances dictated by the needs of the rebanding program clearly indicate that trafficking of licenses is not a concern in this case. Therefore, we conclude that San Diego has met the first prong of the waiver standard. The public interest will be served by grant of the waiver because it will enable San Diego to “provide improved public safety coverage for police, fire, EMS and local government agencies in San Diego and Imperial Counties”¹⁵ from its proposed new base stations.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), and Section 1.925 of the Commission’s rules, 47 CFR § 1.925, that the waiver request associated with ULS File Nos. 00008642975, 0008642976, 0008642979 filed by the County of San Diego IS GRANTED and the associated applications SHALL BE PROCESSED accordingly.

9. This action is taken under delegated authority pursuant to Section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and Sections 0.191 and 0.392 of the Commission’s rules, 47 CFR §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

¹⁴ Waiver Request at 1.

¹⁵ *Id.*