

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

In the Matter of)	
)	
Applications of)	File Nos. 654521, 654522, 654523, 654524,
East River Electric Power Cooperative)	654525, 654526, 654527, 654528, 654529,
Request for New 800 MHz SMR Systems)	654530, 654531, 654532, 654534, 654535,
)	654537
)	
OneComm Corporation, N.A.)	File Nos. 9411604803 et al.
Applications for Various SMR Stations)	

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2003

Released: July 30, 2003

By the Commission:

I. INTRODUCTION.

1. In this *Memorandum Opinion and Order*, we address an Application for Review filed by East River Electric Power Cooperative (East River), seeking review of the Wireless Telecommunications Bureau's (Bureau) dismissal of East River's applications for site-based licenses in the 800 MHz Specialized Mobile Radio (SMR) service.¹ We also address a related Petition for Reconsideration filed by East River against grants made to OneComm Corporation (OneComm).² As discussed below, we grant East River's Application for Review, and reinstate its applications, and deny East River's Petition for Reconsideration of the grants made to OneComm.

II. BACKGROUND.

2. East River is a wholesale electric power supply and transmission cooperative holding Private Mobile Radio Service (PMRS) and Commercial Mobile Radio Service (CMRS) licenses on the 800 MHz band. On January 6, 1994, East River submitted applications for 800 MHz SMR frequencies at seventeen separate sites in South Dakota and Minnesota. Pursuant to the rules then in effect, the applications requested specific frequencies.³ At that time, SMR licenses were granted on a site-by-site, channel-by-channel basis. On August 9, 1994, however, the Commission adopted the *CMRS Third Report and Order*, concluding that the 800 MHz SMR service should be licensed on a geographic area basis and subject to the competitive bidding process.⁴ The Commission suspended the acceptance of site-specific

¹ Applications of East River Electric Power Cooperative – Request for New 800 MHz SMR Systems, *Application for Review*, filed July 29, 1996 (Application for Review).

² East River Electric Power Cooperative Petition for Reconsideration of OneComm Corporation N. A. – Applications for Various 800 MHz SMR Stations, filed March 10, 1997 (Petition for Reconsideration).

³ An SMR applicant could “either request specific frequencies . . . or . . . request the Commission to select frequencies for the system from the SMRS Category.” 47 C.F.R. § 90.621(a) (1992); *see also* § 90.611(c) (1992).

⁴ Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development

SMR applications as of August 9, 1994, pending the adoption of new licensing and service rules for the 800 MHz SMR service.⁵

3. By the time the Commission imposed the application freeze, however, it had a backlog of over 40 thousand applications for 800 MHz channels, including East River's applications. In order to expedite the application processing, the Land Mobile Branch⁶ requested that applicants re-submit their application data in electronic format so that it could use computer software developed by a coalition of industry trade associations (Industry Coalition).⁷ Although the Commission's rules at the time provided that an application must either request specific frequencies, or request that the Commission assign available frequencies,⁸ it was the staff's practice to grant alternative channels if an applicant's requested frequencies were not available at the locations specified in the applications. This practice came about due to the first-in-line nature of application processing for these licenses. Due to grants to other applicants with earlier-filed applications, it was often the case that an applicant's requested frequencies would no longer be available by the time the staff began processing its application(s). For example, license grants to one applicant would have precluded the grants of any later-filed applications for the same frequencies at sites within a 70-mile radius.⁹ Accordingly, to avoid requiring applicants to reapply for other frequencies, thereby adding to the application backlog, or adding to the backlog of wait-listed applications, the staff sought to assign available alternative frequencies where possible. The Industry Coalition software was programmed to follow this practice, and alternative channels were assigned, if possible. On March 17, 1995, the Bureau announced that it had granted approximately 4,500 applications based on the results of this electronic processing.¹⁰ Of the seventeen applications it filed, East River received nine multi-channel licenses in South Dakota and Minnesota, eight of which were granted by assigning alternative frequencies.

4. Programming flaws in the software, however, caused errors in the processing of the applications. In response to these errors, the Industry Coalition sought reconsideration of the grants made in the March 17, 1995 Public Notice, and requested permission to make modifications to its software so that the Land

of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, *Third Report and Order*, 9 FCC Rcd 7988, 8042, (1994) (*CMRS Third Report and Order*).

⁵ See *CMRS Third Report and Order*, 9 FCC Rcd at 7997, para. 15.

⁶ Pursuant to a Wireless Telecommunications Bureau reorganization, the functions of the former Land Mobile Branch of the Licensing Division was incorporated into the Licensing and Technical Analysis Branch of the Commercial Wireless Division.

⁷ The American Mobile Telecommunications Association, Inc., the Industrial Telecommunications Association, Inc., and the Personal Communications Industry Association (collectively, the Industry Coalition).

⁸ See 47 C.F.R. § 90.621(a) (1990); see also § 90.611(c) (1992).

⁹ SMR facilities are generally given interference protection based on a fixed mileage separation from co-channel operations. The typical separation between site-based, co-channel systems is 70 miles. 47 C.F.R. § 90.621(b). In certain cases, the Commission granted sites with less than the requisite 70-mile separation distance if the applicant had consent from any affected licensees or if the applicant provided a technical showing that it would not interfere with co-channel licensees. 47 C.F.R. § 90.621(b)(4)-(5).

¹⁰ "Wireless Telecommunications Bureau Processes Over 40,000 and Grants More Than 4,500 Applications for 800 SMR, Business, Industrial/Land Transportation and General Category Channels Received Between November 9, 1993 and August 10, 1994," *Public Notice*, mimeo No. 52823 (rel. March 17, 1995) (March 17, 1995 Public Notice).

Mobile Branch could reprocess the applications and issue a revised list of granted licenses.¹¹ In light of the number of authorizations potentially affected, the Bureau modified all of the license grants announced in the March 17, 1995 Public Notice to be conditional.¹² The Bureau also concluded that certain adjustments to the software were needed, and permitted the Industry Coalition to modify the software. The modified software, however, did not include the feature that allowed applicants to receive grants of alternate frequencies if the requested frequencies were not available. The alternate frequency option was removed from the modified version of the software in order to moderate the complexity of the software processing, and to avoid improper authorizations, such as grants to ineligible applicants, a problem experienced in the first computer run. Further, the removal of the alternative frequency option more closely comported with the Commission's rules.

5. Following modification of the software, the Land Mobile Branch once again processed the applications. On October 31, 1995, the Bureau released another public notice that superseded the March 17, 1995 Public Notice, vacated the March 1995 authorizations, and granted over 6,300 applications.¹³ Although East River had received authorizations with respect to nine applications in the first software run, only one of East River's applications was granted when applications were reprocessed with the modified Industry Coalition software. All applications that were not granted in the October 1995 Public Notice, including East River's, were placed on a waiting list. These wait-listed applications were subsequently dismissed by the Commission in the *800 MHz First Report and Order*¹⁴ and the *800 MHz Second Report and Order*.¹⁵

6. East River sought reconsideration of the results of the second Industry Coalition software run and the October 31, 1995 Public Notice.¹⁶ East River argued that its applications should not have been wait-listed because a number of frequencies at its requested sites remained available.¹⁷ East River noted that it had confirmed in a January 1995 letter that it would take alternative frequencies if the specific channels it sought were unavailable.¹⁸ The Land Mobile Branch, however, affirmed the decision to wait-list East

¹¹ Petition for Reconsideration by the American Mobile Telecommunications Association, Inc., the Industrial Telecommunications Association, Inc., and the Personal Communications Industry Association, filed April 13, 1995.

¹² Grant of Applications for 800 MHz SMR Business, Industrial/Land Transportation and General Category Channels Received Between November 8, 1993 and August 10, 1994, *Order*, 10 FCC Rcd 6635 (WTB 1995).

¹³ "Wireless Bureau Vacates and Supersedes Grants to SMRS Announced by March 17, 1995 Public Notice," *Public Notice*, Mimeo No. 60472 (WTB rel. Oct. 31, 1995) (October 31, 1995 Public Notice).

¹⁴ In the *800 MHz First Report and Order*, the Commission dismissed all applications on the waiting list in the upper 200 channels of the 800 MHz band. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1635 (1995) (*800 MHz First Report and Order*).

¹⁵ The Commission dismissed all applications in the lower 230 channels of the 800 MHz band in the *800 MHz Second Report and Order*. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19173 (1997). The dismissal of all waitlisted applications were final actions. See California Water Service Company, For Authority to Provide Multiple Address System Service in the States of California and Washington, *Memorandum Opinion and Order*, FCC 03-118 (rel. June 3, 2003).

¹⁶ See Letter from Alan S. Tilles, counsel for East River Electric Power Cooperative, to Terry L. Fishel, Chief, Land Mobile Branch, Federal Communications Commission, filed November 29, 1995 (Petition for Reconsideration).

¹⁷ See Request for Reconsideration at 1.

¹⁸ See Letter from Alan S. Tilles, counsel for East River Electric Power Cooperative, to Terry L. Fishel, Chief, Land Mobile Branch, Federal Communications Commission, filed December 12, 1995 (supplementing Request for

River's applications, stating that East River had sought specific frequencies that were no longer available. Further, the Land Mobile Branch found that the decision not to grant alternative frequencies was reasonable because East River's January 1995 letter constituted a major amendment that could not be accepted because it was submitted after the imposition of the application freeze.¹⁹ In response, East River filed the instant Application for Review, arguing, *inter alia*, that because it was common practice to review SMR applications for alternative frequencies, the Commission should have granted alternative channels to East River.

III. DISCUSSION.

7. Upon review of the record, we conclude that it is in the public interest to grant East River relief that is comparable to the relief it seeks in its Application for Review. This decision is based on our determination that, at the time East River's applications were filed, it was the staff's practice to search for alternative frequencies if the channels specified in an application were not available for grant. Because this practice was not applied when East River's applications were processed pursuant to the second Industry Coalition software run, resulting in the eventual dismissal of the majority of East River's applications, we find that we should grant East River the relief specified below.

8. We note that the staff's practice of assigning alternative spectrum if an applicant's requested frequencies were not available was not prescribed by then applicable Commission rules. Former rule section 90.621(a) required that applicants either seek specific frequencies or request that the Commission assign available channels. Further, former rule section 90.611(d) provided that applications that could not be granted due to the lack of available frequencies were to be waitlisted.²⁰ Although the practice of assigning alternative frequencies in lieu of unavailable requested frequencies derived from the staff's legitimate desire to reduce (and prevent) the backlog of filed or waitlisted applications, such practice was never specifically addressed or sanctioned by the Commission. Now that this issue is specifically before us, we find, as stated above, that the procedure prescribed by section 90.611(d) provided that applications that specified unavailable frequencies would be placed on a wait list.

9. This notwithstanding, factors exist in this situation which lead us to conclude that East River was not "on notice" of the Commission's actual policy.²¹ The record indicates that the assigning of alternative frequencies in lieu of specified channels was a practice that was widely-known by the public. In fact, the first Industry Coalition software run was programmed to search for alternative frequencies in order to mimic the Land Mobile Branch's manual way of processing SMR applications. Although the provision that applications for unavailable spectrum would be placed on a waiting list would normally have been sufficient to put applicants on notice of the possible consequences of applying for specific frequencies, we conclude that the staff practice of granting alternative channels caused the Commission's actual policy to be unclear to applicants. Indeed, given East River's clear desire for any available spectrum at its requested sites, we are not convinced that East River would have applied for specific frequencies in the

Reconsideration), citing letter from Carole C. Harris, counsel for East River Electric Power Cooperative, to Terry L. Fishel, Chief, Land Mobile Branch, Federal Communications Commission, dated January 3, 1995.

¹⁹ Letter from Terry Fishel, Chief, Land Mobile Branch, Federal Communications Commission, to Alan S. Tilles, counsel for East River Electric Power Cooperative, dated June 28, 1996. Former rule sections 1.918 and 1.962(c)(1) provided that a request to modify frequencies specified in an application constituted a substantial change, thereby causing the application to be considered newly filed as of the date of the amendment.

²⁰ 47 C.F.R. § 90.611(d) (1992).

²¹ A regulation must be sufficiently clear to warn a party of what is expected of it; there must be sufficient notice such that a regulated party would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. See *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).

absence of the well-established staff practice. In light of these facts, we conclude that East River requested specific frequencies in reliance upon the staff's practice of assigning alternative spectrum. In light of this reliance, we conclude that it is in the public interest to grant East River's Application for Review, reinstate its applications,²² and provide relief to the extent possible.²³

10. There is not currently a sufficient number of 800 MHz SMR channels available for grant at East River's requested sites. Nevertheless, we provide East River substantial relief by reinstating its applications and by directing the Bureau to process available 800 MHz Business or Industrial/Land Transportation (ILT) category frequencies in lieu of SMR channels where possible²⁴ pursuant to section 90.621(e)(2) of our rules, which allows Business and I/LT frequencies to be converted to commercial use.²⁵ In order to effectuate such use, we waive sections 90.621(e)(2)(ii)²⁶ and section 90.621(e)(2)(i)²⁷

²² The applications to be reinstated are: file nos. 654521, 654522, 654523, 654524, 654525, 654526, 654527, 654528, 654530, 654531, 654532, 654534, 654535, and 654537. One of the applications listed in the Application for Review, file no. 654529, was granted pursuant to the second Industry Coalition run. The grant was accepted by East River. See former rule section 90.143(c); see also 47 C.F.R. § 1.945(c).

²³ We note that our action with respect to East River should in no way be read as invalidating the second Industry Coalition software run. We also emphasize that as a general matter, staff action that is contrary to the Commission's rules or stated policies is not binding on the Commission. See e.g. Nextel Communications, Inc. – Requests for Waiver of 47 C.F.R. §§ 90.617(c) and 90.619(b), *Order*, 14 FCC Rcd 11678 (WTB 1999), citing *Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself), *cert. denied* 525 U.S. 1147 (1999), and *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990); Applications of Ruralvision Central, Inc., *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11640 (1995); Application of American Cellular Network Corporation of Nevada, *Order on Review*, 2 FCC Rcd 4530 (1987).

²⁴ The 800 MHz band is organized into five service categories or pools --Business, Industrial/Land Transportation, General Category, Public Safety and SMR—with each category having specific eligibility criteria. Prior to 1995, “intercategory sharing” enabled SMR, Business, I/LT and Public Safety eligibles to apply for frequencies in other service categories. In 1995, the Commission suspended the acceptance of applications for intercategory sharing. Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350 (1995).

²⁵ 47 C.F.R. § 90.621(e)(2). We note that East River previously filed waiver requests in 1996 to, in effect, put its private land mobile radio (PLMR) spectrum into commercial use. Specifically, East River sought to “share” its excess Business and I/LT capacity with other Business, I/LT and Public Safety licensees. In order to enable such entities to use frequencies outside of their own service categories, East River sought, *inter alia*, waivers of the intercategory sharing freeze. However, at the time, licensees of PLMR channels were not permitted to operate their spectrum for commercial use. The Bureau denied East River's requests because East River's internal system is PMRS but its proposed for-profit use for its excess Business and I/LT capacity could not be classified as PMRS. Rather than a permissible sharing arrangement in which each licensee would be using the same spectrum to provide PMRS service to itself, the Bureau found that the proposed use would consist of East River managing a wide-area mobile radio system for profit. Further, the Bureau noted that shared use on a for-profit basis is only permitted for SMR licensees; other 800 MHz category entities were ineligible. See East River Electric Power Cooperative – Requests for Waiver of the Inter-Category Freeze at 800 MHz and Section 90.621(e)(5), *Order*, 12 FCC Rcd 5871 (WTB 1997). In contrast, the relief being offered here is different in that the Commission subsequently modified section 90.621(e)(2) of its rules to permit PLMR licensees to convert 800 MHz Business or I/LT category frequencies to commercial use. Accordingly, East River is now able to provide CMRS service using Business or I/LT pool channels. See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, RM-9332, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, RM-9405, Petition for Rule Making of the American Mobile Telecommunications Association, RM-9705, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709 (2000) (*Balanced Budget Act Report and Order*).

²⁶ 47 C.F.R. § 90.621(e)(2)(ii).

of our rules. Section 90.621(e)(2)(ii) generally requires that a licensee hold its private land mobile radio (PLMR) licenses for five years prior to modification to CMRS use, and also requires that a licensee hold its PLMR licenses for five years prior to transfer or assignment of the licenses to a CMRS operator. Section 90.621(e)(2)(i) precludes a Business or I/LT licensee that converts frequencies or transfers its license to a CMRS operator from applying for 800 MHz PLMR spectrum in the same area for one year.

11. Both the five-year holding requirement and the one-year application ban were put in place as means to discourage the trafficking of PLMR spectrum and to ensure that such channels are initially licensed only to entities that will use them for PLMR communications.²⁸ Because our intent is to grant East River spectrum that it can put to immediate commercial use,²⁹ the underlying bases of the holding period and application ban are not implicated here. East River is, however, subject to the requirement in sections 90.621(e)(2)(iii) and 90.621(e)(2)(iv) that it certify that it has notified co-channel 800 MHz public safety licensees in the same geographic area and that it will take affirmative steps to avoid harmful interference to such public safety licensees.³⁰ Accordingly, we grant East River certain frequencies as set out in Appendix A.

12. Finally, we deny East River's related Petition for Reconsideration, which seeks reconsideration of the grants of numerous site-based 800 MHz SMR facilities made to OneComm.³¹ The OneComm grants were made pursuant to a waiver mechanism established in the *CMRS Third Report & Order* by which licensees could obtain additional frequencies, despite the application freeze, if their applications were for sites and frequencies within the applicant's aggregate geographic footprint.³² In its Petition for Reconsideration, East River argues that it was premature to approve the OneComm applications because such authorizations would make spectrum unavailable for East River. East River also questions whether the granted frequencies were within OneComm's established footprint.³³

13. We conclude that there is an insufficient basis to rescind the grants made to OneComm. The existence of a pending Petition for Reconsideration or Application for Review does not prevent the Commission from continuing to apply its rules or from continuing to process applications. We do not

²⁷ 47 C.F.R. § 90.621(e)(2)(i).

²⁸ See *Balanced Budget Act Report and Order*, 15 FCC Rcd at 22762-63, paras. 114-15. We also did not apply the five-year holding requirement to licenses granted or applications filed prior to the adoption of the *Balanced Budget Act Report and Order*. The Commission concluded that no purpose would be served by applying the holding period to grants or applications made prior to the rule change because no speculative intent on the part of licensees or applicants could be inferred in those cases. *Balanced Budget Act Report and Order*, 15 FCC Rcd at 22763, para. 116. The same rationale applies here --- no speculative incentive on the part of East River can be inferred in this situation.

²⁹ We note that although we are authorizing these frequencies as CMRS, East River, as a Business and I/LT eligible, may at anytime choose to modify the subject frequencies for use in its PLMR system. See 47 C.F.R. § 90.621(e)(3).

³⁰ See 47 C.F.R. § 90.621(e)(2)(iii), (iv). Normally, this certification must be included in a licensee's modification application. Because we are not requiring East River to file a modification application, we will require East River to submit the certification within 60 days of the effective date of this order.

³¹ See authorizations of OneComm Corporation, issued February 7, 1997. The OneComm grants included sites located near as well as areas far removed from East River's requested sites.

³² See e.g. *CMRS Third Report and Order*, 9 FCC Rcd at 8048, para. 108; Letter from Ralph Haller, Chief, Private Radio Bureau, Federal Communications Commission, to David E. Weisman, 8 FCC Rcd 143 (WTB 1992); Requests for Waiver of the 800 MHz Specialized Mobile Radio Application Freeze, *Order*, 11 FCC Rcd 13850 (WTB 1996).

³³ Petition for Reconsideration at 7, 8.

agree with East River's argument that the possibility that its Application for Review would be granted precluded the Commission from processing and granting other applications.³⁴ Nor can we agree with East River that revoking grants to OneComm will provide adequate relief for East River as we have not found sufficient basis to conclude that the grants went beyond OneComm's wide-area network and were thus improper. Accordingly, we deny East River's Petition for Reconsideration.

IV. ORDERING CLAUSES.

14. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303, and 307 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303, and 307, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review by East River Electric Power Cooperative, filed July 29, 1996, IS GRANTED as provided herein.

15. IT IS FURTHER ORDERED that applications for 800 MHz Specialized Mobile Radio licenses filed by East River Electric Power Cooperative, file numbers 654526, 654535, 654521, 654522, 654523, 654524, 654525, 654527, 654528, 654530, 654531, 654532, 654534, and 654537, ARE REINSTATED. We direct the Wireless Telecommunications Bureau to process the applications as specified in Appendix A.

16. IT IS FURTHER ORDERED that the Petition for Reconsideration by East River Electric Power Cooperative, filed March 10, 1997, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ See e.g. Application of Ray M. Stanfield, Receiver, and Robeson/Suttles Broadcasting, Inc., *Order on Reconsideration*, 12 FCC Rcd 3345 (1997).

APPENDIX A

The following chart lists the East River Electric Power Cooperative applications that are reinstated, as well as the associated 800 MHz Business and Industrial/Land Transportation frequencies that have been identified as available for grant.

Application File No.	Frequencies to be Granted	Location/Coordinates
654523	856.3375/857.3375/858.3375/859.3375/860.3375	454730N/0964955W
654527	856.3375/857.3375/858.3375/859.3375/860.3375	443524N/0974045W
654528	856.3375/857.3375/858.3375/859.3375/860.3375	430855N/0983728W
654534	856.3375/857.3375/858.3375/859.3375/860.3375	440745N/0992611W
654524	855.1375/856.3875/857.3875/859.3875/860.3875	442523N/1002119W
654531	855.1375/856.3875/857.3875/859.3875/860.3875	435757N/0971520W
654535	855.1375/856.3875/857.3875/859.3875/860.3875	445058N/0962836W
654521	855.6375/855.6875/855.8625/857.3125/859.3125	443929N/0950321W
654526	855.6375/855.6875/855.8625/857.3125/859.3125	445217N/0991616W
654530	855.6375/855.6875/855.8625/857.3125/859.3125	433239N/0963301W
654537	855.6375/855.6875/855.8625/857.3125/859.3125	444814N/0964955W
654522	855.4125/855.4375/855.6625/859.3625/860.3625	451221N/0975419W
654525	855.4125/855.4375/855.6625/859.3625/860.3625	441702N/0961856W
654532	855.4125/855.4375/855.6625/859.3625/860.3625	430300N/0964712W