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

In the Matter of	)	
	)	
EFL REALTY TRUST	)	File Nos. 0001852833
	)	0001855236, 0001856946
Applications for New Licenses	)	0001863513, 0001863518
In the Non-SMR 900 MHz Band for	)	0001863675, 0001864169
Industrial/Business Pool, Trunked (YU)	)	0001864170, 0001864172
Stations at Multiple Locations	)	0001864174, 0001864361
	)	0001865507, 0001865743

ORDER

Adopted: October 9, 2008 **Released: October 15, 2008**

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review filed by EFL Realty Trust (EFL) challenging the dismissal of the above-captioned Private Land Mobile Radio (PLMR) applications by the Wireless Telecommunications Bureau's (Bureau) Mobility Division (Division).[1] As discussed below, we deny EFL's Application for Review and affirm the Division's determination that EFL did not make a sufficient showing under the Commission's channel loading requirements to justify grant of its PLMR applications. In particular, we emphasize that EFL was required to demonstrate a need for the requested channels, even if EFL intends to use the channels for internal communications only, and that EFL failed to do so.

II. BACKGROUND

2. *800 and 900 MHz Bands*. Subpart S of Part 90 of the Commission's rules governs the use and licensing of the 800 and 900 MHz bands.[2] Certain channels in these bands (collectively referred to as non-Specialized Mobile Radio (SMR) or PLMR channels) may be used for Public Safety, Business, and Industrial/Land Transportation communications, for internal communications, or to provide service to third-parties on a not-for-profit basis.[3] In addition, certain channels in the 800 and 900 MHz bands may be used to establish SMR service, which provides land mobile communications on a commercial, for-profit basis.[4] On August 6, 2004, the Commission released its *Report and Order* in the *800 MHz Rebanding Proceeding* that adopted technical and procedural measures designed to address the problem

[1] Application for Review, filed by EFL Realty Trust (Aug. 29, 2005).

[2] 47 C.F.R. § 90.600 *et seq*. The 896-901/935-940 MHz bands are known collectively as the 900 MHz band.

[3] In the Matter of Applications for LMR Systems, Inc., 14 FCC Rcd 17227, 17235 ¶ 15 (PSPWD 1999) (LMR Systems) (citing 47 C.F.R. §§ 90.603(a) and (b)); *see* 47 C.F.R. § 90.617(c) (listing the 900 MHz Industrial/Business Pool channels and explaining that SMR systems will not be authorized on these frequencies).

[4] LMR Systems, 14 FCC Rcd at 17235 ¶ 15 (citing 47 C.F.R. § 90.603(c); *see* § 90.617(f) (listing the SMR category 900 MHz band channels).

of interference to public safety communications in the 800 MHz band.[5] As part of its reconfiguration plan, the Commission consolidated the Business and Industrial/Land Transportation (B/ILT) Pools in the 800 and 900 MHz bands, allowing any eligible B/ILT licensee to be licensed on the consolidated channels.[6] The Commission also provided for additional flexibility in the 900 MHz band. In particular, the Commission allowed 900 MHz non-SMR licensees to initiate Commercial Mobile Radio Service (CMRS) operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use in an effort to accommodate displaced systems during the 800 MHz band reconfiguration process.[7]

3. Shortly after release of the *800 MHz R&O*, the Commission received an exceptionally large number of applications for new 900 MHz non-SMR licenses in the B/ILT category. Concerned that so many new authorizations might compromise the use of the 900 MHz band for facilitating band reconfiguration at 800 MHz, the Bureau released a Public Notice on September 17, 2004, imposing a "freeze" on the acceptance of applications for new 900 MHz licenses as of the date of the Public Notice, until further notice.[8] The Bureau noted that it would continue to accept applications for modifications of existing facilities, assignment of a license, or transfer of control of a license. These applications, however, would be subject to existing requirements for showings of eligibility, loading, and other requirements of the Commission's rules.[9] The Bureau also stated that applicants would have recourse to the waiver provisions of the Commission's rules.[10]

4. On February 16, 2005, the Commission released a *Notice of Proposed Rulemaking and Memorandum Opinion and Order* proposing to permit flexible use of remaining 900 MHz "white space" and to adopt a geographic area licensing scheme for licensing the spectrum.[11] In the *900 MHz MO&O*, the Commission affirmed the Bureau's decision to suspend the acceptance of applications for new 900 MHz non-SMR licenses as of the release date of the *Freeze Public Notice*.[12] The Commission found it appropriate and necessary to suspend new 900 MHz applications in the B/ILT category Pools because of the fundamental changes it was proposing in the service areas and channel blocks for future licensees in this service,[13] but indicated it would consider requests for waivers.[14] In addition, the Commission

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[5] In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) (*800 MHz R&O*).

[6] 800 MHz R&O, 19 FCC Rcd at 15126 ¶ 334.

[7] 800 MHz R&O, 19 FCC Rcd at 15127 ¶¶ 336, 337. The Commission reasoned that because it permitted CMRS use of PLMR frequencies in the 800 MHz land mobile band, similar rules should apply in the 900 MHz land mobile spectrum, in the interest of regulatory symmetry. *Id*. at 15127 ¶ 335. The Commission also explained that to provide "green space" necessary to effect reconfiguration of the 800 MHz band, some operations may need to shift from the 800 MHz to the 900 MHz band, a factor that further merited complementary CMRS rules in both bands. *Id*. at 15127 ¶ 336.

[8] Wireless Telecommunications Bureau Freezes Applications in the 900 MHz Band, *Public Notice*, 19 FCC Rcd 18277 (WTB 2004) (*Freeze Public Notice*).

[9] *Id*. at 18278 n.8.

[10] *Id*. at 18278 n.8.

[11] In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 20 FCC Rcd 3814 (2005) (*900 MHz NPRM & MO&O*).

[12] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 67.

[13] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 66. The Commission further explained that allowing applications might limit the effectiveness of the decisions ultimately made in the context of the proceeding proposing flexible use and geographic area licensing for 900 MHz spectrum, and that its action was consistent with

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addressed the status of applications filed just prior to imposition of the freeze. In particular, the Commission stated that "[w]e also note that all 900 MHz band applications for new licenses which were filed prior to the freeze and are still pending will be processed in the normal course."[15] The Commission continued, "[w]e emphasize, however, that each pending application will be subject to strict scrutiny, especially with respect to eligibility and channel loading requirements, and defective applications will be dismissed."[16]

5. *EFL Applications*. EFL filed its 13 applications between August 25, 2004, and September 9, 2004, as part of the group of applications filed prior to the Bureau imposing the freeze on accepting 900 MHz applications. EFL's applications proposed non-SMR trunked service in the Industrial/Business Pool 900 MHz band. Specifically, EFL submitted the following: two applications each proposing 10 frequency pairs to be loaded with 1,000 mobile units;[17] nine applications each proposing 10 frequency pairs to be loaded with 901 mobile units;[18] one application proposing 8 frequency pairs to be loaded with 721 mobile units;[19] and one application proposing 5 frequency pairs to be loaded with 451 mobile units.[20] EFL therefore submitted applications for a total of 123 frequency pairs to be loaded with 11,281 mobile units. The cities in which EFL proposed to operate included Newport, Rhode Island; Hartford, Connecticut; Manchester, New Hampshire; Minneapolis, Minnesota; Milwaukee, Wisconsin; Cincinnati, Ohio; Cleveland, Ohio; Pittsburgh, Pennsylvania; St. Louis, Missouri; Kansas City, Missouri; Indianapolis, Indiana; Buffalo, New York; and Charlotte, North Carolina.

6. In each of its applications, EFL's statement of eligibility under Section 90.617 of the Commission's rules was "[a]pplicant will use radios for transmission of communications essential to business distribution of commodities and services to commercial and non commercial entities." Between late October and early November 2004, the Division returned each of the applications with a "Notice of Return" (Return Notice), directing EFL to provide certain information. The Return Notices sought specific information regarding each location including: (1) a copy of EFL's local business license; (2) the address and telephone number of EFL's local business operation; (3) the name of EFL's local manager; (4) the number of employees at each location; and (5) the number of vehicles at each location to be equipped with radios. The Return Notices also requested a copy of EFL's articles of incorporation and a list of corporate officers.[21]

7. On December 27, 2004, EFL amended each of its applications in response to the Division's request. In an attachment to its amended application, EFL explained that "[t]he business which EFL Realty Trust intends to operate cannot be conducted without an authorization for the requested

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the Commission's past practices. *Id*. (citing Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, *CMRS Third Report and Order*, 9 FCC Rcd 7988, 8047-48 ¶ 108 (1994)).

[14] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 67.

[15] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 67.

[16] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 67.

[17] The applications were FCC File Nos. 0001852833 and 0001855236.

[18] The applications were FCC File Nos. 0001856946, 0001863513, 0001863518, 0001864169, 0001864170, 0001864172, 0001864361, 0001865507, and 0001865743.

[19] The application was FCC File No. 0001863675.

[20] The application was FCC File No. 0001864174.

[21] *See, e.g.,* Notice of Return, Reference No. 3108998 (Newport, Rhode Island Application FCC File No. 0001852833) (Oct. 29, 2004).

channels."[22] EFL further explained that "it would not be prudent for EFL Realty Trust to expend funds to obtain a local business license, obtain a local facility or telephone number or hire a manager or employees prior to securing the requested radio station license."[23] EFL stated that it had not yet obtained any licenses to operate any local businesses, did not have any addresses or telephone numbers, and had not yet hired any local employees or managers.[24] After asserting that Commission rules do not require an applicant to provide any of this requested information, EFL did state that it was amending its application to show that 98 percent of its requested mobile units were expected to be handheld and the remainder were expected to be mounted in vehicles.[25] EFL did not respond at all to the Division's request for a copy of its articles of incorporation and a list of corporate officers.

8. On July 30, 2005, the Division dismissed each of EFL's applications as defective under Section 1.934 of the Commission's rules with a "Notice of Dismissal" explaining:

> Rule 90.631 requires that trunked channels be assigned on the basis of 100 mobile units per channel. Based on our review of the information provided, you have not justified the number of channels requested. You indicate that you have no current business operation in the market nor did you provide any evidence that you were establishing an operation justifying the number of channels requested. Therefore we are hereby dismissing the application.[26]

In response to the dismissals, EFL filed its Application for Review on August 29, 2005. EFL argues that the Division erroneously required it to "demonstrate an immediate need for 100 mobile units per channel" and erroneously required it to justify its need for a trunked system authorization.[27] No parties filed any opposition to EFL's Application for Review.

III. DISCUSSION

9. *Introduction*. We deny EFL's Application for Review because we agree with the Division's determination that EFL has not provided information sufficient to justify the number of channels and mobile units requested in its applications. EFL primarily argues that Commission rules for licensing above 800 MHz require a showing of eligibility, but not a showing of justification of need for trunked channels for an existing business operation in a certain location.[28] To the contrary, as discussed further below, our rules require both a demonstration of eligibility and an initial showing that the channels requested will be occupied in conformity with our loading standards, whether EFL is applying for channels to provide internal communications or to provide not-for-profit service to a third party.

10. *Part 90 Channel Loading Rules and Policies*. EFL asserts that the Division's dismissal attempts to impose requirements "not provided for" by Commission rules[29] and that the Division has

[22] *See, e.g.,* FCC File No. 0001852833, Att. at 1 (Letter from E.F. Leonard, Officer, EFL Realty Trust, to FCC (Dec. 20, 2004)).

[23] *Id*. at 1.

[24] *Id.* at 1.

[25] *Id.* at 1 (EFL amended Item 25 of FCC Form 601, Schedule D).

[26] *See, e.g.,* Notice of Dismissal, Reference No. 3645066 (Newport, Rhode Island Application File No. 0001852833) (July 30, 2005) (*EFL Dismissal Notice*).

[27] Application for Review at 1.

[28] Application for Review at 6.

[29] Application for Review at 3.

"attempted to engraft onto the Commission Rules a non-existent requirement for a justification of need."[30] We disagree.

11. The purpose of the Commission's Part 90 loading rules is to prevent warehousing of channels to ensure that spectrum is used in an efficient manner.[31] Specifically, Section 90.627(a) of the Commission's rules limits the maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system to twenty.[32] Section 90.631(a) of the Commission's rules provides that non-SMR trunked systems will be authorized on the basis of a loading criterion of 100 mobile stations per channel, with mobile stations including vehicular and portable mobile units and control stations.[33] Section 90.631(b) provides that an applicant for a non-SMR trunked system must certify that a minimum of 70 mobiles for each channel authorized will be placed into operation within five (5) years of the initial license grant.[34] Thus, trunked systems are authorized based on a loading level of 100 mobiles per channel and applicants must certify that they will load their systems to at least 70 percent of this level (70 mobiles per channel) within five years of their license grant.[35]

12. The principle that 900 MHz applicants must justify the number of channels requested is based on the policies expressed in the Commission's rulemakings establishing its loading requirements. From the time the Commission first introduced loading standards for private land mobile services in 1971,[36] the measure that the Commission has employed in its rules for determining channel usage for non-SMR trunked service is the number of transmitters authorized for use on the channels.[37] The Commission adopted loading criteria to enable it to set standard levels of channel occupancy, rather than examining loading proposals in applications on a case-by-case basis, to help ensure efficient use of the spectrum.[38]

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[30] Application for Review at 6.

[31] In the Matter of Requests of Viking Dispatch Services, Inc. for Rule Waiver and Associated Applications, *Order*, 10 FCC Rcd 12769, 12771 ¶ 11 (WTB 1995).

[32] 47 C.F.R. § 90.627(a).

[33] 47 C.F.R. § 90.631(a).

[34] 47 C.F.R. § 90.631(b).

[35] In the Matter of Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Notice of Proposed Rulemaking*, 7 FCC Rcd 1400, 1400 ¶ 2 (1992) (*1992 900 MHz NPRM*).

[36] Loading standards were introduced in Docket No. 18621, when the Commission made specific frequencies available in the 470-512 MHz band for assignment for private land mobile services. In the Matter of Amendment of Part 90, Subparts M and S, of the Commission's Rules, *Report and Order*, 3 FCC Rcd 1838, 1844 ¶ 51 (1988) (*Subparts M and S R&O*) (citing In the Matter of Amendment of Parts 21, 89, 91 and 93 of the Rules to Reflect the Availability of Land Mobile Channels in the 470-512 MHz Band in the 10 Largest Urbanized Areas of the United States, *First Report and Order*, Docket No. 18261, 23 F.C.C. 2d 325 (1970); *id*., *Second Report and Order*, 30 F.C.C. 2d 221 (1971) (*Docket No. 18261 Second R&O*)).

[37] *See* In the Matter of Amendment of Part 90 of the Commission's Rules to Release Spectrum in the 806-821/851-866 MHz Bands and to Adopt Rules and Regulations Which Govern Their Use; Amendment of Part 90 of the Commission's Rules to Facilitate Authorization of Wide-Area Mobile Radio Communications Systems; An Inquiry Concerning the Multiple Licensing of 800 MHz Radio Systems ('Community Repeaters'); Amendment of Section 90.385(c) of the Commission's Rules to Allow Transmission of Non-Voice Signals at 800 MHz, *Memorandum Opinion and Order*, PR Docket No. 79-191, 95 F.C.C. 2d 477, 483-84 ¶ 11 (1983) (in deciding that control stations will be counted to determine the loading level of trunked systems, stating that "[t]he measure of channel usage we employ in our rules is the number of transmitters authorized for use on the channels").

[38] *Subparts M and S R&O*, 3 FCC Rcd at 1844 ¶ 51. The Commission adopted the 50/70/90 "units-in-use" channel loading criteria. Docket No. 18261 Second R&O, 30 F.C.C. 2d at 227 ¶ 14. The Commission adopted loading standards also to provide potential users with a means to determine channel availability and to provide a means to

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By 1974, the Commission had developed general rules to assist it in determining when an assigned frequency was to be treated as occupied, or not occupied, in terms of its capacity to serve the requirements of the users in an effective way.[39] The Commission considered a variety of factors including average message length, the number of operating units in any given time period, the number of times per hour that dispatchers and mobiles originate calls, the size of the systems, and the nature of the functions and activities of the licensees.[40] Relying on these factors, the Commission designated levels for channel loading on trunked systems based on what the Commission believed actual operating conditions would demand.[41]

13. In 1988, the Commission adopted one standard for non-SMR systems above 800 MHz. It determined that trunked systems would be authorized on the basis of loading 100 mobiles per channel and adopted the standard requiring applicants to certify that a minimum of 70 mobile units for each channel would be placed into operation within five (5) years of the initial grant of the license.[42] In making its decision, the Commission explained that "[t]his standard will accomplish our objectives of maximizing spectrum efficiency and increasing flexibility."[43] The Commission further explained that "[u]se of this standard will ensure that a substantial level of spectrum efficiency is maintained and that licensees have some flexibility in designing their systems."[44]

14. The Commission has provided examples to demonstrate how it would authorize channels based on examination of an applicant's business need for channel usage, and stated in its 1971 proceeding, when the loading criteria was 90 mobile units per channel, that "[i]f a user has 20 vehicles equipped with radio, it will be assigned one frequency pair, only. If it has 100 such units in use and is eligible in the Business Pool, it would be entitled to two pairs, but it would not be required to use another channel, and we assume that licensees will operate as many mobile units as possible on an assigned pair

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determine whether a licensee of conventional channels was entitled to shared or exclusive use of a channel. *Subparts M and S R&O*, 3 FCC Rcd at 1844 ¶ 51.

[39] In the Matter of and Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91 and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806 and 960 MHz, *Second Report and Order*, Docket No. 18262, 46 F.C.C. 2d 752, 778 ¶ 89 (1974) (*Docket No. 18262 Second R&O*).

[40] *Docket No. 18262 Second R&O*, 46 F.C.C. 2d at 777 ¶ 85; *Subparts M and S R&O*, 3 FCC Rcd at 1844 ¶ 51. For example, based on these factors, the Commission had determined that 50 vehicular mobile units per channel in the Police Radio Service was a reasonable and realistic criterion to apply in licensing stations in that service. *Docket No. 18262 Second R&O*, 46 F.C.C. 2d at 777 ¶ 85. The Commission contrasted that to the Business Radio Service, where frequencies allocated were intended to be shared more intensively because they are designated to serve a much broader group of eligibles, and noted there were inherent differences in the nature of the communications of businessmen and police departments. *Id*. Consequently, the Commission determined that higher loading standards should be employed for the Business Radio Service, with each frequency or channel licensed to serve approximately 90 mobiles. *Id*.

[41] *Docket No. 18262 Second R&O*, 46 F.C.C. 2d at 778-79 ¶ 92-93. At the time, these loading levels were considered to be interim loading parameters, which, if necessary, would be modified to conform with the needs of actual operating conditions. *Id*.

[42] *Subparts M and S R&O*, 3 FCC Rcd at 1845 ¶ 64. Prior to adopting the Subpart M standard, new trunked systems under Subpart S were required to be loaded to 60 mobile units per channel within three (3) years and 80 mobile units per channel within five (5) years of authorization. *Id*. at 1844 ¶ 52 (citing PR Docket No. 79-191 Second R&O, 90 F.C.C. 2d 1281 (1982); PR Docket No. 79-191 MO&O, 95 F.C.C. 2d 477 (1971)).

[43] *Subparts M and S R&O*, 3 FCC Rcd at 1845 ¶ 64.

[44] *Subparts M and S R&O*, 3 FCC Rcd at 1845 ¶ 64.

of frequencies."[45] In a 1974 proceeding, the Commission established the distance for co-channel separation for trunked systems at 70 miles, regardless of whether the trunked facility is located in an urban or suburban area. The Commission explained that "[t]his is feasible in trunked operations because the applicant must make an initial showing that the facilities requested will be occupied in conformity with the applicable loading criteria."[46]

15. More recently, the Commission explained that "[o]ur loading requirements were adopted to serve the public interest by preventing valuable spectrum from remaining fallow."[47] In particular, the Commission found that non-SMR 900 MHz Industrial/Land Transportation licensees, as opposed to 900 MHz SMR licensees, "do not compete for customers and should only apply for enough channels to satisfy their actual needs."[48] The Commission further stated that an Industrial/Land Transportation licensee that cannot meet our loading requirements, for whatever reason, is essentially warehousing spectrum in hopeful anticipation of long term growth of a business.[49]

16. The Bureau relied on Commission loading policy when it dismissed multiple licensed system applications for failure to justify the number of channels needed. The Bureau's former Public Safety and Private Wireless Division (PSPWD) affirmed the dismissal of several applications for trunked PLMR community repeaters on 800 MHz Business Category Pool frequencies in *Mobilcom Pittsburg, Inc*. because Mobilcom failed to demonstrate that its request for 32 channels would be loaded to a capacity of 3200 mobile units.[50] In denying a consolidated petition seeking reconsideration of the dismissal of the applications, PSPWD stated that Section 90.631(a) serves the important function of ensuring that non-SMR applicants for a multiple-licensed system are not granted more PLMR channels than needed for their private internal communication.[51] Similarly, the Bureau's former Public Safety and

[45] In the Matter of Amendment of Parts 21, 89, 91 and 93 of the Rules to Reflect the Availability of land Mobile Channels in the 470-512 MHz Band in the 10 Largest Urbanized Areas of the United States, *Notice of Further Proposed Rulemaking*, Docket No. 18261, 27 F.C.C. 2d 371, 376 ¶ 14 (1971). In Appendix C to *Docket No. 18261 Second R&O*, the Commission also provided a case example of how a company that conducts parcel delivery service in Jersey City, New Jersey would apply for radio facilities in the 470-512 MHz band in the Business Radio Service, and how that application would be processed. *Docket No. 18261 Second R&O*, 30 F.C.C. 2d at 278, App. C. In the example, the company has 17 trucks in operation and 3 more on order, and all would be in operation within less than 8 months. *Id*. The channel loading for Business Service, at that time, had been established at 90 vehicular units per channel. *Id*. Thus, the company was informed that it could expect to share with other licensees, within the 40-mile radius, who, in addition to the company's 20 mobiles, had a total of 70 vehicular units in actual operation. *Id*.

[46] *Docket No. 18262 Second R&O*, 46 F.C.C. 2d at 775 ¶ 79.

[47] *1992 900 MHz NPRM*, 7 FCC Rcd at 1401 ¶ 8.

[48] In the Matter of Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, 7 FCC Rcd 4914, 4914 ¶ 11 (1992) (*1992 900 MHz R&O*); *1992 900 MHz NPRM*, 7 FCC Rcd at 1401 ¶ 6 n.10.

[49] *1992 900 MHz NPRM*, 7 FCC Rcd at 1401 ¶ 6 n.10. The Commission made these statements in the context of its rulemaking where it granted a two-year renewal period for 900 MHz SMR licensees that had not met the loading requirements of Section 90.631(b) by the end of their initial five-year license term. Several commenters urged the Commission to grant similar relief to the Industrial/Land Transportation Pool, but the Commission declined to do so, finding the competitive position for 900 MHz Industrial/Land Transportation and 900 MHz SMR systems with respect to other providers vastly different. *1992 900 MHz R&O*, 7 FCC Rcd at 4914 ¶ 11; *1992 900 MHz NPRM*, 7 FCC Rcd at 1401 ¶ 6 n.10.

[50] In the Matter of Mobilcom Pittsburg, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 23053 (PSPWD 2003) (*Mobilcom Pittsburg, Inc.*).

[51] Mobilcom, 18 FCC Rcd at 23058 ¶ 12 (citing In the Matter of Applications of Viking Dispatch Services, Inc. For Up To Twenty (20) 900 MHz Private Land Mobile Service Channels at Various Locations, *Order*, 11 FCC Rcd 6685, 6693 ¶ 17 (WTB 1996) (*Viking Dispatch*)).

Critical Infrastructure Division (PSCID) granted the National Science and Technology Network, Inc. (NSTN) only three channels from its application to operate on ten channels on the 470 MHz band in the Industrial/Business Pool.[52] PSCID found that three channels were more than adequate for the 181 mobile units NSTN had requested.[53] Importantly, PSCID stated that:

> It is long-standing Commission policy that an applicant for a license must justify the number of channels requested. We are not required to grant a license applicant ten channels just because the applicant had requested this many frequencies. … The Commission does require justification specific as to the need for multiple frequencies to assure that an applicant is not licensed for more channels than it actually needs.[54]

17. As PSPWD explained, Section 90.631(a) of our rules serves the important function of ensuring that non-SMR applicants are not granted more PLMR channels than needed for their systems. The Bureau explained this policy in *Viking Dispatch Services, Inc*.[55] In *Viking Dispatch*, Viking Dispatch Services, Inc. (VDS) filed 42 applications requesting up to 20 non-SMR service channels in the 900 MHz band in each application. VDS proposed to construct two-way mobile communications dispatch systems at various locations in the United States and to operate them as a third-party provider. VDS also proposed to provide service on a not-for-profit, cost-shared basis.[56] The Bureau, however, found that VDS was not eligible as a person or entity providing communications service on a not-for-profit, cost-shared basis under the provisions of Section 90.603(b) of the Commission's Rules.[57]

18. The Bureau also concluded that VDS had failed to justify sufficiently its request for up to twenty channels at various locations throughout the country.[58] Like EFL, VDS had argued that no business entity would commit the resources to share a system that the Commission had not yet authorized. VDS further contended that it had certified each channel would be loaded, that it had five years to load the channels under Section 90.631(b) of the Commission's rules, and that no other Commission rules required it to provide a list of specific users of its proposed service.[59] In rejecting VDS's arguments, the Bureau explained that it is Commission policy to request the applicant, which was proposing PLMR third-party provider service, to justify or demonstrate a need for the channels requested.[60] The Bureau further explained that "[t]he purpose of this policy is twofold: (1) to keep third-party providers from

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[52] In the Matter of Application of National Science and Technology Network For a 470 MHz Trunked Industrial/Business Station License at Rancho Palos Verdes, California, *Order on Reconsideration*, 19 FCC Rcd 23134 (PSCID 2004) (*NSTN*).

[53] *NSTN*, 19 FCC Rcd at 23136 ¶ 6.

[54] *NSTN*, 19 FCC Rcd at 23135-36 ¶ 5.

[55] *Viking Dispatch*, 11 FCC Rcd 6685 (WTB 1996).

[56] *Viking Dispatch*, 11 FCC Rcd at 6685 ¶ 1.

[57] *Viking Dispatch*, 11 FCC Rcd at 6692 ¶ 14. In reaching that conclusion, the Bureau made several findings regarding VDS, including VDS did not intend to use the system itself; VDS planned to keep any profit from the sale of the systems; for all other business purposes, VDS was a for-profit business; VDS had not provided a sufficient explanation as to why it would undertake to construct these systems, involving large amounts of capital, to make them available on a non-profit, cost-shared basis; and VDS failed to identify any particular shared system participants. *Id*.

[58] *Viking Dispatch*, 11 FCC Rcd at 6694 ¶ 19.

[59] *Viking Dispatch*, 11 FCC Rcd at 6692-93 ¶ 15.

[60] *Viking Dispatch*, 11 FCC Rcd at 6693 ¶ 17. This justification is usually demonstrated by disclosing the names and phone numbers of eligible users who wish to use the system. *Id*.

being licensed for more PLMR channels than they actually need; and (2) to assure that the proposed systems are not-for-profit and cost-shared. Identifiable participants with existing communications needs are the essence of a not-for-profit, cost-shared system."[61] Finally, the Bureau rejected VDS's statements, relying on a general market study that VDS was confident that the requested channels would be used. The Bureau stated that "we need more than statements from the applicant that it is confident that the channels will be used and that its analysis is consistent with published growth projections for the PLMR service. Taking such action, we believe, would undermine our policy of ensuring that the spectrum is used efficiently by requiring such requests to be supported by actual, documented user requirements."[62] Accordingly, the Commission's rulemakings and case precedent establish the principle that 900 MHz applicants must justify the number of channels and mobile units requested to ensure the applicant is not licensed for more channels that it needs.

19. *Application of Precedent to Requests for Channels for Internal Communications Use*. EFL argues that there is no precedent for applying the policy set forth in *Viking Dispatch* "to a private user which intends to serve only its own communications needs," and that "EFL does not propose to share its proposed radio facilities with any other person."[63] We disagree. While the Commission, in affirming the Bureau's decision in *Viking Dispatch*, agreed with the Bureau that "when internal communications are not envisioned, greater scrutiny as to the validity of non-profit status is often warranted,"[64] it in no way held that applications proposing internal use systems would face no scrutiny. In fact, the Commission has expressly stated that applications for new licenses in the 900 MHz band that were filed prior to the freeze would be subject to strict scrutiny.[65] Commission precedent set forth above further establishes the principle that non-SMR 900 MHz applicants must justify the number of channels and mobile units requested, even if the applications are for internal communications only.

20. In this case, EFL proffers no documentation that it even exists as a business entity or intends to exist as a business entity. EFL's argument that it need not supply information about its business is unavailing and contrary to the plain language of Section 308(b) of the Act, which states that "[t]he Commission, at any time after the filing of such original application and during the term of any such licenses, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked."[66] Rather than provide information about its business or proposed operations, EFL merely offers statements that it cannot conduct a business without licenses for the requested channels. EFL contends that it has identified the user of its licenses – that is, itself – but it has failed to provide any information about its own identity. EFL has also failed to provide any information about how it plans to use the requested spectrum.[67] This approach does not ensure that the large number of channels requested will be efficiently

[61] *Viking Dispatch*, 11 FCC Rcd at 6693 ¶ 17.

[62] *Viking Dispatch*, 11 FCC Rcd at 6694 ¶ 18.

[63] Application for Review at 6. EFL asserts that *Viking Dispatch* is the only relevant case to this proceeding and, according to EFL, it is distinguishable from the instant matter. *Id*. at 5-6. According to EFL, the issue in *Viking Dispatch* was the identity of the shared system participants and EFL states in its Application for Review that in this case "[t]he proposed user, EFL, has been identified to the Commission and has requested authorization for 100 mobile units per channel for its sole use." *Id*. at 6.

[64] In the Matter of Viking Dispatch Services, Inc. Applications for Up To Twenty 900 MHz Private Land Mobile Radio Service Channels at Various Locations, *Memorandum Opinion and Order*, 14 FCC Rcd 18814, 18818 ¶ 7 (1999).

[65] *900 MHz NPRM & MO&O*, 20 FCC Rcd at 3836 ¶ 67.

[66] 47 U.S.C. § 308(b).

[67] Not only did EFL fail to provide any information on its local business operations, it failed to respond to the Division's request for a copy of its articles of incorporation and a list of corporate officers. EFL has not provided

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used, if used at all. This is a particular concern when the applicant files applications after the Commission significantly modifies its rules to allow 900 MHz non-SMR licensees to initiate commercial operations on its currently authorized spectrum or to assign its authorizations to others for commercial use, and just before the Bureau imposes a freeze on accepting additional 900 MHz applications. We also note that favorable action based on this lack of information could result in a flood of similar requests. As the Division stated, EFL has not provided any evidence that it is establishing an operation of any kind that would justify the number of channels requested.[68]

21. Moreover, EFL's few statements regarding its intentions are inconsistent. In its applications, EFL indicated that it "will use radios for transmission of communications essential to business distribution of commodities and services to commercial and non-commercial entities," but did not indicate in its eligibility statement or elsewhere in its applications that it would use the licenses for internal business communications. The statement that EFL intends to provide service to commercial entities is easily interpreted as intending to receive compensation or to provide service as a third-party provider, and EFL did not clarify its intent in its response to the Division's request for additional information. Only in its Application for Review, after failing to provide any information about its business or business operations, including the requested articles of incorporation and list of corporate officers, and after its applications were dismissed, does EFL state that it intends to use the licenses for internal communications. EFL, however, does not provide any evidence to support this statement. We have an insufficient basis to determine whether EFL intends to use the spectrum for profit, on a not-for-profit, cost-shared basis,[69] or to serve its internal communications requirements. Even if EFL's choice of business model were clear, we find that the Division was correct in its determination that EFL has failed to justify the number of channels requested in its multiple applications.

22. *Similarly Situated 900 MHz Applications Filed Prior to the Freeze*. We also find that the Division's action in dismissing EFL's applications is consistent with its past treatment of similarly situated applications: the Division required applicants to justify the number of channels and mobile units requested in new applications that were filed just prior to the Bureau's freeze on accepting 900 MHz applications and that claimed eligibility and compliance with channel loading requirements. For example, in August, 2004, White Eagle Concrete, Inc. (White Eagle) filed a non-SMR license application for five 900 MHz trunked frequency pairs, and its statement of eligibility under Section 90.617 of the Commission's rules was: "[t]he applicant is a concrete industry, radios will be used for internal communications."[70] The Division returned the application and requested, among other things, a copy of its local business license to operate a concrete business in the area requested on its application, the

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any information except to essentially state that it will not begin to build a business until it has licenses to operate in 11 states on 123 channels to be loaded with 11,281 mobile units. *See supra* text accompanying notes 22-24.

[68] We also find that the lack of documentation that it exists as a business entity brings into question EFL's eligibility to hold the licenses it has requested. The only step EFL has apparently taken in terms of operating is to seek the licenses at issue in this proceeding. Because we independently find that EFL has not made a sufficient showing to justify the number of channels and mobile units requested, we decline to reach the question of EFL's eligibility in this proceeding.

[69] The Commission has determined that where a system is used only to serve the licensee's internal communications requirements rather than offered with the intent of receiving compensation, the licensee is not providing service "for profit." *Viking Dispatch*, 11 FCC Rcd at 6691 ¶ 13 (citing Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1428 (1994)). The Commission has also recognized that legitimate cost-sharing arrangements that allow radio users to combine resources to meet compatible needs for specialized internal communications facilities are not "for-profit." *Id*. (citing *id*. at 1430).

[70] FCC File No. 0001845733, filed by White Eagle Concrete Inc. (Aug. 19, 2004).

number of employees in the area requested on its application, the total number of company employees, the number of vehicles which would be equipped with radios, and a copy of White Eagle's articles of incorporation and a list of corporate officers.[71] White Eagle failed to respond, and the Division dismissed its application as defective.[72] The Division sent out virtually identical Return Notices for several other applications for non-SMR trunked licenses in the 900 MHz band (YU), including a second application for White Eagle also filed on August 19, 2004,[73] an application filed by Ridgewood Investments LLC on August 19, 2004, an application filed by Prompto Delivery Service LLC on September 8, 2004, and two applications filed by Claiborne Distributors, Inc. (Claiborne), one on August 24, 2004, and the other on August 25, 2004. Like EFL, Claiborne's statement of eligibility under Section 90.617 of the Commission's rules was "[a]pplicant is in the distribution of commodities and services to commercial and noncommercial entities."[74] None of the applicants responded to the requests for additional information and, as a result, their applications were dismissed as defective.[75]

23. Of particular note is an application for a non-SMR trunked license in the 900 MHz band filed by Thomas Kurian (Kurian) on September 15, 2004, two days before the Bureau imposed the freeze on accepting applications.[76] On November 5, 2004, the Division returned the application asking for the same information it had requested from other applicants regarding Kurian's business plans in San Diego and Imperial Counties, California.[77] On November 8, 2004, Kurian responded stating that he did "not yet have a local office or employees in either county … and it would not be reasonable for me to take any

[71] FCC File No. 0001845733, Notice of Return, Reference No. 3176204 (Dec. 3, 2004).

[72] FCC File No. 0001845733, Notice of Dismissal, Reference No. 3329361 (Feb. 22, 2005). The Notice stated that "[t]he application was not amended within 60 days of the date shown on the Notice of Application Return letter; therefore, this application is hereby dismissed." *Id*.

[73] FCC File No. 0001845737, filed by White Eagle Concrete Inc. (Aug. 19, 2004) (providing a statement of eligibility that "[t]he applicant is a concrete industry, radios will be used for internal communications." The request for additional information was the same as that requested in White Eagle's application File No. 0001845733. Notice of Return, Reference No. 3176205 (Dec. 3, 2004).

[74] FCC File No. 00018446344, filed by Ridgewood Investments LLC (Aug. 19, 2004) (providing a statement of eligibility under Section 90.617 as "[a]pplicant is in the property management business"); FCC File No. 0001864802, filed by Prompto Delivery Service LLC (Sept. 8, 2004) (providing a statement of eligibility under Section 90.617 as "[a]pplicant delivers goods and provides other services to customers"); FCC File No. 0001851118, filed by Claiborne Distributors Inc. (Aug. 24, 2004); FCC File No. 0001852601, filed by Claiborne Distributors Inc. (Aug. 25, 2004). The Return Notices for these applications requested the following: a copy of the applicant's local business license to operate a business; the address and telephone number of its business operation; the name of its local manager; the number of employees; the number of vehicles that would be equipped with radios; as well as a copy of the applicant's articles of incorporation and list of corporate officers. Ridgewood Notice of Return, Reference No. 3118687 (Nov. 3, 2004); Prompto Notice of Return, Reference No. 3118686 (Nov. 3, 2004); Claiborne Notice of Return, Reference No. 3121960 (Nov. 5, 2004); and Claiborne Notice of Return, Reference No. 3108997 (Oct. 29, 2004).

[75] The Notices of Dismissal stated that "[t]he application was not amended within 60 days of the date shown on the Notice of Application Return letter; therefore, this application is hereby dismissed." FCC File No. 0001845737, filed by White Eagle Concrete Inc., dismissed on February 19, 2005, Notice of Dismissal, Reference No. 3329362 (Feb. 22, 2005); FCC File No. 00018446344, filed by Ridgewood Investments LLC, dismissed January 22, 2005, Notice of Dismissal, Reference No. 3271623 (Jan. 24, 2005); FCC File No. 0001864802, filed by Prompto Delivery Service LLC, dismissed January 22, 2005, Notice of Dismissal, Reference No. 3271622 (Jan. 24, 2005);. FCC File No. 0001851118, filed by Claiborne Distributors Inc., dismissed January 22, 2005, Notice of Dismissal, Reference No. 3271617 (Jan. 24, 2005); FCC File No. 0001852601, filed by Claiborne Distributors Inc., dismissed January 15, 2005, Notice of Dismissal, Reference No. 3260637 (Jan. 18, 2005).

[76] FCC File No. 0001872243, filed by Thomas K. Kurian (Sept. 15, 2004).

[77] FCC File No. 0001872243, Notice of Return, Reference No. 3121961 (Nov. 5, 2004).

further steps toward commencing operations before obtaining the requested license for a sufficient number of radio frequencies."[78] Kurian further explained that he intended "to place 900 mobile units in operation during the term of the license" and "to use a mixture of hand-held and vehicular mounted units" but he could not state the number of units that would be ultimately mounted in vehicles.[79] Kurian's application was dismissed as of November 18, 2004, with the following explanation:

> Rule 90.631 requires that trunked channels be assigned on the basis of 100 mobile units per channel. Based on our review of the information provided, you have not justified the number of channels requested. You do not have a current business operation in the areas requested on the application, and are only speculating you may need the channels. Therefore, we are hereby dismissing the application.[80]

The Division dismissed all of these similarly situated applications for the same reason it dismissed EFL's application. None of the applicants made an initial showing justifying the number of channels requested.

24. *Distinction Between Channel Loading and Build-out Requirements*. Finally, EFL contends that the Division dismissed its applications because EFL failed to demonstrate that it could place 100 mobile units in operation immediately upon grant.[81] EFL argues that Section 90.631 of the Commission's rules not only does not require an applicant to place 100 mobile units in operation immediately, but that the rule section provides a licensee five years within which to complete the loading of its system.[82] EFL argues that a licensee of a trunked facility must place the station into operation within one year and that Commission rules define "placed in operation" as a base station operating with at least two mobile units or one mobile unit and one control station.[83] EFL therefore concludes that it would have four more years to reach "a loading of 100 mobile units per channel."[84]

25. We disagree that the Division expressly dismissed EFL's applications because it failed to demonstrate it would place 100 mobile units immediately into operation upon grant of a license. Rather, the Division's decision cited our loading criterion for non-SMR trunked systems and stated that EFL had not justified the number of channels requested in its applications.[85] An applicant for a non-SMR 900 MHz license cannot rely on our construction rules, which apply only after license grant, in a manner that allows it to avoid complying with our initial channel loading criteria. While the construction rules and channel loading requirements work in concert to ensure that spectrum is placed in the hands of those who will put it to use in a timely and efficient manner, the two sets of rules serve different purposes.[86] Our

[78] FCC File No. 0001872243, Letter from Thomas K. Kurian to FCC, Gettysburg, PA (Nov. 8, 2004).

[79] *Id*.

[80] FCC File No. 0001872243, Notice of Dismissal, Reference No. 3150219 (Nov. 19, 2004).

[81] Application for Review at 3.

[82] Application for Review at 3-4.

[83] Application for Review at 5 (citing 47 C.F.R. § 90.631(f)).

[84] Application for Review at 5.

[85] EFL Dismissal Notice at 1.

[86] Under our construction rules for trunked systems, Section 90.631(f) provides that "a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation," 47 C.F.R. § 90.631(f), and licensees must complete construction within one year. *Id*. § 90.631(e). Under our loading requirements, trunked systems are authorized based on a loading level of 100 mobiles per channel and applicants must certify that they will load their systems to at least 70 mobiles per channel within five years of their license grant. *Id*. §§ 90.631(a) and (b). Section 90.127 of our rules also provides that each application must limit its request for mobile transmitters to those installed immediately after authorization and to

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construction rules set up minimum requirements for licensees in establishing the operation and construction deadlines for trunked facilities. Our loading requirements are intended to identify those applicants that by all appearances may intend to warehouse spectrum in anticipation of speculative business growth or profit from selling unneeded licenses. Accordingly, applicants should only apply for enough channels to satisfy their actual needs.

26. *Conclusion*. Section 309(a) of the Communications Act, as amended, provides that we must determine on a case-by-case basis whether granting an application will serve the public interest.[87] This is particularly true when modifying our licensing rules results in a run on spectrum ultimately requiring us to impose a freeze on the acceptance of applications. This Commission has a long-standing policy of protecting the public interest against speculative applications. In addition, because the Commission no longer uses loading standards as a trigger for automatic termination of channels,[88] it is particularly important that we review each application upfront to determine whether the applicant is intending to use the spectrum for an actual need or mere speculation on the future growth potential of the spectrum in question.

27. In this case, EFL submitted 13 applications requesting up to ten frequency pairs each to be loaded to approximately 100 mobile units per channel in 11 different states. EFL filed its applications soon after the Commission relaxed its licensing rules to allow 900 MHz non-SMR licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use, and just before the Bureau imposed a freeze on accepting additional 900 MHz applications in response to the exceptionally large number of applications it had received. At the time, the Commission cautioned that applications that were pending at the time the freeze was imposed would be subject to strict scrutiny, especially with respect to eligibility and channel loading requirements, and that defective applications would be dismissed. EFL has not provided any information in response to a request from the Division about its own identity and admits it does not intend to start any business unless it receives the requested licenses. Given EFL's failure to provide any information about itself or its business operations, we find that EFL has not made a sufficient showing to justify the number of channels and mobile units requested in its applications, and therefore conclude that granting the applications would not serve the public interest. Accordingly, we deny EFL's Application for Review.

IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by EFL Realty Trust on August 29, 2005, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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those for which purchase orders have been signed and which will be in use within eight months of the authorization date. *Id*. § 90.127(b)(1) and (2). The Commission previously explained that the purpose for establishing the rule regarding mobile transmitter counts, like other loading requirements, is to prevent spectrum from lying fallow. *PR Docket No. 79-191 Second R&O*, 90 F.C.C. 2d at 1284 ¶ 8.

[87] 47 U.S.C. § 309(a).

[88] The Commission determined that unused channels could be more efficiently re-assigned to licensees who needed them through marketplace transactions. *Subparts M and S R&O*, 3 FCC Rcd at 1846 ¶¶ 66-67.