

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

In the Matter of)
)
Amendment of Part 90 of the Commission's Rules) WP Docket No. 07-100
)

ORDER

Adopted: May 25, 2021

Released: May 27, 2021

By the Commission: Commissioner Carr dissenting and issuing a statement

I. INTRODUCTION

1. On December 29, 2020, the Public Safety Spectrum Alliance (PSSA)¹ filed a Petition for Stay² of the Commission's *Sixth Report and Order* in the above-captioned proceeding.³ PSSA asks the Commission to stay the *Sixth Report and Order* pending resolution of its concurrently-filed petition for reconsideration;⁴ petitions for reconsideration have also been filed by APCO International (APCO)⁵ and the National Public Safety Telecommunications Council (NPSTC).⁶ For the reasons set forth herein, we find good cause to stay the implementation of the new leasing framework for the 4.9 GHz (4940-4990 MHz) band adopted in the *Sixth Report and Order* pending a Commission decision on the petitions for reconsideration filed in this proceeding.

II. BACKGROUND

2. On September 30, 2020, the Commission adopted the *Sixth Report and Order* to revise the rules governing the 4.9 GHz band, a shared spectrum band,⁷ which previously required licensees to provide public safety services as defined under our Part 90 rules. These new rules would allow a single statewide licensee in each state⁸ ("State Lessor") to lease some or all of its spectrum rights to third parties

¹ The organization refers to itself both as the "Public Safety Spectrum Alliance" and the "Public Safety Technology Alliance" in its pleadings.

² Petition for Stay, Public Safety Spectrum Alliance, WP Docket No. 07-100 (filed Dec. 29, 2020) https://ecfsapi.fcc.gov/file/1229024403423/PSSA-Petition%20for%20Stay_4.9Ghz_Dec292020%20-%20FINAL.pdf (PSSA Stay Petition).

³ *Amendment of Part 90 of the Commission's Rules*, Sixth Report and Order and Seventh Further Notice of Proposed Rulemaking, WP Docket No. 07-100, FCC 20-137 (2020) (*Sixth Report and Order*).

⁴ Petition for Reconsideration, Public Safety Spectrum Alliance, WP Docket No. 07-100 (Dec. 29, 2020) (PSSA Reconsideration Petition).

⁵ Petition for Reconsideration, APCO International, WP Docket No. 07-100 (Dec. 29, 2020) (APCO Reconsideration Petition).

⁶ Petition for Reconsideration, National Public Safety Telecommunications Council, WP Docket No. 07-100 (Dec. 29, 2020) (NPSTC Reconsideration Petition).

⁷ 4.9 GHz band licenses authorize operation on any channel over the entire 50 megahertz of the band and are issued for the geographic area encompassing the legal jurisdiction of the licensee. A key component of the 4.9 GHz band is that licenses are granted for shared use only and provide no exclusive rights. *Sixth Report and Order* at 3, para. 5.

⁸ States which have been identified by the Commission as diverting 911 fees for non-911 purposes are not permitted to lease their 4.9 GHz band spectrum rights. *Sixth Report and Order* at 11, para. 24.

regardless of whether or not they are engaged in public safety operations.⁹ If implemented, the approach described in the *Sixth Report and Order* would grant states the option to facilitate spectrum access by state and local entities, whether public safety or non-public safety, as well by commercial and other private entities in their jurisdictions.¹⁰

3. PSSA, APCO, and NPSTC filed petitions for reconsideration of the *Sixth Report and Order*. The petitions raise concerns that the new leasing framework adopted by the *Sixth Report and Order* will undermine the availability and utility of spectrum in the 4.9 GHz band for public safety operations.¹¹ PSSA's Reconsideration Petition, in particular, contends that the *Sixth Report and Order* fails to provide for protection of current and future public safety use of the band.¹² The petitions further allege that the *Sixth Report and Order* is arbitrary and capricious because it lacks a basis in the record compiled in this proceeding.¹³

4. The changes to the Commission's Part 1 rules, and the revision to section 90.1203, became effective on December 30, 2020, 30 days after publication of the *Sixth Report and Order* in the Federal Register.¹⁴ The new section 90.1217, which provides for the designation of a State Lessor, will not become effective until the Commission receives approval by the Office of Management and Budget under the Paperwork Reduction Act and announces an effective date.¹⁵ As a result, leasing of 4.9 GHz spectrum rights under the framework adopted in the *Sixth Report and Order* has not yet begun and cannot begin until the Commission announces the effective date for the final rule.

III. DISCUSSION

5. Section 1.429(k) of the Commission's rules provides that, for good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration.¹⁶ In considering requests for stay, the Commission generally looks to the four criteria set forth in *Virginia Petroleum Jobbers Association*.¹⁷ These criteria are (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) the issuance of the order will further the public interest.¹⁸ The Commission then balances these interests in order to determine an administrative response on a case-by-case basis, with no requirement that there be a showing as to each criterion.¹⁹ Indeed, if there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors.²⁰

⁹ *Sixth Report and Order* at 2, para. 2.

¹⁰ *Id.* at 2, para. 2.

¹¹ See APCO Reconsideration Petition; NPSTC Reconsideration Petition; PSSA Reconsideration Petition.

¹² PSSA Reconsideration Petition.

¹³ See, e.g., APCO Reconsideration Petition at 2-7; PSSA Reconsideration Petition at 6-8.

¹⁴ 85 Fed. Reg. 76469 (Nov. 30, 2020).

¹⁵ *Sixth Report and Order* at 31, para. 84.

¹⁶ 47 CFR § 1.429(k).

¹⁷ *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). See also *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Order, 18 FCC Rcd 25491, 25494, para. 6 (2003) (*PLMR Narrowband Stay Order*).

¹⁸ *PLMR Narrowband Stay Order*, 18 FCC Rcd at 25494, para. 6.

¹⁹ *Id.*; see *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508, 14515-16, para. 14 ("In applying the four criteria, we recognize that no single factor is necessarily dispositive. For example, a compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits." (footnote omitted)).

6. We conclude that a stay of the new 4.9 GHz band leasing framework described in the *Sixth Report and Order* is appropriate under the circumstances. Specifically, we believe that, in light of the serious questions posed by the petitions for reconsideration, the possibility of irreparable harm to current and future public safety users of the 4.9 GHz band and to our goal of facilitating greater use of this spectrum, the extent to which a stay will further the public interest, and the fact that no parties will be injured if a stay is granted, a stay is appropriate to permit the Commission to address the issues raised in the petitions for reconsideration. Therefore, we stay the implementation of the new section 90.1217, which was adopted in the *Sixth Report and Order* but has not yet become effective.

7. In its Petition for Stay, PSSA argues that any leasing of the 4.9 GHz band pursuant to the new framework would cause irreparable harm to the public safety community by undermining public safety reliance on the band. Once the change takes effect, PSSA argues, harm would come from risking both lost access in a particular state and “a disconnected patchwork of regulations” as states adopt different rules governing leased access and public safety use.²¹ It argues that, given the shared spectrum environment of the 4.9 GHz band, interference to public safety licensees will result quickly if states are permitted to enter into leases with non-public safety entities, and that unwinding such leases in the event the Commission changes its approach on reconsideration would be “nearly impossible.”²² Instead, a stay of the rules pending resolution of the petitions for reconsideration will provide “administrative certainty and ... efficiency.”²³ PSSA also contends that granting a stay would have “no adverse impact on any third party” and would serve the public interest by protecting public-safety communications.²⁴

8. We agree with PSSA that there is good cause to grant this stay while the Commission considers the pending petitions for reconsideration. The petitions have raised significant questions about the *Sixth Report and Order* that may need to be considered further. In particular, allowing use of the band to become fragmented on a state-by-state basis could create incentives for individual states to make use of the spectrum for revenue generation in ways that do not serve the interests of public safety, decreasing the likelihood of interoperable communications for public-safety users, which we recognize is an important Congressional objective.²⁵ Furthermore, this fragmentation may undermine the ability of operators to upgrade their networks to improve public safety offerings and make more efficient use of spectrum resources. We also find that allowing State Lessors to begin the process of leasing the 4.9 GHz band to non-public safety entities and subsequently changing the rules on reconsideration would cause confusion and could irreparably complicate the Commission’s ongoing efforts to craft rules for this band that maximize its use in a way that will best serve the public interest. In addition, given the shared spectrum environment of the 4.9 GHz band, the piecemeal introduction of new non-public safety users and new

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²⁰ *PLMR Narrowband Stay Order*, 18 FCC Rcd at 25494, para. 6; *see also, e.g., 4.9 GHz Band Transferred from Federal Government Use*, Order, 19 FCC Rcd 15270 (2004) (granting a request to stay the effectiveness of a rule pending Commission resolution of a petition for reconsideration); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order Granting Stay Petition in Part, 32 FCC Rcd 1793 (2017) (granting a requested stay of one aspect of requirements that had not yet taken effect pending Commission action on petitions for reconsideration).

²¹ PSSA Stay Petition at 2-3.

²² *Id.*

²³ *Id.* at 1.

²⁴ *Id.* at 3.

²⁵ *See, e.g.,* PSSA Reconsideration Petition at 12-13 (“This is not only a local issue within each state, but a nationwide issue that could result in a veritable patch work of rules, processes, and terms that govern the use of the spectrum without any guarantee of (i) interoperability within and across state lines or the Canadian border, (ii) interference protection, (iii) appropriate security, (iv) use of open standards, (v) prioritized public safety use, (vi) build out and service in rural areas, or (vii) consistency in technological deployment and assurance that deployed technologies keep up with technological advancement (such as 5G).”).

types of non-public safety operations risks further exacerbating concerns and confusion about access rights. We are therefore concerned that implementing this new framework while we review the petitions for reconsideration would adversely impact both short-term public safety access to this spectrum and our future efforts to improve the band's rules. Instead, we believe the most effective way to further the public interest is by ensuring that we provide certainty before any leasing agreements are entered into or systems are deployed.

9. We further note that there is no information in the record indicating that any party will be harmed by the grant of this interim stay. Though we recognize that certain entities have expressed interest in non-public safety use of the band,²⁶ thus far no non-public safety entities have been provided access to the band, and therefore any harm caused to these potential lessees by a stay of these rules is remote and outweighed by the immediate and irreparable harm that could occur to the public interest.

10. We therefore conclude that a grant of the stay requested by PSSA is appropriate. We grant this stay pending resolution of the petitions for reconsideration of the *Sixth Report and Order*.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, that, pursuant to sections 1, 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, and section 1.429(k) of the Commission's rules, 47 CFR § 1.429(k), the Petition for Stay filed by the Public Safety Spectrum Alliance on December 29, 2020 IS GRANTED, with respect to section 90.1217 of the Commission's rules, and the stay will remain in effect until resolution of the petitions for reconsideration filed in this proceeding. The effective date of section 90.1217 is delayed indefinitely.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ See, e.g., Federated Wireless Comments, WP Docket No. 07-100 (Jan. 13, 2021); WISPA Comments, WP Docket No. 07-100 (Jan. 13, 2021).

**DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Amendment of Part 90 of the Commission's Rules, Order*, WP Docket No. 07-100.

Over the last four years, the FCC took bold steps to open up the airwaves needed for 5G and a range of next-gen operations. Our efforts freed up more than six gigahertz of spectrum for licensed 5G services in addition to thousands of megahertz of unlicensed spectrum.

In the 4.9 GHz band, it was clear that the status quo was not working. After almost two decades, that 50 MHz swath of spectrum remained woefully underutilized. So we established a framework that could allow more intensive uses to flourish, including for public safety, by empowering local leaders to determine the best options for this spectrum based on their own circumstances. While I would have preferred even greater flexibility, last year's order was a step in the right direction. Indeed, Louisiana is now actively pursuing this option through a bill that is moving through its state legislature.

So I am disappointed that the Commission's decision to stay our 4.9 GHz band order will return this spectrum to the broken framework of the past. This is the spectrum equivalent of taking points off the board. While I am dissenting from today's decision, I remain hopeful that we can find a way to quickly put a beneficial framework back in place. And I am open to working with my colleagues, the public safety community, and all other stakeholders on doing exactly that.