

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

In the Matter of)
CITY OF MILWAUKEE, WISCONSIN)
Licensee of Trunked 800 MHz Public Safety)
Station WQRY945)

ORDER ON RECONSIDERATION

Adopted: February 26, 2015

Released: February 26, 2015

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

I. INTRODUCTION.

1. On August 14, 2014, the City of Milwaukee, Wisconsin (Milwaukee or the City) filed a request for waiver of Section 1.946(e) of the Commission's rules (construction and coverage requirements). Milwaukee explained that it met its one-year construction deadline relative to three of the sites licensed under call sign WQRY945, but required a one-year extension of time (i.e. until August 14, 2015) to build out three remaining sites. The Public Safety and Homeland Security Bureau (Bureau or PSHSB) licensing staff accepted Milwaukee's construction notification as to the three constructed sites, but the three unconstructed sites entered into Termination Pending status. Milwaukee then filed a Petition for Reconsideration and a second request for waiver of Section 1.946(e) and 90.155(g) (time in which stations must be placed in operation). For the reasons stated below, we grant the Petition and the Waiver Request.

II. BACKGROUND.

2. On August 16, 2013 the Commission granted Milwaukee's application to license several 800 MHz frequencies at six fixed sites and with 4845 mobile units under call sign WQRY945. These 800 MHz frequencies were relinquished by Sprint-Nextel Corp. and made available to public safety licensees in Wisconsin for five years as part of the 800 MHz rebanding program. On May 20 2014, the Universal

1 See Request for Additional Time to Construct, filed by the City of Milwaukee (filed Aug. 14, 2014) (Waiver Request) attached to FCC File No. 0006424093 (filed Aug. 14, 2014 and amended Oct. 14, 2014).

2 47 C.F.R. § 1.946(e) (Licensees may request to extend a construction period or coverage period by filing FCC Form 601. The request must be filed before the expiration of the construction or coverage period.)

3 47 C.F.R. § 90.155(g).

4 These frequencies include: 856.6875 MHz, 858.5375 MHz, 857.5375 MHz, 859.6625 MHz, 856.1625 MHz, 857.1625 MHz, 858.1625 MHz, 859.1625 MHz, 856.6375 MHz, 859.6875 MHz, 854.1875 MHz, and 856.5625 MHz. See FCC File No. 0005861976 (filed Jul. 17, 2013 and amended Aug. 15, 2013).

5 Specifically, the Commission ordered that, upon initiation of licensing, eligibility for the Sprint Nextel vacated interleaved band channels will be limited to public safety entities for the first three years after the opening of a filing window and to public safety and Critical Infrastructure Industry entities for the following two years. After five years, any remaining vacated channels will revert to their original frequency pools and be available for licensing to any eligible applicant. See, e.g., Public Safety and Homeland Security Bureau Announces Application (continued....)

Licensing System (ULS) generated a reminder notice advising Milwaukee of the August 16, 2014 deadline to construct its frequencies.⁶

3. Milwaukee filed a construction notification on August 14, 2014 claiming that it constructed three of its fixed sites (locations 1, 5, and 6).⁷ Milwaukee also submitted a request for waiver of Section 1.946(e) seeking additional time to construct the remaining three sites (locations 2, 3 and 4).⁸ With regard to location 2, Milwaukee stated that it was partially constructed as of the beginning of August 2014 (*i.e.* antennas and feedlines are already mounted) and that the City is awaiting equipment from the radio vendor.⁹ Due to an administrative error, Milwaukee notes that it incorrectly listed the address for site location 3, but subsequently signed a lease for the correct location.¹⁰ Finally, Milwaukee submits that an unexpected interference issue arose after it signed a lease for location 4 and that it is actively working toward negotiating a solution.¹¹ In sum, Milwaukee (1) submits that it has allocated funds, ordered the equipment and moved in a diligent manner to construct the facilities in a timely manner and (2) anticipates completing construction of the three remaining sites in August 2015.¹²

4. On August 30, 2014, the Bureau returned Milwaukee's construction notification.¹³ The PSHSB licensing staff explained that the extension request could not be granted via a "NT (Required Notification)."¹⁴ The staff advised Milwaukee to late-file an "EX" (extension request) with a waiver request to excuse the late filing.¹⁵ The staff also advised Milwaukee to resubmit the construction notification application showing the sites that are constructed.¹⁶ Milwaukee amended its pending construction notification application to reflect that it constructed three sites but failed to indicate on FCC Form 601 that the purpose of its filing was an extension request (EX), instead indicating that the purpose was a required notification (NT).¹⁷ The staff accepted Milwaukee's certification that it partially constructed WQRY945.

5. On September 24, 2014, the PSHSB notified Milwaukee that the three unconstructed sites

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and Licensing Procedures for Certain Channels Relinquished by Sprint Nextel Corporation in the 809-5-815/854.5-860 MHz Band, WT Docket 02-55, *Public Notice*, 24 FCC Rcd 13236 (PSHSB 2009); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Channels in Non-Border Regions Relinquished By Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, WT Docket 02-55, *Public Notice*, 27 FCC Rcd 14785 (PSHSB 2012).

⁶ Construction/Coverage Deadline Reminder Notice Reference No. 5793629 (dated May 20, 2014).

⁷ FCC File No. 0006424093.

⁸ Waiver Request.

⁹ *Id.* at 1.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2.

¹² *Id.* at 2-3.

¹³ Notice of Return Reference No. 5857829 (dated Aug. 30, 2014).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ FCC File No. 0006424093.

had been placed in a Termination Pending status.¹⁸ The PSHSB advised Milwaukee that it had 30 days from the date of the Public Notice (*i.e.* until October 24, 2014) to file a petition for reconsideration demonstrating that it timely met the construction deadline as to the three unconstructed sites.¹⁹

6. On September 29, 2014, Milwaukee filed a Petition for Reconsideration (Petition) and late-filed waiver (Waiver Request) of Sections 1.946(e) and 90.155(g) of the Commission's rules for additional time to construct the three unconstructed sites.²⁰ Milwaukee claims that it commenced service on its system, but not all locations have been constructed.²¹ Milwaukee adds that its present system capacity is insufficient to meet the increasing workload of the radio network and that the "subject [unconstructed] channels are intended and are being deployed to add vital system capacity as is necessary for the safety of the public and public safety personnel."²² Milwaukee notes that "[t]he Commission has long recognized the challenges faced by governmental entities due to protracted problems with fulfilling statutory obligations and approval of funding guidelines that can delay construction[.]" and that Milwaukee "is not immune" to those challenges.²³ Milwaukee also adds that although all required equipment has been ordered from the manufacturer, "the City cannot control the delivery date of that equipment."²⁴ Finally, Milwaukee asserts that denial of the instant request would create an undue burden for the City, potentially strand hundreds of thousands in investment, unnecessarily delay the deployment of the remainder of the network, and subject the public to continued risk of loss of life or property that the network is designed to ameliorate.²⁵ The City, therefore, declares that the public interest would be served by grant of the instant request.²⁶

7. On October 9, 2014, and February 19, 2015, Milwaukee supplemented its Petition and Waiver Request with a construction schedule and update on recent progress made toward constructing Locations 2, 3 and 4.²⁷ With regard to Location 2, Milwaukee states that it completed antenna construction and expects the vendor to ship the back-ordered repeater within approximately six weeks (*i.e.* early April 2015) and thus improve coverage reliability.²⁸ With respect to Location 3, Milwaukee states that the lease for antenna space has been negotiated and consummated and expects the vendor to ship the back-ordered equipment within six weeks (*i.e.* early April 2015).²⁹ Finally, Milwaukee continues

¹⁸ See Construction/Coverage Deadline Notice of License Termination Pending Status Reference No. 5871410 (dated Sep. 24, 2014). As a result, the following frequencies entered into termination pending status: 856.1625 MHz, 857.1625 MHz, 857.5375 MHz, 858.1625 MHz, 859.1625 MHz, and 859.6625 MHz.

¹⁹ *Id.*

²⁰ Petition for Reconsideration and Late-Filed Request For Additional Time to Construct, filed by the City of Milwaukee, Wisconsin (dated Sept. 29, 2014) (Petition) citing 47 C.F.R. §§ 1.946(e) and 90.155(g).

²¹ Petition at 1-2.

²² *Id.*

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Petition for Reconsideration Addendum (filed Oct. 9, 2014) and Petition for Reconsideration Addendum II for Clarification (filed Feb. 19, 2015) *re* FCC File No. 0006424093.

²⁸ *Id.* at 1-2.

²⁹ *Id.*

to pursue utilizing a new rooftop location for site 4 in order to avoid serious interference.³⁰

III. DISCUSSION.

8. *Petition for Reconsideration.* Section 1.106(c)³¹ states that a petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances: (i) the facts fall within one or more of the categories set forth in Section 1.106(b)(2),³² or (ii) the Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.³³ Based on our review, we find that consideration of the facts relied on is required in the public interest, and therefore grant the petition to permit the acceptance of Milwaukee's request to waive Section 1.946(e).

9. Section 1.946(e) of the Rules provides that licensees may request to extend a construction period by filing FCC Form 601.³⁴ The request must be filed before the expiration of the construction period. Therefore, a request for extension filed after expiration of the construction time must be accompanied by a request for waiver of this rule. Also pertinent to the instant case is Section 90.629 of the Rules, which provides that a license applicant may be authorized for a period of up to five years to construct and place a system in operation if it meets the established criteria.³⁵ The applicant must demonstrate that the extended implementation period is warranted under the circumstances by, among other things, describing the proposed system and stating the amount of time necessary to construct and place the system in operation.³⁶ The applicant must also show that the proposed system will require longer than twelve months to construct and place in operation because of its purpose, size or complexity;³⁷ or the proposed system is to be part of a coordinated or integrated wide-area system which will require more than twelve months to, among other things, plan and place in operation;³⁸ or the applicant is required by law to follow a multi-year cycle for planning.³⁹

10. Here, we find it decisionally significant that Milwaukee partially constructed its system and filed its request for additional time to construct within the one-year construction period, recognizing the importance of doing so. Due to procedural defects arising in Milwaukee's initial construction notification application (*i.e.* incorrectly listing the purpose on its FCC Form 601 as "NT" instead of "EX"), however, Milwaukee's license partially entered into the auto-term process. Although Milwaukee is nevertheless required to file properly, we do note its good faith attempts to do so, particularly that Milwaukee filed a timely response to the return letter as well as a timely petition for reconsideration. We also take note that Milwaukee has allocated funds to construct this system using frequencies made available to public safety through 800 MHz rebanding, it expects the vendor to ship equipment for locations 2 and 3 in April 2015, that it acted with diligence and that the additional time will enhance the City's system to the benefit of the

³⁰ *Id.*

³¹ 47 C.F.R. § 1.106(c).

³² 47 C.F.R. § 1.106(c)(1) citing 47 C.F.R. § 1.106(b)(2).

³³ 47 C.F.R. § 1.106(c)(2).

³⁴ 47 C.F.R. § 1.946(e).

³⁵ 47 C.F.R. § 90.629.

³⁶ 47 C.F.R. § 90.629(a).

³⁷ 47 C.F.R. § 90.629(a)(1).

³⁸ 47 C.F.R. § 90.629(a)(2).

³⁹ 47 C.F.R. § 90.629(a)(3).

public. Therefore, we grant Milwaukee's Petition and now turn to Milwaukee's request for waiver.

11. *Waiver Request.* Section 1.925 of the Commission's Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁴⁰

12. In regard to extending the construction periods, Milwaukee seeks essentially what Section 90.629 provides, an extended period of time to construct a system such as the one envisioned by the City. Milwaukee is not seeking any greater relief than is already typically granted under the Commission's slow growth rules. In fact, Milwaukee meets at least one of the criteria warranting a five-year period of time to construct, *i.e.*, Milwaukee's system will require more than one year to construct and place into operation because of its purpose, size or complexity.⁴¹ Further, additional time to construct is necessary due to an unexpected interference issue that Milwaukee discovered after signing the lease for Location 4.⁴² Thus, the purpose of the construction period rule is not frustrated by grant of a waiver in this instance. Indeed, we find that grant of Milwaukee's request for waiver of Section 1.946(e) of the Commission's Rules will serve the underlying purpose of the rule which is to require that extension requests be filed before the end of the relevant construction notification deadline. Under the circumstances presented, we therefore conclude that grant of the waiver to extend the construction period for an additional year until August 14, 2015 to construct the three remaining sites would serve the public interest.⁴³

IV. ORDERING CLAUSES.

13. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the City of Milwaukee, Wisconsin on August 14, 2014 IS GRANTED.

⁴⁰ 47 C.F.R. § 1.925(b)(3)(i-ii).

⁴¹ 47 C.F.R. § 90.629(a)(1).

⁴² 47 C.F.R. § 1.946(e)(1) (An extension request may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control.)

⁴³ *See, e.g.*, Interstate Power and Light Co., *Order*, 18 FCC Rcd 11051 (WTB 2003) (granting a waiver of Section 1.946(e) and 90.629 of the Commission's rules after the construction period expired even though the licensee timely filed an extension request but submitted the incorrect purpose on its FCC Form 601 *e.g.* "MD" instead of "EX").

14. IT IS ORDERED that pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request for Waiver filed by the City of Milwaukee, Wisconsin on August 14, 2014 IS GRANTED.

15. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's Rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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