

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

In the Matter of)
)
UTAH, STATE OF) FCC File No. 0006641049
)
Request for Waiver of Section 90.529(b)(1) of the)
Commission's Rules)

ORDER

Adopted: June 04, 2015

Released: June 04, 2015

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

I. INTRODUCTION

1. In this Order, we grant the State of Utah (Utah or State) a waiver of Section 90.529(b)(1) of the Commission's rules to permit the acceptance of its late-filed interim "substantial service" showing for its license for 700 MHz state channels under call sign WPTZ788. Section 90.529(b)(1) requires licensees on state channels to certify that they were providing or prepared to provide substantial service to one-third of their population or territory by June 13, 2014.

II. BACKGROUND

2. Utah holds a license permitting it to operate on state channels in the 700 MHz band under call sign WPTZ788. The state channels consist of ninety-six channel pairs (12.5 kHz bandwidth) from the public safety narrowband segment of the 700 MHz band that are reserved for use by each state, territory, district or possession (state licensees). In order to ensure efficient use of the state channels, the Commission established a five-year interim and a ten-year final benchmark for state licensees to provide specified levels of "substantial service" within their statewide license areas.

3. Section 90.529(b)(1) of the Commission's rules specifies June 13, 2014 as the due date for state licensees to file their interim five-year benchmark showing. By this date, state licensees were to

1 47 C.F.R. § 90.529(b)(1).

2 See ULS File No. 0006641049 (Utah's Schedule K Filing) and associated attachments.

3 See call sign WPTZ788.

4 47 C.F.R. § 90.531(b)(5).

5 "Substantial service" is defined as the construction and operation of facilities on state channels which is "sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." See 47 C.F.R. § 90.529(c).

6 47 C.F.R. § 90.529(b)(1). See also Service Rules Governing Public Safety Narrowband Operations in the 769-775/799-805 MHz Bands, WT Docket 96-86, Declaratory Ruling, 26 FCC Rcd 10895, 10896 ¶ 5 (2011) (Declaratory Ruling); Order, 27 FCC Rcd 15010 (PSHSB 2012) (conforming section 90.529(b) of the FCC's rules regarding the substantial service deadlines for state-licensed 700 MHz public safety narrowband channels to comport with the deadlines specified in the Commission's Declaratory Ruling).

certify that they were providing or prepared to provide substantial service to one-third of their population or territory.⁷

4. Prior to the June 13, 2014 deadline, the Public Safety and Homeland Security Bureau (Bureau) issued a *Public Notice* providing state licensees guidance on how to demonstrate compliance with the interim substantial service benchmark.⁸ To facilitate staff review of substantial service showings, the Bureau provided examples of specific information to submit for review, including the type of public safety service being provided, a list of which state channels are used in the state system, and the percentage of population or territory served by the composite footprint of the state system.⁹ On January 29, 2015, Utah filed its interim substantial service certification along with a request for waiver of the June 13, 2014 deadline.¹⁰ In its request for waiver, Utah states it missed the filing deadline because it did not receive the Bureau's reminder public notice due to a "total reorganization" of its public safety communications department.¹¹

5. Nonetheless, Utah indicates it deployed an "IP Series mobile data system" on its state channels consisting of forty-five sites and more than 300 vehicles from the Utah Highway Patrol and other state and local government agencies.¹² Furthermore, Utah certifies that its IP-based mobile data network serves seventy-five percent of the State's population and did so by October 2004, well before the interim substantial service deadline.¹³

III. DISCUSSION

6. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁴ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁵ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁶ Based on the record before us, we find that the Utah has shown that its request should be granted under the first prong of the waiver standard.

⁷ See 47 C.F.R. § 90.529(b)(1). For the ten-year benchmark, state licensees must certify that they are providing or are prepared to provide substantial service to two-thirds of their population or territory. The due date for the ten-year benchmark showing is June 13, 2019. See 47 C.F.R. § 90.529(b)(2).

⁸ Public Safety and Homeland Security Bureau Provides Guidance to 700 MHz Narrowband State Licensees Regarding Interim Substantial Service Benchmark Showing Due on June 13, 2014, *Public Notice*, 29 FCC Rcd 3706 (PSHSB 2014).

⁹ *Id.* For purposes of reviewing interim benchmark showings by state licensees, the Bureau stated that it "will consider coverage on any state channel in a state licensee's system sufficient to establish coverage for purposes of defining the licensee's composite footprint." *Id.* at note 9.

¹⁰ See attachment to Utah's Schedule K Filing labeled "Request for Waiver" (Waiver Request).

¹¹ *Id.*

¹² See attachment to Utah's Schedule K Filing labeled "Supporting Documents" (Utah Certification).

¹³ *Id.*

¹⁴ 47 C.F.R. § 1.925(b)(3)(i).

¹⁵ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁶ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

7. The underlying purpose of the substantial service requirement is to ensure efficient use of state channels including service to “rural, remote and insular areas.”¹⁷ To this end, Section 90.529(b)(1) establishes a deadline for state licensees to certify that they are meeting the interim benchmark by providing or being prepared to provide substantial service to one third of their population or territory.¹⁸ A state licensee is deemed “prepared” to provide substantial service if it certifies that a radio system has been approved and funded by the deadline date.¹⁹ The Commission’s rules also recognize that state licensees that do not meet the interim substantial service benchmark, *e.g.*, because they have failed to construct or receive funding for any facilities by the deadline, will be subject to license cancellation or modification.²⁰ As noted above, the Bureau provided state licensees guidance on how to demonstrate that they met the interim substantial service showing.²¹

8. Consistent with the Commission’s rules and policies as well as the Bureau’s guidance, Commission staff confirmed that Utah satisfied the interim substantial service benchmark. Prior to the June 13, 2014 deadline, Utah deployed an IP-based mobile data system on state channels serving seventy-percent of its population.²² Thus, Utah needs a waiver solely because it failed to file its certification prior to the deadline.

9. The Commission has previously explained that for certain Wireless Radio Services, including the Private Land Mobile Radio Service, the purpose of our construction notification requirements is to “verify whether licensees have in fact met their construction and coverage obligations, not to terminate licenses for legitimately operating facilities based on a failure to notify by the licensee. . . .”²³ Furthermore, the Commission has advised any licensee missing a construction notification deadline that it may seek a waiver of the Commission’s rules but must certify that “it did meet the construction or coverage requirement and provide the date by which the licensee met that requirement.”²⁴

10. Consequently, under the circumstances presented, we find that granting Utah a waiver of Section 90.529(b)(1) would not frustrate the underlying purpose of the rule, because it satisfied the interim benchmark by providing substantial service to more than one-third of its population and it did so prior to the deadline.²⁵

11. Finally, we find that the public interest is served by granting Utah a waiver of Section 90.529(b)(1) and allowing it to retain its license for the state channels. The Commission established a geographic area licensing scheme for all state licensees so that each state or territory would have latitude

¹⁷ See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19869 ¶ 62 (2000) (*Third R&O*). See also State of Iowa, *Order*, 29 FCC Rcd 11899, 11900 ¶ 7 (granting Iowa a conditional waiver of the substantial service requirement).

¹⁸ See 47 C.F.R. § 90.529(b)(1).

¹⁹ See 47 C.F.R. § 90.529(c).

²⁰ See 47 C.F.R. §§ 90.529(d) and (e).

²¹ See *supra* ¶ 4.

²² Utah Certification.

²³ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95 and 101 of the Commission’s Rules to Facilitate the Development of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, 21076 ¶ 106 (1998).

²⁴ See Wireless Telecommunications Bureau Announces the Deployment of “Auto Term,” the Automated Feature in its Universal Licensing System that Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses, *Public Notice*, 21 FCC Rcd 163, 167 (WTB 2006).

²⁵ Waiver Request.

to plan and develop shared wide-area networks under a substantially streamlined licensing process.²⁶ Absent a waiver of Section 90.529(b)(1), Utah would lose its geographic-area based state license. Consequently, we find it in the public interest to grant Utah's request for a waiver of Section 90.529(b)(1) so that it can continue to deploy a wide-area network under a substantially streamlined licensing process thereby enhancing the safety of the Utah's citizens and their property.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 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, that the waiver request filed by the State of Utah IS GRANTED. We instruct staff to process the associated Schedule K application, ULS File number 0006641049, accordingly.

13. 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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²⁶ *Third R&O*, 15 FCC Rcd at 19869 ¶ 57.