

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

In the Matter of )
NORTH CAROLINA, STATE OF ) FCC File No. 0006670143
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 North Carolina (North Carolina 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 WPTZ771. 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. North Carolina holds a license permitting it to operate on state channels in the 700 MHz band under call sign WPTZ771. 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).

3. 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. 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

1 47 C.F.R. § 90.529(b)(1).

2 See ULS File No. 0006670143 (North Carolina's Schedule K Filing) and associated attachments.

3 See call sign WPTZ771.

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).

this date, state licensees were to certify that they were providing or prepared to provide substantial service to one-third of their population or territory.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> On May 11, 2015, North Carolina filed its interim substantial service certification along with a request for waiver of the June 13, 2014 deadline.<sup>10</sup>

5. In its request for waiver, North Carolina claims it missed the filing deadline because construction and operation of the State's 700 MHz facilities was delayed until the State could complete conversion of its statewide trunked radio system to Project 25 (P25) technology.<sup>11</sup> North Carolina states it completed the conversion on July 31, 2014.<sup>12</sup>

6. Nonetheless, North Carolina indicates that it ordered base station equipment capable of operating on the state channels prior to the June 13, 2014 deadline.<sup>13</sup> Furthermore, North Carolina demonstrates that its base stations are now operating on channels from the 700 MHz band, including the state channels, and providing service to over 46% of its population.<sup>14</sup>

### III. DISCUSSION

7. 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;<sup>15</sup> 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.<sup>16</sup> An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and

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<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> *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.

<sup>10</sup> See attachment to North Carolina's Schedule K Filing labeled "Request for Waiver for Late Filing" (Waiver Request).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See attachment #1 to North Carolina's Schedule K Filing labeled "Additional Supporting Documents for Waiver" (North Carolina Supporting Documents) (North Carolina purchased both GTR and Quantar base stations.).

<sup>14</sup> *Id.* See also attachment to North Carolina's Schedule K Filing labeled "Supporting Documents for Waiver" (North Carolina Map). *N.B.*, coverage is based upon the 40 dBuV/m F(50,50) contour.

<sup>15</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>16</sup> 47 C.F.R. § 1.925(b)(3)(ii).

circumstances that warrant a waiver.<sup>17</sup> Based on the record before us, we find that North Carolina has shown that its request should be granted under the first prong of the waiver standard.

8. The underlying purpose of the substantial service requirement is to ensure efficient use of state channels including service to “rural, remote and insular areas.”<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> As noted above, the Bureau provided state licensees guidance on how to demonstrate that they met the interim substantial service showing.<sup>22</sup>

9. Consistent with the Commission’s rules and policies as well as the Bureau’s guidance, Commission staff confirmed that North Carolina satisfied the interim substantial service benchmark. North Carolina demonstrated that it was “prepared” to provide substantial service to more than one-third of its population by purchasing base station equipment capable of operating on the state channels prior to the June 13, 2014 deadline.<sup>23</sup> It later deployed these base stations at various locations throughout the state in order to establish a composite footprint on the state channels which serves more than 46% of its population.<sup>24</sup> Thus, North Carolina needs a waiver solely because it failed to file its certification prior to the deadline.

10. 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....”<sup>25</sup> Furthermore, the Commission has advised any licensee missing a construction notification

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<sup>17</sup> *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).

<sup>18</sup> 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 (PSHSB Oct. 8, 2014) ¶ 7 (granting Iowa a conditional waiver of the substantial service requirement).

<sup>19</sup> See 47 C.F.R. § 90.529(b)(1).

<sup>20</sup> See 47 C.F.R. § 90.529(c).

<sup>21</sup> See 47 C.F.R. §§ 90.529(d) and (e).

<sup>22</sup> See *supra* ¶ 4.

<sup>23</sup> See attachment to North Carolina’s Schedule K Filing labeled “Additional Supporting Documents for Waiver” (North Carolina Supporting Documents).

<sup>24</sup> See North Carolina Map.

<sup>25</sup> 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).

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."<sup>26</sup>

11. Consequently, under the circumstances presented, we find that granting North Carolina a waiver of Section 90.529(b)(1) would not frustrate the underlying purpose of the rule, because it satisfied the interim benchmark by being "prepared" to provide substantial service to more than one-third of its population and it did so prior to the deadline.<sup>27</sup>

12. Finally, we find that the public interest is served by granting North Carolina 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 to plan and develop shared wide-area networks under a substantially streamlined licensing process.<sup>28</sup> Absent a waiver of Section 90.529(b)(1), North Carolina would lose its geographic-area based state license. Consequently, we find it in the public interest to grant North Carolina'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 North Carolina's citizens and their property.

#### IV. ORDERING CLAUSES

13. 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 North Carolina IS GRANTED. We instruct staff to process the associated Schedule K application, ULS File number 0006670143, accordingly.

14. 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

Michael J. Wilhelm  
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Public Safety and Homeland Security Bureau

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<sup>26</sup> 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).

<sup>27</sup> See Waiver Request; See also South Carolina Request for Waiver of Section 90.529(b)(1) of the Commission's Rules, WT Docket No. 15-352, *Order*, 30 FCC Rcd 2352, 2353(PSHSB Mar. 20, 2015) at ¶ 7 (South Carolina missed the June deadline because it erroneously believed it was required to construct base station infrastructure and was unable to do so until it completed conversion to Project 25.).

<sup>28</sup> *Third R&O*, 15 FCC Rcd at 19869 ¶ 57.