

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

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| In the Matter of |) | |
| |) | |
| TOWNSHIP OF WEST ORANGE, NEW JERSEY |) | FCC File No. 0006204093 |
| |) | |
| AND |) | |
| |) | |
| NEW YORK CITY DEPARTMENT OF |) | |
| INFORMATION TECHNOLOGY AND |) | |
| TELECOMMUNICATIONS |) | |
| |) | |
| Joint Request for Waiver of Section 90.609(b) of |) | |
| the Commission’s Rules to Permit the Assignment |) | |
| of an 800 MHz channel. |) | |

ORDER

Adopted: March 31, 2014

Released: March 31, 2014

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

1. *Introduction.* This *Order* addresses a Joint Request for Waiver (Waiver Request) filed by the Township of West Orange, New Jersey (West Orange) and the New York City Department of Information Technology and Telecommunications (NYC) (collectively the Parties). The Parties request a waiver of Section 90.609(b) of the Commission’s rules¹ to assign a channel from West Orange’s license for Station WPCE346 to NYC and to delete that channel from West Orange’s primary site without requiring West Orange to construct the channel at a newly designated site. For the reasons set forth below, we find it to be in the public interest to grant the Waiver Request as it will bring finality and certainty to the licensing status of frequency 854/809.3125 MHz, which is the subject a proposed license modification proceeding.² Here, we grant the requested assignment, vacate the license modification order and dismiss as moot, West Orange’s petition seeking reconsideration of the license modification proceeding.

2. *Background.* On February 23, 2009, the Commission granted West Orange’s application to add channels 854/809.3125 MHz and 854/809.3375 MHz to Station WPCE346.³ On March 3, 2009, NYC and the International Municipal Signal Association (IMSA) objected to the grant of West Orange’s application. New Jersey Transit (NJ Transit) filed a similar objection relative to channel 854/809.3375 MHz on March 27, 2009. The objections alleged that the coordinations for West Orange’s frequencies were defective.⁴

3. On April 11, 2013, finding merit in the allegations, we proposed to modify West Orange’s

¹ 47 C.F.R. § 90.609(b) (prohibits the transfer of unconstructed conventional or trunked stations absent certain specific circumstances not applicable here).

² Township of West Orange, New Jersey, *et al.*, *Memorandum Opinion and Order and Order Proposing Modification*, 28 FCC Rcd 4600 (PSHSB 2013) (*Modification Order*).

³ FCC File No. 0003721208 (filed Jan. 29, 2009) *re* WPCE346.

⁴ *See Modification Order*, 28 FCC Rcd at 4602.

license for WPCE346 to delete the authorization for the two channels.⁵ On May 13, 2013, West Orange filed an Opposition and Petition for Reconsideration, claiming that it reached a short-spacing agreement with New Jersey Transit, thus resolving the issues between West Orange and NJ Transit.⁶

4. Subsequently, West Orange and NYC negotiated an agreement to resolve the issues surrounding channel 854/809.3125 MHz.⁷ Under that agreement, West Orange proposes to assign the authorization for 854/809.3125 MHz to NYC for NYC's use at a location different than that initially licensed under Station WPCE346.⁸ To implement this agreement, on January 28, 2014, West Orange added a site to its license at a location where NYC intends to construct this channel on 854/809.3125 MHz.⁹ On March 19, 2014, NYC filed an FCC Form 603 application for assignment of the channel to NYC.¹⁰ NYC and West Orange submitted the instant Waiver Request in which they "seek to transfer and assign the channel from West Orange to [NYC] (and also cancel the authorization for the channel at West Orange's primary site) without West Orange having to construct the channel at [NYC]'s site."¹¹

5. *Discussion.* 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.¹² When seeking to deviate from the general rule, an applicant faces a heavy burden.¹³ In order to obtain a waiver, an applicant must plead with particularity the facts and circumstances which warrant such action.¹⁴ In reviewing the Waiver Request, we find grant of the requested waiver in the public interest.

6. Generally, a public safety license may not be transferred or assigned prior to construction of the station in accordance with its authorization.¹⁵ The prohibition on the assignment and transfer of unconstructed licenses was implemented to prevent spectrum warehousing.¹⁶ Section 90.609(b) of the Commission's rules addresses the assignment of unconstructed stations, stating that transfer is permissible

⁵ *Id.*

⁶ Opposition and Petition for Reconsideration filed by the Township of West Orange, New Jersey (dated May 13, 2013) (Petition). New Jersey Transit did not object to West Orange's Petition.

⁷ Joint Request for Waiver filed by the Township of West Orange, New Jersey, and the New York City Department of Information Technology and Telecommunications at 2 (dated Mar. 9, 2014) (Waiver Request).

⁸ *Id.*

⁹ *Id.* See FCC File No. 0006070279 (filed Dec. 26, 2013).

¹⁰ Waiver Request at 2; see FCC File No. 0006204093 (filed Mar. 19, 2014).

¹¹ Waiver Request at 2.

¹² 47 C.F.R. § 1.925(b)(3)(i-ii).

¹³ See *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁴ *Id.* citing *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

¹⁵ See, e.g., District of Columbia, *Second Memorandum Opinion and Order*, 12 FCC Rcd 19419 (WTB 1997) (waiving Section 90.609(b) to permit the District of Columbia to partially assign its license to Howard County, Maryland, prior to completion of the construction of the facility as part of an agreement between the parties).

¹⁶ See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19096-98, ¶¶ 40-44 (1997) (*800 MHz SMR Second Report and Order*) (Section 90.609(b) "was designed to prevent trafficking in site-specific licenses and spectrum warehousing by taking back unused spectrum.").

only when involuntary or *pro forma*.¹⁷ Here, the pending assignment application is neither involuntary nor *pro forma*, but rather is intended to resolve a licensing dispute between the parties consistent with our license modification order, which encouraged the parties to negotiate a resolution to this long-running dispute.¹⁸ Although the proposed assignment is not exempt from the prohibition against the assignment of unconstructed facilities, we believe that the underlying purpose of the rule would not be served in the instant case were we to enforce it, and that grant of the waiver would serve the public interest.

7. Grant of the waiver would avoid prolonging this proceeding and imposing additional costs on the Parties. It also would conserve limited Commission resources. Additionally, NYC is prepared to place the channel into operation promptly, at a location where the channel would provide needed relief for NYC's public safety operations.¹⁹ We agree with the Parties that grant of the waiver to permit the assignment of the channel to NYC would expedite the resolution of this matter, thus serving the public interest.

8. *Conclusion.* Accordingly, we dismiss as moot West Orange's Petition for Reconsideration of our license modification proposal given that West Orange has resolved all issues with NYC and NJ Transit. We therefore vacate the license modification order. Finally, we note that NYC must file a construction notification with the Commission once it activates frequency 854/809.3125 MHz. If frequency 854/809.3125 MHz is not constructed on or before January 28, 2015 the authorization for that channel will cancel automatically.²⁰

9. Accordingly, IT IS ORDERED, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Sections 0.191, 0.392, and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.191, 0.392 and 1.925, Joint Request for Waiver filed by the New York City Department of Information Technology and Telecommunications and the Township of West Orange, New Jersey, IS GRANTED, to assign the authorization for channel 854.3125 MHz from Station WPCE346 to New York City Department of Information and Telecommunications, prior to construction of the facility.

10. IT IS FURTHER ORDERED that the April 11, 2013 *Memorandum Opinion and Order and Order Proposing Modification* IS VACATED.

11. IT IS FURTHER ORDERED, that the FCC Form 603 Application, FCC File No. 0006204093, filed by the Township of West Orange, New Jersey, dated March 19, 2014, SHALL BE PROCESSED.

¹⁷ 47 C.F.R. § 90.609(b)(1-2).

¹⁸ *Modification Order*, 28 FCC Rcd at 4604-05 ¶¶ 13-17 ("the conflicts in the applications should have been resolved by negotiation and settlement between the frequency coordinators involved.").

¹⁹ Waiver Request at 3.

²⁰ Because NYC is the assignee of a partial assignment, the authorization granted NYC herein reflects the assignor's (West Orange's) license expiration date. See 47 C.F.R. § 90.609(b).

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Opposition and Petition for Reconsideration filed by the Township of West Orange, New Jersey, dated May 13, 2013, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau