

January 15, 2015

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Ex Parte* Notice
Request for Waivers of Sections 90.729(b) and 90.723(f) of the Commission's Rules
WT Docket No. 13-59**

Dear Ms. Dortch:

On January 15, 2015, Michele Farquhar and David Martin, counsel to PTC-220, LLC ("PTC-220"), and Henry McCreary, President of PTC-220, spoke with Richard Arsenault of the Wireless Telecommunications Bureau via telephone regarding PTC-220's February 1, 2013 Waiver Request in the above-referenced docket.¹ On the call, counsel summarized the information below, which responds to the May 14, 2013, joint *ex parte* comments submitted by Dixie Electric Membership Corporation, Inc. ("DEMCO") and Berkeley Electric Cooperative, Inc. ("BEC") (jointly, the "Utilities") (which asks the Commission to deny the Waiver Request and commence a "comprehensive rulemaking" to develop a new 220 MHz band plan).²

It Is Appropriate to Proceed via Waiver Rather than Rulemaking in this Proceeding

The Commission has broad discretion to elect whether it will proceed by general rulemaking or through case-by-case decision-making, such as the waiver process.³ Indeed, an "agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."⁴

PTC-220's request is most appropriately addressed through the waiver process, rather than a rulemaking. The Congressionally mandated positive train control ("PTC") implementation deadline

¹ Request of PTC-220, LLC for Waivers of Sections 90.729(b) and 90.723(f) of the Commission's Rules, WT Docket No. 13-59 (Feb. 1, 2013).

² *Ex Parte* Comments of Dixie Electric Membership Corporation, Inc. and Berkeley Electric Cooperative, Inc., WT Docket No. 13-59 (May 14, 2013) ("*Ex Parte* Comments of the Utilities").

³ See *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947).

⁴ *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

of December 31, 2015,⁵ constitutes a “unique or unusual factual circumstance” supporting a waiver under the “second prong” of the Commission’s waiver standard, which allows for a waiver where “application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”⁶ Many of the “unique or unusual factual circumstance[s]” justifying the grant of a waiver militate in favor of proceeding via a waiver process, rather than a rulemaking. For example, a waiver is more appropriate where the time required for resolution of a rulemaking would “hinder [applicant’s] ability to meet its construction and service obligations,”⁷ or where a waiver offers the “most efficient and expeditious means available for accommodating” statutory policies.⁸

The Commission has explicitly rejected the need for a rulemaking in lieu of a waiver where, as here, the grantee’s operations – which were also nationwide – were conditioned on criteria designed to prevent interference.⁹ In particular, the Commission rejected suggestions that a rulemaking was required because grant of the waiver could hinder the FCC’s ability to ensure that sufficient spectrum would be available to accommodate other parties’ future desired uses of the band. The Bureau explained that its decision was “premised solely on the record generated by AirCell’s unique proposed use. Other proposals must be considered on their own merit, based on a separate record, at such time as they are presented to the Bureau.”¹⁰ As discussed below, the Utilities have not presented any proposal regarding other uses of the band.

By contrast to the examples above, the Commission has found that a rulemaking *is* appropriate when a waiver would establish “a policy of general applicability to all operators in [a band],”¹¹ where an applicant “has failed to demonstrate unique or [unusual] factual circumstances or that it has no reasonable alternative,”¹² or where a waiver petition “challenges the basis for a rule, rather than

⁵ Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4857 (2008).

⁶ 47 C.F.R. § 1.925(b)(3)(ii).

⁷ See *In the Matter of Maritel, Inc.*, Order, 16 FCC Rcd. 9294 ¶ 4 (2001) (“*Maritel Order*”) (granting waiver where related rulemaking proceeding is pending, due to time-sensitivity of construction and service obligations).

⁸ See *In the Matter of Speedusny.com*, Memorandum Opinion and Order and Order on Reconsideration, 22 FCC Rcd. 13974 ¶ 3 (2007); *In the Matter of Speedusny.com, L.P.*, Memorandum Opinion and Order, 27 FCC Rcd. 15321 ¶ 2 (2012) (same); *In re Application of Hye Crest Management, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd. 332 ¶ 18 (1991) (same).

⁹ See *In the Matter of Aircell, Inc.*, Order, 14 FCC Rcd. 806 ¶ 22 (1998) (“*Aircell Bureau Order*”) (granting a waiver where applicant’s system operated “pursuant to the recommended guidelines set forth in Appendix B, does not produce the harm that [the rules are] designed to prevent, *i.e.* harmful interference.”); see also *In the Matter of Aircell, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 9622 ¶¶ 16-17 (2000) (affirming the *Aircell Bureau Order* and finding that the Bureau “properly crafted its waiver in such a manner as to offer non-participating licensees adequate, indeed redundant interference protection”).

¹⁰ *Id.*, ¶ 20.

¹¹ See *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd. 12545 ¶ 388 (1997).

¹² See *In the Matter of Schlumberger Technology Corp.*, Order, 14 FCC Rcd. 2988 ¶ 7 (1999).

assuming its validity and seeking an exception therefrom.”¹³ Because PTC-220’s Waiver Request does not seek to establish “a policy of general applicability to all operators” in the 220 MHz band, a rulemaking would not be appropriate. Moreover, PTC-220 does not challenge the basis for the rules, but is simply seeking an exception for the specific purpose of complying with a Congressional mandate. A waiver here offers the “most efficient and expeditious means available for accommodating” the Rail Safety Improvement Act of 2008, given the imminent deadline for implementation of PTC service.

The New Rulemaking Sought by the Utilities Would Not Preclude Grant of the Waiver

The Utilities oppose the Waiver Request because they would prefer that the Commission initiate a “comprehensive rulemaking reviewing all the spectrum issues of the 220 MHz band in order to develop a band plan that address the vital communications needs of all critical infrastructure users.”¹⁴ It is clear that the Utilities seek greater access to and utilization of the 220 MHz band for their electric utility network needs,¹⁵ although it is not at all clear what type of changes they seek, other than the desire for a wholly new band plan. The Utilities are, of course, free at any time to file a petition for rulemaking (e.g., offering a new band plan proposal) or, as PTC-220 did, file waiver requests that will facilitate a more efficient utilization of their licenses for their specific needs. Until they do so, however, it is impossible for the Commission to address their (unknown) goals regarding greater use of the band by electric utilities.

Even if the Utilities had filed a petition for rulemaking, the Commission would be well within its authority to grant the Waiver Request pending the outcome of any rulemaking proceeding, as it has done in the past.¹⁶ But in this case, where no petition for rulemaking has been filed and no explanation has been provided as to how the grant of the waiver might prejudice any future rulemaking, there is absolutely no justification for rejecting the Waiver Request as the Utilities ask.

The Utilities Have Not Substantiated Any Interference Concerns

In sharp contrast to the since-withdrawn filings made by NRTC and PHI,¹⁷ the Utilities have made no showing that the specific 220 MHz licenses they hold are in danger of receiving harmful interference from PTC-220 should the Waiver Request be granted. Rather than presenting any technical analysis based on the spectral proximity of their licenses or other factors, the Utilities only speak

¹³ See *In the Matter of Applications of Telecom Services, Inc.*, Order on Reconsideration, 16 FCC Rcd. 18623 ¶ 9 (2001) (noting that the “very essence of a waiver is the assumed validity of the general rule.”).

¹⁴ *Ex Parte* Comments of the Utilities, 9.

¹⁵ See, e.g., *id.*, 7 (“Available spectrum for use by electric utilities at 220 MHz is also consistent with Federal homeland security objectives.”); see also *id.*, 3 (“DEMCO is in constant search of additional spectrum, including spectrum in the 220 MHz band.”).

¹⁶ *Maritel Order*, ¶ 4.

¹⁷ See Comments of the National Rural Telecommunications Cooperative, WT Docket No. 13-59 (April 8, 2013) (“NRTC Comments”), 4-6; *Ex Parte* Letter of Pepco Holdings, Inc., WT Docket No. 13-59 (June 6, 2013) (“PHI Letter”), 4-5 and Exhibits A and B.

about the potential for interference to the nation's utility spectrum users in general. For support, they cite only to the comments of NRTC,¹⁸ which addressed interference scenarios specific to NRTC's operations.¹⁹ More importantly, because the NRTC comments have since been withdrawn, the Utilities are left with no support in the record for their generic interference allegations.²⁰

Although the Utilities chose to ignore it, the Waiver Request proposes a stringent interference protection framework upon which any waiver grant by the Commission will presumably be conditioned.²¹ Contrary to the Utilities' suggestion, therefore, grant of the waiver will not "eviscerate" the protection from interference afforded to incumbent users under the rules. Because the Utilities do not provide any comment on the Waiver Request's interference protection criteria, the Commission need not address their vague and unsupported interference concerns.

PTC-220 Will Provide Advance Notice to the Utilities of Intended Waiver Operations

On procedural matters, the Utilities object to the requested waiver of Section 90.723(f), implying that it will eliminate the "advanced warning" of new operations that nearby users would otherwise receive.²² This concern has already been addressed by PTC-220 in its October 17, 2014, *ex parte* letter. In that filing, PTC-220 offered to provide a 30-day advance written notification of PTC-220's planned operations to licensees which would otherwise be covered by the coordination requirement in Section 90.723(f).²³

Furthermore, PTC-220 notes that the need for the waiver is primarily due to spectrum capacity limitations in dense urban environments. Because the Utilities do not operate in such markets, there is a high likelihood that PTC-220 will not need to operate pursuant to the waiver in their service territories at all. Nevertheless, because the Utilities remain as the only commenters in the record expressing *any* interference concern, PTC-220 hereby pledges to contact the Utilities at least 30 days in advance of any operations conducted under the waiver authority occurring within the Utilities' service territories, regardless of whether the Utilities' licenses would otherwise be covered by Section 90.723(f).

¹⁸ See *Ex Parte* Comments of the Utilities, 5 and note 9.

¹⁹ See NRTC Comments, 8-9 and Appendix II. It is clear throughout the NRTC Comments that the interference analysis is specific to NRTC's operations. For example, NRTC explains that the "base stations *in NRTC's deployed system* utilize a variety of directional and omnidirectional antennas that contribute from 0 dBd to 6 dBd of antenna gain." *Id.*, Appendix II at 6 (emphasis added).

²⁰ See Letter from PTC-220, LLC, the National Rural Telecommunications Cooperative, and PHI Service Company, to Marlene Dortch, Secretary, FCC, WT Docket No. 13-59 (Oct. 24, 2014) ("Joint Comment Withdrawal and Waiver Amendment Letter").

²¹ Waiver Request, 10, 14-17 (including an explicit commitment to correct any harmful interference, should any occur despite the proposed interference protection framework).

²² See *Ex Parte* Comments of the Utilities, 3 and note 9.

²³ See PTC-220 *Ex Parte* Notice.

The Waiver Is Urgently Needed to Enable PTC Progress in Dense Urban Markets

PTC-220's frequency coordinator, TTCl, has identified and ranked by rail density complexity (including commuter railroads) 35 US dense urban areas. It is in these areas where the waiver is most needed. The continued lack of the waiver grant is currently stalling PTC-220's efforts to move forward in completing RF design in a number of these markets, and will therefore delay construction in these markets.

The last step in preparing an RF design for a given market is to produce a channel and time slot plan. To date, each RF network analysis completed for a dense urban area has shown that all of the PTC-220 channels – including the upper band channels operating with the same power and height limits as the lower band channels – will be needed to provide an interoperable PTC network with sufficient capacity for both freight and commuter railroads. Simply put, without the waivers, PTC-220 cannot complete the channel and time slot plans for these markets. Currently, PTC-220 is stalled in preparing channel and time slot plans for the following markets: Chicago, the Northeast Corridor, New York/Newark, the Los Angeles Basin, Kansas City, Minneapolis/St Paul, Dallas/Fort Worth and San Francisco Bay. This list will continue to grow as the RF design process reaches the channel and time slot stage in other markets.

Conclusion

For the foregoing reasons, PTC-220 respectfully requests that the Commission grant its Waiver Request as expeditiously as possible in order to avoid further delay in constructing a nationwide, interoperable PTC network as required by law.

I am filing this letter electronically in the above-referenced docket. Please contact me with any questions.

Respectfully submitted,

/s/ Michele C. Farquhar

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