

Before the
Federal Communications Commission RECEIVED
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In the Matter of:)
)
Applications of i2way Corporation)
and Request for Declaratory Ruling)
Before the)
Wireless Telecommunications Bureau,)
Commercial Wireless Division,)
Policy and Rules Branch)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 02-196

To: Secretary of the Commission

REPLY COMMENTS OF i2way CORPORATION

i2way Corporation ("i2way"), applicant and petitioner in the above-referenced matter, by its attorneys and pursuant to the *Public Notice* (DA 02-1827) released by the Federal Communications Commission ("Commission") on July 29, 2002, hereby files its Reply Comments responding to the comments and letters previously submitted in this matter.

INTRODUCTION

On June 7, 2002, i2way filed a Request for Declaratory Ruling with the Commission seeking clarification as to the meaning and intent of the ten-channel limit contained in Section 90.187(e) of the Commission's rules and regulations, 47 C.F.R. §90.187(e) (2001). On July 29, 2002, the Commission issued a *Public Notice* inviting comments on the Request for Declaratory Ruling. Two parties, the Industrial Telecommunications Association, Inc. ("ITA") and the Land Mobile Communications Council ("LMCC") filed comments addressing the Request for Declaratory Ruling. In addition, before the release of the *Public Notice*, two other parties, Mr. Robert De Buck, owner of Buck Electric Company, and L. Sue Scott-Thomas, president of KNS Communications Consultants, submitted correspondence regarding i2way's applications. The

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Commission has incorporated the letters from these two individuals into the instant docket.

REPLY COMMENTS

i2way is pleased to submit these reply comments responsive to the Commission's *Public Notice* and the views expressed in the letters and pleadings filed in this proceeding.

A. The Issue of the Intent and Meaning of the Ten-Channel Limit Is Not An Appropriate Subject for Public Comment.

The Commission adopted the ten-channel rule, Section 90.187(e), in the Land Mobile “refarming” proceeding, PR Docket No. 92-235, after extensive public comment in the proceeding.¹ When adopting this rule, the Commission stated,

Under our current rules, there is no limit on the number of trunked channels for which an entity may apply in one application. Some petitioners have asserted the need for such a limit lest an applicant inhibit effective use of the spectrum by obtaining authorizations for trunked channels that would not be immediately used. We share the petitioners' concern regarding the potential for spectrum “warehousing” in the PLMR shared spectrum. We are persuaded that a limit is appropriate. Further, in defining such limit, we are guided by the industry consensus position reflected in the LMCC's filing; thus, we conclude that the maximum number of channels that may initially be requested for any given trunked system is ten.²

The substance of a prospective rule imposing a limit on the number of channels for which applicants may apply is an appropriate topic for public comment. Therefore, it was entirely consistent with the Administrative Procedure Act, 5 U.S.C. §553(c), for the Commission to subject the issue to the public comment process. Once a rule has been adopted, however, the

¹ In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Third Memorandum Opinion and Order* (FCC 99-138), PR Docket No. 92-235, adopted June 10, 1999, released July 1, 1999, 14 FCC Rcd. 10922 (1999).

² *Id.* at 10930 [*Footnotes omitted*].

public's responsibility for providing comments has been fulfilled and the APA process completed. The question raised in i2way's Request for Declaratory Ruling is very narrow in scope: what is the meaning of the rule and does it prevent applicants from applying for more than ten channels at different sites or in different frequency bands within the same market?

When the parties commented in the context of the “refarming” proceeding, the focus, appropriately, was on the nature of the rules that would best serve the public interest. Once a rule has been adopted, the focus is not what the public interest requires, but rather what is the meaning and intent of the rule that has been implemented. The Commission—not the public—drafted and implemented the ten-channel limit. The Commission—not the public—was responsible for the actual words that form the rule. The Commission—not the public—is the appropriate party to interpret the rule that was put into place. And while the Commission enjoys broad discretion as to how it performs its statutory responsibilities, interpretation of existing rules is an area that lies well within the Commission's expertise and is best left to that expertise.

B. The Comments of ITA and LMCC Do Not Address The Meaning of Section 90.187(e).

The rule in question, set forth in Section 90.187(e), states as follows: “[n]o more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for *in a single application.*”³ In the comments filed, neither ITA nor LMCC addressed the actual meaning of this sentence. Instead, both parties offered reasons as to why the rule should be used to preclude applicants from requesting more than ten channels over an undefined geographic area. The focus of this proceeding is significantly more narrow, however. The Commission is being asked to determine what the rule, as drafted, means and how that rule is to be applied in the context of

³ 47 C.F.R. §90.187(e) (2001) [*Emphasis added.*].

specific applications. Both ITA and LMCC treat the rule as if it reads, “no more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single geographic area.”⁴ This is not what the rule says.

Both ITA and LMCC have taken the wrong perspective in their comments.⁵ If they are to arrive at a proper interpretation of the rule, they must approach it from the perspective of an applicant who has to understand and comply with the rule. An applicant looking at the rule and seeking to formulate an application strategy will see only the restriction “no more than 10 channels for trunked operations . . . in a single application.” Having seen these words, the applicant might then decide to file applications for different sites or different frequency bands in

⁴ Even if the rule had been formulated to read “no more than 10 channels for trunked operations . . . in a single geographic area,” the rule might still suffer from impermissible vagueness. By itself, the term “geographic area” does not offer a finite geographic definition. In 1981, for example, the Commission amended its rules for the Private Microwave Operational-Fixed Service to permit use of the three H-group channels at 2.5-2.69 GHz for the distribution of video program material and information services to hotels and other locations. *First Report and Order*, Docket No. 19671, 86 F.C.C.2d 299 (1981). The rules adopted limited licenses to one such channel “per geographic area.” While well-intentioned, the rule did not provide the Commission with a hard and fast standard that could be used to dismiss applications filed by applicants attempting to obtain more than one H-group channel in a municipality, regional area or state. Similarly, the rule did not provide a standard for determining mutual exclusivity among competing applications. These defects were subsequently remedied when the *en banc* Commission adopted a *Public Notice* establishing 50 miles as the standard for identifying competing applications. *Public Notice* (FCC 85-12), adopted January 10, 1985, 50 Fed. Reg. 6992 (February 19, 1985). Not until adoption of this *Public Notice* was there a sufficient procedural basis on which the Commission could determine the meaning of “geographic area” and apply that standard to the processing of pending applications.

⁵ The Land Mobile Communications Council takes issue with i2way's statement that “[p]rior to adoption of the *Third Memorandum Opinion and Order*, the rules imposed no limit on the number of 450 MHz and 150 MHz channels for which applicants could apply.” However, this statement is taken directly from the *Third Memorandum Opinion and Order*. Paragraph 18 of that document states “[u]nder our current rules, there is no limit on the number of trunked channels for which an entity may apply in one application.” *Third Memorandum Opinion and Order*, 14 FCC Rcd. at 10930.

the same geographic area, with each application requesting no more than ten channels. Further, the applicant might well then invest significant funds in performing engineering studies to support its applications, obtaining the required frequency coordination and paying the FCC filing fees—all in reliance on a rule that states, no more than ten channels per application. This is exactly the process that i2way followed. i2way read the rule, limited its applications to ten channels and, having obtained coordination, filed the applications with the Commission.⁶ Only then did i2way learn that the FCC staff interpreted the rule to prohibit multiple ten-channel applications in the same geographic area. Both ITA and LMCC seek to recast the rule into a rule prohibiting multiple applications over an undefined geographic area.⁷ However, there is nothing on the face of the rule that provides an appropriate—or legal—foundation for doing so.

C. The Commission Is Obligated To Interpret Section 90.187(e) In A Manner Consistent With The Plain Meaning Of The Words Used In The Rule.

i2way Corporation is asking only for clarity in the rules that the Commission applies to its applications and reasonable advance notice as to what those rules permit and proscribe. For i2way Corporation and other applicants, there are severe practical implications when the rules are ambiguous or do not clearly articulate a policy that can be consistently applied. i2way spent hundreds of thousands of dollars on frequency coordination fees and FCC application fees to file

⁶ i2way fully complied with the applicable frequency coordination requirements. The coordinator interposed no objection to the applications and believing them to be consistent with the FCC's rules, filed the applications with the Commission.

⁷ Relying on *Valley Industrial Communications, Petition for Reconsideration of Grant of License for Station WPPV640*, 15 FCC Rcd. 14823, LMCC suggests that the proper recourse for i2way is to apply for waiver of the ten-channel limit. However, the situation in *Valley Industrial* is distinctly different than the circumstances underlying i2way's applications. Most tellingly, *Valley Industrial* involved 800 MHz frequencies that are licensed on an exclusive basis. Additionally, *Valley Industrial* was in the context of a *single* Form 601 application filed for 28 different channels at a *single* site in Redding, California under a *single* call sign.

applications, all on the very reasonable assumption that the applicable limit was “no more than ten channels . . . in a single application.” If the FCC intended this rule to mean something other than “a single application,” it was not apparent from the words that form the rule.

If the Commission is permitted to expand the meaning of Section 90.187(e) beyond its logical limits, the result will be the dismissal of all i2way Corporation applications in every geographic market, except for the one ten-channel application per area that i2way Corporation would be allowed to retain in pending status. In such situations, the courts have made it abundantly clear that the FCC must clearly articulate the standard used as the basis for dismissal. Specifically, the Court of Appeals for the District of Columbia Circuit has held that dismissal of an application pending before the Commission is sufficiently grave as to require the agency to provide clear notice of its rules.⁸ In the instant situation, the “gloss” that the Commission has applied to Section 90.187(e) fails to meet that judicial test.

Moreover, the Court of Appeals for the D.C. Circuit has made it equally clear that the FCC may not deviate beyond the rational boundaries of its own rules. “It is elementary,” the Court declared, “that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned. Simply stated, rules are rules, and fidelity to the rules is required.”⁹ In its attempt to recast the meaning of Section 90.187(e), the Commission is not being faithful to the dictates of the U.S. Court of Appeals.

D. As Used in Section 90.187(e), the Word “Application” Means A Single FCC Form 601.

In its comments, ITA asserts that, “[s]imply stated, a system operating pursuant to a

⁸ *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1 (D.C. 1987).

⁹ *Reuters Limited v. FCC*, 781 F.2d 946, 955 (D.C. Cir. 1986).

previously granted license needs to be constructed and operating within the parameters of its license to apply for additional channels in its geographic area.” From an administrative law perspective, there are severe difficulties with the position taken by ITA. While the interpretation that ITA advances would make an understandable and logical rule, it is not the rule set forth in Section 90.187(e). Nowhere in Section 90.187(e) does one find the words “geographic area.” Therein lies the problem. If the rule is to mean anything other than what it literally says, *i.e.*, “no more than 10 channels for trunked operations . . . in a single application,” then the rule is imprecise, vague and susceptible to varying interpretations.

As defined in Section 1.907 of the Commission's rules, an application is “A request on a standard form for a station license as defined in §3(b) of the Communications Act, signed in accordance with §1.917 of this part, or a similar request to amend a pending application or to modify or renew an authorization.”¹⁰ Thus, an “application” is a single request on a single standard form, a single Form 601. There is nothing in the Part 1 definition of the term “application” that would lead to the conclusion that “a single application,” as used in Section 90.187(e), actually means multiple applications filed for multiple sites. Yet, this is the definition that has been applied to the applications filed by i2way Corporation.

ITA argues that the intent underlying Section 90.187(e) is “plainly stated” in the Commission's “refarming” proceeding. Specifically, ITA refers to an explanatory statement contained in the *Third Memorandum Opinion and Order* in that proceeding, in which the

¹⁰ 47 C.F.R. §1.907 (2001). This definition appears in Subpart F of Part 1, which bears the heading “Wireless Telecommunications Services Applications and Proceedings.” Section 90.7, which contains definitions for Part 90 generally, does not provide a definition of “application.” However, Section 90.111, entitled “Applications and Authorizations,” directs users to Subpart F of Part 1 for “the requirements and conditions under which commercial and private radio stations may be licensed and used in the Wireless Telecommunications Services.”

Commission concludes “that the maximum number of channels that may initially be requested for any given trunked system is ten.”¹¹ Even with the benefit of that statement, one is left to ponder what the applicable standard really is. The rule states no more than 10 channels per application; the text of the *Memorandum Opinion and Order* states no more than 10 channels for a trunked system. That would suggest that “application” and “system” are synonymous, but that is not always the case. It is unclear whether the Commission intended to limit applicants to no more than ten channels per application, as the rule states, or no more than ten channels per system.

Under the customary practices of rule interpretation, one would look to the clarifying words in the *Memorandum Opinion and Order* only if the rule itself were deemed unclear. i2way submits that there is nothing unclear about the rule. Rather, the lack of clarity comes from a highly questionable interpretation of the rule. On its face, the rule limits applications to ten channels in a single application. It is clear. Nor is there anything unclear about the term “application.” An application is a single request—a single FCC Form 601. The rules say so.

E. Even Assuming A Degree of Ambiguity In The Rule, Applicants Must Be Permitted to File Applications for Different Sites That Are Not Part Of The Same FCC License.

Even assuming, for purposes of argument, that some ambiguity exists in the rule itself, and assuming that it is therefore necessary to refer to the text of the *Memorandum Opinion and Order* for clarification, the resulting legal analysis supports i2way's position. The text of the *Memorandum Opinion and Order* states that applicants may initially request no more than ten

¹¹ ITA's reference is to the *Third Memorandum Opinion and Order* (FCC 99-138), In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, released July 1, 1999, 14 FCC Rcd. 10922, 10930 (1999).

channels for any given trunked system. When one looks to the definition of a “system” for guidance, Section 90.7 offers little help. That section defines a “trunked radio system” as “A method of operation in which a number of radio frequency channel pairs are assigned to mobile and base stations in the system for use as a trunk group.” Nowhere in that rule section is the term “system” itself defined. Nor is the term defined in Section 1.907. When one looks elsewhere in the Commission's rules for guidance, a definition of “system” can be found in the rules for the Broadcast services under Part 74. Specifically, Section 74.401 defines “system” as “A complete remote pickup broadcast facility consisting of one or more mobile stations and/or one or more base stations authorized pursuant to a single license.”¹² The key element of the definition consists of the words “pursuant to a single license.” While the definition does not apply directly to the Part 90 services, it does provide a conceptual sense of “system” that can be used to understand the words in the *Memorandum Opinion and Order*. In the absence of a better definition, a system can only be defined as the facilities licensed under a single authorization.¹³

F. Radio Systems Used For Telemetry Should Operate On The Frequencies Set Aside for Data Operations.

In their correspondence to the Commission, Robert De Buck and L. Sue Scott-Thomas express concern that the proposed operations of i2way will threaten the telemetry operations of companies operating SCADA and telemetry systems on land mobile channels. By rule, however, telemetry operations on regular land mobile channels are on a secondary basis.¹⁴ The difficulty

¹² 47 C.F.R. §74.401 (2001). This definition actually appears under the term “systems.” However, from both the context in which the term is used, it is apparent that the pluralization of “system” is a typographical error and that the term being defined is “system” in the singular.

¹³ The applications filed by i2way often involve different frequency bands, alternately 150-174 MHz and 450-470 MHz.

¹⁴ *See, e.g.*, Section 90.238(e), 47 C.F.R. §90.238(e) (2001).

of integrating voice systems with data has led to the designation of certain low-power channels in the land mobile bands for data transmissions. Clearly, if the telemetry systems that are of concern to Mr. De Buck and Ms. Scott-Thomas are using regular voice channels, they are at risk of interference from land mobile systems operated by any regularly licensed land mobile service operator. The proper solution is for these telemetry systems to operate on channels specifically designated for data transmissions.

CONCLUSION

For the reasons stated above, i2way Corporation believes that there is a pressing need for the Commission to examine Section 90.187(e) and issue a declaratory ruling as to the intent, meaning and application of the rule. If the Commission's current interpretation is allowed to stand, extreme hardship will be visited upon i2way Corporation, and vast sums of money expended in reliance on the rules will be wasted. The "gloss" being applied to Section 90.187(e) will cause the demise of a radio system that has the potential to offer a state-of-the-art, low-cost nationwide dispatch service premised on efficient use of 6.25 kHz and 12.5 kHz channels. Consistent with the intent of Section 1.2 of the Commission's rules, the current ambiguity requires a Commission ruling to resolve the controversy and remove the uncertainty.

Respectfully submitted,

i2way Corporation



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Certificate of Service

I, Frederick J. Day hereby certify that on this 12th day of September, 2002, a copy of the foregoing Reply Comments was sent via first-class mail, postage prepaid, to the following:

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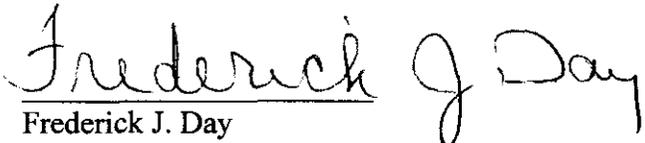
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