

FCC MAIL SECTION

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

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DISPATCH

In the Matter of)
)
The 4.9 GHz Band Transferred from Federal) WT Docket No. 00-32
Government Use)

ORDER

Adopted: July 30, 2004

Released: August 2, 2004

By the Commission:

I. INTRODUCTION

1. In this order we grant a request¹ to stay the effectiveness of a rule adopted in the *4.9 GHz Memorandum Opinion and Order and Third Report and Order (Third R&O)*.² The *Third R&O* established licensing and service rules for the 4940-4990 MHz (4.9 GHz) band. One element of the rules permits the 700 MHz regional planning committees (RPCs) to submit regional plans on guidelines to be used for sharing the spectrum within each region, and requires that any such plan must be submitted within twelve months after the effective date of the rules. The rules became effective on July 30, 2003, making the RPC sharing plans due on July 30, 2004. For the reasons set forth herein, we find that good cause has been shown to stay this date pending Commission resolution of the petition for reconsideration filed in this proceeding.³

II. BACKGROUND

2. The 4.9 GHz band was transferred from the Federal Government to non-Government use in 1999, in accordance with the provisions of the Omnibus Budget Reconciliation Act of 1993.⁴ In 2000, the Commission released a *Notice of Proposed Rulemaking* proposing to allocate the 4.9 GHz band to non-Government fixed and mobile services, and to allow flexible use of this band.⁵ In 2002, the Commission adopted the fixed and mobile allocation, and designated the band for use in support of public

¹ Letter dated June 24, 2004 from Chairman, Stephen T. Devine, Chairman, National Association of Regional Planning Committees (NARPC) to Marlene H. Dortch, Secretary, FCC (Stay Request). NARPC is an association formed to support public safety regional planning activities in the 700 MHz, 800 MHz and 4.9 GHz bands. See *id.* at 1.

² The 4.9 GHz Band Transferred from Federal Government Use, *Memorandum Opinion and Order and Third Report and Order*, WT Docket No. 00-32, 18 FCC Rcd 9152 (2003) (*Third R&O*).

³ See National Public Safety Telecommunications Council (NPSTC) Petition for Reconsideration (filed July 30, 2003) (NPSTC Petition). NPSTC is federation of public safety associations that encourage and facilitate, through a collective voice, the implementation of Public Safety Wireless Advisory Committee and 700 MHz Public Safety National Coordination Committee recommendations. See *id.* at 1.

⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

⁵ The 4.9 GHz Band Transferred from Federal Government Use, *Notice of Proposed Rulemaking*, WT Docket No. 00-32, 15 FCC Rcd 4778 (2000).

safety.⁶ At the same time, the Commission sought comment on the establishment of licensing and service rules for the 4.9 GHz band. In April of 2003, the Commission adopted licensing and service rules for use of this band. As part of these rules, the Commission authorized the 700 MHz regional planning committees (RPCs) to submit regional plans regarding utilization of the 4.9 GHz band spectrum in support of public safety. In this regard, the Commission required such plans to be submitted within twelve months after the effective date of the rules adopted in the *Third R&O*.⁷ The *Third R&O* was published in the Federal Register on June 30, 2003, with an effective date of July 30, 2003.⁸ Thus, under the rules as adopted, the 700 MHz RPCs were tasked with development of a plan on guidelines for the shared use of the 4.9 GHz band within their regions, and are required to submit such plans by July 30, 2004.⁹

3. On July 30, 2003, the National Public Safety Telecommunications Council (NPSTC) filed a petition for reconsideration of the *Third R&O* (NPSTC Petition). Specifically, NPSTC requests that the Commission adopt different emission masks,¹⁰ develop a clear path toward the identification and adoption of a technology standard for general and interoperability use within the 4.9 GHz band,¹¹ require mandatory regional planning, and require that each plan filed by the RPCs include a conflict resolution process.¹² Several entities filed comments to the NPSTC Petition.¹³

4. On June 26, 2004, the National Association of Regional Planning Committees (NARPC) filed a request to stay the July 30, 2004 deadline until twelve months after the Commission resolves the NPSTC Petition. In addition, several RPCs recently requested an extension of the deadline, largely for the same reasons as stated by NARPC.¹⁴

⁶ The 4.9 GHz Band Transferred from Federal Government Use, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 00-32, 17 FCC Rcd 3955 (2002).

⁷ See 47 C.F.R. § 90.1211(a).

⁸ 68 Fed. Reg. 38635 (2003).

⁹ 47 C.F.R. § 90.1211(a).

¹⁰ In the *Third R&O*, the Commission adopted a single emission mask for all 4.9 GHz band operations. See *Third R&O*, 18 FCC Rcd at 9174. NPSTC proposes that the Commission adopt two different masks, one for low power operations and one for higher power operations. See NPSTC Petition at 5. The two principal parties involved in the petition, NPSTC and Motorola filed different proposals to resolve the emission mask issue. The time for filing comments was extended, as requested by Motorola. See *The 4.9 GHz Band Transferred from Federal Government Use, Order Extending Time for Filing of Comments*, WT Docket No. 00-32, 18 FCC Rcd 18074 (WTB PSCID 2003). In addition, interested parties continue to make *ex parte* presentations regarding this issue, as recently as this month.

¹¹ "Interoperability" is an essential communications link within public safety and public service wireless communication systems, which permits units from two or more different entities to interact with one another, exchanging information according to a prescribed method, in order to achieve predictable results. See 47 C.F.R. § 90.7.

¹² See NPSTC Petition at 5.

¹³ See generally Comments of PacketHop, the New York State Office for Technology Statewide Wireless Network, Motorola Inc., Proxim Corporation, IEEE 802.18, and David A. Case.

¹⁴ See Letter dated June 30, 2004 from Kevin Kearns, Chairman, Region 43-Washington to Marlene H. Dortch, Secretary, FCC; Letter dated July 14, 2004 from William Vincent, Chairman, Region 18-Louisiana to D'wana R. Terry, Chief, Public Safety and Critical Infrastructure Division, FCC; Joint Letter dated July 15, 2004 from Ronald Mayworm, Chairman, Region 49-Central Texas on behalf of Six Texas Regional Planning Committees Washington to Marlene H. Dortch, Secretary, FCC; Joint Letter dated July 16, 2004 from David Buchanan, Chairman, Region 5-Southern California and William DeCamp, Chairman, Region 6-Northern California Washington to Marlene H. Dortch, Secretary, FCC.

III. DISCUSSION

5. In considering requests for stay, the Commission generally considers the four criteria set forth in *Virginia Petroleum Jobbers Association*.¹⁵ These criteria are (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) the issuance of the order will further the public interest.¹⁶ The Commission then balances these interests in order to determine an administrative response on a case-by-case basis.¹⁷ The relative importance of the four criteria will vary depending upon the circumstances of the case.¹⁸ If there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors.¹⁹ For the reasons set forth below, we agree with NARPC that a stay of the July 30, 2004 date is appropriate under the circumstances presented. Specifically, we conclude that a stay will further the public interest, and that no parties will be injured if relief is granted.

6. We agree with NARPC that it would be in the public interest to stay the July 30, 2004 deadline. In this regard, we believe that some of the matters that are the subject of the NPSTC Petition arguably could bear upon how the 4.9 GHz band is utilized by public safety entities and other 4.9 GHz band operations in support of public safety. We concur that twelve months from the effective date of the *Third R&O* may not have been sufficient time for RPCs to complete plans for the sharing of 4.9 GHz spectrum in light of the issues raised on reconsideration.²⁰ We are concerned that if RPCs were required to meet the July 30, 2004 deadline, they may produce plans that are over- or underinclusive and would therefore need to be revised following resolution of the reconsideration petitions. The public interest favors avoiding unnecessary and potentially duplicative efforts in this regard, particularly for the public safety community. We are concerned that such a result could have the unintended consequence of adversely affecting public safety and critical infrastructure operations in the 4.9 GHz band.

7. In addition, nothing in the record before us suggests that there will be any injury to any other party if the requested relief is granted. A temporary stay of the July 30, 2004 date pending the resolution of the petitions for reconsideration of the *Third R&O* will not place limitations on licensing in the 4.9 GHz band, or preclude the licensing of any new stations. In addition, given that manufacturers are not likely to commence full-scale production of 4.9 GHz band equipment until the technical issues raised in the NPSTC Petition are resolved, we do not believe that extensive operations will be undertaken in the absence of regional plans.

8. We disagree with NARPC, however, regarding the proper length of the stay. NARPC requests that we stay the deadline until twelve months after the resolution of the NPSTC Petition.²¹ While

¹⁵ *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also, e.g., Implementation of Section 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Order*, WT Docket No. 99-87, 18 FCC Rcd 25491 (2003) (*BBA Stay*); Biennial Regulatory Review – Amendment of Parts 0, 1, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order*, WT Docket No. 98-20, 14 FCC Rcd 9305, 9307 (1999) (*ULS Stay*).

¹⁶ *Virginia Petroleum Jobbers Ass'n.*, 259 F.2d at 925.

¹⁷ *BBA Stay*, 18 FCC Rcd at 25493; *ULS Stay*, 14 FCC Rcd at 9307.

¹⁸ *BBA Stay*, 18 FCC Rcd at 25493; *ULS Stay*, 14 FCC Rcd at 9307.

¹⁹ *BBA Stay*, 18 FCC Rcd at 25493; *ULS Stay*, 14 FCC Rcd at 9307.

²⁰ Stay Request at 2.

²¹ *Id.*

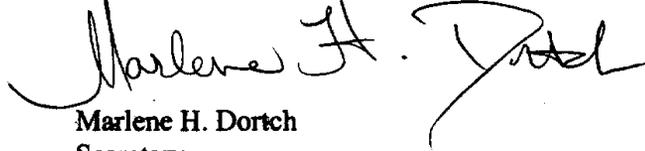
NARPC does not explain the basis for requesting twelve months, it appears to be analogizing to the twelve-month period that RPCs were provided following the effective date of the 4.9 GHz band service rules. We do not believe that a full twelve months following resolution of the NPSTC Petition is necessary. Unlike the case when the Commission originally adopted the service rules, most of the possible issues are now settled, and not affected by the NPSTC Petition. Pending resolution of those issues, RPCs can begin considering matters within their plans that are not implicated by the NPSTC Petition. After we rule on the NPSTC Petition, the RPCs can complete their efforts. We believe that six months should provide sufficient time to respond to the Commission's resolution of the NPSTC Petition, by developing and/or further refining their plans accordingly.

9. Based on the record before us, we are concerned that retaining the July 30, 2004 deadline would not be in the public interest, because it may adversely affect public safety communications and critical infrastructure operations. We also believe that a temporary stay of the deadline would not injure any party. We therefore conclude that a stay of the July 30, 2004 date is appropriate. For the foregoing reasons, therefore, we will stay the July 30, 2004 deadline for submission of 4.9 GHz regional plans in Section 90.1211(a) of the Commission's Rules. We grant this stay until six months after the release date of the order resolving issues raised in the petition for reconsideration of the *Memorandum Order Opinion and Order and Third Report and Order*.

IV. ORDERING CLAUSE

10. For the aforementioned reasons, IT IS ORDERED pursuant to Sections 4(i), 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 161, 303(g), and 303(r), that the Request for Stay filed by The National Association of Regional Planning Committees on June 24, 2004, IS GRANTED to the extent described herein and will remain in effect until six months after release of a decision resolving the petition for reconsideration filed in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary