

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

May 27, 2005

In the Matter of)
)
State of Ohio) FCC File Number
0002106060)
) P.R. Docket 91-258
Modification for license)
WPQF782 to add)
NPSPAC Frequencies)

To: Public Safety and Critical Infrastructure Branch
Wireless Telecommunications Bureau

REPLY

The City of Brooklyn, Cuyahoga County, Ohio (“Brooklyn”) and Medina County, Ohio (hereinafter “Petitioners”) hereby reply to those *Comments of the State of Ohio Regarding The Petition For Reconsideration Jointly Filed By The City Of Brooklyn, Ohio And County Of Medina, Ohio* (“Comments”), which Comments oppose the Petitioners’ request that the Bureau set aside its grant of that application to modify station WPQF782, to add frequencies; and which petition further requests that the Bureau make such inquiry and investigation as is necessary to determine whether the actions of the Chairman of the Region 33 NPSPAC Plan (“Chairman”) acted within the dictates of the Plan, acted within his authority as Chairman, and whether the Chairman improperly diverted an opportunity to the State to forestall the

City of Brooklyn from receiving grant of its application, then pending before the Region 33 NPSPAC Committee (“Committee”).

The Committee Is Illusory

And

The Chairman's Actions Are Highly Questionable

Although the parties to this proceeding agree on the essential facts and circumstances which resulted in stalling of the Brooklyn application within Committee, the parties do not agree on either the ramifications or the violations of rule and reasonable expectations that have occurred. Whereas, the Comments urge the Bureau to find that the actions of the Chairman are in accord with rule, law and the ethical responsibilities of a person charged to perform quasi-governmental functions to further the public interest in the dissemination of spectrum, to serve both state and local public safety needs, and to coordinate the use of 800 MHz channels in a manner which will promote the ability of county and city officials to communicate effectively intra and interagency functions, the facts of this matter do not support the Bureau's finding, through the granting of the modifications to license WPQF782, that the Chairman acted appropriately.

The Comments do not address the failure of the Committee to meet and act in a joint capacity to reflect the needs of Region 33 as a whole. Instead, the Comments support Petitioners contention that, in fact, the Committee does not meet and its functions have been improperly delegated, by practice or design, to a single individual, the Chairman. It is beyond doubt that the Bureau and the Commission never intended to reside authority for a NPSPAC regional committee's actions within a single

individual. However, as stated in the Comments, the Committee only meets in the form of the APCO Ohio Chapter Executive Board. There is no mention of the frequency when this Executive Board has met or any minutes pertaining to these meetings. Certainly, the Commission's records provide no dates. As for the full Committee, it is "not called upon unless there is contention or conflict." Comments at page 6. What the Bureau must conclude from the Comments description of its operations is that the Committee does not meet and has not met for years. The Executive Board may or may not meet and its purpose remains a mystery. Whereas, the Chairman handles all matters related to coordination of the NPSPAC channels throughout the State, presumably with little oversight or input from either the Committee or any other responsible body.

That the Chairman is an Ohio State employee does not ameliorate the harm or justify the actions taken. In fact, the Chairman would be disposed to provide as much spectrum for the State's use, to the detriment of local governments, in his decisions, because his performance for the State would, in part, be judged on the availability of channels to satisfy his superiors. In matters of potential bias or capricious activity, the fact that a single individual is providing all, or substantially all, of the decision making authority is sufficient to create a specter of impropriety. And although the Comments attempt to justify the State's actions by claiming "the Greatest Good For the Greatest Number," this approach would and does pit the State against the needs of smaller local governments, which entities the

Commission did not intend to exclude or provide a lower priority to in the assignment of the subject frequencies.

Of critical concern to the Bureau should be the Comments statements at Page 6 which clearly admit a bias toward a single equipment manufacturer, Motorola. What the Comments clearly suggest is that Parma's request for additional channels is impeded due to Parma's selection of a M/A COM (GE/Ericsson) EDACS system, rather than Motorola. Although the City of Parma is clearly not one of the joint petitioners in these proceedings, the arbitrary and improper nature of the Chairman's actions (or perhaps the Executive Board) that would take into consideration the identity of the manufacture of equipment is startling and must not be allowed by the Commission. In effect, the State via the Chairman is not only directing to its own use nearly all available channels, but is further attempting to impose on local governments its selection of equipment providers. There is nothing under the Commission's rules and policies which would allow for such a criterion to be considered, and the Bureau should direct the Committee to meet and disallow any such activity in the performance of its duties.

Nor should the Bureau be swayed by the claim that the application filed by the State to modify WPQF782 was in the works prior to the application prepared by Brooklyn. As the record clearly shows, the Brooklyn application was coordinated on or about April 23, 2004 by IMSA, eleven months before the State's application was filed. The Chairman acknowledged

to ACD that it was aware of the Brooklyn application at least as early as December 9, 2004, nearly three months prior to the filing of the State's application. Stated simply, the Chairman was aware of the coordinated application, aware of the frequencies proposed by Brooklyn for its use, and aware of the additional information which the regional plan required for further processing of the application. However, rather than assist Brooklyn in completing its application to the Committee or informing Brooklyn that additional information would be required beyond IMSA's coordination, the Chairman did nothing; until the Chairman caused the State to file its application the grant of which precludes Brooklyn's application. The suggestion that the State's application was the product of, say, coincidence simply stretches credulity beyond reason. Additionally, for the State to indicate that the channels requested by Brooklyn are assigned to the Turnpike provides further evidence that the Chairman overstepped his authority when the FCC approved Region 33 Plan clearly states that the channels can be assigned, on a non-interfering basis, to other users.

It is an insufficient justification for the State and the Chairman to now claim that the Brooklyn application did not meet any criteria for acceptance by the Committee, while concurrently being wholly silent on the issue of whether the State's application was prepared and processed out of order of receipt by the Committee. The use of NPSPAC committees was not intended to serve as a means of denying use of spectrum by misapplication of authority and failure to communicate assistance to local governments, but rather as a

means of encouraging additional use and coordination of regional plans to facilitate the licensing of entities in a manner that would encourage interoperability among agencies, not to the benefit of a single entity even if that entity is the State. If, as in the instant case, the Committee required additional information from an applicant whose application had been coordinated by a recognized, certified frequency coordinator; then the Committee should have requested that the information be provided from the applicant if said information was not provided by the recognized, certified frequency coordinator. To do otherwise is to negate the actions taken by the coordinator, delay the grant of spectrum to a needy applicant, and to violate the confidence of those entities whose requests are a portion of the basis for NPSPAC coordination. Then, if the Committee engages in diversion of spectrum opportunities to another agency under the guise of “greater good” the Committee (or in this case the Chairman) creates the impression of impropriety or, at the least, acts in a manner that is wholly arbitrary.

Avenue Of Resolution

Although Petitioners sincerely believe that the operations of the Committee are in serious need of greater oversight and direction (perhaps if the Committee ever met, this oversight would be a byproduct of regular efforts), Petitioners also understand that the Bureau does not wish to micromanage the NPSPAC Committee's future efforts. However, in its oversight of all such committees' activities, the Bureau should, at the minimum, satisfy itself that a committee actually exists, is viable, is not operated via the de facto control of an individual, is performing in accord with the directions and intentions of the Commission, and is not engaging in activity which calls into question the impartiality of the Committee's decisions.

Regarding the instant matter, the Bureau should note that nowhere within the Comments does the Committee or its Chairman suggest alternative channels for Petitioners' use. Standing alone this obvious omission calls into further question the past actions of the Chairman. If, as the Bureau is led to believe, the actions of the Chairman are fully benevolent and accommodating to local entities, such as Petitioners, the Comments would have suggested a means whereby Petitioners may operate on 800 MHz channels in a manner which is consistent with the alleged goals of the Committee. No such suggestion is made. Accordingly, the Bureau is placed in a position to either uphold its grant of the State's application despite the clear evidence of arbitrary action by the Chairman which fully undermines

the alleged “Committee Approval”, or to deny the State’s application without having concurrently provided for the aggrieved Petitioners. A better solution would be for the Bureau to make a simple request of the Committee, to determine suitable channels upon which Petitioners may operate their proposed systems in accord with the Commission’s rules and the Committee’s guidelines, and to declare that those channels will be available to Petitioners upon receipt of an application request from Petitioners for those channels, providing to Petitioners up to 120 days to submit such application to the Committee for approval. If the Committee were to make such a good faith commitment, Petitioners would be willing to withdraw their petition in favor of grant of the State’s application.

By the forgoing, it is apparent that Petitioners do not seek to exacerbate this situation and put the Bureau in a position of having to substitute itself for the Committee. The Chairman’s actions were clearly *ultra vires* and not in accord with the intentions of the Commission in its adoption of the present system, however, the Commission further did not contemplate that the various committees would require the Bureau to accept upon itself the job of coordinating the use of the NPSPAC channels. With that said, the Commission also did not delegate to the committees the ability to dictate to the Bureau or the Commission in a manner which would result in an arbitrary and capricious misuse of committee authority. Accordingly, as the Commission attempted to balance carefully its need to involve local committees in the NPSPAC effort with the Commission’s duty to be the final

arbiter of whom shall receive licensing authority, so too do Petitioners reach out to the Bureau to effect a similar balance in this matter.

Petitioners have been improperly precluded from obtaining “due process” from the Committee in the performance of its duties and, thus, have been unfairly denied any approval for its future use of necessary channels to operate its public safety systems. Petitioners’ ultimate goal is to provide for the safety of life and property within its jurisdictions, consistent with the NPSPAC Regional 33 Plan and the Commission’s rules. Petitioners do not seek anything more than what they reasonably have been made to expect from the Commission’s past Orders and from a clear reading of the Region 33 Plan. If the Committee has acted improperly, even if such actions were inadvertent due to a lack of participation by Committee members, the Bureau should place the burden on the Committee to resolve the matter in a way that provides necessary relief to Petitioners. If the Committee, instead, remains recalcitrant and unwilling to cooperate with the Bureau in resolving this matter, the Bureau should set aside its grant of the modification of the license for station WPQF782 and accept applications filed by Petitioners acceptable for filing and eligible for grant.

Public Interest

The Joint Petitioners contend that, based on their review of the number of channels licensed by the State, and by the State’s own admission, the excessive use of the finite spectrum precludes the Joint Petitioners and

possibly other Public Safety organizations within the State of Ohio from acquiring licenses for the spectrum needed to ensure the safety of the public in those areas. The Joint Petitioners strongly disagree with the State's assertion that the Public Interest is best served by the granting of this license.

Conclusion

For those reasons set forth herein, Petitioners request that the Bureau take such action as is consistent with this Reply and Petitioners' early filed Petition For Reconsideration.

**Respectfully Submitted,
The City of Brooklyn, Ohio
and Medina County, Ohio**

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