

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Public Safety and Homeland Security)	PS Docket No. 06-229
Bureau Seeks Comment on Petitions for)	
Waiver to Deploy 700 MHz Public Safety)	DA 09-1819
Broadband Networks)	



INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA) hereby submits these comments on the above captioned petitions for waiver. NTCA specifically focuses its comments on the petitions submitted by the State of North Dakota and the commercial entity, New EA, Inc. d/b/a Flow Mobile (Flow Mobile).

I. INTRODUCTION

NTCA is an industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 585 rural rate-of-return regulated telecommunications providers, including 17 in the state of North Dakota. All of NTCA's members are full service rural local exchange carriers (LECs) and many of its members provide wireless, broadband, video, Internet, satellite and long distance services to their communities.

NTCA's members are actively deploying broadband service to their rural communities and many have paid substantial sums for spectrum to develop a wireless product.¹ Rural telecommunications providers have an interest in ensuring that the Commission does not act to harm rural carriers and their customers or provide an unproven competing commercial entity an unfair competitive advantage in the provision of broadband services.

As an initial matter, neither Flow Mobile nor the State of North Dakota has satisfied the criteria for an FCC waiver grant. Furthermore, the petition is so fraught with defects and public policy concerns that it must be disregarded.

II. NEITHER FLOW MOBILE NOR THE STATE OF NORTH DAKOTA HAS MET THE STANDARD FOR WAIVER OF AN FCC RULE

Neither Flow Mobile nor the State of North Dakota has demonstrated that their 700 MHz proposal meets the standard for grant of a rule waiver. Section 1.3 of the Commission's rules provides the Commission with the discretion to waive its rules upon a showing of good cause. Section 1.925(b)(3) provides that the Commission may grant a waiver request when the following is demonstrated:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application of the instant case, and that grant of a waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

The Courts have affirmed the Commission's power to waive its rules,² but when an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.³

¹ More than 80 NTCA members acquired 700 MHz spectrum in FCC auctions 44 and 73.

² See, e.g., *WAIT Radio v. FCC*, FCC 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

The application for waiver, as filed separately by Flow Mobile and the State of North Dakota, is short in length and lacking in detail. Neither entity cites the rule or rules from which relief is sought. There is no description of how the underlying purpose of a rule is frustrated, or a description of how unique or unusual circumstances create a situation in which application of the rules would be inequitable or unduly burdensome and there is no affirmative statement that the applicant has no reasonable alternative to the waiver. Furthermore, there is no public interest showing as required by FCC Rule Sections 1.3 and 1.925(b) and *WAIT Radio*.

The application is also woefully deficient in technical detail and analysis. It describes the technology to be used as “4G-like.” There is no means for the FCC or any other interested party to determine if there exist compatibility or interference issues or whether there are “reasonable alternatives” to what is proposed.

It is unclear how the spectrum will be used or what services will be provided. In short, it is impossible for commenting parties to discern the intended use of the spectrum. The Petition for Waiver is inadequate and must be denied.

III. GRANT OF THE REQUESTED WAIVER IS NOT IN THE PUBLIC INTEREST

Though the North Dakota Petition for Waiver is lacking detail, clearly some commercial use is intended. The Petition was originally submitted by Flow Mobile, a commercial entity. That petition was withdrawn and a substantially identical version was filed by the State of North Dakota. Initially, Flow Mobile was named in the State’s petition, but in the most recent version, it is not. NTCA strongly suspects that the State of North Dakota is acting as Flow Mobile’s agent in its attempt to gain access to the public safety spectrum. An examination of a series of *ex parte* submissions indicates that Flow Mobile intends to obtain the public safety spectrum (from or through the State of North Dakota), build out a “public safety” network with the State as a

³ Rio Grande Radio Fellowship Inc. v. FCC, 132 U.S.App.D.C. 128, [406 F.2d 664](#) (1968)

client and also offer commercial and residential services. Regardless of whether Flow Mobile intends to use the public safety spectrum to provide a commercial service or if it is merely planning to use the public safety spectrum in combination with commercial spectrum,⁴ the petition is contrary to law and not in the public interest.

A. Grant of the Requested Waiver would Violate Section 337 of the Communications Act.

Section 337 of the Communications Act, as amended, required the Commission to allocate 24 MHz of 700 MHz spectrum for public safety services and 36 MHz for commercial use to be assigned by competitive bidding. Section 337(f)(1) defines “public safety services.” In relevant part (C) “public safety services” means services that are not made commercially available to the public by the provider. Flow Mobile is a for-profit commercial entity whose self-described primary mission is to provide “all rural residents with an affordable mobile broadband service.” Flow Mobile recently submitted hundreds of individual applications seeking broadband stimulus funding for last mile remote area projects so that it could provide for-profit broadband service in rural areas. Flow Mobile is not a permissible licensee of the public safety spectrum and cannot escape the restriction by having a state file a request for waiver on its behalf.

B. Permitting Commercial Use of the Public Safety Spectrum would Create an Unfair Competitive Situation and Harm Rural Consumers

Whether the State of North Dakota or Flow Mobile intends a commercial use of the public safety spectrum or to somehow combine a public safety offering with other commercial spectrum, a waiver would ultimately hinder rural broadband deployment.

⁴ It is not possible to discern Flow Mobile’s intent from publicly available information beyond providing “all rural residents with an affordable mobile broadband service”.

NTCA's members are deploying broadband service to their subscribers. They are using innovative methods, combining fiber, wireless and other technology to reach that difficult "last mile." In furtherance of their efforts, NTCA's members spent millions of dollars to obtain commercial 700 MHz spectrum. The State of North Dakota now proposes to introduce an unproven commercial competitor with free access to spectrum and a guaranteed source of revenue in the form of a public safety subscriber. This plan undermines the business decisions of the rural carriers who are dedicated to the rural communities they serve and who have been offering service for decades.

Rural carriers who paid for spectrum would not be able to compete for customers with a state subsidized competitor. Rural carriers could not offer a competitive price and still recoup their initial investment. Without the ability to offer a competitive broadband product, rural carriers would likely delay, if not abandon, broadband deployment. Having already committed precious resources toward obtaining access to spectrum, rural carriers are committed to following through and bringing service to the inhabitants of rural areas. On the other hand, assuming Flow Mobile gets the waiver, but fails to get other favorable rulings from the FCC,⁵ or if its business model simply proves unsound and fails, it is the rural consumer who would suffer in the form of delayed broadband service.⁶

If Flow Mobile has a sound and reliable rural broadband business model, it should stand on its own, with no competitive advantage, in the same place as other providers looking for innovative methods to get broadband out to rural consumers. Otherwise, the playing field will not be level, and both rural carriers and their customers will end up suffering.

⁵ Flow Mobile's business plan seems to rely on favorable auction rules in the 700 MHz D-block.

⁶ Competing providers also tend to provide service to only the more densely populated, thus more profitable, areas. NTCA's members cannot afford to provide service to the most rural consumers if a competitor with an unfair competitive advantage is permitted to "cherry pick."

CONCLUSION

The Flow Mobile/North Dakota Petition for Waiver does not meet the standard for a waiver grant and is puzzlingly vague. There is not enough information for the Commission or any interested party to determine that the proposal is a good idea, let alone find that a FCC rule waiver is appropriate. The Flow Mobile *ex parte* submissions provide no help to the Petition. They are also conspicuously lacking in detail and offer no further explanation about technological compatibility, interference issues or public interest concerns. As such, the Petition for Waiver must be denied. If the parties are serious in their quest for an FCC rule waiver, they should re-file the request with full disclosure, describing with particularity what they are trying to accomplish, how it is compatible with Section 337 of the Communications Act, how technical and interference concerns will be addressed, and explaining the purported public interest benefit. Interested parties should have the opportunity to comment on a thorough and complete Petition before the FCC considers granting it.

Respectfully submitted,



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October 16, 2009

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in PS Docket No. 06-229, DA 09-1819, was served on this 16th day of October 2009 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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