

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

In the Matter of)
License Acquisitions, LLC) WT Docket No. 02-55
Request to Rescind ESMR Election)

ORDER

Adopted: March 12, 2018

Released: March 12, 2018

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Order, we deny a request by License Acquisitions, Inc. (License Acquisitions) to rescind its election under the 800 MHz rebanding program to relocate to the Enhanced Specialized Mobile Radio (ESMR) portion of the band.

2. The request arises from the early stages of the rebanding program, when 800 MHz incumbents that held geographic area licenses in the former interleaved portions of the band (809.75-816/854.75-861 MHz) were allowed to choose between two relocation options: (1) they could elect to remain in the interleaved portion of the band and operate high-site systems, or (2) they could elect to relocate to the ESMR band (816-824/861-869 MHz) and operate low-site cellular-architecture systems. Based on each licensee's election, the 800 MHz Transition Administrator (TA) would then assign the licensee channels in the appropriate band, and the licensee would proceed with rebanding in accordance with its election.

3. Silver Palm Communications, Inc. (Silver Palm), the predecessor licensee to License Acquisitions, held several 800 MHz geographic-area licenses in Texas, Oklahoma, and New Mexico. In May 2005, Silver Palm elected to relocate those licenses to the ESMR band, and so notified the TA. In

1 Letter from Rob Somers, Esq., General Counsel, License Acquisitions, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Nov. 28, 2017 (License Acquisitions letter).

2 Improving Pub. Safety Communications in the 800 MHz Band, Consolidating the 800 & 900 MHz Industrial/land Transp. & Bus. Pool Channels, Report and Order, 20 FCC Rcd 16015 (800 MHz Report and Order).

3 A high-site system is one in which wide-area coverage is achieved from one, or a few, base stations with antennas mounted on high towers, buildings, promontories, hills, mountains, etc.

4 A low-site system is one that uses multiple base stations, arranged in a cellular configuration, with relatively low antenna elevations and frequency reuse.

5 Silver Palm held the following licenses: WPLM 227, BEA 126, Western Oklahoma, WPLM228, BEA 128 Abilene, Texas; WPLM 229, BEA 129 San Angelo, Texas; WPLM 230, BEA 138, Amarillo Texas, New Mexico; WPSJ 755, BEA 129 San Angelo, Texas; WPSJ 756, BEA 134 San Antonio, Texas; WPSJ760, BEA Western Oklahoma; WPSJ 761, BEA 126, Abilene, Texas; WPSJ 762, BEA 129, San Angelo, Texas; WPSJ 766, BEA 130, Austin-San Marco, Texas; WPSJ 767, BEA 127, Dallas-Fort Worth Texas, Arizona, Oklahoma. License Acquisitions acquired the Silver Palm licenses in July 2010.

6 Letter from William J. Sill, Esq. and David Judelsohn, Esq. counsel to Silver Palm, to Robert B. Kelly, Esq., 800 MHz Transition Administrator, May 13, 2005.

October 2005, the Commission ordered that licensees that had elected to relocate to the ESMR band be given a new election window in which to either rescind or reaffirm their previous elections, and the TA opened a 20-day election window pursuant to the Commission's directive.⁷ In February 2006, Silver Palm reaffirmed its election to relocate to the ESMR band and to construct and operate a cellular architecture system.⁸ In July 2010, License Acquisitions acquired the Silver Palm licenses, subject to Silver Palm's ESMR election.

4. On November 28, 2017, License Acquisitions filed a letter seeking to rescind the ESMR election and requesting that it be assigned back the non-ESMR channels that were licensed to Silver Palm prior to its election. In support of its request, License Acquisitions states "events that have since transpired" make License Acquisitions' "only course of action . . . to rescind the Election. . ."⁹ License Acquisitions does not describe the nature of these events.

II. DISCUSSION

5. We treat License Acquisitions' letter as a request for waiver to allow it to withdraw or rescind an ESMR election 12 years after the expiration of the election window in 2006. For the reasons set out below, deny the request.

6. Section 1.925 of the Commission's rules states that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of waiver would be in the public interest;¹⁰ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹¹

7. Under the first prong of the Commission's waiver standard, we find that the intent of the February 2006 deadline on ESMR elections would be frustrated were we to grant the requested relief. The Commission imposed this deadline to define the spectrum landscape at the outset of the rebanding process so that the TA could develop a rebanding band plan based on a clear delineation of which licensees required frequencies in the ESMR and non-ESMR portions of the band. Allowing License Acquisitions to switch from ESMR to non-ESMR spectrum 12 years after the fact would require revisions to the band plan that would be highly disruptive to the almost-completed rebanding process and would in fact unwind progress that has already been made.

8. License Acquisitions concedes that, if its request were granted, the TA would need to identify new non-ESMR frequencies for License Acquisitions to the extent its licenses are within the U.S. - Mexico sharing zone.¹² The Commission has already established a cross-border band plan agreement with its Mexico counterpart and has released a revised Mexico border band plan.¹³ Changing the band

⁷ *800 MHz Report and Order*, 20 FCC Rcd at 16028 paras. 27-28 (2005).

⁸ Letter from William J. Sill, Esq., counsel to Silver Palm, to Steve Lederman, Esq., 800 MHz Transition Administrator, Feb. 6, 2006.

⁹ License Acquisitions Letter at 1.

¹⁰ 47 CFR § 1.925(b)(3)(i).

¹¹ 47 CFR § 1.925(b)(3)(ii).

¹² License Acquisitions Letter at 1, n.3.

¹³ See Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the Allotment, Assignment and Use of the 806-824/851-869 MHz and 896-901/935-940 MHz Bands for Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border, June 8 2012. See also *Improving Public Safety*

plan to accommodate License Acquisitions' request to rescind its ESMR election would entail additional effort by the TA and delay the rebanding of both U.S. and Mexico licensees.

9. Similarly, allowing License Acquisitions to rescind the ESMR election for its licenses in non-border areas of the United States would entail reopening the rebanding process in areas where rebanding has been completed.¹⁴ In order to assign non-ESMR channels to License Acquisitions, the TA would have to implement a new band plan and identify vacated channels in the interleaved band. Under the 800 MHz rebanding rules, following completion of rebanding in a region, these vacated channels are to be made available for licensing to public safety for five years and to public safety and critical infrastructure industries for the last two years of the five year term.¹⁵ Granting License Acquisitions' request would effectively confer it preferential access to these channels and reduce the number of vacated channels available for new licensing, with no offsetting public interest benefit.¹⁶

10. With respect to the second prong of the Commission's waiver standard, we find that License Acquisitions has failed to demonstrate the existence of unique or unusual circumstances. The case law establishes that parties "must plead with particularity the facts and circumstances that warrant a waiver."¹⁷ License Acquisitions, however, fails to describe the nature of the "events that have since transpired" that allegedly compel it to seek to rescind the ESMR election.¹⁸ Relying on unspecified events without explaining the substance or implications of those events does not meet the particularity requirement or surmount the "high hurdle" that courts have placed before proponents of waiver requests.¹⁹

11. Moreover, denial of License Acquisitions' request is neither inequitable, unduly burdensome, nor contrary to the public interest. Prior to filing this request, License Acquisitions consistently represented to the Commission that it was fully prepared to implement an ESMR system, and that it had purchased equipment and obtained site leases in preparation for construction of such a system.²⁰ License Acquisitions has not provided any justification for its eleventh-hour reversal of

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Communications in the 800 MHz Band, New 800 MHz Band Plan for U.S. — Mexico Sharing Zone, Fifth Report and Order, 28 FCC Rcd 4085 (2013).

¹⁴ With the exception of Nevada, the only regions outside the Mexico border area that are not fully complete are those in which License Acquisitions holds an EA license. Letter to David Furth, Deputy Chief, Public Safety and Homeland Security Bureau from James Goldstein, Sprint – Status Report on 800 MHz Band Reconfiguration – Feb. 1, 2018 at 2.

¹⁵ *800 MHz Report and Order*, 19 FCC Rcd at 15052, para. 152.

¹⁶ We are not persuaded by License Acquisition's arguments that granting its request would advance the public interest. It claims that allowing it to vacate the ESMR portion of the band would lessen potential interference to Sprint Corporation's (Sprint) operations. License Acquisitions Letter at 2. The Commission's rules establish standards for interference avoidance and License Acquisitions' adherence to those rules avoids any potential interference to Sprint. License Acquisitions also claims that, with grant of its request, Sprint would have access to additional spectrum, thereby improving service to its subscribers. *Id.* License Acquisitions has not shown that Sprint's existing spectrum is inadequate to furnish adequate subscriber service. Finally, License Acquisitions represents that granting its request would benefit the public by allowing License Acquisitions to provide "machine-to-machine network services to mobile devices." *Id.* License Acquisitions has neither demonstrated a demand for such network service nor shown that it would be superior to the ESMR service that License Acquisitions represented it would provide.

¹⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*) (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

¹⁸ License Acquisitions Letter at 1.

¹⁹ *Id.*

²⁰ Letter from Carole L. Downs, Manager, License Acquisitions, LLC, to Michael J. Wilhelm, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, July 7, 2011; Letter from Carole L. Downs,

(continued...)

position or demonstrated that it would be inequitable or burdensome to require License Acquisitions to continue to abide by the ESMR election that has applied to these licenses since 2006.

12. For the reasons set out above, we deny License Acquisitions' request to rescind its ESMR election. Our action today is limited to License Acquisitions request to rescind the ESMR election and does not affect any other pending matter relating to License Acquisitions, including the contested renewal of certain License Acquisitions licenses or other pending waiver requests by License Acquisitions.²¹

III. ORDERING CLAUSE

13. IT IS THEREFORE ORDERED that the Petition to Rescind Election to Relocate 800 MHz SMR EA Licenses to the ESMR Band, filed by License Acquisitions, LLC, On November 28, 2017, IS DENIED.

14. This action is taken pursuant to delegated authority pursuant to Sections 0.191, 0.392 and 1.925 of the Commission's rules, 47 CFR §§ 0.191, 0.392, 1.925.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

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Manager, License Acquisitions, LLC, to Michael J. Wilhelm, Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, July 14, 2015.

²¹ See ULS file numbers associated with the call signs listed *supra* n.5.