

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

In the Matter of
Improving Public Safety Communications in the
800 MHz Band
New 800 MHz Band Plan for Puerto Rico and the
U.S. Virgin Islands
WT Docket 02-55

ORDER

Adopted: November 9, 2010

Released: November 9, 2010

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

I. INTRODUCTION

1. The 800 MHz Transition Administrator, LLC, (TA) has requested a waiver of Section 90.621(b)1 of the Commission's rules (co-channel spacing) in order to allow NPSPAC licensees in Puerto Rico to relocate to the "new" National Public Safety Planning Advisory Committee (NPSPAC) public safety band (806-809/851-854 MHz) as part of 800 MHz rebanding.2 The waiver is necessary because Preferred Acquisitions, Inc. (Preferred) holds Economic Area (EA) licenses in the 806-809/851-854 MHz band in Puerto Rico.3 As discussed below, because Preferred has no constructed facilities at 806-809/851-854 MHz and will be required to move to replacement spectrum for any future construction, we grant the waiver request.

II. BACKGROUND

2. The 800 MHz Third Report and Order established a new 800 MHz band plan for Puerto Rico, which requires that all non-NPSPAC incumbent licensees vacate the 806-809/851-854 MHz band segment so that NPSPAC licensees can relocate there.4 Preferred's EA licenses are the only remaining non-NPSPAC licenses in that band segment, but Preferred has not constructed facilities in the band.5 Pursuant to the Commission's rebanding orders, Preferred is required to vacate the 809-809/851-854 MHz band and has elected to relocate to the ESMR portion of the 800 MHz band.6 The TA has identified

1 47 C.F.R. § 90.621(b).

2 800 MHz Transition Administrator, LLC, Request for Waiver, filed August 23, 2010 (TA Waiver Request). The original NPSPAC allocation was at 821-824/866-869 MHz. In 2004, the Commission moved the allocation to 806-809/851-854 MHz as part of 800 MHz rebanding in order to mitigate interference to public safety systems from adjacent cellular architecture systems. Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004).

3 TA Request for Waiver at 1, citing 47 C.F.R. § 1.925.

4 Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, Third Report and Order and Third Further Notice of Proposed Rulemaking, 25 FCC Rcd 4443, 4451 (PSHSB 2010) (Third Report and Order).

5 TA Waiver Request at 2.

6 The ESMR (Enhanced Specialized Mobile Radio) band in Puerto Rico and in most of the United States, is at 817-824/862-869 MHz and is occupied by cellular-architecture systems. See 47 C.F.R. § 90.7.

replacement frequencies in the ESMR band for Preferred's future use.<sup>7</sup> However, Preferred has not relocated to the ESMR band because the underlying status of its EA licenses is contingent on the outcome of two pending proceedings: an enforcement action against Preferred in which a proposed settlement is pending appeal,<sup>8</sup> and a waiver request filed by Preferred for an extension of time to construct facilities.<sup>9</sup>

3. The TA notes that five of the six NPSPAC licensees in Puerto Rico have negotiated their Frequency Reconfiguration Agreements (FRAs), which have been approved by the TA, and are ready to proceed with the reconfiguration of their radio systems.<sup>10</sup> Absent a waiver, however, these NPSPAC licensees cannot relocate to the new NPSPAC band because doing so would result in their occupying spectrum that is still licensed to Preferred.

### III. DISCUSSION

4. The Commission may grant a request for waiver if it is shown 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 the waiver would be in the public interest; 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.<sup>11</sup>

5. The requested waiver satisfies the Commission's waiver criteria. The underlying purpose of Section 90.621(b) of the Commission's rules is to prevent inter-station interference. That purpose would not be frustrated here because, as noted above, Preferred has no facilities in the 806-809/851-854 MHz band and is required to vacate the band to facilitate rebanding. Therefore, allowing NPSPAC licensees to relocate to the band will not cause interference to Preferred, nor does it infringe on Preferred's rights as a licensee. Assuming that Preferred's licensee status is resolved favorably in the two pending proceedings referenced above, Preferred will relocate to the ESMR band. We also note that Preferred has filed no objection to the TA's waiver request.<sup>12</sup> Finally, the requested waiver is in the public interest because it

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<sup>7</sup> TA Waiver Request at 2.

<sup>8</sup> In 2007, the Commission initiated an enforcement action against Preferred and its affiliate, Preferred Communications Systems, Inc. (PCSI), regarding their qualifications as Commission licensees. See Preferred Communications Systems, Inc., *et al.*, *Order to Show Cause and Notice of Opportunity for Hearing*, 22 FCC Rcd 13363, 13367 (2007). On August 6, 2009, the presiding Administrative Law Judge (ALJ) terminated the proceeding and approved a settlement agreement between the licensees and the Commission's Enforcement Bureau. See Preferred Communications Systems, Inc. *et al.*, *Order*, FCC 09M-51 (ALJ Aug. 6, 2009) (granting motion for approval of settlement agreement); Preferred Communications Systems *et al.*, *Memorandum Opinion and Order*, FCC 09M-57 (ALJ Sept. 25, 2009) (renewing *Order* FCC 09M-51). A related party, Pendleton C. Waugh, filed an appeal to the full Commission of the ALJ's approval of the settlement agreement. See Pendleton C. Waugh, *Notice of Appeal* (filed October 5, 2009). This appeal remains pending, and consequently, the status of Preferred and PCSI as licensees remains undecided pending disposition of the appeal.

<sup>9</sup> Preferred requested a waiver of its construction deadline for six months, if its channels could be used in advance of band reconfiguration in the region without causing interference, or, otherwise, six months after completion of reconfiguration in the NPSPAC region where Preferred's license is located. See File Nos. 0002408877 *et al.* Preferred's waiver request remains pending before the Wireless Telecommunications Bureau.

<sup>10</sup> TA Waiver Request at 2.

<sup>11</sup> 47 C.F.R. § 1.925.

<sup>12</sup> On September 7, 2010, the TA sent a copy of the waiver request via overnight delivery, and by regular mail, to Preferred's President, Charles Austin, to Preferred's address of record in the Commission's Universal Licensing System: Preferred Communication Systems, Inc., PO Box 153164, Irving, TX 75015-3164. The overnight delivery copy of the waiver request was returned as undeliverable. The TA advised Preferred's former counsel of the waiver request but counsel declined to accept service for Preferred and was unable to provide a current address. Licensees are responsible for maintaining a current address for the receipt of Commission documents. 47 C.F.R. § 1.5.

will permit NPSPAC licensees to relocate to a band segment where they will be less susceptible to interference from ESMR and other cellular architecture stations, thus furthering the goal of 800 MHz band reconfiguration.

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the waiver request filed August 23, 2010 by the 800 MHz Transition Administrator, LLC, IS GRANTED. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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