

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

In the Matter of)	
)	
SOUTHWEST CENTRAL DISPATCH)	FCC File No. 0000427005
)	
Request for Waiver of Section 101.81 of the Commission's Rules)	

ORDER ON RECONSIDERATION

Adopted: August 6, 2002

Released: August 8, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On December 6, 2001, Southwest Central Dispatch (Southwest Central) filed a request for reconsideration¹ of the Public Safety and Private Wireless Division's (Division) November 8, 2001 *Order*² denying Southwest Central's request to grant its application for a new license to operate a Fixed Microwave Services (FMS) station³ in the 2 GHz band with primary status. For the reasons set forth below, we grant Southwest Central's Reconsideration Petition.

II. BACKGROUND

2. The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services.⁴ To this end, the Commission has adopted certain transition rules.⁵ In doing so, the Commission balanced the needs of incumbent FMS licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.⁶

¹ Southwest Central Dispatch Petition for Reconsideration (filed Dec. 6, 2001) (Reconsideration Petition). On February 14, 2002, Southwest Central filed with the Commission a supplement to its Reconsideration Petition. Supplement to Reconsideration Petition (filed Feb. 14, 2002) (Supplement).

² Southwest Central Dispatch, *Order*, 16 FCC Rcd 19509 (WTB PSPWD 2001) (*Nov. 8 Order*).

³ Station WNES989, Willow Brook, Illinois.

⁴ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

⁵ See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public, and most conducive to the introduction of new services. *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁶ *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁷ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁸ In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.⁹ Most minor modifications of FMS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the ET licensee.¹⁰ The result is that while incumbent FMS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status.

3. Southwest Central is an intergovernmental cooperation association created in 1985.¹¹ Southwest Central's fifteen members are all units of local government, *i.e.*, municipalities that operate fire and/or police departments and fire protection districts that operate fire departments.¹² The number of individuals served by Southwest Central's police/fire/EMS agencies exceeds 200,000 citizens who are situated in about 210 square miles contained within three Illinois counties.¹³

4. FMS Station WNES989, Willow Brook, Illinois, provided a 2 GHz link within Southwest Central's radio communications network.¹⁴ Due to administrative error, Southwest Central failed to renew the license for Station WNES989 in a timely manner, and, thus, the license expired on August 5, 1998.¹⁵ On April 13, 2001, Southwest Central filed an application for a new license for the station.¹⁶ In July 2001, Southwest Central filed a request for waiver of Section 101.81 of the Commission's Rules¹⁷ that provides that new FMS stations in the 2 GHz band will be authorized on a secondary basis to ET licenses. On November 8, 2001, the Division denied Southwest Central's waiver request.¹⁸ We concluded that, based on the record before us, Southwest Central had not demonstrated circumstances justifying a grant of its waiver request.¹⁹

⁷ 47 C.F.R. §§ 101.69(b), 101.79(a). *See also ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁸ *See* 47 C.F.R. §§ 101.69(a), 101.71-101.77

⁹ 47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis (*e.g.*, the new ET licensees) and they are not protected from interference from primary operations. *Cost Sharing and First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. *Id.*

¹⁰ 47 C.F.R. § 101.81.

¹¹ Reconsideration Petition at 4.

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Nov. 8 Order*, 16 FCC Rcd at 19510 ¶ 3.

¹⁶ FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000427005 (filed April 13, 2001)

¹⁷ 47 C.F.R. § 101.81.

¹⁸ Although we denied Southwest Central's request that we waive Section 101.81 of the Commission's Rules, we directed the Division's Licensing and Technical Analysis Branch (Branch) to grant Southwest Central's April 13, 2001 application for a new license on a secondary basis. On November 20, 2001, the Branch granted the license under Call Sign WPTQ259.

¹⁹ *Nov. 8 Order*, 16 FCC Rcd at 19511-12 ¶¶ 6-7.

5. On December 6, 2001, Southwest Central filed its Reconsideration Petition. Southwest Central argues that we should reconsider our decision in the *Nov. 8 Order* and grant its request for waiver of Section 101.81 of the Commission's Rules, because a grant of a waiver would be in the public interest, and denial would leave it with no reasonable alternative.²⁰

III. DISCUSSION

6. First, Southwest Central argues that, in the *Nov. 8 Order*, we erroneously concluded that the only ground upon which Southwest Central requested a waiver of the Commission's Rules was because Southwest Central did not receive a renewal notice from the Commission stating that the subject license was about to expire.²¹ Southwest Central argues that it also requested a waiver on ground that the public safety communications would be compromised if it did not maintain primary status, and suggests that the Division did not take this into account.²² In fact, however, the Division did take into account the potential effect on public safety of a denial of the waiver request to the extent it was reflected in the record. In support of its waiver request, Southwest Central stated:

Southwest Central Dispatch, a governmental cooperation association by state statute, is a multi-jurisdictional E9-1-1 communications center which provides primary emergency radio communication and dispatch services for a combination of eighteen Police, Fire and EMS agencies throughout a three county area encompassing portions of DuPage, Cook and Will Counties. These microwave stations provide the conduit for primary emergency radio, burglary, invasion and fire alarms and data transmissions for Southwest Central Dispatch by connection of a series of remote sites and base station transmitters and receivers within this dispatch system. These microwave paths are one link of several existing 2 GHz systems serving the same service area for which emergency communications are provided by Southwest Central Dispatch.²³

We clearly took the potential impact on public safety communications into account in arriving at our decision, as shown by the fact that the *Nov. 8 Order* reflects the information Southwest Central provided.²⁴

7. Southwest Central now seeks to present additional information regarding its operations and the potential impact of the denial of its waiver request.²⁵ We note, as an initial matter, that none of this information was presented earlier. Section 1.106(c) of the Commission's Rules limits the circumstances in which a petitioner can rely on new information on reconsideration to the following: 1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; 2) the petition relies on facts unknown to petitioner until after its last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or 3) consideration of the facts relied on

²⁰ Reconsideration Petition at 4-8.

²¹ *Id.* at 2-3.

²² *Id.* at 3.

²³ Letter, dated July 12, 2001, from William D. Shanley, Director, Southwest Central Dispatch, to Susan Mickley, Microwave Section, Wireless Telecommunications Bureau, Federal Communications Commission (filed July 13, 2001).

²⁴ See *Nov. 8 Order*, 16 FCC Rcd at 19510 ¶ 3.

²⁵ Reconsideration Petition at 4-7.

is required in the public interest.²⁶ Because the new information relates to the safety of the public, we agree with Southwest Central²⁷ that consideration of the additional information is the public interest.²⁸

8. In this case, while the station at issue was originally authorized with primary status, Southwest Central allowed its license for the station to expire. Southwest Central requests a waiver of the rules so that its new license for the station can be accorded primary status. We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁹ Southwest Central argues that the additional information it has submitted demonstrates that this case falls within the second prong of the waiver standard.³⁰

9. First, Southwest Central argues that application of Section 101.81 would be contrary to the public interest.³¹ According to Southwest Central, should we deny it primary status, the public's safety would be significantly and negatively affected by ET interference.³² Southwest Central asserts that interference from ET licensees would result in certain police, fire, and EMS agencies³³ receiving incomplete or no information regarding pending emergencies, resulting in personal and pecuniary injury to the citizens that Southwest Central serves.³⁴ In addition, Southwest Central contends that other member agencies would be unable to seek assistance from these agencies during emergency situations.³⁵

10. Second, Southwest Central argues that application of the rule would leave it with no reasonable alternative.³⁶ According to Southwest Central, its use of FMS frequencies eliminates the common errors and failures associated with other methods of connectivity, *i.e.*, telephone lines and buried cables.³⁷ It argues that a FMS system is the only way it can satisfy its public safety communications requirements, because of the topography of the area in question, which includes extreme high and low

²⁶ 49 C.F.R. § 1.106(c).

²⁷ See Reconsideration Petition at 4 n.2.

²⁸ See, e.g., Billy Williford d/b/a Jasper Mobil Phone, Order, 17 FCC Rcd 477, 479 ¶ 6 (WTB CWD PRB 2002). We will not, however, consider the Supplement that Southwest Central filed to its Reconsideration Petition on February 14, 2002. Section 1.106(f) of the Commission's Rules says that supplements shall be filed within 30 days from the date of public notice of the final Commission action. 47 C.F.R. § 1.106(f). Any supplement filed after that time will be considered only upon leave granted to file. *Id.* Our records do not show that Southwest Central requested leave to file its Supplement. Moreover, we note that the Supplement largely repeats the arguments found in the Reconsideration Petition. To the extent it presents new information, Southwest Central fails to demonstrate why that information was not presented earlier.

²⁹ 47 C.F.R. § 1.925(b)(3).

³⁰ Reconsideration Petition at 4-8.

³¹ *Id.* at 4.

³² *Id.*

³³ Specifically, 1) Village of Clarendon Hills Police Department, 2) Village of Willowbrook Police Department, 3) Village of Lemont Police Department, 4) Village of Clarendon Hills Fire Department, and 5) Lemont Fire Protection District. *Id.* at 5. Southwest Central states that the microwave path including Station WNES989 is the only existing communication link to its emergency radio network for these agencies. *Id.*

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *Id.*

elevations, forests, and high tension wires, and because of the area's violent weather.³⁸ Southwest Central adds that a FMS system operating in a higher frequency band is not an option because such a system would require additional links which, given the geographical nature of the area that it serves, along with the paucity of suitable parcels of land or buildings, it would be unable to construct.³⁹ Additionally, Southwest Central argues that construction of a new system would be unduly burdensome because of the significant expense it would impose on the small governmental entities that comprise its membership.⁴⁰ Southwest Central also notes that its members would be deprived of emergency dispatching services during the two or three years needed to construct such a new FMS system.⁴¹

11. That a licensee engages in public safety activities does not by itself justify grant of a waiver after a license is inadvertently allowed to expire.⁴² We conclude, however, that, as Southwest Central has demonstrated a confluence of unusual factors under the circumstances presented, a grant of its waiver request is appropriate. We place particular importance on the fact that grant of a waiver could further interoperability of public safety communications among neighboring jurisdictions.⁴³ We also persuaded that, given the terrain and related considerations, Southwest Central has few if any other options.⁴⁴ Given the adverse impact to public safety communications that a disruption of emergency radio communications could create, in addition to the other factors discussed above, we believe that the waiver to afford Southwest Central primary status should be granted.⁴⁵ However, we admonish Southwest Central to conform to the renewal requirement, and the Commission's other licensing rules, in the future.

IV. CONCLUSION

12. Southwest Central has provided a showing of unique or unusual circumstances demonstrating that application of Section 101.81 would be inequitable, unduly burdensome or contrary to the public interest, or that it has no reasonable alternative. We therefore grant Southwest Central's Reconsideration Petition and reverse our decision in our *Nov. 8 Order*.

V. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.3 and 1.106 of the Commission's

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 ¶ 20 (1991).

⁴³ *See, e.g.,* City of Santa Monica, California, *Order*, 15 FCC Rcd 24938, 24942 ¶ 13 (WTB PSPWD 2000). The Commission places great importance on facilitating public safety interoperability. *See, e.g.,* The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *Fourth Memorandum Opinion and Order*, 17 FCC Rcd 4736, 4746 ¶ 24 (2002).

⁴⁴ *See* Wilderness Valley Telephone Co., *Order*, 15 FCC Rcd 11751, 11752-53 ¶¶ 3, 6 (WTB PSPWD 2000) (granting waiver because terrain and other conditions limited applicant's ability to comply with the rules).

⁴⁵ *See* Monroe County, *Order on Reconsideration*, 16 FCC Rcd 16447, 16449 ¶ 7 (WTB PSPWD 2001).

Rules, 47 C.F.R. §§ 1.3, 1.106, the Reconsideration Petition, filed on December 6, 2001, by Southwest Central **IS GRANTED**.

14. IT IS FURTHER ORDERED that the license for Station WPTQ259, Willow Brook, Illinois, SHALL BE MODIFIED consistent with this *Order on Reconsideration* and the applicable Commission rules.

15. This action is taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131. 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
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