

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

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	FCC File No. 0000606520
	)	
For Modification of Private Land Mobile	)	
Radio Station WNSS385 And Request for	)	
Waiver of Inter-Category Sharing Freeze	)	
in the 806-821/851-866 MHz Bands and	)	
Section 90.617 of the Commission's Rules	)	

**ORDER**

**Adopted: January 30, 2003**

**Released: January 31, 2003**

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

1. *Introduction.* In this *Order*, we address the above-captioned application and request for waiver (*Waiver Request*)<sup>1</sup> of Duke Energy Corp. (Duke Energy) to modify the license for 800 MHz Industrial/Land Transportation (I/LT) Station WNSS385, Elkin, North Carolina. In this connection, Duke Energy seeks waiver of the inter-category sharing freeze<sup>2</sup> and Section 90.617 of the Commission's Rules.<sup>3</sup> For the reasons set forth below, we grant the *Waiver Request*.

2. *Background.* Private Land Mobile Radio (PLMR) service frequencies in the 806-821/851-866 MHz bands (the "800 MHz band") are divided into the following "categories" or "pools:" (a) Specialized Mobile Radio (SMR), (b) Public Safety, (c) Business, (d) Industrial/Land Transportation (I/LT) and (e) General.<sup>4</sup> As a general matter, applicants are licensed on frequencies in the category or categories for which they meet the eligibility criteria. However, Section 90.621(e) of the Commission's Rules permits "inter-category sharing" whereby applicants that are eligible for licensing in the 800 MHz Public Safety, Industrial/Land Transportation or Business Categories can be licensed on channels outside of their respective categories if no channels are available in the category for which the applicant is eligible.<sup>5</sup>

<sup>1</sup> The waiver request, as amended, was submitted as an attachment to the application. See Request for Rule Waiver, FCC File No. 0000606520 (filed Sept. 27, 2001 as amended on Nov. 7, 2001, Jan. 3, 2002, and April 18, 2002). See also Notice of Return, Automated Letter Ref. No. 1369252, dated April 8, 2002.

<sup>2</sup> Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350 (WTB 1995) (*Inter-Category Sharing Order*), recon. denied, *Memorandum Opinion and Order*, 11 FCC Rcd 1452 (WTB 1995).

<sup>3</sup> 47 C.F.R. § 90.617.

<sup>4</sup> See 47 C.F.R. §§ 90.615, 90.617.

<sup>5</sup> See 47 C.F.R. § 90.621(e)(1). That provision also requires that no public safety systems are authorized on those channels under consideration to be shared. Further, the Commission's Rules require that the frequency coordinator certify that frequencies are not available in the applicant's own category, and that the frequencies are coordinated by an applicable out-of-category coordinator. See 47 C.F.R. § 90.621(e)(5).

3. On April 5, 1995, the Wireless Telecommunications Bureau (Bureau) suspended the acceptance of applications for inter-category sharing (inter-category sharing freeze) of all private land mobile radio service frequencies in the 806-821/851-866 MHz bands.<sup>6</sup> The Bureau determined that the inter-category sharing freeze was warranted to ensure the successful resolution of the spectrum allocation issues raised in PR Docket No. 93-144, and that the future radio spectrum needs of the public safety community would not be compromised.<sup>7</sup>

4. Duke Energy, licensee of Station WNSS385, is authorized to operate a Public Safety Category<sup>8</sup> channel in Elkin, North Carolina (Elkin site), and a second Public Safety Category channel in Clover, South Carolina (Clover site).<sup>9</sup> Duke Energy is not a Public Safety Category eligible; it was licensed for these channels the under inter-category sharing rule prior to adoption of the *Inter-Category Sharing Order*.<sup>10</sup> The above-captioned application seeks to modify, *inter alia*, Duke Energy's authority to operate on the two Public Safety Category channels by relocating the transmitter for the Elkin site and correcting the coordinates of the Clover site. In this connection, Duke Energy requests waiver of the Commission's Rules, *i.e.*, Section 90.617(a), and the *Inter-Category Sharing Order*.

5. *Discussion.* We may grant a request for rule 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.<sup>11</sup>

6. Relative to the Elkin site, Duke Energy explains that it is seeking authority to relocate due to a lease cancellation between the property owners and the owner of the existing tower. Relative to the Clover site, Duke Energy explains that the revised coordinates in the above-captioned application reflect minor data corrections that are the result of a recent resurvey of the facility, *i.e.*, Duke Energy is not relocating the Clover site.<sup>12</sup> In support of its request, Duke Energy asserts its continued need to operate on the subject frequencies in order to provide reliable voice communications for its electric distribution and transmission crews who use the radio station to coordinate and safely perform daily work

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<sup>6</sup> See *Inter-Category Sharing Order*, note 2 *supra*.

<sup>7</sup> *Id.*, 10 FCC Rcd at 7352 ¶¶ 5-7.

<sup>8</sup> Public Safety Category channel pairs (channels) are designated by Table 1 of Section 90.617(a) of the Commission's Rules as available to eligible applicants in the Public Safety Category. For convenience, we refer to channel pairs by identifying the 851-866 MHz base-side frequency of each 806-821/851-866 MHz pair.

<sup>9</sup> Duke Energy is authorized to operate one Public Safety Category channel, and three I/LT category channels in Elkin, North Carolina, and a second Public Safety Category channel and three different I/LT category channels in Clover, South Carolina. See Radio Station License call sign WNSS385 (Station WNSS385).

<sup>10</sup> The licensee's name changed to Duke Energy Corp. on September 5, 1995. See FCC File No. 9407679630. In October 1999 the Commission granted Duke Energy a waiver of the inter-category sharing freeze to allow the deletion of Public Safety Category Channel 860.4375 MHz and the addition of Public Safety Category Channel 855.7125 MHz. This swap alleviated interference concerns related to public safety Station WPHM264 on 860.4375 MHz. See Radio Station License call sign WNSS38 (granted Oct. 21, 1999).

<sup>11</sup> 47 C.F.R. § 1.925(b)(3).

<sup>12</sup> *Waiver Request* at 1, 6.

activities, as well as emergency activities.<sup>13</sup> In addition, Duke Energy notes APCO's consent to the operations proposed in the above-captioned application<sup>14</sup> and the consent of a short-spaced, co-channel public safety licensee.<sup>15</sup> We also note that, when Duke Energy first received authorization for the Public Safety Category channels in 1995 and again in 1999 when it modified Station WNSS385, no in-category frequencies were available. In this connection, the record reflects that the in-category channel situation remains unchanged.<sup>16</sup>

7. Under the circumstances presented, we are persuaded by Duke Energy's contention that grant of the *Waiver Request* to permit grant of the above-captioned application will not frustrate the underlying purpose of the inter-category sharing freeze.<sup>17</sup> Our decision to grant Duke Energy's request for waiver in this instance neither dilutes the availability of Public Safety Category channels for prospective non-commercial and public safety use nor encumbers existing SMR channels with shared non-SMR users.<sup>18</sup> Furthermore, to the extent the proposed data correction enhances the accuracy of the licensing database, we find that a grant of *Waiver Request* is also consistent with our overarching public interest goals to promote efficient utilization of the spectrum.

8. Additionally, we find that the underlying purpose of the inter-category sharing freeze would not be served by application to this case. First, we note that the Bureau imposed the freeze largely to preserve the regulatory landscape pending the resolution of certain spectrum allocation issues regarding the 800 MHz band.<sup>19</sup> Given that the emphasis of the inter-category sharing freeze was on vacant rather than licensed frequencies, we believe that Duke Energy's current request — for continued use of public safety frequencies that it already occupies — will not undercut the purpose of the inter-category freeze. The needs of the public safety community are not compromised as no additional public safety spectrum is

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<sup>13</sup> *Id.* at 3.

<sup>14</sup> See Letter and Electronic-mail from Wendy Caruthers, Association of Public Safety Communications Officials, Inc. (APCO), to Sue Daniel, Industrial Telecommunications Association, Inc., dated Sept. 26, 2001, and Jan. 29, 2003, respectively (APCO's consent to the operations proposed on 855.7125 MHz and 854.9625 MHz, respectively) (APCO No. 16YOAP810151625). APCO is a Commission-certified frequency coordinator for Public Safety Category channels. See also 47 C.F.R. § 90.621(e)(5), which requires frequency coordination from the applicable out-of-category coordinator.

<sup>15</sup> Letter from Dennis Baucom, Radio Communications Manager, City of Charlotte, North Carolina, to Rodney Bost, Duke Energy, dated June 19, 2001, for Charlotte Douglas Municipal Airport, licensee of Station WPPF737. We note that 47 C.F.R. § 90.621(b)(5) requires that a license applicant seeking to be licensed for a station located at a distance less than the prescribed co-channel separation (in this case 70 miles) must submit, with its application, letters of concurrence indicating that the applicant and each co-channel licensee within the specified separation agree to accept any interference resulting from the reduced separation between their systems.

<sup>16</sup> See File No. 0000606520, Form 601 Schedule H, Items 3-7 (ITA Frequency Coordination No. 20010926114556).

<sup>17</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, 12 FCC Rcd 9972, 10004-5 ¶ 103 (1997) ("This freeze was intended to stem the increase in inter-category applications for Public Safety channels by I/LT and Business licenses whose own channels were subject to increased demand from SMR applicants.").

<sup>18</sup> See *id.* at 10005 ¶ 104.

<sup>19</sup> *Inter-Category Sharing Order*, 10 FCC Rcd at 7350-7351.

being sought. In this connection, we note the minimal distances between the currently authorized and proposed sites.<sup>20</sup> We also believe that granting a waiver under these circumstances is consistent with precedent.<sup>21</sup> In addition, we note that the circumstances of the *Waiver Request* are well within the specific circumstances to warrant a waiver of another processing freeze as indicated by the Commission in PR Docket 93-144.<sup>22</sup>

9. For the reasons stated herein, we find that Duke Energy has met the burden for waiver of the inter-category sharing freeze. This *Order* grants Duke Energy's Waiver Request and permits the processing of the subject application for license modification. This action serves the public interest in that it will enable the continuation of critical radio communications for electric distribution and transmission crews in their daily work activities and, especially, for emergency activities.

10. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 90.617 of the Commission's Rules, 47 C.F.R. §§ 1.925, 90.617 of the Commission's Rules, the Request for Rule Waiver filed by Duke Energy Corp. on April 18, 2002, IS GRANTED, and application FCC File No. 0000606520 SHALL BE REFERRED to the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch, for processing consistent with this *Order*.

11. This action is taken under delegated 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  
Wireless Telecommunications Bureau

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<sup>20</sup> The proposed Elkin site is 1.264 km (0.785 mi) from the current Elkin site and the corrected coordinates for the Clover site are 0.164 km (0.102 mi) from the coordinates currently authorized for the Clover site.

<sup>21</sup> See, e.g., Fisher Ranch, *Order*, 17 FCC Rcd 602, 603 (WTB PSPWD 2002) (granted waiver of inter-category freeze to permit I/LT assignee to operate on a public safety channel already being used by I/LT assignor because the I/LT use of the public safety channel would have no adverse impact on public safety systems).

<sup>22</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Third Report and Order*, 9 FCC Rcd 7988, 8047-8048 ¶ 108 (1994) (dockets omitted). In the *Third Report and Order*, the Commission suspended acceptance of new 800 MHz applications on the 280 SMR category channels and established the following criteria for waiver of that freeze: "We will consider requests for waiver of the application freeze for new station licenses for permanent facilities, provided that operation of such proposed stations affects coverage solely within a geographic area and on a frequency channel that already is licensed permanently to the applicant(s), i.e., there is no infringement of new spectrum or previously uncovered geographical areas."