

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

In the Matter of Application of	)	
	)	
CITY OF EMERYVILLE	)	File No. 0001265256
	)	
Request for Waiver of Section 90.209	)	
of the Commission's Rules	)	

**ORDER**

**Adopted: March 31, 2004**

**Released: April 7, 2004**

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

1. *Introduction.* Before us is an application filed for modification of the license for Station WNYA218, Emeryville, California, held by the City of Emeryville (“Emeryville”) and an associated request for waiver of Section 90.209 of the Commission’s Rules<sup>1</sup> to allow operation of the currently licensed system with a revised emission mask of 20K0F2D.<sup>2</sup> For the reasons discussed herein, we deny Emeryville’s waiver request.

2. *Background.* The license for Station WNYA218 authorizes Emeryville to operate base/mobile facilities in the 821-824/866-869 MHz band from two fixed locations in Alameda County, California. Emeryville utilizes the license to facilitate private, internal communications essential to official police activities. Emeryville intends to upgrade its current system with new modems that will allow higher speed data transfers of up to 19.2 kbps. Moreover, Emeryville proposes to accomplish this upgrade by modifying its license for Station WNYA218. Specifically, Emeryville proposes to modify the license for Station WNYA218 by employing an emission mask of 20K0F2D.<sup>3</sup> The proposed emission mask would enable Emeryville to handle over its system, data loads of greater than the 9.6 kbps throughput limitation imposed by current NPSAC emission mask requirements. Accordingly, Emeryville seeks a waiver of the authorized bandwidth limitations of Section 90.209 of the Commission’s Rules.<sup>4</sup> Emeryville requires a waiver because Section 90.209 authorizes a standard 12.5 kHz channel spacing per 20 kHz of bandwidth for public safety operations in 821-824/866-869 MHz band.<sup>5</sup>

3. *Discussion.* We may grant a request for rule waiver when (i) the underlying purpose of the rule 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

<sup>1</sup> 47 C.F.R. § 90.209.

<sup>2</sup> FCC File No. 0001265256, filed April 7, 2003.

<sup>3</sup> See Emission, modulation, and transmission characteristics, 47 C.F.R. § 2.201.

<sup>4</sup> 47 C.F.R. § 90.209.

<sup>5</sup> *Id.*

interest, or the applicant has no reasonable alternative.<sup>6</sup> An applicant seeking a waiver faces a high hurdle and must plead the facts and circumstances which warrant a waiver.<sup>7</sup>

4. We do not find that Emeryville has demonstrated that waiver of Section 90.209 of the Commission's Rules is warranted under the circumstances presented. Emeryville states that the proposed modification would enable its system to achieve the desired 19.2 kbps data throughput. In support of this contention, Emeryville submits a letter from the Chief of the City of Piedmont Police Department,<sup>8</sup> stating that a waiver will "permit wider emissions."<sup>9</sup> Emeryville also submits a copy of a memorandum drafted by the Chair of the Review and Revision Committee of the Northern California NPSAC Region VI stating that "in some instances" a 19.2 kbps data throughput "can be accomplished if the adjacent channels are widely separated geographically without any increase in the potential for interference to either licensed systems..."<sup>10</sup> Emeryville, however, fails to provide any technical basis to support these statements.<sup>11</sup> We find that such statements alone -- without empirical data to support the assertion -- to be unpersuasive and not sufficient to satisfy the high hurdle articulated in *WAIT Radio*.<sup>12</sup>

5. We further note that Emeryville has not demonstrated any unique or unusual factual circumstances that would warrant grant of a waiver.<sup>13</sup> While we recognize the potential benefits of Emeryville's proposal, Emeryville has not provided any basis to distinguish it from any other similarly situated land mobile system licensee seeking to enhance its data communications capabilities. Further, Emeryville has not shown that application of Section 90.209 would be inequitable, unduly burdensome, or contrary to the public interest. Finally, although Emeryville submits a letter from the Chief of Police stating that "[a] search of available 800 MHz conventional frequencies that allow wider emissions have so far been unsuccessful,"<sup>14</sup> we are not persuaded that this statement suffices to show that Emeryville has no other alternatives for enhancing its land mobile facilities.

6. *Conclusion.* We find that Emeryville has not submitted sufficient reasons in support of its request for waiver in connection with its proposal to modify the facilities for Station WNYA218. Thus, we will deny the waiver request and dismiss the application.

7. Accordingly, IT IS ORDERED that pursuant to section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925 of the Commission's Rules, the Request for Rule Waiver filed by the City of Emeryville, on April 7, 2003, IS

---

<sup>6</sup> 47 C.F.R. § 1.925(b)(3).

<sup>7</sup> *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) *aff'd*, 459 F.2d 1203 (1973) *cert. denied*, 409 U.S. 1027 (1972) *citing Rio Grande Family Radio Fellowship, Inc. v. FCC* 406 F.2d 664 (D.C. Cir. 1968); Birach Broadcasting Corporation, *Memorandum Opinion and Order*, 18 FCC Rcd 1414 (2003).

<sup>8</sup> Hereinafter "Chief of Police."

<sup>9</sup> Letter from John E. Moilan, Chief, City of Piedmont Police Department, to Wireless Telecommunications Bureau, dated January 27, 2003.

<sup>10</sup> Memorandum from Art McDole, Chair, Review and Revision Committee of the Northern California NPSAC Region VI to APCO/AFC/FCC, dated March 28, 2003.

<sup>11</sup> *See, e.g., Application of School Board of Dade County, Memorandum Opinion and Order*, DA 03-3668 (rel. Nov. 19, 2003) (*Dade County*) (finding no sufficient reasons to support the waiver request); Request of Skytel Communications, Inc., *Order*, 16 FCC Rcd 12349 (WTB CWD 2001) (failing to provide support that there is no possibility of harmful interference).

<sup>12</sup> *See supra* note 7.

<sup>13</sup> *See Dade County, supra* note 9.

<sup>14</sup> Letter from Ken James, Chief, Emeryville Police Department, to Wireless Telecommunications Bureau, dated January 20, 2003.

DENIED, and application FCC File No. 0001265256 SHALL BE DISMISSED consistent with this *Order*.

8. 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 Critical Infrastructures Division  
Wireless Telecommunications Bureau