

(continued....)

that the Commission permit the licensing and use of wideband channels designated for interoperability⁵ and wideband reserve,⁶ in addition to currently available general use channels. NCR also seeks to aggregate 50 kHz channels to accommodate a 1.25 MHz channel size,⁷ prior to a Commission decision in a pending rulemaking proceeding seeking comment on proposals to modify the current 700 MHz band plan to accommodate broadband communications, and on related issues.⁸ NCR states that its request is not intended to impact the outcome of the rulemaking proceeding,⁹ but its member jurisdictions have an immediate need for dedicated broadband capability, in order to be responsive to natural disasters or criminal or terrorist activity.¹⁰

3. NCR states that, while the rules limit 700 MHz public safety wideband spectrum aggregation to 150 kHz,¹¹ several broadband technologies providing wide-area coverage require at least a 1.25 MHz channel size.¹² NCR proposes to establish a region-wide 700 MHz broadband wireless data communications system to provide high-speed wireless broadband data capability with ubiquitous coverage throughout NCR's jurisdictions, and achieve interoperability¹³ among first responders. NCR further states that its proposed network will deliver an aggregate throughput in excess of 352 megabits per second, compared to 912 kilobits per second under a wideband channel plan.¹⁴

4. NCR states that it has obtained concurrence from NCR members for the design, engineering and staged implementation plan for a shared NCR Regional Wireless Broadband Network.¹⁵

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modulation must be capable of maintaining a minimum data (non-voice) rate of 384 kbps (kilobits per second) per 150 kHz of bandwidth).

⁵ See *Amended Waiver Request* at 4-5. The Commission designated thirty-six 50 kHz channels (in three-channel groups) for wideband interoperability. See 47 C.F.R. § 90.531(c)(1). NCR proposes to utilize wideband interoperability channels 73-75, 82-84, 91-93, 193-195, 202-204, and 211-213.

⁶ See *Amended Waiver Request* at 5. The Commission designated six megahertz of public safety spectrum to be held in reserve, which consists of 0.6 megahertz for narrowband and 5.4 megahertz for wideband use. See 47 C.F.R. § 90.531(b)(2), (c)(3). NCR proposes to utilize wideband reserve channels 94-98 and 214-218.

⁷ See *Amended Waiver Request* at 5.

⁸ See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Eighth Notice of Proposed Rulemaking*, 21 FCC Rcd 17786 (2006) (*Eighth NPRM*).

⁹ See *Amended Waiver Request* at 3. NCR states that its request utilizes the mixed-use (wideband and broadband) band plan as proposed by the National Public Safety Telecommunications Council. See *Eighth NPRM*, 21 FCC Rcd at 17796 Fig. 4.

¹⁰ See *Amended Waiver Request* at 3. NCR adds that it must pursue its network implementation in parallel with the rulemaking process also because it has funding that must be used before the end of 2006 to implement the first phase of the proposed network. *Id.*

¹¹ See 47 C.F.R. § 90.531(d)(2).

¹² See *Amended Waiver Request* at 3.

¹³ Interoperability is defined as "An essential communication link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results." See 47 C.F.R. § 90.7.

¹⁴ See *Amended Waiver Request* at 4, 6.

¹⁵ *Id.* at 9.

NCR advises that it is in the process of obtaining the Region 20 (District of Columbia, Maryland and Northern Virginia) 700 MHz Regional Planning Committee's approval to incorporate NCR broadband operations into the Region 20 700 MHz plan. In addition, NCR states that the request may affect counties and cities in the four adjacent 700 MHz regional planning regions.¹⁶ NCR states that its proposal allows NCR neighbors sufficient spectrum for wideband operations with the same capacity as tentatively planned by the Region 20 Regional Planning Committee.

5. *Comments.* On September 29, 2006, Public Safety and Homeland Security Bureau released a *Public Notice* soliciting comment on the NCR request.¹⁷ Comments were due October 30, 2006, and reply comments were due November 14, 2006. All parties submitting comments supported grant of NCR's waiver request to permit broadband communications.¹⁸

6. Commenters argue that permitting NCR to proceed with planning and deployment of a regional wireless broadband network for use by public safety agencies will allow agencies to share critical data and information during emergencies as well as improve the efficiency of day-to-day operations.¹⁹ NPSTC adds that NCR's proposal "will enhance public safety communications and reflects coordination and cooperation with the region's public safety agencies through the regional planning committee process."²⁰ By using this system, commenters further contend, first responders in the NCR would have

¹⁶ Region 20 (District of Columbia, Maryland and Northern Virginia) has four adjacent regions: Region 28 (Eastern Pennsylvania, Southern New Jersey and the State of Delaware), Region 26 (Western Pennsylvania), Region 42 (Virginia), and Region 44 (West Virginia). NCR states that it has reached out to affected regions to develop a working inter-regional plan.

¹⁷ See Public Safety and Homeland Security Bureau Seeks Comment on Request by National Capital Region for Waiver of Part 90 Rules to Allow Establishment of a 700 MHz Interoperable Broadband Data Network, *Public Notice*, 21 FCC Rcd 10863 (PSHSB 2006).

¹⁸ See Comments of National Public Safety Telecomm Council (filed Oct. 30, 2006) (NPSTC); Motorola, Inc. (filed Oct. 30, 2006) (Motorola); Qualcomm, Inc. (filed Oct. 30, 2006); 700 MHz Regional Planning Committee (RPC) for Region 28 (filed Oct. 30, 2006) (Region 28); Washington Metro Airport Authority (WMAA) (filed Oct. 30, 2006); City of San Diego Police Dept. (filed Oct. 30, 2006) (San Diego); City of Palo Alto Police Dept. and on behalf of the Silicon Valley Regional Interoperability Project (filed Oct. 27, 2006) (Palo Alto); Montgomery County, MD Dept. of Police (filed Oct. 27, 2006) (MCPD); City of Fairfax Fire Dept. (filed Oct. 27, 2006) (Fairfax); Arlington County, VA, Office of the Sheriff (filed Oct. 27, 2006) (Arlington County Sheriff); Arlington County Police Dept. (filed Oct. 27, 2006) (Arlington County PD); City of Alexandria, VA (filed Oct. 27, 2006) (Alexandria); Fairfax County Office of Emergency Management & NCR Emergency Manager's Committee (filed Oct. 27, 2006) (Fairfax OEM); City of Los Angeles, Information Technology Agency (filed Oct. 27, 2006) (LAITA); Metropolitan Washington Chief Information Officers of the National Capital Region (Oct. 27, 2006) (Metro CIOs); E. Michael Latessa, Director of the Office of Unified Communications for the District of Columbia (filed Oct. 27, 2006) (DCO); District of Columbia, Deputy Mayor for Public Safety and Justice, Edward D. Reiskin (filed Oct. 27, 2006) (DC); County of Fauquier County, VA (filed Oct. 27, 2006) (Fauquier); Loudoun County, VA (filed Oct. 27, 2006) (Loudon); Capital/ZGS Communications/WZDC Channel 64 at 1 (filed Oct. 27, 2006) (ONDA). See also Reply Comments of the National Capital Region (filed Nov. 14, 2006) (NCR Reply) and City and County of Denver (filed Nov. 13, 2006) (Denver). We note that the Commonwealth of Virginia, Virginia Information Technology Agency (VITA) and Lucent Technologies, Inc., (Lucent) filed comments after the initial comment period expired but before the end of the reply comment period. See Comments of Lucent (filed Oct. 31, 2006); VITA (filed Oct. 31, 2006). In the interest of developing a full record, we accept these late-filed comments.

¹⁹ See, e.g., Comments of WMAA at 1; San Diego at 1; Region 28 at 1; Fairfax at 1; Arlington County Sheriff at 1; Arlington County PD at 1; Alexandria at 1; MCPD at 1; Fairfax OEM at 1; Loudon at 1; Fauquier at 1; ONDA at 1; D.C. at 1; DCO at 1; LAITA at 1; Palo Alto at 1; Denver at 1.

²⁰ See Comments of NPSTC at 1.

the opportunity to reap the benefits associated with a dedicated, reliable, interoperable, broadband data communications network.²¹ Commenters also agree that the essential and critical nature of public safety communications and the benefits associated with a broadband interoperable network in the nation's capitol, which has been identified as a top terrorist target, favor granting the instant waiver request.²²

7. *Subsequent Notice of Proposed Rulemaking.* Following the comment cycle on the NCR request, the Commission adopted and released on December 20, 2006 a *Ninth Notice of Proposed Rulemaking* in WT Docket 96-86.²³ The *Ninth NPRM* proposed a national, centralized approach to maximize public safety access to interoperable, broadband spectrum in the 700 MHz band. Specifically, the *Ninth NPRM* proposed, among other things, that the Commission allocate 12 megahertz of the 700 MHz public safety spectrum from wideband to broadband use, and assign this spectrum nationwide to a single national public safety broadband licensee.

8. On January 29, 2006, NCR filed additional comments stating that the waiver request is not intended to impact the outcome of the Public Safety Broadband rulemaking proceedings. Specifically, NCR stated:

We fully understand and accept that as a result of any rulemaking changes the Commission may make, the NCR will have to comply with the results of such rule making and may have to do one of the following to continue the use of the 700 MHz spectrum for public safety broadband wireless communications:

1. Modify its proposed network. For example, we may have to change the center frequency of the carriers and the filters to protect narrowband operations; or
2. Change the proposed network. For example, we may have to change the underlying technology, and therefore, have to change the equipment to use a standard that is different from that chosen by the NCR (1xEVDO Rev A); or
3. Transition to a 700 MHz public safety national broadband wireless network that is managed by a single national licensee.²⁴

²¹ See, Comments of WMAA at 1; San Diego at 1; Region 28 at 1; Fairfax at 1; Arlington County Sheriff at 1; Arlington County PD at 1; Alexandria at 1; MCPD at 1; Fairfax OEM at 1; Loudon at 1; Fauquier at 1; ONDA at 1; D.C. at 1; DCO at 1; LAITA at 1; Palo Alto at 1; Denver at 1.

²² See Comments of Motorola at 1; Lucent at 1.

²³ See Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, *Ninth Notice of Proposed Rulemaking*, 21 FCC Rcd 14837 (2006) (*Ninth NPRM*).

²⁴ See *Ex Parte* Letter from Bill Butler, NCR Interoperability Program, OCTO-Wireless Programs Group, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2007) and attached e-mail from Robert L. LeGrande, II, NCR Interoperability Program, Deputy Chief Technology Officer, District of Columbia, to Dana Shaffer, Deputy Chief, Public Safety and Homeland Security Bureau, FCC (Jan. 28, 2007).

III. DISCUSSION

A. Waiver Criteria

9. 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 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.²⁵ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²⁶ Based on the record before us, we conclude that the waiver request should be granted, subject to certain conditions.

10. While the current 700 MHz public safety band plan allocates spectrum for general use administered under a regional planning approach and for interoperable public safety communications, it does not provide for broadband communications including channels wider than 150 kHz.²⁷ The Commission did design the plan, however, to be flexible enough to accommodate deployment of future technologies.²⁸ Furthermore, in December 2005, the Commission found, in its Report to Congress submitted pursuant to the Intelligence Reform Act, that "accommodating public safety's need for mobile, broadband communications may be critical in the long-term."²⁹ Also, as noted above, the subsequent *Eighth NPRM* and *Ninth NPRM* address potential broadband operations in the 700 MHz public safety band. Thus, because the Commission is committed to ensuring the availability of public safety spectrum in the 700 MHz band capable of supporting broadband communications, grant of NCR's waiver request would not frustrate the underlying purpose of the rules.

11. We also find that grant of the requested waiver, subject to the conditions stated herein, would be in the public interest.³⁰ Consistent with the broad support of parties submitting comments in this proceeding, we agree that grant of NCR's waiver request would permit more rapid deployment of a regional broadband communications network until related rulemaking proceedings are concluded. As a result, NCR's network would serve the needs of its member communities and public safety entities and

²⁵ 47 C.F.R. § 1.925(b)(3).

²⁶ *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 Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁷ See Comments of NPSTC at 4.

²⁸ See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, 14 FCC Rcd 152, 157 ¶ 9 (1998); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19874 ¶ 69 (2000).

²⁹ See Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Response Providers, WT Docket No. 05-157 at 39 ¶ 99 (Dec. 16, 2005) (*Intel Reform Act Report*).

³⁰ As explained in more detail below, this grant is subject to important conditions that would (1) ensure the NCR system complies with the outcome of pending rulemaking proceedings, (2) be consistent with the regional planning process, (3) protect incumbent licensees, and (4) require the submission of a license application consistent with all relevant rules.

permit more effective and efficient response capabilities for emergency personnel. The availability of a broadband data network is especially important in the Washington, D.C. area, which NCR argues is a “top terrorist target.”³¹ Accordingly, we find that grant of the NCR request would serve a number of public safety objectives. As we describe in more detail below, however, grant of the requested waiver must be subject to certain important conditions.

B. Conditions of Grant

12. *Outcome of Pending Rulemaking Proceedings.* A key element of our decision to conditionally grant NCR’s waiver request is NCR’s acknowledgment that its operations would be subject to any rule changes adopted following conclusion of the pending 700 MHz public safety rulemaking proceedings. As noted above, NCR has agreed to accept conditions to ensure that grant of its waiver request would not prejudice the outcome of those proceedings.³² In this respect, we strongly emphasize that grant of NCR’s waiver request specifically is conditioned upon, and subject to, the outcome of these proceedings.³³ As a result, NCR potentially may have to implement substantial modifications to its network to comport with future technical and operational requirements adopted for the 700 MHz public safety band, or potentially even relinquish its license in order to accommodate a nationwide public safety network and a single national licensee as contemplated in the *Ninth NPRM*.

13. *License Application.* In addition, this waiver grant does not include approval of a license application by NCR to operate within the 700 MHz band; indeed, no application has been filed. Thus, NCR is still required to obtain a license in order to use any portion of the 700 MHz band. Not only must NCR submit an application in the Commission’s Universal Licensing System, but, notwithstanding the waiver granted herein, must obtain a grant of license before commencing operations. NCR’s license application must meet our requirements at the time of application, such as demonstrating evidence of frequency coordination³⁴ and comporting with the Commission’s rules in all other aspects, including those relating to TV/DTV interference protection criteria.³⁵

14. *Concurrence of Regional Planning Committees and Consistency with an Approved Regional Plan.* As a further condition, NCR must obtain concurrence from relevant 700 MHz regional planning committees before submitting and as part of its license application. Although the Region 20 (District of Columbia, Maryland and Northern Virginia) 700 MHz Regional Planning Committee has

³¹ *Amended Waiver Request* at 13.

³² *See supra* ¶ 9.

³³ These proceedings include the *Eighth NPRM*, *Ninth NPRM*, as well as Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket Nos. 06-169, 96-86, *Notice of Proposed Rulemaking*, 21 FCC Rcd 10413 at ¶¶ 42-48 (2006). Comments on the *Ninth NPRM* are due February 26, 2007, and reply comments are due March 12, 2007.

³⁴ 47 C.F.R. § 90.175(e).

³⁵ 47 C.F.R. § 90.545. We note that ONDA Capital dba ZGS Communications/WZDC, a potentially affected low power TV station on channel 64, which has applied to move to channel 25, supports the NCR waiver. *See* Comments of ONDA at 1. Additionally, full power TV station WJAL, owned by Entravision Holdings LLC, has applied to move from channel 68 to channel 38 earlier than the February 17, 2009 DTV transition date. *See Waiver Request* at 9, Exhibit D. NCR notes that while WJAL will not affect the plans for the first phases of the NCR network, it may affect the deployment of wireless services in Montgomery and Loudon Counties during later phases. *Id.* 9, note 11. *See also* Qualcomm Comments at 2, 4.

“overwhelmingly approved the draft plan for 700 MHz,” which incorporates the NCR proposal,³⁶ to date, no such plan has been filed or approved by this Commission. Further, we agree with NPSTC that the Commission should ensure that the waiver request comports with adjacent regional planning obligations,³⁷ to ensure that grant of the waiver request would not cause interference to current or future public safety communications. NCR states that it is committed to obtaining concurrence from adjacent regional planning committees (Regions 28, 36, 42, and 44), and Region 20 notes that the plan has been submitted to the four adjacent regions for their review and concurrence.³⁸ However, to date, Region 28, which comprises Delaware, eastern Pennsylvania, and southern New Jersey, is the only adjacent region that has stated its support for the NCR request.³⁹ Accordingly, we further condition our grant of the waiver request upon NCR providing evidence of concurrence from all remaining adjacent regions.

IV. CONCLUSION

15. We recognize the importance of enabling implementation of a broadband public safety network in the nation’s capitol as rapidly as possible. We also seek to ensure, however, that the goal of achieving nationwide interoperable communications for public safety is not unduly hindered. NCR is fully aware of the possible impact of the outcome of pending rulemaking proceedings involving the 700 MHz public safety band on its ability to occupy the 700 MHz band as a licensee. Accordingly, we believe that the public interest would best be served by conditionally granting NCR’s waiver request on the outcome of these pending proceedings, and further require that NCR obtain a license prior to commencing operations in the 700 MHz band. In short, once a license is obtained, users of NCR’s system ultimately still will be subject to the rules adopted in the pending 700 MHz proceedings. This waiver ensures, however, that they are able to pursue a license and commence operations without further delay.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 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, that the Request for Waiver filed by the National Capital Region on May 12, 2006, and amended on July 3, 2006, IS GRANTED SUBJECT TO THE CONDITIONS referenced herein.

³⁶ See *Ex Parte* Letter from G. Edward Ryan II, Chairperson of Regional Planning Committee 20 to Dana Shaffer, Deputy Chief, Public Safety and Homeland Security Bureau, FCC (Jan. 17, 2007) (*Region 20 Ex Parte*).

³⁷ See NPSTC Comments at 1, 5. As the Commission has stated, “inter-regional cooperation and concurrence remains the best, most cost effective, and least complicated method for avoiding cross-border harmful interference problems between regions.” See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Report and Order*, 14 FCC Rcd 152 ¶ 88 (1998).

³⁸ See *Region 20 Ex Parte*.

³⁹ See Comments of Region 28 at 1.

17. 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

Dana Shaffer, Deputy Chief
Public Safety and Homeland Security Bureau