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

In the Matters of	)	
	)	
i2way Request for Declaratory Ruling	)	WT Docket No. 02-196
Regarding the Ten-Channel Limit	)	
of Section 90.187(e) of the Commission's Rules	)	
	)	
Hexagram Petition to Deny i2way	)	
Applications	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2004 **Released: May 5, 2004**

By the Commission:

I. INTRODUCTION

1. On May 1, 2003, i2way Corporation (i2way)[1] and Hexagram, Inc. (Hexagram)[2] filed Applications for Review seeking the reversal of an *Order*[3] issued by the former Commercial Wireless Division's Policy and Rules Branch (Branch).[4] In that *Order*, the Branch denied in part i2way's Request for Declaratory Ruling seeking clarification that the ten-channel limit set forth in Section 90.187(e) of the Commission's rules does not limit the number of applications that can be filed in an area (i2way Request).[5] The *Branch Order* concluded that Section 90.187(e) limits an applicant to filing a single application in a single service area, and limits to ten the number of channels in an application. Once

[1] Application for Review, filed by i2way Corporation (May 1, 2003) (i2way Application for Review).

[2] Application for Review, filed by Hexagram, Inc. (May 1, 2003) (Hexagram Application for Review).

[3] In the Matter of i2way Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules and Hexagram Petition to Deny i2way Applications, *Order*, 18 FCC Rcd 6293 (2003) (*Branch Order*).

[4] In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. Many of the mobile radio services licensing issues formerly under the Bureau's Commercial Wireless Division, including operations that i2way proposes in its applications, are now under the purview of the Bureau's new Mobility Division. *See* FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003).

[5] Request for Declaratory Ruling filed by i2way Corporation (June 7, 2002). Prior to the submission of its Request, i2way filed a number of individual, substantially similar requests for declaratory rulings, each arising from the return of i2way's applications for failure to meet the terms of Section 90.187(e) of the Commission's rules. The Branch dismissed these requests because i2way filed the requests electronically as attachments to i2way's applications via the Commission's Universal Licensing System. Wireless Telecommunications Bureau Seeks Comment on i2way Corporation's Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e), *Public* Notice, 17 FCC Rcd 14541 (2002) (*i2way Public Notice*). Pleadings associated with licensing matters may not be electronically filed and instead are required to be filed manually. *See* Certain Actions Provided For in the Commission's Rules Are Not Yet Available For Electronic Filing via the Universal Licensing System (ULS) and Must Be Filed Manually, *Public Notice*, 16 FCC Rcd 12,886 (2001). The issues raised in i2way's prior requests for declaratory ruling were essentially the same issues raised in its Request filed in June 2002, and thus were consolidated and resolved by the *Branch Order*.

licensed facilities are constructed and placed into operation, the licensee may file an additional application limited to ten channels in the same service area. The *Branch Order* also dismissed Hexagram's petition seeking denial of several i2way applications because the petition was not timely filed and did not allege facts sufficient to warrant further investigation.[6] For the reasons discussed below, we deny both Applications for Review.

II. BACKGROUND

2. i2way proposes to use both full-power and lower-power frequencies to deploy a digital-based dispatch system that would provide two-way mobile voice and data communications in major urban areas throughout the country.[7] To deploy its system, i2way filed multiple applications seeking authority to provide trunked operations in the 150-174 MHz and 450-470 MHz bands.[8] Frequencies on those bands are divided between the Industrial/Business Radio Pool and Public Safety Radio Pool and are authorized on a shared basis.[9] Section 90.187(e) of the Commission's rules limits single applications for trunked operations to ten channels in the bands between 150 MHz and 512 MHz (except 220-222 MHz). Subsequent applications for trunked operations in those bands are also limited to ten channels and must be accompanied by a certification that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation.[10]

3. The Commercial Wireless Division's Licensing and Technical Analysis Branch returned certain i2way applications because i2way had filed multiple applications in the same service area or failed to provide the construction certifications required under Section 90.187(e).[11] In response to the return of

[6] *Branch Order*, 18 FCC Rcd at 6298-99, ¶¶ 12-13.

[7] i2way Application for Review at 2.

[8] i2way Request at 2. i2way explains that the authority sought in each application is designed to fulfill a specialized role in its overall system design. *Id*. i2way has also filed a number of applications seeking authority to provide conventional operations as well as trunked operations on exclusive frequencies. The applications were accepted for filing on December 19, 2001. Wireless Telecommunications Bureau Site-By-Site Accepted for Filing, *Public Notice*, Report No. 1047 (Dec. 19, 2001).

[9] Section 90.173(a) of the Commission's rules provides that "[e]xcept as otherwise provided …, frequencies assigned to land mobile stations are available for shared use only and will not be assigned for the exclusive use of any licensee." 47 C.F.R. § 90.173(a).

[10] 47 C.F.R. § 90.187(e). Section 90.187(e) provides that "[n]o more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single application. Subsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification, submitted to the certified frequency coordinator coordinating the application, that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation. Certified frequency coordinators are authorized to require documentation in support of the applicant's certification that existing channels have been constructed and placed in operation. Applicants in the Public Safety Pool may request more than 10 channels at a single location, provided that any application for more than 10 Public Safety Pool channels must be accompanied by a showing of sufficient need. The requirement for such a showing may be satisfied by submission of loading studies demonstrating that requested channels in excess of 10 will be loaded with 50 mobiles per channel within a five year period commencing with grant of the application." *Id*.; *see* In the Matter of Replacement of Part 90 By Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them; and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Third Memorandum Opinion and Order*, 14 FCC Rcd 10922, 10930-31, ¶ 18 (1999) (*Part 90 Refarming Third MO&O*) (adopting the ten-channel limit for trunked operations).

[11] Specifically, some applications were returned because they were filed while other applications were pending for the same service area, and other applications were returned because i2way failed to provide the necessary construction certifications for its licensed facilities where the application sought licensing authority in the licensed station's service area. *See i2way Public Notice*, 17 FCC Rcd at 14541. In its Request, i2way provided file numbers

(continued....)

these applications, i2way filed its Request on June 7, 2002, seeking clarification whether the ten-channel limit "compels the return or dismissal of applications in situations where a single applicant has filed multiple applications, each requesting 10 channels, for different sites within the same general service area."[12] The Commercial Wireless Division released a public notice on July 29, 2002, seeking comment on i2way's Request.[13] Three parties filed comments in response to the public notice,[14] and several other parties filed *ex parte* comments.[15] All commenters opposed i2way's interpretation of Section 90.187(e).[16]

4. In its *Order*, the Branch rejected i2way's argument that Section 90.187(e) only restricts the number of channels that can be proposed in a single application, not the number of applications that can be filed or the location of any proposed facilities.[17] The Branch concluded that Section 90.187(e) limits to ten the number of channels in an application for which a party may apply within a site-specific service area as defined under Section 90.187(b). Thus, a single application refers to a single service area. The Branch also explained that a licensee may apply for additional frequencies in that same service area only if it certifies that it has constructed and placed into operation all licensed channels in that area.[18] In response, i2way filed its Application for Review reiterating its argument that the rule section only limits the number of channels permitted in a single application. i2way further argues that a single application could refer to a single transmitter location without limiting a party from filing subsequent applications in that transmitter's service area. According to i2way, the Commission must provide notice through a rulemaking proceeding that the ten-channel limit in Section 90.187 applies to service areas before dismissing i2way's applications.[19]

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for twenty-six applications and stated that these file numbers "reflect i2way Corporation's best efforts" to identify all of the applications found to be in violation of the 10-channel limit set forth in Section 90.187(e). *Id.* at n.1.

[12] i2way Request at 1-2.

[13] *i2way Public Notice,* 17 FCC Rcd 14541 (2002).

[14] In response to the public notice, the Land Mobile Communications Council and Industrial Telecommunications Association filed comments, Comments of the Land Mobile Communications Council (Aug. 28, 2002); Comments of Industrial Telecommunications Association, Inc. (Aug. 28, 2002); and Motorola, Inc. and i2way filed reply comments, Reply Comments of Motorola, Inc. (Sept. 12, 2002); Reply Comments of i2way Corporation (Sept. 12, 2002).

[15] The parties that filed *ex parte* comments in this proceeding included Entranosa Water & Wastewater Association, Letter from John L. Jones, Entranosa Water & Wastewater Association, to Senator Jeff Bingaman (Feb. 26, 2002); Buck Electric Co., Letter from Robert De Buck, Buck Electric Co., to Senator Peter Domenici (Feb. 21, 2002); KNS Communications Consultants, Electronic Message from L. Sue Scott-Thomas, KNS Communications Consultants, to Terry Fishel, FCC (Jan. 31, 2002); Denver Water, Letter from Gayle Heazlett, Denver Water, to Terry L. Fishel, FCC (Aug. 26, 2002); and Letter from Mitchell Lazarus, Counsel for Hexagram, Inc., to Marlene H. Dortch, Secretary FCC (Oct. 25, 2002) (Hexagram *Ex Parte*).

[16] *Branch Order*, 18 FCC Rcd at 6296, ¶ 4.

[17] The Branch granted in part i2way's Request to return to pending status four applications that were returned because of a staff error made during the application review process. *Branch Order*, 18 FCC Rcd at 6286, ¶ 11.

[18] *Branch Order*, 18 FCC Rcd at 6295-97, ¶¶ 4-6.

[19] Application for Review at 4. Hexagram filed an Opposition, Opposition to Application for Review, filed by Hexagram, Inc. (May 19, 2003), and i2way filed a Reply, Reply to Opposition to Application for Review, filed by i2way Corporation (June 3, 2003). Hexagram included a Motion for Acceptance of Late Filing (Motion) because it filed its Opposition one day late. Hexagram states that i2way failed to serve a copy of the Application for Review on Hexagram, Motion at 1, and i2way acknowledges the omission in its Reply, stating that it subsequently filed a Submission of Certificate of Service *Nunc Pro Tunc*. i2way Reply at 2. In light of these circumstances, we grant Hexagram's Motion and accept its Opposition.

5. Hexagram makes and operates radios for the automatic reading of utility meters. Hexagram states that its nationwide system operates under the low-power rules of the same set of Part 90 frequencies proposed in the i2way applications. Hexagram's licenses are authorized on a secondary basis.[20] Hexagram's Petition requested that the Commission deny 66 of i2way's applications unless i2way demonstrated that "it [could] protect all incumbent users, including Hexagram."[21] The Branch dismissed Hexagram's Petition and Hexagram filed an Application for Review reiterating its arguments from its Petition to Deny.[22]

III. DISCUSSION

6. We reject i2way's argument that Section 90.187 of our rules limits only the number of channels in a single application, not the number of applications that can be filed within a single service area. i2way argues that the language in Section 90.187 does not mention the terms "location" or "service area," and further claims that the rule's reference to "application" is the only term defining the scope of any restriction.[23] i2way then argues that an application is merely a standard form and Section 90.187(e) limits the number of channels that may be applied for on each standard form.[24] We disagree. An application for a Commission license is more than an electronic filing on a standard form. In submitting an application for a site-specific license, the applicant seeks authority to provide service in accordance with our rules. In granting the application, the license designates specific coordinates for locating a transmitter and our rules delineate the area contours within which the licensee is authorized to provide its service. In this case, Section 90.187(b) delineates service area contours at 37 dBu and 39 dBu, respectively, for each VHF and UHF station location.[25] Moreover, i2way's claim that the rule does not mention the term "location" is incorrect. In adopting an exception to the ten-channel limit for Public Safety Pool applicants, the rule expressly states that the applicants "may request more than 10 channels at a single location provided that any application … be accompanied by a showing of sufficient need." Thus, a single application to provide service on ten channels at a site-specific location is a request to provide service on those channels within a service area defined by our rules based on the transmitter location.

7. Moreover, we reject i2way's argument that the limitation on filing multiple or subsequent applications could apply to a single transmitter location, rather than a defined service area. A requirement limiting the number of channels permitted on a single transmitter, rather than in a service area, would vitiate the underlying purpose of the rule, which is to prevent spectrum warehousing and promote spectrum efficiency in this shared channel environment.[26] If Section 90.187(e) only limited subsequent applications to the location of the licensed transmitter, there would be nothing to prevent an applicant from filing an application at one site and another application a few hundred feet away, thereby extending

[20] Hexagram Application for Review at 2-3.

[21] Hexagram Petition at 4. Hexagram stated in its *ex parte* filed in the Petition to Deny proceeding that it objects to "any [i2way] application that proposes to share frequencies with the systems of Hexagram or its customers." Hexagram *Ex Parte* at 1.

[22] i2way filed an Opposition, Opposition to Application for Review, filed by i2way Corporation (May 16, 2003) (i2way Opposition), and Hexagram filed a Reply, Reply to Opposition to Application for Review, filed by Hexagram, Inc. (May 29, 2003) (Hexagram Reply).

[23] i2way Application for Review at 4-6.

[24] i2way Application for Review at 3-4.

[25] 47 C.F.R. § 90.187(b).

[26] *See Part 90 Refarming Third MO&O*, 14 FCC Rcd at 10930-31, ¶ 18 (explaining that the ten-channel limitation and construction certification requirement were adopted to address the concern that PLMR shared spectrum could be potentially warehoused).

the original service area without ever constructing any facilities or placing any channels into operation. Under i2way's argument, an applicant could simultaneously file several applications that could encumber large amounts of spectrum over vast areas without ever constructing any licensed channels. This outcome clearly undermines the underlying purpose of Section 90.187(e).

8. We further reject i2way's argument that it followed a reasonable interpretation of the rule, and the Commission must therefore give prior notice of any prohibition against multiple applications in a service area before dismissing its applications.[27] The interpretations of Section 90.187(e) that i2way offers fail to explain how the restriction on filing subsequent applications absent certification that licensed facilities have been constructed would apply. Under i2way's interpretation that the rule section only limits the number of channels proposed in a single application, there would be no distinction, for example, between five applications seeking authority to operate ten channels each, and one application seeking authority to operate fifty channels in any given service area.[28] i2way's contention that the rule section could be understood to limit applicants to ten channels at a single transmitter location is effectively the same as arguing that the rule only limits the number of channels in a single application. Under either interpretation, an applicant could file an unlimited number of applications without ever constructing a single facility. An interpretation of a rule that disregards essential elements of that rule cannot be deemed reasonable. Moreover, the Commission adopted the requirements for trunked operations under Section 90.187 in notice and comment proceedings in full compliance with agency administrative rules.[29] For these reasons, we reject i2way's argument that the Commission has not provided clear notice of the standard used as the basis for dismissing i2way's applications.

9. Further, we will not grant i2way relief on the basis of its assertion that our interpretation of Section 90.187(e) will not afford i2way sufficient spectrum to accommodate the deployment of its digital system.[30] This argument is irrelevant to any consideration of how we interpret Commission rules. We further note that i2way has neither sought a waiver of Commission rules limiting the number of applications that may be filed, nor provided information at any point during this proceeding to justify the grant of a waiver of those rules. Accordingly, we deny i2way's Application for Review.

10. Finally, we also deny Hexagram's Application for Review, which seeks acceptance of its late-filed Petition and interference protection for all co-channel licensees from i2way's operations in the 450-470 MHz bands. Hexagram filed its Petition nearly six weeks after public notice of i2way's applications.[31] Hexagram acknowledges that it filed its Petition late, but argues that the Commission's standard public notice of the filing of Industrial/Business Pool applications did not provide "actual

[27] i2way Application for Review at 6-7 (citing *Satellite Broadcasting Co., Inc. v. FCC* 824 F.2d 1 (D.C. Cir. 1987)). In *Satellite Broadcasting*, the Court of Appeals concluded that where distinct regulations identifying the appropriate place for filing an application are inconsistent and ambiguous, administrative due process prohibits the agency from dismissing an application where a party followed a reasonable interpretation of the rules. 824 F.2d at 3-4.

[28] *Branch Order*, 18 FCC Rcd at 6287, ¶ 7.

[29] *Part 90 Refarming Third MO&O*, 14 FCC Rcd 10922, 10931, ¶ 18; In the Matter of 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services; Replacement of Part 90 By Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them; and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 16673, 16683-87, ¶¶ 22-28 (2000).

[30] i2way Application for Review at 2.

[31] While i2way originally filed most of its applications in January 2001, the public notice accepting the latest amendments to the applications listed in Hexagram's Petition was released December 19, 2001, Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, *Public Notice*, Report No. 1047 (Dec. 19, 2001), establishing a deadline of January 18, 2002, for filing petitions to deny. Hexagram filed its Petition on February 28, 2002, nearly six weeks late.

notice."[32] Hexagram's argument that the public notice listing i2way's applications did not give actual notice because it did not include "i2way's request to substitute its own technology for the required frequency coordination"[33] – the sole issue raised in Hexagram's Petition – is without merit. Our standard public notice accepting applications for filing includes information that puts a licensee on notice that another party has applied to operate as a co-channel licensee in its service area.[34] The public notice further states that the listed applications are subject to the petition to deny rules contained in Section 309 of the Communications Act, as amended.[35] Hexagram's contention that we provide detailed substantive information about applications in our standard public notices is not only administratively inefficient and overly burdensome, but unnecessary and contrary to established Commission procedures. The standard notice provides sufficient information to alert existing licensees and those with pending applications that we have received a proposal for service that may affect existing services or other pending proposals. The affected licensees or applicants are then responsible for determining whether to petition the Commission to deny the application listed in the notice.[36] Hexagram has therefore provided an insufficient basis on which to accept its late-filed Petition.

11. We further reject Hexagram's argument that we must deny i2way's applications or require i2way to provide interference protection to all co-channel licensees, including those licensees such as Hexagram authorized to operate on a secondary basis. Hexagram asserts that i2way has made a commitment to providing this blanket interference protection in exchange for avoiding frequency coordination for its applications.[37] We have no record that i2way sought an exemption from frequency coordination of its applications and we decline in this proceeding to provide protection beyond that afforded under our rules for secondary or co-primary operations in the 450-470 MHz bands. i2way's applications must be processed through a certified frequency coordinator before we process those applications. Accordingly, we deny Hexagram's Application for Review.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.115 and 90.187 of the Commission's rules, 47 C.F.R. §§ 1.115, 90.187, the Application for Review filed by i2way Corporation on May 1, 2003, IS DENIED.

13. Accordingly, IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.115 of the

[32] Hexagram Application for Review at 3.

[33] Hexagram Application for Review at 9-10.

[34] Our standard public notices accepting applications for filing include the applicants name, file number, receipt date of the application, frequencies proposed in the application, and the proposed location for the license, and whether the application is new or a modification or some other type of application.

[35] 47 U.S.C. § 309.

[36] In addition, Hexagram's reliance on *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) is inapposite. In that case, the Court of Appeals found that the petitioner was denied actual notice because the Commission did not adhere to its own rule to mail adjudicatory orders to the parties. *Id*. at 1089-90. The Court found that the rule had created a reasonable expectation in the parties to the proceeding that the Commission would give notice through the mail. *Id*. at 1090. In this case, the Commission has fully adhered to its rules and procedures, meeting the public's expectations with regard to notice of applications accepted for filing.

[37] Hexagram Application for Review at 16-17.

Commission's rules, 47 C.F.R. §§ 1.115, the Application for Review filed by Hexagram, Inc. on May 1, 2003, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary