



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION

445 12TH STREET, S.W.

WASHINGTON, D.C. 20554

DA 01-360

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WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON REQUEST FOR WAIVER AND PROPOSED AIRTIME CAPACITY AGREEMENT

Comment Date: February 27, 2001

Reply Comment Date: March 9, 2001

On December 15, 2000, James A. Kay, Jr. ("Kay"), licensee of various Specialized Mobile Radio Service ("SMR") stations in the 800 MHz band in southern California, filed a waiver request ("Waiver Request") with the Federal Communications Commission, pursuant to section 1.925 of the Commission's rules.¹ Specifically, Kay requests waiver of "such rules and policies as the Commission may deem necessary" to permit him to enter into a proposed "Airtime Retransmission Capacity Agreement" ("Agreement") with Nextel of California, Inc. ("Nextel").² Under the proposed Agreement, Kay would provide Nextel access to capacity on Kay's Los Angeles and Orange County, California, SMR stations licensed on certain 800 MHz Business and Land Transportation ("BI/LT") channels, obtained through inter-category sharing, to be incorporated for use in Nextel's 800 MHz digital iDEN system. The specific call signs and BI/LT channels that would be subject to the "airtime capacity" Agreement are:

Call Sign WNJA910: 854.8875; 855.0625; 855.2625; 855.2875; 855.5375; 855.6375; 855.6875;
855.8125; 857.4125; 858.9125; 859.7875 MHz

Call Sign WNKV762: 854.9375 MHz

Call Sign WNMY402: 854.7875; 855.0875; 855.5125; 855.7875 MHz

Call Sign WNPJ874: 854.7625; 854.9375 MHz

Call Sign WNXW327: 854.7875; 855.0875; 855.5125; 855.7875 MHz

Call Sign WNXW487: 859.7875 MHz

According to the terms of the Agreement, Kay would retain the licenses and would continue to be the licensee. The Agreement provides that Kay, as licensee, would make available to Nextel all of the "airtime capacity" available under Kay's licenses, and that Nextel would integrate that capacity into its iDEN network for use by Nextel's customers. Nextel, as user of the spectrum licensed to Kay, would

¹ See generally Letter, "Waiver Request – Expedited Action Requested," from Robert J. Keller, Counsel for James A. Kay, Jr., to William W. Kunze, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Dec. 15, 2000 ("December 15, 2000 Waiver Request"). Kay sought expedited review. *Id.* at 1. A draft "Airtime Transmission Capacity Agreement" ("*Draft Airtime Transmission Capacity Agreement*") is attached to the letter. See also Letter from Robert J. Keller, Counsel for James A. Kay, Jr., to William W. Kunze, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Feb. 5, 2001.

² December 15, 2000 Waiver Request at 1.

agree to comply with all applicable FCC policies and regulations. The Agreement also states that Kay would remain ultimately responsible for compliance with the Commission's rules.³ Kay contends that the proposed Agreement is fully compliant with the Commission's existing rules and policies.⁴

Kay asserts that the arrangement would serve the public interest by alleviating an immediate demand for additional spectrum by Nextel, allowing Nextel to enhance and expand its service to customers in the Los Angeles area, and by allowing Kay to put his spectrum to more efficient use than currently possible.⁵

Kay specifies that, to the extent the Commission deems a waiver necessary, it could be issued contingent upon, and subject to, the pending rulemaking in the *Secondary Markets* proceeding.⁶ Kay also asserts that the proposed "airtime capacity" agreement would be consistent with the Commission's desire to foster secondary market spectrum transactions, as set forth in its *Secondary Markets* proceeding, and specifically in its *Secondary Markets NPRM*. Kay contends that the Agreement includes provisions consistent with the policies and kinds of safeguards discussed in that proceeding.⁷

The Bureau seeks comment on the Waiver Request and the proposed Agreement. In particular, we seek comment on whether granting Kay's request would further the public interest. We also seek comment on Kay's contention that the proposed Agreement is fully compliant with all existing Commission policies and rules, including Section 310(d) of the Communications Act of 1934, as amended (the "Act"),⁸ our *de facto* control policies implementing that provision of the Act,⁹ and the applicable technical and service rules regarding the spectrum licensed to Kay.

Interested parties may file comments on or before **February 27, 2001**. The deadline for filing reply comments is **March 9, 2001**. All comments and reply comments should reference "Waiver Request – Expedited Action Requested," and include the designated authority number of this *Public Notice*, **DA 01-360**. An original and four copies of all pleadings must be filed with the Commission's Secretary, Magalie Roman Salas, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D. C. 20554. **In addition, one copy of each pleading should be delivered to each of the following locations:** (1) the Commission's duplicating contractor, International Transcription Services, Inc. ("ITS"), 445 Twelfth Street, S.W., Room CY-B492, Washington, D. C. 20554; (2) Office of Media Relations, Reference Operations Division, 445 Twelfth Street, S.W., Washington, D.C. 20554; (3) Don Johnson,

³ See *Draft Airtime Transmission Capacity Agreement*.

⁴ December 15, 2000 Waiver Request at 1-2.

⁵ See *id.* at 2-4.

⁶ *Id.* at 1-2. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, WT Docket No. 00-230, FCC 00-402 (rel. Nov. 9, 2000) ("*Secondary Markets NPRM*"); see also Principles for Promoting Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, FCC 00-401 (rel. Dec. 1, 2000).

⁷ December 15, 2000 Waiver Request at 2-3.

⁸ 47 U.S.C. § 310(d).

⁹ See generally *Secondary Markets NPRM* at ¶¶ 70-82.

Commercial Wireless Division, Wireless Telecommunications Bureau, Room 4-A332, Federal Communications Commission, 445 Twelfth Street, S.W., Washington, D. C. 20554; and (4) Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau, Room 4-B442, Federal Communications Commission, 445 Twelfth Street, S.W., Washington, D. C. 20554.

Parties should limit their comments to the Waiver Request and the proposed Agreement and not comment on any other pending proceeding involving James Kay or any of his licensed stations. Specifically, as referenced in Kay's Waiver Request,¹⁰ we note that Kay is involved in a pending contested proceeding before the Commission, WT Docket No. 94-147. Because that proceeding remains pending, commenters are cautioned to avoid any discussion in their submissions in response to this *Public Notice* of issues arising in or under consideration in WT Docket No. 94-147. In this regard, we note that the Waiver Request and proposed Agreement provides that any waiver grant would be conditioned on whatever action the Commission takes in light of a final determination in WT Docket No. 94-147. **The Bureau also specifically requests that commenting parties serve one copy of each pleading on the following:** (1) Robert J. Keller, Counsel to James Kay, P.O Box 33428-Farragut Station, Washington, D.C. 20033; and (2) Gary Schonman, Enforcement Bureau, Room 3-A660, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

By this *Public Notice*, we announce, pursuant to section 1.1200(a) of the Commission's rules, 47 C.F.R. § 1.1200(a),¹¹ that this proceeding will be governed by "permit-but-disclose" *ex parte* procedures under section 1.1206 of the Commission's rules. 47 C.F.R. § 1.1206.¹² We believe the public interest will best be served by applying permit-but-disclose *ex parte* procedures in this case because this proceeding involves broad public policy issues. These procedures permit interested parties to make *ex parte* presentations to the Commissioners and Commission employees, but require that these presentations be disclosed in the record of the relevant proceeding. If a person makes a written *ex parte* presentation to a Commissioner or Commission employees, the written presentation must be filed with the Commission Secretary no later than the next business day after the presentation. 47 C.F.R. § 1.1206(b)(1). Oral *ex parte* presentations must be summarized in writing, filed with the Commission Secretary, and copies must be delivered to the Commissioners or Commission employees involved with the oral presentation no later than the next business day after the presentation. 47 C.F.R. § 1.1206(b)(2). All *ex parte* filings must also reference the designated authority number of this *Public Notice* as well as any other applicable docket or file numbers. Accordingly, as of the release date of this *Public Notice*, all parties making *ex parte* presentations in this proceeding shall file any written *ex parte* presentations and summaries of any oral *ex parte* presentations in accordance with the procedures applicable to permit-but-disclose proceedings set forth in section 1.1206 of the Commission's rules. 47 C.F.R. § 1.1206.

The waiver request and proposed Agreement are also available for public inspection and copying in the Reference Center, Room CY-A257, Federal Communications Commission, 445 Twelfth Street, S.W., Washington, D.C. 20554. Copies of these documents are also available from ITS.

For further information, contact Don Johnson or Paul Murray at (202) 418-7240.

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau.

¹⁰ December 15, 2000 Waiver Request at 3.

¹¹ Section 1.1200(a) permits the Commission to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

¹² This *Public Notice* does not alter the *ex parte* procedures currently applicable in WT Docket No. 94-147.

