

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

In the Matter of
New Orleans Convention Center
Licensee of Station WPJS469,
New Orleans, Louisiana
File No. EB-03-TS-134

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2004

Released: April 27, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we conclude that the New Orleans Convention Center ("NOCC"), licensee of public safety radio station WPJS469, New Orleans, Louisiana, has violated Sections 90.1791 and 1.903(a)2 of the Commission's Rules ("Rules") by leasing mobile units operating on its public safety frequencies to end users. We admonish NOCC for these violations. However, we deny the request filed by Two-Way Communications, Inc. ("Two-Way") for an Order to Show Cause ("Request"), which seeks revocation of NOCC's license for station WPJS469.

II. BACKGROUND

2. The New Orleans Convention Center is a registered trade name of the Ernest N. Morial New Orleans Exhibition Hall Authority ("Authority").3 The Authority is a public body created by the Louisiana Legislature and is charged with creation and operation of the NOCC. NOCC does not receive public subsidies. It finances its operations by the sale of goods and services.4 The Convention Center building is a concrete and iron structure of 3,500,000 square feet, with 11 exhibit halls that are approximately 100,000 square feet each. The building is 0.9 mile long and 0.3 mile wide. NOCC holds a license for station WPJS469 in the Public Safety/Special Emergency service for operations in and immediately around the Convention Center building. Station WPJS469 is authorized to operate on eight channel pairs in the 800 MHz band.

3. Two-Way holds radio station licenses in the Business/Industrial service that encompass the area surrounding the New Orleans Convention Center.5 On January 21, 2003, Two-Way filed a Request for an Order to Show Cause, seeking revocation of NOCC's license for station WPJS469. In its

1 47 C.F.R. § 90.179.

2 47 C.F.R. § 1.903(a).

3 Letter to Kathy Berthot, FCC Enforcement Bureau, from Matthew P. Chenevert, Ernest N. Morial New Orleans Exhibition Hall Authority, July 25, 2003 ("Response to LOI")

4 Response to LOI at page 2.

5 Two-Way is the licensee of radio stations WPRK456, WPMM676, WPGI277, WPFZ997, and WPIT544.

Request, Two-Way argues that NOCC is using station WPJS469 for commercial purposes. Two-Way asserts that NOCC has contracted with Tomba Communications and Electronics, Inc. (“Tomba”) to manage NOCC’s public safety radio system and to lease handheld radios on that system to NOCC’s customers and contractors for a fee. Two-Way also charges that the “misuse of this public safety license was conceived prior to the Convention Center’s submitting its initial application” for the license.<sup>6</sup> In this regard, Two-Way asserts that the initial application requested authorization for 900 mobile units, too many for the “small coverage area” of 3.5 million square feet of the interior of the Convention Center.<sup>7</sup> Accordingly, Two-Way charges that NOCC misrepresented facts and demonstrated lack of candor in filing its license application.

4. Two-Way further states that anyone wishing to use any other wireless device within the Convention Center building must acquire prior approval from an engineering company with which NOCC has contracted to ensure that the proposed wireless device will not interfere with its internal antenna systems. Two-Way provides a document entitled “Radio Frequency Coordination Procedure” in which NOCC requires that “[a]ny person or entity propagating radio signals within the [Convention Center], or receiving signal from any source not served by the [Convention Center] antenna system, must apply for prior approval....There is a charge for this engineering review....”<sup>8</sup> Accordingly, Two-Way argues, NOCC has usurped the Commission’s authority for the purpose of engaging in anti-competitive practices.

5. The Spectrum Enforcement Division (“SED”) of the Enforcement Bureau issued a letter of inquiry to NOCC on July 8, 2003. In its response, NOCC denied that it uses station WPJS469 for commercial purposes. It states that it uses the station in a manner consistent with Section 90.20(a)(1) of the Rules,<sup>9</sup> and makes its system available to customers on a “user fee sharing basis styled in the form of a lease.”<sup>10</sup>

6. NOCC states that it has a public safety department employing 66 officers, and provides for a medical staff that operates out of three offices spread evenly throughout the building. NOCC also states that it hosts conventions, trade shows and other events that require installation, operation and demolition with extensive use of heavy machinery in confined quarters, construction of large structures with heavy elements and rapid transportation of a large number of people over the length of the building. NOCC states that these activities would be extremely hazardous and inefficient without excellent coordination of the customers, Convention Center staff, public safety personnel and medical subcontractors.<sup>11</sup>

7. NOCC explains that communications throughout the Convention Center building originally were accomplished with handheld radios but without a wired antenna system to support mobile communications. Eventually, NOCC contracted with Two-Way to install a radio network in the building that supported Two-Way’s radio station frequencies. NOCC states that Two-Way subsequently made application on NOCC’s behalf for NOCC’s public safety radio station license.<sup>12</sup> Two-Way’s contract was later terminated and its network removed and replaced with a new trunking and distributed antenna system belonging to NOCC, which uses NOCC’s public safety frequencies and also provides cellular

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<sup>6</sup> Two-Way’s Request at 5.

<sup>7</sup> *Id.*

<sup>8</sup> Two-Way’s Request, Attachment E at page 1.

<sup>9</sup> 47 C.F.R. § 90.20(a)(1).

<sup>10</sup> Response to LOI at page 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at page 2. According to NOCC, Two-Way’s principal, Lester Boeihm, personally prepared NOCC’s application.

telephone coverage. NOCC allows its customers and contractors to use the public safety radio system by providing preprogrammed radios at a “nominal cost.”<sup>13</sup> NOCC issued a request for proposal (“RFP”) for a contractor to manage the internal trunked system, equipment, and rental of the mobile units to visiting conventioners and contractors and subsequently selected Tomba to manage the system. NOCC argues that this use does not qualify as “commercial” and is consistent with the rules under which the license was issued.<sup>14</sup>

### III. DISCUSSION

8. Section 1.903(a) of the Rules provides that stations in the Wireless Radio Services may be used only in accordance with the rules applicable to their service. Section 90.179 of the Rules describes the manner in which licensees may share use of private radio stations.

9. The record before us indicates NOCC’s use of its Public Safety/Special Emergency radio station, WPJS469, violates Sections 1.903(a) and 90.179 of the Rules. Public safety licensees on frequencies in the 800 MHz band may not operate as a for-profit private carrier.<sup>15</sup> NOCC is permitted under its station authorization to enter into non-profit cost sharing agreements with other entities; however, entities entering into such agreements with NOCC must themselves be eligible to be licensed for public safety frequencies.<sup>16</sup> Further, our rules require NOCC to have a written agreement with each such entity that sets out (1) the method of operation, (2) the components of the system that are covered by the sharing arrangements, (3) the method by which costs are to be apportioned, and (4) acknowledgement that all shared transmitter use must be subject to the licensee’s control.<sup>17</sup>

10. In addition, stations licensed in the public safety frequency bands may transmit only communications related directly to imminent safety-of-life or property and/or communications directly related and necessary to activities that “make the licensee eligible for the station license . . .,” including all communications provided under cooperative sharing arrangements.<sup>18</sup> Finally, our rules hold NOCC directly responsible for the proper operation and use of each transmitter for which it is licensed.<sup>19</sup> NOCC must exercise whatever direction and control is necessary to assure that all authorized facilities are used (1) only for permissible purposes, (2) only in a permissible manner, and (3) only by persons with authority to use and operate the equipment.<sup>20</sup> The Commission holds NOCC directly responsible for the compliance of its operations with all laws and regulations, notwithstanding that it may have contracted management of its system to a third party.<sup>21</sup>

11. The record indicates that NOCC, through its contractor Tomba, is leasing mobile units

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

<sup>14</sup> *Id.* at page 3. NOCC states that the license was issued pursuant to 47 C.F.R. § 90.20(a), which provides in part that governmental entities are eligible to hold a license in the Public Safety Service to operate radio stations for transmission of communications essential to official activities of the licensee.

<sup>15</sup> 47 C.F.R. § 90.179(f).

<sup>16</sup> 47 C.F.R. § 90.179(a). *See also* 47 C.F.R. § 90.179(g) (permitting licensees authorized to operate radio systems on Public Safety Pool frequencies designated in § 90.20 to share their frequencies with Federal Government entities on a non-profit, cost sharing basis).

<sup>17</sup> 47 C.F.R. § 90.179(d). The agreements must be kept as part of the station records.

<sup>18</sup> 47 C.F.R. § 90.405(a)(1) and (2). Testing is also permitted under § 90.405(3).

<sup>19</sup> 47 C.F.R. § 90.403(a).

<sup>20</sup> *Id.*

<sup>21</sup> 47 C.F.R. § 90.403(b).

for use on its public safety radio system to customers and contractors in the Convention Center. While NOCC claims that it leases its mobile units at a “nominal cost,” we do not believe that such leases qualify as non-profit, cost sharing agreements within the meaning of Section 90.179(a). In this regard, there is no demonstrated nexus between the cost of the mobile units to NOCC’s customers and contractors and the actual cost of the system. In addition, NOCC rents its mobile units with no apparent effort to ensure that only authorized users (i.e., entities themselves eligible to be licensed on public safety frequencies) have mobile units and that only authorized communications (i.e., communications directly related to imminent safety-of-life or property and communications directly related to activities that make the licensee eligible for the license) take place on the system. Finally, while it is permissible for NOCC to hire Tomba to manage its system, it does not appear that NOCC is exercising direct responsibility for, and control over, all actions taken by its contractor.

12. Notwithstanding our findings with regard to NOCC, we do not believe that issuance of an Order to Show Cause is warranted. Two-Way has not established that NOCC misrepresented facts or lacked candor in its application for the public safety radio station.<sup>22</sup> From the facts in the record before us, it appears that NOCC arrived at its decision to make overly broad use of the public safety system after its contract with Two-Way ended. Moreover, the record evidence does not support a finding that NOCC intentionally used its public safety radio system in an anti-competitive manner. Accordingly, we deny Two-Way’s Request.

13. As a result of our review of this matter, we conclude that Two-Way has not provided justification for our initiation of a revocation proceeding. However, the record indicates that NOCC is in violation of Sections 1.903(a) and 90.179 of the Rules, and we believe that an admonishment is warranted.

14. Finally, we require, pursuant to Section 308(b) of the Communications Act of 1934, as amended (“Act”),<sup>23</sup> that NOCC submit a report to the Enforcement Bureau within 30 days of the release date of this *Order* demonstrating that it has brought its activities with regard to station WPJS469 into compliance with the Commission’s rules as discussed herein. NOCC’s report must be submitted in the form of an affidavit or declaration signed by a duly authorized representative of NOCC.<sup>24</sup>

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that NOCC **IS ADMONISHED** for violating Sections 90.179 and 1.903(a) of the Rules.

16. **IT IS FURTHER ORDERED** that the Request for Order to Show Cause filed by Two-Way Communications, Inc. **IS DENIED**.

17. **IT IS FURTHER ORDERED** that, pursuant to Section 308(b) of the Act, NOCC must submit the report described in paragraph 14 no later than thirty (30) days from the date of release of this *Order* to: Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division, 445 12th Street, S.W., Washington, D.C. 20554, Attention: Susan Magnotti.

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<sup>22</sup> Indeed, we note that Two-Way’s principal apparently prepared the application on behalf of NOCC. Thus, any finding of misrepresentation or lack of candor by NOCC might also raise questions as to Two-Way’s qualifications to be a Commission licensee.

<sup>23</sup> 47 U.S.C. § 308(b).

<sup>24</sup> Such affidavit or declaration should comply with Section 1.16 of Rules, 47 C.F.R. § 1.16, and be substantially in the form set forth therein.

18. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by first class and Certified Mail, Return Receipt Requested, to counsel for New Orleans Convention Center, Matthew P. Chenevert, Office of Legal Counsel, 900 Convention Center Boulevard, New Orleans, Louisiana, 70130, and to counsel for Two-Way Communications, Inc., Garret R. Hargrave, Schwaninger & Associates, P.C., 1331 H Street, N.W., Suite 500, Washington, DC, 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau