

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

In the Matter of
STATE OF TENNESSEE
DEPARTMENT OF TRANSPORTATION
For a Public Safety License
Pursuant to Section 337 of the
Communications Act of 1934, as Amended
File No. D132332

ORDER

Adopted: June 1, 2000

Released: June 5, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. We have before us an application¹ and waiver request² filed by the State of Tennessee, Department of Transportation (TNDOT), for mobile paging radio service authorization. TNDOT seeks a waiver, pursuant to Section 337 of the Communications Act of 1934, as amended (the "Act"),³ of certain provisions in Part 22 of the Commission's Rules to use three mobile paging channels in its public safety communications system.⁴ For the reasons stated below, we deny TNDOT's waiver request, and dismiss the associated application.

II. BACKGROUND

2. TNDOT requests authorization to add three VHF frequencies⁵ to its public safety communications system.⁶ Each of the requested frequencies is the mobile frequency of a duplex channel allocated for paging operations under the Commission's Part 22 Public Mobile Radio Service rules.⁷ The

¹FCC File No. D132332, State of Tennessee, Department of Transportation Application (filed October 4, 1999) (Request).

² See Letter from Michael Carroll, Sr., Communications Systems Manager, State of Tennessee, Department of Transportation, to Al Knerr, Chief, Technical Section, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (dated August 31, 1999 and filed October 4, 1999).

³47 U.S.C. § 337.

⁴Specifically, 47 C.F.R. § 22.561 allocates the desired VHF channels to paging operations.

⁵The specific frequencies that TNDOT proposes to use are 157.950 MHz, 157.980 MHz, 158.080 MHz.

⁶Request at 1.

⁷47 C.F.R. § 22.561. The frequencies may also be assigned to base or fixed transmitters if the paired base frequency is assigned to base transmitters in the same area operated by the same licensee. Id.; 47 C.F.R. § 22.567(h).

Commission grants licenses for these channels by reference to the base frequency only; as a result, the paired mobile frequency does not appear as assigned on the Commission's licensing database.⁸

3. TNDOT states that its public safety communications system is a regionwide and statewide system operating in the 150-174 MHz band.⁹ It states that public safety entities in Tennessee have come to rely upon this band, and thus it, in turn, has become their primary frequency band.¹⁰ In support of its waiver request, TNDOT submitted an engineering study and a letter from its frequency coordinator showing that no Part 90 VHF or UHF spectrum is available at any of the ninety-five sites to which it seeks to add the requested frequencies.¹¹ TNDOT requests authorization for use of the subject frequencies because 800 MHz channels would be incompatible with its own system and those of other state public safety agencies, and would be more expensive to implement.¹²

4. TNDOT's waiver request was placed on public notice on January 5, 2000.¹³ We received no comments on this matter.

III. DISCUSSION

5. TNDOT requests a waiver pursuant to Section 337 of the Act, which provides public safety entities with a statutory means of obtaining a waiver of the Commission's Rules to permit them to use frequencies not allocated for public safety use.¹⁴ Subsection (c)(1) of Section 337 provides as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.--

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--

(A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;

(B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;

(C) the use of the unassigned frequency for the provision of public safety services

⁸Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service for Paging and Other Services, *First Report and Order*, CC Docket No. 87-120, 4 FCC Rcd 1576, 1576 ¶¶ 3-4 (1989).

⁹Request at 2-3.

¹⁰*Id.* at 2.

¹¹*Id.* at 1.

¹²*Id.* at 1-2.

¹³*See* Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by State of Tennessee, Department of Transportation to Obtain a License for Three Channels Allocated for Paging Operation, *Public Notice*, DA 99-2765 (WTB PSPWD rel. January 5, 2000).

¹⁴*See* 47 U.S.C. § 337.

is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
(D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
(E) granting such application is consistent with the public interest.¹⁵

We find that grant of a waiver is not warranted in this instance because: (1) two of the requested frequencies are not unassigned, and (2) TNDOT has not made the requisite showing for a waiver with respect to the other frequency.

6. When considering requests under Section 337, we first must determine whether the applicant is “an entity seeking to provide public safety services.”¹⁶ TNDOT is a governmental entity. Its function is maintaining safe roadways in furtherance of the protection of the safety of life, health and property.¹⁷ TNDOT proposes to use the subject spectrum as a part of its regionwide and statewide public safety communications system and in conjunction with other state public safety agencies.¹⁸ Based on the record herein, we conclude that TNDOT is an entity seeking to provide public safety services and meets the eligibility criteria established by Section 337.

7. TNDOT requests authorization to add three VHF channels, 157.950 MHz, 157.980 MHz and 158.040 MHz, to its public safety communications system.¹⁹ Upon review of our licensing records, we found that two of the requested frequencies are assigned to other licensees in Tennessee, and thus are not available to TNDOT. Specifically, 157.950 MHz and 157.980 MHz serve as the mobile half of frequency pairs allocated for one-way or two-way mobile operation. Frequency 157.950 MHz is the mobile frequency that is paired with base frequency 152.690 MHz in a channel that is licensed to Highland Telephone Cooperative, Inc. as Station KNKM781,²⁰ in Oneida and Wartburg, Tennessee, and to Lowrance Sound Co., Inc. as Station KWT915,²¹ in Martin, Tennessee. Similarly, frequency 157.980 MHz is the mobile frequency paired with base frequency 152.720 MHz in a channel that is licensed to

¹⁵47 U.S.C. § 337(c)(1); *see also* Balanced Budget Act, § 3004.

¹⁶47 U.S.C. § 337(c). Section 337(f) defines the term “public safety services” as “services –
(A) the sole or principle purpose of which is to protect the safety of life, health, or property;
(B) that are provided –
(i) by the State or local government entities; or
(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
(C) that are not made commercially available to the public by the provider.”

¹⁷*See e.g.*, Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission, September 11, 1996, at 12.

¹⁸TNDOT argues that acquiring these frequencies would provide interoperability with the Tennessee Highway Patrol, Tennessee Emergency Management Agency, Tennessee Division of Forestry, Tennessee Wild Life Resources Agency and Tennessee Department of Environment and Conversation.

¹⁹Request at 1.

²⁰The current license was granted on August 3, 1998.

²¹The current license was granted on May 18, 1999.

DeKalb Telephone Cooperative, Inc. as Station KIY411,²² in Woodbury, Tennessee; Jackson Mobilphone Company, Inc. as Station KNKP791,²³ in Adamsville, Bolivar, Brownsville, Dyersburg, Henry, Jackson, Memphis, Paris, Ralston and Waverly, Tennessee; Station KNLN271²⁴ in Partons, Tennessee and Station KNLU336²⁵ in Springville, Tennessee. Therefore, we must deny TNDOT's request for authorization on 157.950 MHz and 157.980 MHz and dismiss its application for these frequencies because the subject frequencies are currently assigned and unavailable.

8. We now turn to whether TNDOT has met the statutory criteria for grant of a waiver under Section 337(c)(1) of the Act for use of frequency 158.040 MHz. The plain language of subsection (c) provides that a waiver request under this section shall be granted only upon a finding that all five conditions are met regarding the spectrum specifically sought by an applicant.²⁶ Where any one of the five conditions is not met, the subject waiver will not be granted.²⁷

9. We find that TNDOT's request to use frequency 158.040 MHz does not satisfy Section 337(c)(1)(B), which requires that the proposed use not cause interference to other spectrum users entitled to protection from such interference.²⁸ TNDOT asserts that its use of the subject frequencies will not cause harmful interference because there are no existing users in Tennessee or adjacent states.²⁹ In fact, however, the frequency pair 152.780/158.040 MHz is licensed to Highland Paging, Inc. as Station KNKJ530,³⁰ in Blacksburg, Virginia; Teletouch Licenses, Inc. as Station KNKC686,³¹ in Little Rock, North Little Rock and Pine Bluff, Arkansas; and Sledge Telephone Company, Inc. as Station WXS373,³² in Sunflower, Mississippi. Because TNDOT and its frequency coordinator do not appear to have been aware of these stations in states adjacent to Tennessee, we conclude that we do not have evidence that these stations were taken into account when the interference potential associated with the proposed use was analyzed.³³ Therefore, we find that TNDOT has failed to show that the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the

²²The current license was granted on August 31, 1998.

²³The current license was granted on May 11, 1999.

²⁴The current license was granted on May 16, 1997.

²⁵The current license was granted on February 1, 1996.

²⁶See 47 U.S.C. § 331(c)(1).

²⁷South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998) (*South Bay*); Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Notice of Proposed Rulemaking*, WT Docket No. 99-87, 14 FCC Rcd 5206, 5234 ¶ 56 (1999).

²⁸47 U.S.C. § 337(c)(1)(B).

²⁹Request at 2.

³⁰The current license was granted on April 19, 1999.

³¹The current license was granted on June 21, 1999.

³²The current license was granted on December 17, 1998.

³³See 47 C.F.R. §§ 22.352, 22.567.

Commission's rules.

10. We further find that TNDOT also has not shown that no other public safety spectrum is immediately available. In its waiver request, TNDOT cites expense and incompatibility, but not unavailability, as the reasons for not applying for public safety channels in the 800 MHz band.³⁴ We note, however, that the showing required by the statute is not that no public safety frequencies are available in the applicant's preferred band, but rather that no public safety frequencies in any band are unassigned in its area.³⁵ TNDOT's engineering study reviews only VHF and UHF frequencies.³⁶ By contrast, in *South Bay*, the applicant provided an engineering analysis that showed there were no Part 90 frequencies available in its area.³⁷ Based on the information provided, TNDOT has failed to satisfy the requirements of Section 337(c)(1)(A).

IV. CONCLUSION

11. We find that TNDOT has not demonstrated that it meets the criteria for a waiver of the Commission's Rules pursuant to Section 337(c)(1) of the Act, because two of the VHF channels requested are in fact already licensed to entities in Tennessee and TNDOT has not shown that the requested use of the remaining VHF channel it seeks is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations. In addition, TNDOT has not shown that there is no other public safety spectrum immediately available for its use. Accordingly, we must deny TNDOT's request to use the subject frequencies for public safety services, and we need not address whether TNDOT has submitted evidence that would allow us to make other findings required by Section 337(c)(1) of the Act.³⁸

V. ORDERING CLAUSES

12. **IT IS ORDERED** that pursuant to Sections 4(i) and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337, the waiver request filed on October 8, 1999, by the Tennessee Department of Transportation to use frequencies 157.950 MHz, 157.980 MHz and 158.040 MHz at the requested locations for public safety services **IS DENIED**, and the associated application, FCC File No. D132332, **IS DISMISSED**.

³⁴Request at 1-2.

³⁵*See, e.g.*, County of Burlington, New Jersey, *Order on Reconsideration*, DA 00-814, ¶ 7 (WTB rel. Apr. 12, 2000).

³⁶Request at Exhibit B.

³⁷License Communications Services, Inc., South Bay Regional Public Communications Authority and Paging Systems, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 34 (1998).

³⁸*See supra* note 27.

13. 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

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