

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

In the Matter of
STATE OF FLORIDA
Request for Waiver of the Commission's Rules to
Permit Licensing of Stations in 800 MHz General
Category on Non-standard Channel Centers

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 2001

Released: January 24, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the State of Florida's (Florida) Request for an Expedited Waiver of the Commission's Rules to enable Florida to obtain licenses on nineteen "off-set channels" associated with twenty contiguous 800 MHz General Category channels for which Florida is currently licensed. For the reasons discussed herein, we grant Florida's request.

II. BACKGROUND

2. In 1994, the Commission proposed a new licensing framework for Specialized Mobile Radio (SMR) systems in the 800 MHz band. In its 800 MHz Further Notice, the Commission proposed revising its eligibility rules for General Category channels to prohibit SMR and non-SMR applicants from applying

1 By the term "off-set channels", we are referring to licensees operating on channels centered between regularly assignable channels. Request for Waiver of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, Memorandum Opinion and Order, 4 FCC Rcd. 3830, 3831 n.3 (1989) (San Bernardino MO&O). The regularly assignable channels are spaced 25 kHz apart for the 800 MHz General Category channels, which results in the off-set channels being spaced 12.5 kHz away from the regularly assignable channels. Id.; see generally 47 C.F.R. § 90.613.

2 The General Category consists of 150 contiguous 25 kHz channels in the 800 MHz band.

3 State of Florida, Request for Waiver of Sections 90.613 and 90.645 of the Commission's Rules to Permit Licensing of Stations in the 800 MHz Private Land Mobile Radio Band on Non-standard Channel Centers, Request for Expedited Waiver, Aug. 8, 2000 (2000 Waiver Request). We note that to date, Florida has not filed applications proposing specific sites associated with this request.

4 Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, PP Docket No. 93-253, Further Notice of Proposed Rulemaking, 10 FCC Rcd. 7970, 7973 ¶ 1 (1994) (800 MHz Further Notice).

for the same channels in the future.⁵ The Commission also sought comment on how to structure competitive bidding procedures to choose among mutually exclusive initial SMR applications proposing operations in the Commercial Mobile Radio Services.⁶

3. After the release of the *800 MHz Further Notice*, there was a steep rise in the requests by SMR applicants and licensees for General Category channels. To ensure that the successful resolution of the spectrum allocation issues raised in the *800 MHz Further Notice* would not be compromised, the Wireless Telecommunications Bureau (Bureau) placed a “freeze” on the filing of new applications for General Category channels.⁷

4. In 1997, the Commission adopted final service and competitive bidding rules for the General Category channels.⁸ In doing so, the Commission reallocated the General Category channels exclusively to the 800 MHz SMR service.⁹ Further, it determined that the 800 MHz General Category channels would be licensed by channel block under a geographic area licensing approach with service areas based on Economic Areas (EAs)¹⁰ and that mutually exclusive initial applications would be subject to competitive bidding. In the *800 MHz SMR MO&O*, the Commission reconsidered its final rules for the General Category channels and determined that private land mobile radio applicants would remain eligible for the General Category channels.¹¹ The Commission, however, continued to subject General Category channels to competitive bidding procedures.¹² The Commission partially lifted the freeze on General Category channels to permit potential EA applicants to relocate incumbents out of the upper 10 megahertz block of

⁵ *Id.* at 8000.

⁶ *Id.* at 8007.

⁷ Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, *Order*, 10 FCC Rcd. 13190 (WTB 1995).

⁸ Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 1463 (1995) (*800 MHz SMR Report and Order*), and *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 9972 (1997) (*800 MHz SMR MO&O*).

⁹ Under the rules adopted, incumbent licensees would be allowed to continue to operate under their existing authorizations and EA licensees would be required to provide protection to all co-channel systems within their licensing areas. See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMRS Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order*, PR Docket No. 93-144, 14 FCC Rcd. 17556, 17569 ¶ 19 (1999) *citing 800 MHz Second Report and Order*, 11 FCC Rcd at 19107–08, ¶¶ 75-76.

¹⁰ The U.S. Department of Commerce Bureau of Economic Analysis has established 172 EAs that cover the continental United States. See Final Redefinition of the BEA Economic Areas, 60 Fed Reg. 31, 114 (Mar. 10, 1995).

¹¹ We note here that even though the caption of 47 C.F.R. § 90.615 appears to limit General Category channels to SMR use, private applicants such as Florida are eligible to use this spectrum. See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order*, PR Docket No. 93-144, 14 FCC Rcd. 17556 (1999).

¹² See *800 MHz SMR MO&O*, 12 FCC Rcd. at 9972 ¶ 4.

800 MHz spectrum to the General Category channels.¹³ For situations other than this type of relocation, however, the Commission decided to maintain the freeze so as not to frustrate the future licensing of General Category channels under the new geographic licensing approach.¹⁴

5. On August 8, 2000, Florida filed its 2000 Waiver Request seeking to become licensed on the nineteen offset frequencies within the twenty contiguous 800 MHz General Category channels¹⁵ for which it is the licensee. Florida contends that it is building a technically advanced, multi-million dollar 800 MHz digital trunked public safety statewide wireless communications system.¹⁶ According to Florida, the system, when completed, will provide interoperable communications capability among all statewide public safety agencies.¹⁷ Florida states that it has completed construction of two phases of its system and has taken steps to complete construction of the final three phases.¹⁸ In this regard, Florida asserts that significant public interest benefits would flow from it receiving licenses for the subject off-set channels at sites different from those at which it is currently using regularly assignable channels.¹⁹ Specifically, it states that such authorizations will allow it to ensure the best possible coverage performance, enhance the efficient use of its existing spectrum, and achieve greater communications capacity without having to utilize any more spectrum than currently authorized.²⁰

6. Florida argues that a waiver is warranted because application of the rule to its unique or unusual factual circumstances would yield a result contrary to the public interest. Florida asserts that the state, almost in its entirety, is covered by the composite footprint of its licensed stations; thus, according to Florida, another user could not gain access to the requested off-set frequencies. Without the requested waiver, Florida contends that it will be able to use only sixteen of the nineteen off-set channels at its currently licensed locations.²¹

¹³ See *800 MHz SMR Report and Order*, 11 FCC Rcd. at 1508 ¶ 74-75.

¹⁴ *Id.* at 1509 ¶ 76.

¹⁵ Florida is licensed on 800 MHz General Category channels 114-133. The specific channel centers for the twenty mobile station frequencies currently licensed to Florida are: 808.8375, 808.8625, 808.8875, 808.9125, 808.9375, 808.9625, 808.9875, 809.0125, 809.0375, 809.0625, 809.0875, 809.1125, 809.1375, 809.1625, 809.1875, 809.2125, 809.2375, 809.2625, 809.2875 and 809.3125 MHz.

¹⁶ Florida 2000 Waiver Request at 2.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3.

¹⁹ Florida seeks a waiver to license all nineteen off-set channels at its existing sites as well as at sites which are different from its current licensed locations.

²⁰ Florida 2000 Waiver Request at 4-5.

²¹ *Id.*

7. On August 21, 2000, we sought comment on Florida's 2000 Waiver Request.²² Motorola filed comments asserting that Florida (1) has other alternatives, and (2) has failed to adequately demonstrate that its proposed operations would not negatively impact the operations of any current or future Commission licensee.²³

8. After Florida submitted its waiver request, the Commission conducted an auction for 800 MHz General Category spectrum.²⁴ The auction commenced on August 16, 2000²⁵ and closed on September 1, 2000.²⁶ For the purposes of the auction, the 150 General Category channels were divided into six blocks or groups (D, DD, E, EE, F and FF) each containing twenty-five channels. The channels Florida is interested in are part of the spectrum in blocks F and FF. Eighteen EAs in Florida for Channel blocks F and FF received high bids in the auction.²⁷ Three applicants were the high bidders for the relevant F and FF channel blocks in Florida. First, Nextel Spectrum Acquisition Corp. (Nextel) was the high bidder for eleven markets.²⁸ Second, Southern Communications Services, Inc. (Southern) was the high bidder for six markets.²⁹ Third, Motient Communications Company (Motient) was the high bidder for one market.³⁰ None of these high bidders have filed comments opposing Florida's waiver request.

III. DISCUSSION

9. A petitioner may obtain a waiver of the Commission's Rules by demonstrating that (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and that grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or

²² Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by the State of Florida to Allow Use of General Category Offset Channels, *Public Notice*, DA 00-1913 (Aug. 21, 2000). The Comment and Reply dates were September 5, 2000 and September 15, 2000 respectively. One comment and one reply comment were received.

²³ Motorola Comments in Opposition to the State of Florida Waiver Request at 5 (Sept. 5, 2000) (Motorola Comments).

²⁴ Florida's waiver request was included on the auction due diligence announcement released August 11, 2000. See Due Diligence Announcement for Upcoming 800 MHz Auctions, *Public Notice*, 15 FCC Rcd. 14935 (2000).

²⁵ *Id.*

²⁶ 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, *Public Notice*, DA 00-2037, Sept. 6, 2000 (Auction Closing PN).

²⁷ *See id.*

²⁸ Nextel's high bids are for EA029F (Jacksonville, FL-GA), EA030F and EA030FF (Orlando, FL), EA031F and EA031FF (Miami-Fort Lauderdale, FL), EA032FF (Fort Myers-Cape Coral, FL), EA033F and EA033FF (Sarasota-Bradenton, FL), EA034F and EA034FF (Tampa-St Petersburg-Clearwater), and EA035F (Tallahassee, FL-GA).

²⁹ Southern's high bids are for EA035F (Tallahassee, FL-GA), EA036F and EA036FF (Dothan, AL-FL-GA), EA081F and EA081FF (Pensacola, FL), and EA029FF (Jacksonville, FL-GA).

³⁰ Motient's high bid is for EA032F (Fort Myers-Cape Coral, FL).

contrary to the public interest or no reasonable alternative exists.³¹ Based upon our review of the totality of the circumstances presented, we find that Florida has demonstrated that grant of the requested waiver is warranted here.³²

10. First, we find that the underlying purposes of both the Commission's Rules³³ and the General Category freeze would not be frustrated by granting the requested waiver.³⁴ In this regard, we conclude that grant of Florida's request to use the subject off-set channels would not frustrate the underlying purpose of Sections 90.613 and 90.615 of the Commission's Rules.³⁵ We believe, as a general matter, that the underlying purpose of these Part 90 provisions is to further the Commission's goals of promoting technical flexibility and spectrum efficiency, while preventing harmful interference to licensed operations.³⁶ For example, granting Florida a waiver to use the subject off-set channels would allow Florida to make more efficient use of its 800 MHz General Category spectrum.³⁷ We believe that grant of the requested waiver also would facilitate more effective utilization of the General Category channels for which Florida is currently licensed, given that without the waiver the specific channels would not be licensed. Based on Florida's description of its licensed system, we are persuaded that the subject channels could not be used by another entity. Specifically, it is our understanding that Florida's statewide system comprises the channels in such a way that the EA licensee would not be able to operate on the subject channels in Blocks F and FF without causing harmful interference to Florida's operations. Against this backdrop, we believe that it would be contrary to the public interest to prohibit Florida from using the subject channels when it is the only entity in a position to do so, provided that such use would not adversely affect other licensees.

³¹ See 47 C.F.R. § 1.925(b)(3)(i)-(ii); see also *Wait Radio v FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)..

³² Granting the waiver is consistent with other actions the Commission has taken to support public safety communication needs. See e.g., *New Jersey State Transit Authority, Order*, 14 FCC Rcd 4334, 4337 ¶ 9 (WTB 1999). See also, *City of Denton, Texas, Order*, DA 00-2411, released 11/30/00.

³³ The specific provisions at issue here are 47 C.F.R. §§ 90.613, 90.615, which do not allow use of off-set channels in the General Category spectrum, and 47 C.F.R. § 90.621, which addresses co-channel mileage separation requirements.

³⁴ Although it could be argued that the freeze is no longer relevant since the Commission auctioned the General Category channels, it was still technically in effect at the time Florida filed its waiver request and, therefore, we believe it needs to be addressed.

³⁵ These two sections taken together identify the specific General Category channels that can be used (regularly assignable channels). Off-set channels are not listed and, therefore, can not be used without a waiver. See 47 C.F.R. §§ 90.613; 90.615.

³⁶ See e.g., Amendment of Part 90 of the Commission's Rules to release spectrum in the 806-821/851-866 MHz bands and to adopt rules and regulations which govern their use, PR Docket No. 79-191, *Second Report and Order*, 90 FCC 2d 1281, 1289-1290 ¶ 21 (1982). See also, Developmental 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 (1999) (*Public Safety First R&O*).

³⁷ See Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to operate a countywide public safety communication system in the 800 MHz band, *Order*, 2 FCC Rcd. 6721 ¶ 5.

11. We also believe that grant of Florida's request would not result in harmful interference to other current or future licensees because Florida is the licensee of the regularly assignable channel on each side of each of the offset channels requested. Motorola argues that Florida failed to adequately demonstrate that its proposed operations would not negatively impact the operations of any current or future Commission licensee.³⁸ Motorola, however, has not provided any engineering showings or other evidence indicating that there would be interference to other users, that the spectrum in question could be used by EA licensees, or that Florida's technical showings are flawed. Thus, based on the information before us, we are not persuaded that grant of Florida's request would adversely affect current or future licensees.

12. As to the General Category freeze, it was intended to prevent the filing of new applications for General Category channels in order to preserve the licensing landscape of the General Category spectrum so the Commission could implement competitive bidding procedures.³⁹ In granting Florida a previous waiver concerning its General Category channels, the Bureau determined that the twenty regularly assignable channels licensed to Florida were used in such a significant portion of the state that they provided little use for EA licensees.⁴⁰ We continue to believe that Florida's statewide system provides coverage to virtually the entire state as a result of the composite footprint of its stations thus providing little in terms of access to other users.⁴¹ As a result, we believe that licensing the off-set channels in question would have little impact on EA licensees. Moreover, the potentially affected bidders were on notice of Florida's request through the August *Public Notice* and the auction due diligence announcement, and the winning bidders did not oppose Florida's waiver request.

13. Second, we conclude that granting Florida's request is in the public interest. The Commission has stated on numerous occasions that two of its primary goals are to provide for the communications needs of the public safety community and promote interoperability among public safety entities.⁴² The waiver requested will allow Florida to expand and improve the coverage of its multi-million dollar statewide public safety communications system within its existing footprint. It will also allow public safety entities in Florida to communicate with one another. In sum, we believe that grant of a waiver here will allow Florida to perform its critical public safety responsibilities such as protection of life and property more effectively and efficiently. We nonetheless note that Motorola has suggested other alternatives to implement Florida's proposed operations that would not necessitate a waiver, such as use of Motorola's technical proposal for Florida's system. Given the record of this proceeding, we believe that this proposition alone is an insufficient basis upon which to deny the requested waiver. Further, we note that several factors are considered when a licensee evaluates competing proposals and, under the circumstances presented, we do not believe that it would be appropriate for us to question that decision. We believe that such decisions are most appropriately left to the discretion of the licensee, provided they do not contravene the Commission's rules and policies. Accordingly, we conclude that grant of the waiver is in the public interest.

³⁸ Motorola Comments at 7.

³⁹ See *800 MHz SMR Report and Order*, 11 FCC Rcd 1508 ¶¶ 74-75.

⁴⁰ State of Florida Request for Waiver of the General Category Freeze, *Order*, DA 97-1631, released Jul. 31, 1997.

⁴¹ According to our database, Florida has 228 stations licensed on these channels across the state and a statewide mobile license for the mobile side of the 20 regularly assignable channels.

⁴² See e.g., *Public Safety First R&O*, 14 FCC Rcd. 152.

IV. CONCLUSION

14. For the reasons discussed herein, we conclude that grant of Florida's waiver request is warranted and furthers the public interest. We therefore grant Florida's request to waive the rules to use the nineteen off-set channels in question.⁴³ As a result of this *Order*, Florida may provide public safety communications coverage state-wide for 808.8375-809.3125/853.8375-854.3125 MHz (Channels 114 - 133). However, applications for additional facilities must be located within the existing contours of Florida's currently authorized system as of January 24, 2001.⁴⁴

15. To obtain authorization for these channels, Florida must show compliance with this *Order* in their applications for the channels. Consequently, Florida may operate on the specified offsets at existing sites and new sites for which the relevant EA licensee must provide the same level of protection that it must provide to Channels 114 - 133. However, regarding the border areas of Georgia and Alabama, we will require that Florida comply with current Commission practices, which state that 40 dBu is an appropriate measure for the signal level necessary to provide sufficient protection from interference.⁴⁵ Finally, we note that all applications to operate on these channels require frequency coordination.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to Section 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, the Waiver Request filed by the state of Florida on August 8, 2000 IS GRANTED to the extent indicated herein.

17. 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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⁴³ In this regard, we waive the General Category freeze and 47 C.F.R. §§ 90.613, 90.615, 90.621. We did not address Florida's request to waive 47 C.F.R. § 90.645 since, based on our understanding of Florida's system, we do not believe that a waiver of that provision is relevant here.

⁴⁴ As used in this *Order*, Florida's currently authorized system includes all facilities granted as of January 24, 2001, but does not include pending applications which have not been granted.

⁴⁵ See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Report and Order*, PR Docket No. 93-144, 11 FCC Rcd. at 1518 (1995).