

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

In the Matter of
DUPAGE PUBLIC SAFETY
COMMUNICATIONS
For a Public Safety License
Pursuant to Section 337 of the
Communications Act of 1934, as Amended
File No. 0000333055

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 2001

Released: June 12, 2001

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us an application1 and waiver request2 filed by DuPage Public Safety Communications ("DU-COMM"), for authority to operate a public safety radio system in the western suburbs of Chicago, Illinois. DU-COMM seeks a waiver, pursuant to Section 337 of the Communications Act of 1934, as amended (the "Act"),3 of Section 22.621 of the Commission's Rules4 to use currently unassigned frequencies allocated for non-public safety use.5 For the reasons stated below, we conditionally grant DU-COMM's waiver request.

II. BACKGROUND

2. On December 22, 2000, DU-COMM filed an application and waiver request pursuant to Section 337 of the Communications Act of 19346 to permit it to use eight (8) unassigned Part 22 paging

1 FCC File No. 0000333055, DuPage Public Safety Communications ("DU-COMM") (filed December 20, 2000). DU-COMM filed an application on November 28, 2000, which the FCC's office in Gettysburg dismissed without prejudice, due to the absence of certain required information. DU-COMM filed a corrected application on December 20, 2000.

2 See Request for Waiver of DuPage Public Safety Communications (filed December 22, 2000) (Request).

3 47 U.S.C. § 337.

4 47 C.F.R. § 22.621.

5 DU-COMM also requests a waiver of Sections 22.501 and 90.303 of the Commission's Rules, 47 C.F.R. §§ 22.501, 90.303. Request at 1. We do not believe DU-COMM requires a waiver of Section 22.501 because that section merely states that the rules in Subpart E of Part 22 apply to all public mobile paging and radiotelephone stations. Section 90.303 provides that frequencies in TV channel 14 (470-476 MHz) are available for assignment under Part 90 of the Commission's Rules. DU-COMM does not need a waiver of that section because its proposal is consistent with that general provision, although it is inconsistent with the more specific provisions of Section 22.621.

6 See 47 U.S.C. § 337; see also Balanced Budget Act of 1997, Pub.L.No. 105-33, 111 Stat. 252 (1997), § 3004 (Balanced Budget Act).

UHF control channels allocated for use in the Chicago, Illinois, metropolitan area.⁷ DU-COMM is an intergovernmental agency formed in 1975 to provide police, fire, and emergency medical communications to member agencies in DuPage County, Illinois.⁸ DU-COMM seeks a waiver of Section 22.621 of the Commission's Rules,⁹ which allots the frequencies in question for use within point-to-multipoint systems that support transmitters providing public mobile service.

3. DU-COMM asserts that, because of the rapid growth of the western suburbs of Chicago, its current radio frequency assignments are not meeting that area's immediate communications requirements, and that DU-COMM needs additional frequencies promptly to ensure the protection of life, health, and property.¹⁰ The agency states that the problem is greatest in the western portion of DuPage County.¹¹ DU-COMM states that this once largely rural area now generates nearly constant police radio traffic, with officers having to wait for the one assigned channel to clear.¹² DU-COMM acknowledges that a county-wide DU-COMM channel is also available, but argues that that channel already is heavily used throughout the county for tactical operations, including an almost daily need for tactical interoperability with the City of Chicago and other heavily populated communities in adjacent Cook County.¹³

4. DU-COMM's waiver request was placed on public notice on February 2, 2001.¹⁴ We received comments from the Village of Bartlett, Illinois, Department of Police, Carol Stream (Illinois) Fire Protection District, City of Elmhurst, Illinois, the Glen Elyn (Illinois) Police Department, the Glenside (Illinois) Fire Protection District, the Village of Hanover Park (Illinois) Chief of Police, the Lisle-Woodridge (Illinois) Fire District, the Warrenville (Illinois) Fire Protection District, the West Chicago (Illinois) Police Department, the Wheaton (Illinois) Police Department, the Village of Winfield (Illinois) Police Department, and the York Center (Elmhurst, Illinois) Fire Protection District. All 12 commenters are member agencies of DU-COMM, and they all support DU-COMM's waiver request.

5. In seeking its waiver, DU-COMM asserts that it "now averages 260,000 emergency 9-1-1 calls each year, which are then dispatched to appropriate public safety agencies via a wireless communications network that currently relies upon seven UHF channels (primarily for police), and five VHF channels (primarily for fire and EMS)."¹⁵ DU-COMM's member agencies have a total of 1,585 mobile and portable voice radio units operating on these 12 channels, which is roughly two and a half times greater than the Commission's channel loading guidelines (*i.e.*, 50 units/channel).¹⁶ The

⁷ The specific channels that DU-COMM seeks to acquire are 470.2625/473.2625 MHz, 470.2875/473.2875 MHz, 470.0375/473.1375 MHz, and 470.1875/473.1625 MHz.

⁸ Request at 2.

⁹ 47 C.F.R. § 22.621.

¹⁰ Request at 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Wireless Telecommunications Bureau Seeks Comment On Request for Waiver By DuPage Public Safety Communications To Obtain a License For Eight Unassigned Frequencies Allocated For Non-Public Safety Use, *Public Notice*, DA 01-264 (WTB PSPWD rel. Feb 2, 2001).

¹⁵ Request at 2 (footnote omitted).

¹⁶ *Id.*, See 47 C.F.R. § 90.313.

commenters state that DuPage County has experienced tremendous growth and that as a result, DU-COMM's existing radio facilities are increasingly congested.¹⁷

III. DISCUSSION

6. DU-COMM 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.¹⁸ 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 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.¹⁹

7. When considering requests under Section 337, we must first make a preliminary determination that the applicant is an "entity seeking to provide public safety services."²⁰ Section 337(f) defines the term "public safety services" as "services --

(A) the sole or principal 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.²¹

¹⁷ See, e.g., Village of Bartlett, Illinois, Department of Police Comments, Carol Stream (Illinois) Fire Protection District Comments, City of Elmhurst, Illinois, Glenside (Illinois) Fire Protection District Comments, and Village of Hanover Park Comments.

¹⁸ See 47 U.S.C. § 337.

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

²⁰ *Id.*

²¹ 47 U.S.C. § 337(f).

In its request, DU-COMM describes itself as “an intergovernmental agency formed in 1975 to provide police, fire, and emergency medical communications to member agencies in DuPage County, Illinois, which includes the rapidly expanding western suburbs of Chicago.”²² DU-COMM also includes a list of its member agencies, all of which are local police and fire departments whose primary mission is to provide public safety services.²³ Based on the information before us, we conclude that DU-COMM is an entity that seeks to provide public safety services and that meets the eligibility criteria established by Section 337.

8. We next must determine if DU-COMM’s proposal meets the statutory criteria for grant of a waiver under Section 337(c)(1) of the Act. DU-COMM contends that it has met the five criteria set forth in Section 337(c)(1), and that the statute compels the grant of its application. The statutory criteria indicate that Section 337(c) requires that a public safety applicant, such as DU-COMM, request specific unassigned spectrum. The plain language of subsection (c) provides that grant of a waiver request under this statute is required only upon a finding that all five conditions are met regarding the spectrum specifically sought by an applicant.²⁴ As discussed in greater detail *infra*, we find that all five criteria required by Section 337(c)(1) are met with respect to DU-COMM’S waiver request for the eight unassigned paging control frequencies in the 470-512 MHz band. For these reasons, we grant DU-COMM’s waiver request under Section 337(c) of the Act.

9. DU-COMM requests an authorization for eight channels, 470.2625/470.2625 MHz, 470.2875/473.2875 MHz, 470.0375/473.1375 MHz, and 470.1875/473.1625 MHz. DU-COMM “intends to pair these channels, which will then be used to provide critical public safety communications services as part of DU-COMM’s existing 470 MHz band radio system.”²⁵ A review of our licensing records indicates that none of the eight channels are presently assigned.

10. *No other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.* DU-COMM has submitted a letter from a frequency coordinator stating “that there are no VHF, UHF, or 800 MHz channels” that could be used on DU-COMM’s system to provide coverage throughout DuPage County.²⁶ While the letter mentions possible frequencies in the 476-482 MHz range (TV Channel 15), DU-COMM has demonstrated that those frequencies are not available because WTMW(TV), which operates on Channel 15 at Madison, Wisconsin, is less than 120 miles from several of DU-COMM’s proposed sites.²⁷ The Commission has accepted similar evidence in other cases as sufficient evidence of the unavailability of other public safety spectrum.²⁸ With respect to

²² Request at 2.

²³ Request at Appendix A.

²⁴ See 47 U.S.C. § 337(c)(1). See also South 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, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000).

²⁵ Request at 2.

²⁶ See Request at Exhibit C, Letter dated November 22, 2000 from William J. Carter, Association of Public-Safety Communications Officials (APCO) Local Frequency Advisor William J. Carter to John Lozar, DuPage Public Safety Communications.

²⁷ See Request at Exhibit B, “Availability of Frequency for DuPage Public Safety Communications” prepared by Vogel Consulting Group, pp. 4, 6. The minimum distance between a land mobile radio station in the 470-512 MHz band and a co-channel television station is 120 miles. See 47 C.F.R. §§ 90.307(a), 90.309 Table A.

²⁸ See, e.g., *South Bay*, 13 FCC Rcd at 23796.

the public safety spectrum allocated in the 700 MHz band, we conclude that this spectrum is not “immediately available” to DU-COMM because the 700 MHz General Use channels may be assigned only after the Commission approves a regional plan developed by the appropriate regional planning committee, and no such plan has been submitted or approved for the region to which DU-COMM belongs.²⁹ Based on our analysis of the information DU-COMM has submitted, we conclude that DU-COMM has shown that no other public safety spectrum is immediately available in the area to be covered by DU-COMM.

11. *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.* DU-COMM has provided an extensive report from its consultant, which indicates that the requested Part 22 paging control frequencies are currently unassigned, and would not cause harmful interference to other licensed users of the band.³⁰ At the same time, we note that Part 22 licensees using these frequencies are entitled to interference protection as set forth in the rules governing their radio service.³¹ Thus, we will condition any license granted pursuant to this waiver upon DU-COMM’s compliance with the relevant interference criteria set forth in Part 22 of the Commission’s rules.³² As a condition to granting the waiver, we will require DU-COMM to submit, within 30 days of the release of this Order, an engineering study setting forth the technical specifications required of Part 22 licensees and demonstrating its compliance with the Part 22 interference criteria.³³

12. *The use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made.* DU-COMM has shown that it is already licensed for seven channel pairs in the 470-512 MHz band, and that the band is also heavily used by other public safety entities in the Chicago metropolitan area.³⁴ We find, then, that DU-COMM’s use of the requested frequencies would be consistent with the Commission’s prior public safety allocations in this geographic area.³⁵

13. *The unassigned frequencies were allocated for their present use not less than two years prior to the date on which the application will be granted.* The allocation of the subject frequencies for paging control became effective on January 1, 1995.³⁶ Thus, the frequencies at issue were allocated for their present use more than two years ago.

14. *Granting the application is consistent with the public interest.* In its waiver request, and through the comments received from numerous public safety agencies throughout the affected region, we find that DU-COMM has made a compelling case that a grant of its waiver request is in the public

²⁹ See 47 C.F.R. § 90.531(b)(6). In concluding that the 700 MHz band public safety spectrum is not “immediately available,” we do not rely on DU-COMM’s arguments concerning lack of 700 MHz band equipment or DU-COMM’s need to purchase new equipment if it moved to the 700 MHz band. See Request at 7-8.

³⁰ Request at Exhibit B.

³¹ See 47 U.S.C. § 337(c)(1) (in granting a waiver request, Commission shall not waive “its regulations regarding harmful interference”).

³² See 47 C.F.R. §§ 22.625, 22.627.

³³ See FCC Form 601, Exhibit J.

³⁴ Request at 9.

³⁵ See, e.g., County of San Mateo, California, *Memorandum Opinion and Order*, 14 FCC Rcd 19002 (1999).

³⁶ Amendment of Part 22 of the Commission’s Rules, 9 FCC Rcd 6513, 59 Fed.Reg. 59502 (1994).

interest. As described by DU-COMM, and supported by commenters, DuPage County, because of its rapid growth, is in immediate need of additional frequencies for public safety use. Granting DU-COMM's request will allow it to use otherwise vacant spectrum, alleviate serious spectrum congestion in DuPage County, and promote interoperability for public safety agencies.³⁷ As one commenter noted, "[t]he additional frequencies would relieve the congestion and permit the free flow of information vital to the public health and safety of the residents of the area."³⁸ Therefore, we conclude that DU-COMM has made the requisite showing that granting a waiver is in the public interest.

IV. CONCLUSION

15. We find that DU-COMM's Waiver Request satisfies the criteria under Section 337(c) of the Act to obtain a grant of its application for Part 22 PLMS paging control frequencies. We therefore grant DU-COMM's Waiver Request.

V. ORDERING CLAUSES

16. **IT IS ORDERED** that pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), the waiver request filed on December 20, 2000, by DuPage Public Safety Communications to use frequencies 506/509.0625 MHz, 506/509.0750 MHz, 506/509.0875 MHz, 506/509.1000 MHz, and 506/509.1125 MHz for public safety services **IS GRANTED**, conditioned upon DuPage timely providing the exhibit required below.

17. **IT IS FURTHER ORDERED** that within 30 days of the release of this order, DuPage shall provide an exhibit setting forth the technical specifications requested in FCC Form 601, Exhibit J, and demonstrating that it complies with the interference criteria contained in Sections 22.625 and 22.627 of the Commission's Rules.

18. 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

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

³⁷ Request at 9.

³⁸ *Ex parte* Comments of the York Center Fire Protection District, filed March 6, 2001.