

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

In the Matter of)
)
ILLINOIS COOPERATIVE ASSOCIATION,)
INC. d/b/a Clear Talk)
)
Request for Waiver of 47 C.F.R. §§ 90.179(a),)
90.603(b))

ORDER

Adopted: December 26, 2001

Released: December 28, 2001

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

I. INTRODUCTION

1. In this *Order*, we consider a request for waiver of Sections 90.179(a) and/or 90.603(b) of the Commission’s Rules¹ submitted by Illinois Cooperative Association, Inc. d/b/a Clear Talk (IL Coop) on February 21, 2001.² Specifically, IL Coop seeks authorization to share its 800 MHz Industrial/Land Transportation (I/LT) frequencies with non-I/LT Business eligibles. For the reasons stated below, we deny IL Coop’s waiver request.

II. BACKGROUND

2. The 800 MHz band is divided into five service categories – Business, General Category, I/LT, Public Safety and Specialized Mobile Radio (SMR) – with each category having specific eligibility criteria.³ As a general matter, entities are licensed on frequencies in the category or categories for which they meet the eligibility criteria. Section 90.603 of the Commission’s Rules establishes the framework by which an entity may provide communications services to other parties on a not-for-profit, cost-shared basis.⁴ Section 90.179 of the Commission’s Rules provides that licensees of radio stations may share the use of their facilities under certain conditions.⁵ Generally, shared use of radio stations is limited to persons who would be separately eligible for authorization on the subject frequencies.⁶

¹ 47 C.F.R. § 90.603(b).

² Illinois Cooperative Association Waiver Request (filed Feb. 21, 2000) (Waiver Request II).

³ See 47 C.F.R. §§ 90.615, 90.617.

⁴ 47 C.F.R. § 90.603(b).

⁵ 47 C.F.R. § 90.179.

⁶ *Id.*

3. IL Coop was formed by four electric cooperatives serving nineteen counties in rural Illinois.⁷ It is currently licensed to use one hundred twenty-one 800 MHz band channels at thirty-eight sites.⁸ The four electric cooperatives use this combined communications system for dispatching crews, meter reading and communicating with one another during emergency situations.⁹ Integration of their separate, outmoded systems into a single, state-of-the-art network resulted in excess capacity.¹⁰

4. On January 21, 2000, IL Coop filed its initial waiver request seeking authorization to allow non-I/LT Business eligibles and Public Safety eligibles to use its I/LT frequencies. On January 18, 2001, we granted in part and denied in part IL Coop's initial waiver request.¹¹ We granted its request to share I/LT frequencies with Public Safety eligibles because, subsequent to IL Coop's filing of its initial waiver request, the Commission amended its eligibility rules to allow such sharing.¹² However, because we found that the circumstances described by IL Coop – *i.e.*, that Business eligibles in rural Illinois shared a need with Public Safety entities for low-cost, high quality dispatch service – did not warrant a waiver of the Commission's Rules, we denied its request to share I/LT frequencies with other non-I/LT eligibles.¹³ Specifically, we concluded that IL Coop had not demonstrated any need for Business eligibles to have interoperability with the system's other users, and had not substantiated its claim that these entities lacked other communications alternatives.¹⁴

5. While IL Coop's initial waiver request was pending, the Commission released the *BBA R&O*, which amended our rules to permit 800 MHz Business and I/LT licensees to modify their licenses to authorize use of the channels for commercial operation, or to assign the channels to a commercial operator, under certain circumstances and conditions.¹⁵ Subsequently, IL Coop filed the present waiver request.

⁷ Waiver Request II at Attachment.

⁸ *Id.* Of these channels, 45 are Business, 27 are I/LT and the remaining channels are SMR.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ Illinois Cooperative Association Inc. d/b/a/ Clear Talk, *Order*, 16 FCC Rcd 1002 (WTB PSPWD 2001) (*Initial Order*).

¹² *Id.* at 1604 ¶ 6 (citing 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services, *Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 92-235, 15 FCC Rcd 16673, 16684 ¶ 21 (2000) (determining that Industrial/Business licensees would be allowed to share frequencies with public safety and Federal Government entities)).

¹³ *See Initial Order*, 16 FCC Rcd at 1004-05 ¶ 7.

¹⁴ *Id.*

¹⁵ *See* 47 C.F.R. § 90.621(e)(2); Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709, 22760-64 ¶¶ 109-19 (2000) (*BBA R&O*).

III. DISCUSSION

6. Section 1.925 of the Commission's Rules permits a rule waiver if the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest.¹⁶ Alternatively, an applicant's request for waiver may also be granted if, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to public interest, or the applicant has no reasonable alternative.¹⁷ As noted above, we concluded in the *Initial Order* that IL Coop failed to show that a waiver of Section 90.603 to permit it to share its I/LT frequencies with non-I/LT Business eligibles was warranted. IL Coop argues that its current request meets the criteria of Section 1.925(b)(3)(i) – namely, that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and grant of the request would be in the public interest.¹⁸ However, IL Coop does not offer any new facts or information regarding its system or service that differs from what it presented in its initial waiver request.¹⁹

7. Rather, IL Coop rests its argument on regulatory changes that occurred after the submission of its initial waiver request. In this regard, it argues that equity demands that it, as an 800 MHz private land mobile radio (PLMR) licensee, be permitted to share its PLMR frequencies with any PLMR eligible, since the Commission's rules now permit modification of licenses to allow use of 800 MHz PLMR channels in commercial systems.²⁰ IL Coop concludes that it should be afforded the same flexibility to pursue operation strategies that would result in the most efficient use of its authorized channels.²¹

8. IL Coop suggests that the rule change in the *BBA R&O* permitting 800 MHz PLMR licensees to submit modification applications to allow use of their PLMR spectrum in commercial operations in effect lifts the freeze²² on inter-category sharing of Business and I/LT frequencies.²³ IL Coop asserts that the Commission has abandoned a distinction between Business, I/LT and SMR eligibles.²⁴ It

¹⁶ 47 C.F.R. § 1.925(a)(3)(i).

¹⁷ 47 C.F.R. § 1.925(a)(3)(ii).

¹⁸ Waiver Request II at 4-7.

¹⁹ Because IL Coop does not offer any new facts or information regarding its system or service that differs from what it presented in its initial waiver request, we note that similar requests to permit non-I/LT eligibles to share I/LT frequencies by other licensees have been denied. *See* Waiver Request at 22 (citing East River Electric Power Cooperative, *Order*, 13 FCC Rcd 5871 (WTB 1997); Viking Dispatch Services, Inc., *Order*, 11 FCC Rcd 6685 (WTB 1996), *aff'd*, *Memorandum Opinion and Order*, 14 FCC Rcd 18814 (1999)); *see also Initial Order*, 16 FCC Rcd at 1004-05 ¶ 7.

²⁰ *Id.* at 5-7.

²¹ *Id.* at 7.

²² *See* Waiver II at 6.

²³ *See* Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350 (WTB 1995).

²⁴ *Id.* at 4.

argues that this action justifies a waiver of our rules limiting sharing of such frequencies to eligible entities.²⁵ We disagree. The *BBA R&O* did not expressly lift or modify the inter-category sharing freeze. In fact, the Commission specifically declined to adopt a proposal to eliminate the distinction between CMRS spectrum and non-public safety PLMR spectrum.²⁶ In the *BBA R&O*, the Commission decided only to allow 800 MHz PLMR licensees to modify their authorizations to permit the use of their assigned PLMR frequencies for commercial operations, subject to certain provisions and restrictions.²⁷ In particular, a PLMR licensee, like IL Coop, may modify its license to permit commercial use of its PLMR channels. Such a modification would allow IL Coop to achieve its desired result, *i.e.*, the ability to allow Business eligibles to use its I/LT channels.²⁸ The Commission's decision was based on a balancing of various factors, including the need shown in the record of that proceeding for additional commercial spectrum in the 800 MHz band, and the reasons underlying the inter-category sharing freeze.²⁹ Further, certain conditions were placed on the commercial use of 800 MHz PLMR spectrum in order to maintain this balance.³⁰ The *BBA R&O* did not address either assignment of Business or I/LT frequencies for other uses by way of inter-category sharing, or the not-for-profit sharing of such frequencies.

9. Furthermore, we are concerned that the practical effect of granting IL Coop's waiver request would be to establish a policy of general applicability regarding 800 MHz PLMR spectrum and 800 MHz spectrum eligibility. It is axiomatic that the Commission "must not eviscerate a rule by a waiver."³¹ "The Commission has been especially reluctant to grant a waiver when to do so would 'invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function.'"³² Instead, we believe that a rulemaking proceeding or similar proceeding seeking relief of general applicability from the freeze³³ would be a "better, fairer, and more effective method" of implementing a new policy than the granting of individual waivers.³⁴

²⁵ *Id.* at 6.

²⁶ *BBA R&O*, 15 FCC Rcd at 22762 ¶ 113.

²⁷ *Id.* at 22760-61 ¶ 110.

²⁸ To the extent that IL Coop believes that it does not come within the scope of the rule permitting commercial use of 800 MHz PLMR spectrum, *see* Waiver Request II at 7, it may seek a waiver of the rule, if it believes that its request would satisfy the standard set forth in 47 C.F.R. § 1.925(b)(3).

²⁹ *See id.* at 22759-62 ¶¶ 108-13.

³⁰ *See id.* at 22762-64 ¶¶ 114-18.

³¹ Nextel Communications, Inc., *Order*, 14 FCC Rcd 11678, 11691 ¶ 31 (WTB 1999) (*Nextel Order*) (citing Riverphone, Inc., *Memorandum Opinion and Order*, 3 FCC Rcd 4690, 4692 ¶ 12) (1998)).

³² *Nextel Order*, 14 FCC Rcd at 11691-92 ¶ 31 (quoting Verilink Corporation, *Memorandum Opinion and Order*, 10 FCC Rcd 8914, 8916 ¶ 6 (1995)).

³³ In this regard, we note that we do not believe that IL Coop's one-sentence footnote indicating that the Commission could resolve the present request by lifting the freeze to constitute a sufficient request that we consider lifting the inter-category freeze. *See* Waiver Request II at 7 n.14.

³⁴ *See* Stockholders of Renaissance Communications Corp. and Tribune Co., *Memorandum Opinion and Order*, 12 FCC Rcd 11866, 11887-88 ¶ 50 (1997); *see also* *Nextel Order*, 14 FCC Rcd at 11691-92 ¶ 31.

IV. CONCLUSION

10. Based on our review of the record before us, we conclude that IL Coop has not demonstrated that grant of a waiver of the Commission's Part 90 rules regarding eligibility for use of I/LT spectrum is warranted under the circumstances presented. IL Coop failed to demonstrate that the underlying purpose of the rule would not be served or would be frustrated.

V. ORDERING CLAUSES

11. 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 Sections 1.925, 90.179 and 90.603(b) of the Commission's Rules, 47 C.F.R. §§ 1.925, 90.179, 90.603(b), the Waiver Request filed by Illinois Cooperative Association on February 21, 2000 IS DENIED.

12. 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
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