

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

In the Matter of Application of)
COMMONWEALTH OF VIRGINIA) File No. 0001924695
To Operate a Wide Area Public Safety Radio)
System Utilizing Part 22 Frequencies)

ORDER

Adopted: June 2, 2006

Released: June 5, 2006

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

I. INTRODUCTION

1. We have before us an application and waiver request¹ filed by the Commonwealth of Virginia (the Commonwealth) for authority to operate a wide area, trunked public safety radio system on eighteen unassigned Part 22 VHF frequencies.² Specifically, the Commonwealth seeks a waiver of the Commission's Rules, pursuant to Section 337(c) of the Communications Act, as amended (the Act),³ or, alternatively, Section 1.925 of the Commission's Rules,⁴ to permit it to use frequencies currently designated in Virginia for one-way or two-way mobile paging operation pursuant to Part 22 of the Commission's rules. The Commonwealth requests use of these frequencies to support the communications requirements of its public safety agencies at five locations in western Virginia.⁵ For the reasons stated below, we grant the Commonwealth's waiver request.

II. BACKGROUND

2. The Commonwealth currently operates a land mobile network with equipment that is in most cases over twenty years old and that cannot accommodate evolving and expanding public safety and homeland security requirements.⁶ The analog system is comprised of forty-seven transmitter sites operating statewide on only four channels.⁷ As a result, according to the Commonwealth, the system is

1 See FCC File No. 0001924695 (filed November 4, 2004 as amended on September 15, 2005 and March 31, 2006) and attached Request for Waiver, filed by Motorola, Inc. and the Commonwealth of Virginia (Request).

2 The channels will be paired in accordance with 47 C.F.R. § 22.561 as follows: 152.03/158.49, 152.06/158.52, 152.21/158.67, 152.54/157.80, 152.66/157.92, 152.69/157.95, 152.72/157.98, 152.78/158.04, and 152.81/158.07 MHz.

3 47 U.S.C. § 337(c).

4 47 C.F.R. § 1.925.

5 Request at 1, 8.

6 Id. at 2.

7 Id. at 3.

severely congested and unable to meet emergency communications requirements.⁸ Further, the age of the current system results in a lack of manufacturer support for the Commonwealth's equipment and a shortage of replacement components for repairs.⁹ The Commonwealth states that the technology of the existing network precludes the addition of mobile data and digital, trunked narrowband communications.¹⁰ Finally, the operational and technical characteristics of radio networks used by Virginia State Police and other Commonwealth agencies make interoperability with the current four-channel VHF network often problematic and sometimes impossible.¹¹

3. The Virginia General Assembly has approved and funded a plan to implement a land mobile radio system based on digital, trunked narrowband technology to serve up to 7,500 users within twenty state agencies and facilitate interoperability with federal and local agencies.¹² The existing physical sites, including sites used by the Commonwealth's backbone microwave system, will be used for the new statewide, shared land mobile radio system.¹³ The Commonwealth has determined that it will need additional channels to implement the proposed upgrade, *i.e.*, between three and eight channel pairs per transmitter site.¹⁴ The instant application addresses the need for spectrum in the western portions of Virginia. Due to the lack of sufficient public safety spectrum, the Commonwealth has identified several unused Part 22 channels in Basic Economic Area (BEA) No. 45 and BEA No. 47 as available and suitable for the proposed system. Specifically, the Commonwealth requests frequencies at one site in BEA No. 45 and at four sites in BEA No. 47.¹⁵ Pursuant to Part 22 of the Commission's rules, the requested frequencies are available to eligible applicants in the Public Mobile Services.¹⁶ Specifically, the Commission designated the frequencies requested herein for one-way or two-way mobile paging.¹⁷

⁸ *Id.* at 3. The Commonwealth states that one of many examples of this congestion occurred during the October 2002 sniper shooting on Interstate 95 in Ashland, Virginia. *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 4.

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* at 6.

¹⁵ The application seeks between three and eight channel pairs at each site.

¹⁶ *See* 47 C.F.R. § 22.7.

¹⁷ *See* 47 C.F.R. § 22.561. In addition, the Commonwealth requests a waiver of Section 20.9(a)(6) of the Commission's Rules, which specifies that Part 22 Paging and Radiotelephone operations shall be treated as common carrier services and regulated as commercial mobile radio services. 47 C.F.R. § 20.9(a)(6); *see* Request at 21. The Commonwealth also requested waivers of Sections 22.7 (limiting eligibility to operate on Part 22 frequencies to common carriers) and 22.577(a)(3) (limiting the total output power (TPO) of dispatch transmitters to ten watts) and (b) (requiring notification to the Commission upon the installation of each dispatch transmitter), 47 C.F.R. §§ 20.7, 22.577(a)(3), (b), but those restrictions subsequently were deleted from Part 22. *See* Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, *Report and Order and Notice of Proposed Rulemaking*, WT Docket No. 03-103, 20 FCC Rcd 4403 (2005). Finally, the Commonwealth originally requested a waiver of the Part 22 power limit for mobile units in Section 22.565(f) of the Commission's Rules, 47 C.F.R. § 22.565(f), but, as discussed in para. 8, *infra*, the Commonwealth now proposes to operate in conformance with the rule. *See* FCC File No. 0001924695, and attached Supplement to Application and Response to Second "Notice of Return," filed on March 31, 2006 (Second Supplement).

4. The Wireless Telecommunications Bureau's Public Safety and Critical Infrastructure Division (Division) placed the Commonwealth's waiver request on public notice on July 22, 2005.¹⁸ We received no comments or reply comments. On August 2, 2005, the Division returned the Commonwealth's application because Section 22.567 of the Commission's Rules¹⁹ requires a demonstration of interference protection to co-channel Station KNKJ255, Flattop, West Virginia on frequency 152.66 MHz.²⁰ On September 15, 2005, the Commonwealth amended its application with an engineering analysis to demonstrate interference protection to Station KNKJ255.²¹ On February 2, 2006, the Division returned the Commonwealth's application again with respect to its request for a waiver of the Part 22 power limit for mobile units in Section 22.565(f) of the Commission's Rules. Specifically, the Division requested (a) demonstration of interference protection from the Commonwealth's mobile and dispatch transmitter operations to Station KNKJ255's mobile operations on frequency 157.92 MHz; and (b) confirmation of equipment certification for its proposed mobile equipment operating at 110 watts.²² On March 31, 2006, the Commonwealth amended its application to reduce the mobile unit power levels to fifty watts, eliminate a dispatch transmitter at Location 1, and provide a copy of its mobile unit equipment certification.²³

III. DISCUSSION

5. Section 337(c) of the Act provides that the Commission must waive any rules necessary to authorize entities providing public safety services to operate on "unassigned frequencies," if the Commission makes five specific findings:

- public safety spectrum is not immediately available;
- the proposed use will not cause harmful interference to protected spectrum users;
- public safety use of the unassigned frequencies is consistent with public safety spectrum allocations in the geographic area;
- the unassigned frequencies have been allocated for non-public safety use for more than two years; and
- grant of the application is consistent with the public interest.²⁴

¹⁸ See Wireless Telecommunications Bureau Seeks Comment Request for Waiver by the Commonwealth of Virginia to Operate a Wide Area Public Safety Radio System Utilizing Part 22 VHF Frequencies, *Public Notice*, 20 FCC Rcd 11439 (WTB PSCID 2005).

¹⁹ 47 C.F.R. § 22.567.

²⁰ See FCC File No. 0001924695, Notice of Return dated August 3, 2005, Reference No. 3652030. The authorization for Station KNKJ255 was terminated on March 9, 2005 after the licensee failed to respond to a spectrum audit, but the licensee filed a timely petition for reconsideration, and the license was reinstated on May 5, 2005.

²¹ See FCC File No. 0001924695, and attached Supplement to Application and Response to "Notice of Return," filed on Sept. 15, 2005 (First Supplement).

²² See FCC File No. 0001924695, Notice of Return dated February 2, 2006, Reference No. 3913926.

²³ See Second Supplement.

²⁴ See 47 U.S.C. § 337(c).

6. When considering requests under Section 337, we first must determine whether the applicant is “an entity seeking to provide public safety services.”²⁵ Based on the record before us, we conclude that the Commonwealth is an entity providing public safety services.²⁶ We therefore consider whether the Commonwealth meets the other statutory requirements supporting a waiver under Section 337(c) of the Act.

7. *No other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.* After evaluating the VHF, UHF, 700 MHz, and 800 MHz bands for public safety frequencies, the Commonwealth determined that only the 150 MHz band has the quantity of channels needed statewide.²⁷ Moreover, because the Virginia State Police already operates a statewide VHF system, the use of the VHF band would reduce the cost of a new system.²⁸ In areas of the state where the available Part 90 channels are insufficient, the Commonwealth has sought VHF channels available under Parts 22 and 80.²⁹ Based on our analysis of the information the Commonwealth has submitted, we conclude that the Commonwealth has shown that other public safety spectrum is not immediately available in the area to be covered by the Commonwealth.³⁰

8. *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.* The Commonwealth notes that the requested channels are currently unassigned.³¹ There were no winning bidders for the licenses encompassing these channels in the Commission’s Auction No. 40 beginning on October 31, 2001, or Auction No. 48, beginning on May 13, 2003.³² Further, the channels are not assigned to any entity within the geographic areas of BEAs 45 and 47.³³ In response to the first return

²⁵ 47 U.S.C. § 337(c). 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 State or local government entities; or
(ii) by non-governmental 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.”

47 U.S.C. § 337(f).

²⁶ Request at 9 n.13.

²⁷ *Id.* at 6.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 7. See, e.g., FCC File Nos. 0001580901, 0001577343, 0001583565, and 0001583569. Part 80 of the Commission’s rules governs radio communications in the maritime services. See 47 C.F.R. § 80.1. *et seq.*

³⁰ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (the statutory requirement is satisfied if there is “no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services”).

³¹ Request at 8.

³² See Lower and Upper Paging Bands Auction Closes, Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 21821 (WTB 2001); Lower and Upper Paging Bands Auction Closes, Winning Bidders Announced, *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

³³ Request at 11.

notice, the Commonwealth filed an amendment³⁴ to demonstrate that its interfering contour, as defined by Section 22.567 of the Commission's Rules,³⁵ will not overlap the service contour of Station KNKJ255's nearest transmitter. In response to the second return notice, the Commonwealth amended its application by reducing the power of all proposed mobile units to comply with Section 22.565(f) of the Commission's Rules³⁶ and eliminating a dispatch transmitter on frequency 157.92 MHz at Location 1, closest to Station KNKJ255, thus resolving concerns relating to Station KNKJ255's mobile operations.³⁷ Based on the record before us, we believe that the operational and technical parameters of the Commonwealth's proposed system meet the Commission's requirements for interference protection to incumbent licensees. We therefore find that the Commonwealth's proposed system is technically feasible and will not cause harmful interference to protected spectrum users.

9. *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.* The Commonwealth already utilizes VHF public safety frequencies, as do other state public safety entities within Virginia.³⁸ In addition, we note that the Commonwealth has acquired VHF maritime spectrum for use in its statewide system.³⁹ We conclude that the proposed use of the requested frequencies will be consistent with the Commission's public safety spectrum designation in the subject geographic area and will further interoperability.⁴⁰

10. *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 Commission allocated these frequencies for public mobile services over twenty years ago.⁴¹ Thus, these frequencies have been allocated for their present use for more than two years.

11. *Granting the application is consistent with the public interest.* We believe that the Commonwealth's filings demonstrate that access to additional spectrum is needed in order to promote effective public safety communications. As described by the Commonwealth, granting the application and waiver request would be in the public interest because it would enable the Commonwealth to cure deficiencies in the existing public safety radio systems and provide interoperability among various public safety agencies in the Commonwealth.⁴² We believe that it would further the public interest by affording the Commonwealth's public safety agencies the necessary spectrum to allow them to safely protect the lives and property in their care. Indeed, Section 1 of the Act defines one of the Commission's overarching purposes as "promoting safety of life and property through the use of ... radio communication."⁴³

³⁴ See First Supplement.

³⁵ 47 C.F.R. § 22.567.

³⁶ 47 C.F.R. §22.565(f).

³⁷ See Second Supplement at 1.

³⁸ See Request at 6, 12.

³⁹ See Commonwealth of Virginia, *Order*, 19 FCC Rcd 15454 (WTB PSCID 2004).

⁴⁰ See City of Pomona, California, *Order*, 15 FCC Rcd 15597, 15601 ¶ 10 (WTB 2000).

⁴¹ See Domestic Public Fixed Radio Services and Public Mobile Radio Services, *Memorandum Opinion and Order*, FCC Docket No. 79-595, 46 Rad. Reg. 2d 652 (1979).

⁴² Request at 12.

⁴³ 47 U.S.C. § 151.

We therefore find it in the public interest to permit the Commonwealth to use this otherwise vacant spectrum to support critical communications that will promote public safety and homeland security.

IV. CONCLUSION

12. We conclude on the record before us that the Commonwealth's waiver request satisfies the criteria set forth under Section 337(c) of the Act to obtain a grant of its application to operate a public safety communications system on paging frequencies in the VHF band.⁴⁴ We therefore grant the Commonwealth's waiver request.

V. ORDERING CLAUSES

13. Accordingly, **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 request for waiver associated with the captioned application filed by the Commonwealth of Virginia on November 4, 2004, as amended, to use eighteen VHF frequencies for public safety services as requested in the captioned application **IS GRANTED**.

14. **IT IS FURTHER 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), FCC File No. 0001924695 **SHALL BE PROCESSED** consistent with this *Order* and the Commission's Rules.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0131, 0331.

FEDERAL COMMUNICATIONS COMMISSION

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Wireless Telecommunications Bureau

⁴⁴ In view of the conclusion that a waiver is warranted under Section 337(c) of the Act, we need not reach the question of whether the Commonwealth's waiver request should be granted under Section 1.925(b)(3) of the Commission's Rules.