

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

In the Matter of
STATE OF COLORADO and
HOLY CROSS ELECTRIC ASSOCIATION,
INC.
Request for Waiver of Section 90.179(a) of the
Commission's Rules

ORDER

Adopted: June 24, 2010

Released: June 24, 2010

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The State of Colorado (Colorado) and Holy Cross Electric Association, Inc., (Holy Cross) (collectively, Petitioners) seek a waiver of Section 90.179(a) of the Commission's rules to permit Colorado to share use of the 800 MHz frequencies on its statewide radio network with Holy Cross. Based on the record, we grant the request.

II. BACKGROUND

2. Colorado operates a statewide radio network known as the Colorado Statewide Public Safety Digital Trunked Radio System (DTRS), which provides communications for state and local public safety agencies. Petitioners state that DTRS encompasses "176 radio sites operating on three Zone Controllers with an additional 10 funded sites under construction across the state," supports "over 900 State, local, federal and tribal agencies consisting of approximately 30,000 subscriber radios using over 1000 channels," and "handled over 64 million calls in 2008." Petitioners note that DTRS "supports wireless voice and data communications on a single integrated system based upon the Project 25 suite of open standards" and "meets the highest level of interoperability for Technology on the Safecom Interoperability Continuum." Petitioners state that "the main benefits of DTRS are improved

1 47 C.F.R. § 90.179(a).

2 Request for Waiver of Section 90.179 of the FCC's Rules by Holy Cross Energy in the State of Colorado (May 15, 2008) (Waiver Request). Petitioners explain that DTRS uses frequencies in both the 700 MHz and 800 MHz bands, although no 700 MHz channels are used within Holy Cross's operating area. Id. at 2. Petitioners state that Holy Cross seeks access only to the 800 MHz frequencies and that Holy Cross "will be denied operation on sites and channels in the 700 MHz. [sic] Public Safety band." Id.

3 Id. at 1. The DTRS comprises facilities licensed to the State of Colorado under WNXN848 and other call signs, as well as facilities licensed to state agencies and local governments within the state of Colorado. See id. at Attachment A, "Colorado Statewide Digital Trunked Radio System Licenses."

4 Additional Information to Request for Waiver of Section 90.179 of the FCC's Rules by Holy Cross Energy in the State of Colorado at 1 (March 11, 2009) (Supplemental Request).

5 Id.

communications for all participating agencies with significant improvement in interoperability between agencies.”⁶

3. Holy Cross is the principal provider “of electric and gas utility service in Eagle, Pitkin and Garfield counties in the State of Colorado.”⁷ Petitioners state that “Holy Cross operates a trunked 800 MHz land mobile radio system along Interstate I-70 from Vail to Parachute; Hwy 82 Glenwood Springs to Aspen; rural areas of Garfield, Eagle, and Pitkin counties; and very small portions of Gunnison and Mesa counties.”⁸ Its system “consists of six sites, two dispatch consoles, 115 portable radios, and 90 mobile radios” and also supports “the Roaring Fork Transportation Authority (RFTA) regional bus operations of approximately 110 radios and one dispatch console.”⁹

4. Colorado seeks to integrate Holy Cross into the DTRS to “enhance interoperability” between Holy Cross and public safety users of the network.¹⁰ During “natural disasters, acts of terrorism, and technological or chemical catastrophes,” Petitioners explain, “electric power maintenance and restoration efforts must be coordinated with public safety and homeland security functions.”¹¹ Moreover, Petitioners explain, Holy Cross must be able to communicate with public safety during emergencies “to [e]nsure the safety of the public and the individuals involved.”¹²

5. Section 90.179(a), which governs sharing of Part 90 frequencies, provides that “persons may share a radio station only on frequencies for which they would be eligible for a separate authorization.”¹³ Petitioners request a waiver of Section 90.179(a) because Holy Cross, as an electric utility provider that operates on Industrial/Business Pool frequencies, is not eligible for a separate authorization to use the DTRS network’s 800 MHz public safety spectrum.¹⁴

6. In support of their waiver request, Petitioners state that “DTRS will have sufficient capacity to accommodate the land mobile radio requirements of [Holy Cross] without limiting its public safety operations.”¹⁵ Petitioners also argue that Holy Cross “could contribute as many as 20 channels in the 800 MHz band” which would be “available for use in the DTRS network” and “would greatly enhance the system’s capacity and coverage.”¹⁶ Petitioners also note that DTRS operates sixteen sites in Holy Cross’s area of operation.¹⁷ Moreover, Petitioners state that the integration of Holy Cross’s 800 MHz frequencies into DTRS could provide public safety users with radio coverage they presently lack in the “remote town” of Marble, Colorado.¹⁸

⁶ *Id.*

⁷ Waiver Request at 1.

⁸ Supplemental Request at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Waiver Request at 1-2.

¹² Supplemental Request at 2.

¹³ 47 C.F.R. § 90.179(a).

¹⁴ Waiver Request at 2. *See also* 47 C.F.R. § 90.20.

¹⁵ Supplemental Request at 2.

¹⁶ Waiver Request at 2.

¹⁷ Supplemental Request at 2.

¹⁸ *Id.*

7. Petitioners contend that permitting Holy Cross to share the DTRS network's 800 MHz frequencies would serve the public interest by promoting interoperability and enhancing spectrum efficiency.¹⁹ Petitioners add that "[Holy Cross] intends to enter into a Participation Use Agreement with DTRS users to establish the terms and conditions of [Holy Cross's] use of DTRS,"²⁰ which "will be on a non-profit basis" and subject to "public safety agency priorities in the unlikely event that" DTRS capacity becomes inadequate to accommodate all users.²¹ Petitioners believe that this proposal is consistent with and supported by Commission precedent granting waivers of Section 90.179(a) to permit sharing arrangements between public safety and utilities to enhance the operations of both entities.²² Finally, Petitioners provide a letter from the relevant 800 MHz Regional Planning Committee (Region 7) stating that Petitioners' proposed "[s]haring of frequencies for mutual benefit and interoperable communications serves the interest and the plan of the public safety community and is in compliance with" the Region 7 800 MHz Plan.²³

III. DISCUSSION

8. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;²⁴ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁵ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²⁶

9. We agree that Holy Cross is not eligible for a separate authorization to use DTRS under Section 90.20(a)²⁷ and thus cannot share DTRS frequencies absent a waiver of Section 90.179(a). This rule, among other things, is intended to ensure that adequate spectrum is available for each service category (*i.e.*, Public Safety and Industrial/Business), and to avoid interference to communications from incompatible services.²⁸ In this instance, we find that the Petitioners have demonstrated that the underlying purpose of the rule would not be served or would be frustrated by application to the present case. We accept Petitioners' position that DTRS has adequate spectrum to accommodate sharing of 800 MHz frequencies with Holy Cross. In this regard, we note that Holy Cross will increase the capacity of

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Waiver Request at 3-4 (citing Douglas Electric Cooperative, *Order*, 21 FCC Rcd 11298 (PSHSB 2006) (*Douglas*); State of South Carolina and SCANA Communications, Inc., *Order*, 13 FCC Rcd 8787 (WTB PSPWD 1997) (*SCANA*)).

²³ *Id.* at Attachment D, Letter from Dennis Kalvels, Chairman, Region 7 800 MHz Planning Committee, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated May 14, 2008. Region 7 is Colorado.

²⁴ 47 C.F.R. § 1.925(b)(3)(i).

²⁵ 47 C.F.R. § 1.925(b)(3)(ii).

²⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

²⁷ As a utility, Holy Cross is not an entity "eligible to hold authorizations in the Public Safety Pool." See 47 C.F.R. § 90.20(a).

²⁸ *Douglas*, 21 FCC Rcd at 11298 ¶ 7.

the DTRS network by contributing “as many as 20” of its own channels.²⁹ Moreover, we find it important that “communications protocols have been worked out under which” public safety would have priority access in the event that network capacity proves inadequate.³⁰ We also note that Region 7 supports the instant proposal, which further evidences that there would be sufficient spectrum to support the requested sharing arrangement. Also, we find it unlikely that the proposed sharing agreement would result in interference.

10. We also find that a grant of this waiver would serve the public interest by improving Holy Cross’s ability to communicate and interoperate with public safety, particularly in times of emergency.³¹ In sum, we find that Petitioners have satisfied the waiver criteria with respect to the 800 MHz frequencies used in the DTRS network. Because our decision is based on the specific application before us, however, we will require separate waivers for other utilities seeking to use 800 MHz public safety spectrum in the DTRS network.

IV. ORDERING CLAUSES

11. IT IS ORDERED that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.925 and 90.179(a) of the Commission’s rules, 47 C.F.R. §§ 1.925, 90.179(a), the Waiver Request by the State of Colorado and Holy Cross Electric Association, Inc. IS GRANTED.

12. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy Division
Public Safety and Homeland Security Bureau

²⁹ Waiver Request at 2.

³⁰ *Id.* at 3.

³¹ *See, e.g., SCANA*, 13 FCC Rcd at 8792 ¶ 9. *See also* Commonwealth of Pennsylvania and GPU Energy, *Order*, 14 FCC Rcd 14029 (WTB PSPWD 1999).