

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

In the Matter of)
)
Implementing Public Safety Broadband Provisions) PS Docket No. 12-94
of the Middle Class Tax Relief and Job Creation)
Act of 2012)
)
Service Rules for the 698-746, 747-762 and 777-) WT Docket No. 06-150
792 MHz Bands)
)
Implementing a Nationwide, Broadband,) PS Docket No. 06-229
Interoperable Public Safety Network in the 700)
MHz Band)

ORDER

Adopted: September 20, 2012

Released: September 20, 2012

By the Chief, Public Safety and Homeland Security Bureau.

I. INTRODUCTION

1. The Middle Class Tax Relief and Job Creation Act of 2012 (Public Safety Spectrum Act),¹ enacted February 22, 2012, creates the First Responder Network Authority (FirstNet) and directs it to establish a nationwide public safety broadband network spanning the 700 MHz D Block (758-763/788-793 MHz) and the public safety broadband spectrum (763-768/793-798 MHz).² On July 31, 2012, the Federal Communications Commission (Commission) released an order (*STA Order*) that provides for limited deployment in the latter spectrum under Special Temporary Authority (STA) as FirstNet gains its footing.³ The *STA Order* identifies a number of public interest considerations likely to be relevant in evaluating applications for STA filed by public safety entities seeking to operate in the spectrum during this transitional period. The Public Safety and Homeland Security Bureau (Bureau) is directed to grant any such complete requests “that present a compelling basis for relief as articulated in [the *STA Order*.]”⁴ The Bureau has previously considered one such request from the State of Texas and, after finding such a basis for a relief demonstrated, granted the STA as requested.⁵

2. The Bureau has before it an STA request from the Bay Area Regional Interoperable Communications System Authority (BayRICS) filed in the Bureau’s Universal Licensing System (ULS)

¹ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012).

² See *id.* §§ 6204, 6206.

³ See Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, PS Docket No. 12-94, *Order*, FCC 12-85 (rel. July 31, 2012) (*STA Order*).

⁴ *Id.* at 13-14 ¶ 28.

⁵ See Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, (PSHSB rel. Aug. 31, 2012) (*Texas STA Order*) granting STA for a deployment in Harris County, Texas.

on August 21, 2012.⁶ BayRICS substantially amended its application on September 7, 2012, to supplement information in its application with respect to two factors: deployment prior to the Public Safety Spectrum Act and ability to deliver timely service.⁷ As the *STA Order* contemplates, BayRICS requests an STA for a period of 180 days to operate a public safety broadband network within “the geographical scope and jurisdictional limits of BayRICS local government member agencies.”⁸ As explained in more detail below, we find that the BayRICS request is deficient in key areas with respect to the public interest considerations identified by the Commission, such that we cannot find that extraordinary circumstances have been demonstrated meriting the grant of an STA. Accordingly, we deny the request.

II. DISCUSSION

3. The *STA Order* provides that applications for STA to operate public safety broadband networks in the public safety broadband spectrum shall be held to “a rigorous standard ‘involving circumstances which are of such extraordinary nature that delay in the institution of temporary operation would seriously prejudice the public interest.’”⁹ To further clarify this standard, the Commission identified a number of considerations likely to be supportive of a finding that grant of an STA would serve the public interest in a particular case. These include whether there has been substantial deployment prior to the enactment of the Public Safety Spectrum Act, the ability to deliver timely service (including ready availability of funding), demonstration of a specific public safety need, compliance with the “minimum technical recommendations” of the Technical Advisory Board for First Responder Interoperability, and coordination with the state in which the applicant seeks to operate.¹⁰ In light of the Commission’s obligation under the Public Safety Spectrum Act to “facilitate the transition” to FirstNet (whose Board of Directors has now been appointed¹¹) of the spectrum currently sought by BayRICS, the Commission carefully tailored its STA approach “to permit only limited incremental investments that are needed to allow the realization of the substantial amount of effort and deployment to date, that will deliver near-term public safety benefits that cannot be substantially achieved by existing services, and that do not jeopardize the interoperability goals for FirstNet that form the centerpiece of the Public Safety Spectrum Act regime.”¹²

4. The Commission thus cautioned that applications that fail to demonstrate “several stages of important deployment milestones” would not be viewed favorably.¹³ In particular, those that have not ordered, received and deployed equipment, completed site preparation or completed similar activities

⁶ See Application for Special Temporary Authority of the Bay Area Regional Interoperable Communications System Authority, Universal Licensing System File No.0005358161 (filed Aug. 21, 2012) (*STA Justification*).

⁷ *Id.* (*Amended STA Justification*).

⁸ *STA Justification* at 1.

⁹ See *STA Order* at 10 ¶ 23 (citing Section 1.931(b)(2)(v) of the Commission’s rules, 47 C.F.R. § 1.931(b)(2)(v)).

¹⁰ *Id.* at 12-13 ¶ 25.

¹¹ See Acting U.S. Commerce Secretary Rebecca Blank Announces Board of Directors for the First Responder Network Authority, Press Release (Aug. 20, 2012), available at <http://www.commerce.gov/news/press-releases/2012/08/20/acting-us-commerce-secretary-rebecca-blank-announces-board-directors-> (last visited Aug. 31, 2012).

¹² *STA Order* at 10 ¶ 22.

¹³ *Id.* at 10-11 ¶ 23.

would not meet the Commission’s standards.¹⁴ “Early-stage” preparatory efforts such as developing a site plan or selecting a vendor would also be considered insufficient.¹⁵

5. BayRICS’ application and amended application seek to address each of the *STA Order*’s articulated considerations. We focus, however, on those considerations that we find to be insufficient such that a grant of an STA is not justified.

6. *Significant Deployment Prior to Enactment of the Act.* In the *STA Order*, the Commission found that a consideration in assessing whether to grant an STA would include a finding of a “pattern of sustained investment, both monetary and in terms of planning and construction, including whether applicants have significantly deployed their network prior to the Public Safety Spectrum Act’s enactment on February 22, 2012.”¹⁶ The Commission directed the Bureau to assess in particular “funding obtained, contracts entered into for network construction and deployment, equipment purchased and delivered, sites identified and towers placed, engineering analyses performed, infrastructure actually deployed in the field, and coordination carried out at the statewide and regional level.”¹⁷

7. With respect to these considerations, BayRICS fails to support a showing of extraordinary circumstances.¹⁸ In particular, BayRICS acknowledges that no LTE equipment for this project has been purchased, delivered or installed, and no infrastructure has been actually deployed in the field.¹⁹ BayRICS also acknowledges that an agreement has yet to be finalized with an LTE equipment vendor.²⁰ Instead, BayRICS asserts that, but for the partial suspension by NTIA of grant funds allocated to the purchase and installation of LTE equipment, such equipment purchase and installation would have occurred in April 2012.²¹ The fact remains, however, that none of the deployment that BayRICS identified as necessary to undertake was accomplished before or even after enactment of the Public Safety Spectrum Act, and no contract was finalized. Accordingly, we cannot find that this criterion has been met. We also note that there were considerable delays in establishing the Joint Powers Agreement (JPA), a necessary prerequisite to entering into the “BOOM” agreement with Motorola to “build, own, operate and manage” the network, which separately contributed to BayRICS’ failure, to date, to have ordered or deployed equipment and infrastructure.²²

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 12 ¶ 25.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.931(b).

¹⁹ *STA Justification* at 9, 11. *Amended STA Justification* at 3-4 (noting that “Equipment purchased and delivered” and “Infrastructure actually deployed in the field” were at “0%”).

²⁰ *Amended STA Justification* at 3. BayRICS states that a vendor agreement was “90%” completed as of enactment of the Act. However, an agreement was not, and has not been, signed. *Id.*

²¹ *Id.* at 3-4.

²² The JPA established the BayRICS Authority, which consists of Bay Area jurisdictions intending to participate in the BayWEB project, including the Counties of Alameda, Contra Costa, San Francisco, San Mateo, Santa Clara, and Sonoma; the Cities of San Francisco, and Oakland; the East Bay Hub; and the State of California. The BayRICS Authority was established only after a dispute among the original waiver jurisdictions regarding the legal authority of certain parties to act on behalf of those seeking to deploy in the San Francisco Bay Area. *See, e.g.*, City and County of San Francisco, the City of Oakland and the City of San Jose, Request for Waiver of the (continued....)

8. BayRICS further asserts that Motorola has spent almost \$5 million in BTOP grant money and matching funds on the project, with BayRICS member organizations investing \$1 million as well as in-kind resources and project support efforts including substantial amounts of staff time.²³ According to Motorola's estimates, however, these monetary expenditures to date are less than 10% of projected overall costs.²⁴ This is thus not a case in which only "limited incremental investments" remain to "deliver near-term public safety benefits" as contemplated in the *STA Order*.²⁵

9. BayRICS asserts that its project does not "bear ready comparison" to the Texas deployment, which reflected substantial deployment prior to the enactment of the Public Safety Spectrum Act,²⁶ because the BayRICS project is much larger in area, sites and complexity, as well as "risk of stranded investment."²⁷ We agree with BayRICS that we must compare each STA application to the criteria the Commission put forth, and determine how each measures against those considerations on a case-by-case basis. Those criteria do not include mere size or scope of potential risk. Rather, as we pointed out in the Texas order, the Commission emphasized the importance of evidence of substantial deployment, and here we find the lack of deployment and the large scale of investment still required to be made from BTOP funds versus the comparatively limited investment made from those funds overall to date to be significant.

10. In sum, we find based on the existing record that there has not been substantial network deployment by BayRICS on the scale warranting a grant of an STA, either prior to or after the Act. The lack of any such substantial deployment indicates that BayRICS has failed to satisfy its burden of demonstrating that this STA would be necessary in facilitating the transition to FirstNet, and indeed such STA might hinder FirstNet's ability to exercise its statutory obligations in the Bay Area.²⁸

11. *Ability to Deliver Timely Service.* Among the considerations to assess whether an STA applicant could deliver timely service, the Commission directs the Bureau to consider "whether funding is readily available to support network deployment and operation of the scope contemplated in that

(Continued from previous page) _____
Commission's Rules to Deploy a 700 MHz Interoperable Public Safety Broadband Network, PS Docket No. 06-229 (filed Dec. 23, 2011) (detailing the history of the efforts and early deployment, the disputed authority, and the formation of the JPA/BayRICS Authority more than a year after the award of the BTOP grant to Motorola).

²³ *Amended STA Justification* at 5.

²⁴ See Motorola Quarterly Progress Report for Broadband Infrastructure Projects at 7, available at http://www2.ntia.doc.gov/files/grantees/nt10bix5570089_motorola_solutions_inc_ppr2012_q2.pdf (last visited Sept. 17, 2012) (assessing overall project costs at approximately \$72.5 million, with federal grants accounting for approximately \$50.6 million). Whatever progress BayRICS may have made with respect to identifying or securing rights to potential sites and towers even after February 22, 2012, still leaves it with the overwhelming majority of costs yet to incur and far short of significant deployment.

²⁵ *STA Order* at 10 ¶ 22. BayRICS itself characterizes its project status as "getting to the point of near deployment" rather than "near completion" as contemplated by the *STA Order*. See *Amended STA Justification* at 5.; *STA Order* at 10 ¶ 22.

²⁶ At the time of the Act's enactment, Harris County not only had the relevant equipment contract in place, but also had six eNodeBs fully operational with an additional three towers with RF antennas and backhaul equipment installed. See Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, *Texas STA Order* at 3 ¶ 6.); State of Texas, Universal Licensing System, File No. 0005346762 (Aug. 9, 2012), Amended Application (Aug 28, 2012), Amended STA Narrative at 1.

²⁷ *Amended STA Justification* at 5.

²⁸ *STA Order* at 11 ¶ 23.

application (including whether any federal agency that administers the funds upon which an STA applicant intends to rely supports the application), and whether deployment is reasonably likely to commence for the benefit of public safety users well in advance of FirstNet's offering.”²⁹ Even if BayRICS had demonstrated that it had satisfied the Commission's criterion of significant deployment, we believe that in these circumstances, where the applicant would require such an extensive period of time to initiate service, this second factor would independently require dismissal of its application.

12. In the first instance, irrespective of the availability of funding, the timeframe BayRICS provides for deployment reasonably indicates that it cannot provide “near term” services to public safety.³⁰ BayRICS estimates that it would still require at least fifteen months to become operational after it receives the grant money from NTIA, a period far outside the term of the authorization it seeks.³¹ In fact, it would take at least two renewals of any STA authorization³² before BayRICS would be prepared to deploy, and even that assumes that NTIA funds would be made available immediately, for which there is no guarantee. By way of contrast, at the time of Texas's STA application in July of 2012, some operations had already commenced in Harris County pursuant to Texas's waiver, and Texas estimated that operations pursuant to an STA for 14 sites would commence by September 15, 2012 (a matter of weeks).³³ In our view, the length of time cited by BayRICS does not illustrate that service would be provided quickly.³⁴ Nor do we find it “reasonably likely” that BayRICS would be able to commence deployment for the benefit of public safety users well in advance of FirstNet's offering service, even if FirstNET's deployment may take some time.³⁵ In fact, we find that this extended time horizon for deployment is further evidence that the other efforts that BayRICS cites in support of its application were, in fact, merely preparatory. Accordingly, we find that BayRICS has failed to demonstrate that it is capable of delivering timely service.

13. Moreover, BayRICS' ability to deliver any service is also contingent on NTIA's lifting the partial suspension of the BTOP funds awarded to Motorola.³⁶ How soon and whether BayRICS can deploy at all depends on obtaining necessary funding, which it currently does not have available. On this point, BayRICS suggests that the Commission's consideration of funding has placed it in a “potential ‘catch-22’”[sic] situation, whereby the Commission will not be satisfied unless NTIA releases funds and NTIA “will not release funds without additional evidence of spectrum rights,” which it argues the STA would provide.³⁷ That is not so; If BayRICS had provided evidence of NTIA's current support of its application and intent to release funds upon grant of an STA, we would have been satisfied that funding was timely available from this source for purposes of this particular criterion.

14. Absent support from NTIA or submission of any explanation of NTIA's position since

²⁹ *Id.* at 12 ¶ 25.

³⁰ *Id.* at 11-12 ¶¶ 23, 25.

³¹ *STA Justification* at 7.

³² *Id.*

³³ State of Texas, Universal Licensing System, File No. 0005346762 (Aug. 9, 2012), Amended Application (Aug 28, 2012), Amended STA Narrative at 2.

³⁴ *STA Order* at 11 ¶ 25.

³⁵ *Id.* at 12 ¶ 25.

³⁶ *STA Justification* at 7.

³⁷ *Amended STA Justification* at 4.

the Commission’s July 31 Order pursuant to which this application was submitted, BayRICS urges the Commission to accept an earlier memorandum dated July 20, 2012, from NTIA “as evidence to NTIA’s intent to release the suspended funds.”³⁸ The memorandum states in part that a portion of the BTOP award to Motorola upon which BayRICS is relying will “remain on suspension until [Motorola] is granted long term access to the 700 MHz public safety broadband spectrum.”³⁹ The NTIA memorandum was written before the Commission articulated the factors outlined in the July 31 *STA Order*, before the Commission set forth its expectation with respect to renewal of STAs in light of FirstNet’s preferences,⁴⁰ and before BayRICS applied for the instant STA. As such, it does not in our view provide evidence that NTIA “supports the application,” or that the money will be available and the project can proceed in a timely fashion, as NTIA could not when the memorandum was written have supported an application that had not yet been submitted and that is governed by Commission standards that had yet to be established. As of July 20, therefore, NTIA had no opportunity to make relevant comments about the use of this spectrum as set forth in subsequent Commission orders.⁴¹

15. The goal of the Commission in the *STA Order* was to accommodate the mandate of the Public Safety Spectrum Act to “facilitate the transition” of this spectrum for the use of FirstNet, while preserving the potential benefits of prompt early deployments that could be of use to FirstNet as a test bed without jeopardizing its role in designing, constructing, and managing a nationwide public safety broadband network. The Commission also noted that it would accord “considerable weight” in the future to the views of FirstNet in its assessment of these relative costs and benefits.⁴² While support by FirstNet with respect to deployment by BayRICS could therefore be a significant factor, FirstNet, whose Board has only recently been appointed, has not provided any such views to date. In these circumstances, and in light of the foregoing deficiencies, we find that BayRICS’ request fails to present “a compelling basis for relief” consistent with the terms of the *STA Order*. Accordingly, we deny BayRICS’ request for relief and direct the Licensing Branch of the Bureau’s Policy and Licensing Division to dismiss the pending ULS application associated with this request without prejudice.

III. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 301, 303, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303, and 332, and Section 6201(c) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012), THIS ORDER in PS Docket No. 12-94, WT Docket No. 06-150, and PS Docket No. 06-229 is ADOPTED.

17. IT IS FURTHER ORDERED that the Licensing Branch of the Policy and Licensing Division SHALL DISMISS the pending application for Special Temporary Authority filed by BayRICS, Universal Licensing System File Number 0005358161, without prejudice.

³⁸ *Id.*

³⁹ Amended *STA Justification* at Attachment 1.

⁴⁰ *STA Order* at 14 ¶ 29.

⁴¹ *Id.* at 12 ¶ 25.

⁴² *Id.* at 14 ¶ 29.

18. 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, 0.392, and paragraph 28 of the *STA Order*, FCC 12-85 (rel. July 31, 2012).

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Public Safety and Homeland Security Bureau