

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

In the Matter of)	
)	
STATE OF MINNESOTA)	File Nos. 0004349779 and 0004342189
)	
Request for Waiver of Section 90.617(b))	
of the Commission's Rules to modify Trunked,)	
Public Safety Stations WPKG265 and WPER943)	

ORDER

Adopted: November 27, 2012

Released: November 27, 2012

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

I. INTRODUCTION

1. In this *Order*, we address the above-captioned applications and waiver requests filed by the State of Minnesota (Minnesota) relating to its proposal to add one 800 MHz Business/Industrial/Land Transportation (B/ILT) Pool channel to its licenses for trunked public safety stations WPKG265 and WPER943.¹ Minnesota seeks a waiver of the eligibility requirements in Section 90.617(b) of the Commission's rules² to license channel pair 812.8625 MHz/857.8625 MHz at three existing base station sites with associated mobile units.³ By requesting a waiver of the eligibility requirements, Minnesota seeks to add the requested channel pair to Stations WPKG265 and WPER943 before the date when the channel pair will become available for licensing through the Commission's Vacated Channel Search Engine (*i.e.* the date on which the channel would normally become available for public safety use).⁴ For the reasons stated below, we deny Minnesota's request for a waiver and dismiss its application. We advise Minnesota, however, that it may pursue an alternative channel to suit its needs in the Expansion Band.

II. BACKGROUND

2. Minnesota states that stations WPKG265 and WPER943 "are part of the three-site 'simulcast' subsystem that covers the core of the Twin Cities metropolitan area."⁵ Minnesota claims that,

¹ See FCC File Nos. 0004349779 (filed Aug. 10, 2010 amended December 9, 2010) *re* WPKG265 and 0004342189 (filed Aug. 3, 2010 amended Nov. 22, 2010) *re* WPER943.

² 47 C.F.R. § 90.617(b).

³ See Letter from David H. Pagel, Senior Engineer, Minnesota Department of Transportation, to Federal Communications Commission (dated Dec. 8, 2010) *re* WPKG265; Letter from David H. Pagel, Senior Engineer, Minnesota Department of Transportation, to Federal Communications Commission (dated Nov. 5, 2010) *re* WPER943 (collectively Waiver Request).

⁴ *Id.* at 1.

⁵ *Id.* ("Under the Minnesota Allied Radio Matrix for Emergency Response (ARMER), the State of Minnesota is responsible to license, construct and maintain this subsystem.")

in 2008, the subsystem experienced an increase in “busy signals” causing Minnesota to realize that it “needed to add at least one more channel to increase reliability.”⁶

3. In building out the ARMER system to the statewide level, Minnesota asserts that “Public Safety Interleaved channels have been fully utilized and are not now available for geographic reuse in this core metropolitan area.”⁷ Accordingly, Minnesota argues that it “must now turn to any available vacated spectrum to bolster reliability for the most heavily utilized part of its growing public safety radio system.”⁸

4. As part of 800 MHz band reconfiguration, Sprint is required to vacate channels in stages in the interleaved segment of the 800 MHz band as a function of rebanding progresses in each NPSAC Region.⁹ Once vacated, former Sprint channels become available for licensing to eligible public safety entities.¹⁰ The Public Safety and Homeland Security Bureau (Bureau) announces by public notice the date on which eligible entities may apply for Sprint-vacated channels.¹¹ The Bureau maintains a Vacated Channel Search Engine (VCSE) which eligible entities may use to search for available vacated channels to license in their geographic area.¹²

5. The channel pair Minnesota seeks to license (812.8625 MHz/857.8625 MHz) is currently licensed to Sprint on an Economic Area (EA) basis¹³ in BEA107.¹⁴ This EA covers not only the

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2.

⁹ Improving Public Safety Communications in the 800 MHz Band, Relinquishment By Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, *Order*, 23 FCC Rcd 15966 (2008).

¹⁰ See 47 C.F.R. § 90.617(g). Vacated channels are exclusively available for licensing to public safety eligible entities for three years after release and to public safety and Critical Infrastructure Industry eligible entities from three to five years after release. After five years, vacated channels return to their original pool category. *Id.*

¹¹ See Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Channels Relinquished by Sprint Nextel Corporation in the 809-809.5/854-854.5 MHz Band, *Public Notice*, 23 FCC Rcd 18343 (PSHSB 2008) (*Vacated Spectrum PN Round 1*); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Certain Channels Relinquished by Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, *Public Notice*, 24 FCC Rcd 13236 (PSHSB 2009) (*Vacated Spectrum PN Round 2*); Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Certain Channels Relinquished by Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, *Public Notice*, 25 FCC Rcd 16038 (PSHSB 2010) (*Vacated Spectrum PN Round 3*).

¹² See Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Establish New 800 MHz Vacated Channel Search Engine for Identifying Vacated Channels in the 800 MHz Interleaved Band That Will Be Available for Licensing to Public Safety and Critical Infrastructure Industry Entities, *Public Notice*, 23 FCC Rcd 16481 (PSHSB, WTB 2008).

¹³ Prior to band reconfiguration, the channel pair 812.8625 MHz/857.8625 MHz was included in the Business/Industrial/Land Transportation Pool outside the Canada border region but in the SMR Pool inside the Canada border region. Since the EA encompasses areas both inside and outside the border region, the channel pair was licensed to Sprint throughout the entire EA.

¹⁴ The BEA Economic Areas are delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce February 1995 and extended by the Federal Communications Commission, 62 FR 9636 (March 3, 1997).

Minneapolis region but also counties in Wisconsin and Iowa.¹⁵ Three of the Wisconsin counties included in this EA are affected by the ongoing freeze on applications along the Canada border.¹⁶ The application freeze is intended to preserve spectrum for licensees implementing band reconfiguration in the Canada border region and maintain stability in the spectral environment.¹⁷ Thus, the channel pair Minnesota seeks to license will become available for licensing to public safety throughout the entire EA only after band reconfiguration along the Canada border progresses to the point where the application freeze can be lifted in all counties covered by the EA. At that time, the Bureau will issue a public notice of the channels' availability and list, in the VCSE, the date on which public safety eligible entities may apply.

6. Minnesota, however, seeks to add the Sprint-occupied channel to its AMER system before the channel becomes available for licensing to public safety entities through the VCSE. To do so, Minnesota requests a waiver of the B/ILT pool channel eligibility requirements in Section 90.617(b) of the Commission's rules.¹⁸ In support of its waiver request, Minnesota states that the frequency pair 812.8625 MHz/857.8625 MHz "likely represents the last 800 MHz channel available to assign" to its subsystem when taking into consideration other metro county needs for 800 MHz spectrum.¹⁹ Minnesota states that most of the interleaved channels that could have been allocated to its system "have been used in band reconfiguration to relocate SMR licensees in the Twin Cities or nearby areas, leaving only a small number of available channels as possibilities when they are finally vacated by Sprint."²⁰ Minnesota claims that frequency searches demonstrate that the requested frequency pair is one of only three or four frequencies known to be available and useable in the Twin Cities metro area. Minnesota believes that "these channels will be released when the ULS vacated spectrum database is updated to reflect new changes in Sprint's progress on band reconfiguration in Region 22 (Minnesota), Region 45 (Wisconsin), and Region 11 (Iowa)."²¹

7. Minnesota adds that it is in the public interest to grant its waiver to ensure ongoing, reliable, public safety communications in the Twin Cities metro area.²² Minnesota suggests that the Commission review data submitted by Sprint regarding its progress in completing band reconfiguration, and the Commission's order directing Sprint to vacate interleaved channels in stages as a function of the clearing of channels in the "old" NPSPAC band (821-824/866-869 MHz).²³ Minnesota notes that Sprint's November 2010 report states "that the level of NPSPAC clearance is at 100% for Minnesota,"²⁴

¹⁵ A list of counties by BEA is available online at <http://transition.fcc.gov/oet/info/maps/areas/>.

¹⁶ The Counties impacted by the freeze on applications are Rusk, Sawyer and Washburn.

¹⁷ See Public Safety and Homeland Security Bureau Reinstates 800 MHz Application Freeze for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Canada Border, WT Docket 02-55, *Public Notice*, 25 FCC Rcd 11049, 11049-50 (PSHSB 2010). See also Public Safety and Homeland Security Bureau Extends 800 MHz Application Freeze for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Canada Border, *Public Notice*, 27 FCC Rcd 4037 (PSHSB 2012).

¹⁸ Waiver Request at 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

and that the Twin Cities geographic area is not affected by Canadian border region 800 MHz band reconfiguration.²⁵

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; 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.²⁶

9. As noted above, the Sprint-occupied channel Minnesota seeks to add to licenses WPKG265 and WPER943 will become available for licensing to public safety entities in Minneapolis only after the application freeze is lifted in all counties included in BEA107. At that time, the Bureau will issue a public notice announcing that public safety entities may apply to license the vacated channels on the date listed in the VCSE. The public notice ensures that all public safety entities have an equal opportunity to apply for vacated spectrum. By granting Minnesota's waiver, however, we would frustrate the purpose of the public notice if we allowed Minnesota to license the requested channel before any other public safety entity had the opportunity to apply. Furthermore, we find the lack of available Public Safety Pool channels in the Minneapolis metropolitan region is neither a unique nor unusual factual circumstance that might otherwise warrant a waiver of the rules. All public safety licensees in the region are likely affected by the shortage of available channels.

10. We note that, in 2007, the Bureau waived the Commission's rules to allow Minnesota early access to a Sprint-vacated channel so that Minnesota could expand operation of its mobile data system.²⁷ The Bureau concluded that early access to the vacated channel was justified in that instance because Minnesota was already licensed on that channel at three separate sites,²⁸ thus rendering the Sprint-vacated channel of limited utility to other public safety entities because any new licensee would need to protect Minnesota's existing operations on that channel.²⁹ The 2007 waiver is thus clearly distinguishable from the instant case in which Minnesota seeks to license a Sprint-vacated channel as a new channel for its AMER system.

11. In sum, based on the information before us, we find that Minnesota's request to waive Section 90.617(b) of the Commission's rules does not satisfy the waiver criteria set out in Section 1.925(b)(3)(i-ii) of the Commission's rules. We therefore deny the waiver request and dismiss the associated application.

12. Nonetheless, we direct Minnesota's attention to a *Public Notice* we are releasing concurrently with this *Order* announcing the completion of band reconfiguration in certain NPSPAC regions.³⁰ In that *Public Notice*, we announce the availability for licensing of channels in the Expansion

²⁵ *Id.*

²⁶ 47 C.F.R. §§ 1.925(b)(3)(i-ii).

²⁷ State of Minnesota, *Order*, 22 FCC Rcd 17485 (PSHSB 2007).

²⁸ *Id.* at 17487 ¶ 6.

²⁹ *Id.*

³⁰ See Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce the Completion of 800 MHz Band Reconfiguration in Certain NPSPAC Regions, *Public Notice*, WT Docket 02-55, DA 12-1838 (PSHSB, WTB 2012).

Band (815-816/860-861 MHz) in NPSPAC Region 22 – Minnesota.³¹ The Expansion Band consists of a mix of B/ILT and SMR channels. The Bureau, however, has previously provided guidance to public safety licensees about using the intercategory sharing process to obtain Expansion Band channels.³² Consequently, the release of Expansion Band channels in NPSPAC Region 22 may provide Minnesota with the opportunity to obtain a channel to expand its AMER system.³³

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the Waiver Requests filed by the State of Minnesota with respect to applications FCC File Nos. 0004349779 and 0004342189 ARE DENIED.

14. IT IS FURTHER ORDERED that the Policy and Licensing Division of the Public Safety and Homeland Security Bureau SHALL DISMISS application FCC File Nos. 0004349779 and 0004342189 in accordance with this *Order* and the Commission's rules.

15. 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.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm, Deputy Chief
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³¹ *Id.* at 6-8, Attachment A.

³² *Cf.* Public Safety and Homeland Security Bureau Clarifies the Rights of 800 MHz Public Safety Licensees Electing to Remain in the 800 MHz Expansion Band, *Public Notice*, 22 FCC Rcd 6803, 6803-6804 (PSHSB 2007) (stating that public safety applicants wishing to add Expansion Band channels to their current Expansion Band facilities may do so if the application is accompanied by a request for intercategory sharing or other relief that would permit use of channels designated for other services).

³³ Please note that any applicant seeking to license a B/ILT channels through intercategory sharing must obtain a waiver of the intercategory sharing freeze. *See* Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350, *aff'd on recon.*, 11 FCC Rcd 1452 (WTB 1995). Furthermore, SMR channels are not subject to intercategory sharing, so a waiver proponent seeking access to an SMR channel through intercategory sharing must obtain a waiver of the SMR eligibility requirements. *See, e.g.*, Ohio, State of, Request for Waiver of the 800 MHz Inter-category Sharing Freeze and the Wave 4 Application Freeze, *Order*, 27 FCC Rcd 8251 (PSHSB 2012).