

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

In the Matter of
County of Boone, Iowa
Request for Waiver of Section 90.35 of the
Commission's Rules.
File No. 0003255243

ORDER ON RECONSIDERATION

Adopted: March 8, 2012

Released: March 8, 2012

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

I. INTRODUCTION

1. On February 22, 2008, the County of Boone, Iowa (Boone) filed a Petition for Reconsideration (Petition) of the dismissal of its request for waiver and underlying application. Boone sought waiver of Section 90.35 of the Commission's rules in order to permit it to operate vehicular repeaters on Industrial/Business Pool frequency 173.275 MHz. For the reasons discussed herein, we deny the petition.

II. BACKGROUND

2. Boone operates a VHF conventional public safety radio system, using VHF mobile and UHF portable radios with cross-band vehicular repeaters, licensed under call sign KVN493. Because the system is built mainly for mobile coverage, vehicular repeaters are used to ensure coverage for public safety users. However, according to Boone, the UHF portable radios can become unusable on those occasions when an officer is working away from the vehicle's repeater, thus creating a safety issue. As Boone notes, this situation leaves an officer potentially exposed to danger because the officer is unable to communicate back to the communications center.

3. In noting that several of these safety-related issues have occurred in areas that have VHF portable coverage, Boone states that using an in-band vehicular repeater in conjunction with a VHF portable would enhance portable coverage throughout the County and allow public safety personnel to

1 See Boone County Petition for Reconsideration (filed on Feb. 22, 2008) (Petition).

2 File No. 0003255243 (filed Dec. 11, 2007, as amended Feb. 8, 2008) and attached letter from Laura L. Smith, Counsel for Boone County, to Erika Olsen, Deputy Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission (Waiver Request).

3 47 C.F.R. § 90.35.

4 See supra note 2.

5 Petition at 1-2.

6 Id. at 1.

7 Id.

8 Id.

communicate directly to a tower site rather than through a cross-band vehicular repeater.<sup>9</sup> In this regard, Boone proposed to install high power, in-band repeaters in its public safety vehicles in an effort to extend the range of its low power handhelds, thus enabling its officers to communicate more effectively.<sup>10</sup> According to Boone, because the proposed in-band vehicular repeater requires “a specific spectrum spread that is not available in the existing public safety pool frequencies,”<sup>11</sup> the only adequate way to attain the needed spectral separation is to employ a frequency from the Industrial/Business (I/B) pool.<sup>12</sup> Accordingly, Boone sought waiver of Section 90.35 to permit operation on a non-public safety frequency, 173.250 MHz.<sup>13</sup> Boone submitted a frequency search of UHF and VHF channels in support of its request.<sup>14</sup>

4. On February 13, 2008, the Public Safety and Homeland Security Bureau (Bureau) denied the request for waiver and dismissed the application because Boone failed to provide sufficient justification for seeking to license an I/B pool frequency.<sup>15</sup> According to the Dismissal Letter, “the Commission has granted waivers to allow public safety users to operate on Industrial/Business channels when there are no public safety channels available in the area and the Industrial/Business channels are otherwise unassigned in the intended area of operation.”<sup>16</sup> Further, the Bureau noted that Boone’s “attached frequency coordination report indicates that there are numerous Public Safety channels available in the area.” The Bureau stated that, “[i]t is not in the public interest to place important safety of life communications on Industrial/Business channels while Public Safety frequencies are unused in the area.”<sup>17</sup> Accordingly, the Bureau denied the waiver request and dismissed the associated application, pursuant to Section 1.925(b)(3)(ii).<sup>18</sup> On February 22, 2008, Boone filed the instant Petition seeking reconsideration of the dismissal.<sup>19</sup>

### III. DISCUSSION

5. Section 1.106 sets forth the procedures, requirements and standards for a petition for reconsideration.<sup>20</sup> Section 1.106(d)(2) requires the petitioner to cite the findings of fact and or

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<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *See supra* note 2.

<sup>14</sup> *See* File No. 0003255243, two attachments titled “APCO AFC Inc. Frequency Search Results” (Frequency Search).

<sup>15</sup> *See* File No. 0003255243, Notice of Dismissal, Reference No. 4709808 (dated Feb. 13, 2008) (Dismissal Letter).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* *See* 47 C.F.R. § 1.925(b)(3)(ii). Section 1.925(b)(3) of the Commission’s rules provides that 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 requested 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. 47 C.F.R. § 1.925(b)(3).

<sup>19</sup> *See* Petition.

<sup>20</sup> 47 C.F.R. § 1.106.

conclusions of law which petitioner believes to be erroneous.<sup>21</sup> Boone's Petition does not present any new facts. Rather it restates its previous arguments and reasserts its position that the proposed activity will not inconvenience other licensees using the requested frequencies and that waiver of the rule is in the public interest. In particular, Boone failed to demonstrate that there are no more available channels from the Public Safety frequencies to satisfy its request.

6. Boone cites three cases in support of its petition.<sup>22</sup> We do not find these cases persuasive to our decision in the instant matter. In each case cited by Boone, the Commission acted to reinstate a license that had either expired or lapsed.<sup>23</sup> For example in *ADF*, the Wireless Telecommunications Bureau (WTB) affirmed a previous decision reinstating a Public Safety license, which had inadvertently expired, over the objections of a commercial entity that subsequently had been granted a license for that spectrum.<sup>24</sup> In *Henderson*, WTB reinstated a license to primary status after the licensee had unintentionally allowed the license to lapse because the station in question was the "heart" of the licensee's public safety communications system, which includes the entire Police, Fire, and Public Works Departments as well as other local government agencies, and that not granting the station primary status would render the system useless.<sup>25</sup> In *District of Columbia*, WTB permitted the reinstatement of a license, which had lapsed because the public safety licensee had failed to begin construction in a timely manner. WTB concluded that, based on public interest considerations, additional evidence of the licensee's intent and ability to begin construction, as well as an agreement between the parties in dispute that would allow both parties to build an expanded interoperable 800 MHz network.<sup>26</sup> Here, by contrast, Boone seeks access to new frequencies within a pool of frequencies from which it is otherwise excluded, absent waiver by the Commission.

7. Boone states that it is requesting frequency 173.275 MHz because its proposed in-band vehicular equipment requires a "specific spectrum spread."<sup>27</sup> However, Boone neither states what precise spectrum spread its proposed equipment requires, nor addresses the availability of equipment that could perform the same function using available public safety spectrum or why available public safety spectrum would not be feasible.<sup>28</sup> While we support the goal Boone has identified (ensuring that officers are able to communicate beyond the limitation of existing handhelds and vehicular repeaters), Boone has not demonstrated that this goal can not be met using available public safety frequencies.<sup>29</sup> In 1997, the

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<sup>21</sup> 47 C.F.R. § 1.106(d)(2).

<sup>22</sup> Petition at 3 citing *ADF Communications, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 13207 (WTB 2000) (*ADF*); *City of Henderson, Nevada, Order*, 14 FCC Rcd 16156 (WTB PSPWD 1999) (*Henderson*); *District of Columbia, Second Memorandum Opinion and Order*, 12 FCC Rcd 19419 (WTB 1997) (*District of Columbia*).

<sup>23</sup> See Petition at 3.

<sup>24</sup> See *ADF*, 15 FCC Rcd at 13213 ¶ 14. In this case, WTB determined that the public interest favored reinstatement of the Public Safety license because appreciable and irreparable harm would result if the public safety entity lost exclusive access to the frequency pair it had designated as its primary channel for public safety communications.

<sup>25</sup> See *Henderson*, 14 FCC Rcd at 16158 ¶ 7.

<sup>26</sup> See *District of Columbia*, 12 FCC Rcd at 19422 ¶ 9.

<sup>27</sup> See Petition at 3.

<sup>28</sup> Boone identifies its equipment provider as Pyramid Communications, Inc., (Pyramid). See *id.* at 2. Pyramid has a VHF in-band notch filter available for use in conjunction with the vehicular repeater that reduces the required frequency spacing between the SVR and the mobile transmitter down to two megahertz. See <http://www.pyramidcomm.com> (last visited Feb. 9, 2012).

<sup>29</sup> According to the license for Station KVN493, Boone's mobile frequencies range from 154.7700 MHz to 158.8650 MHz. There are several available frequencies spaced more than two megahertz from Boone's mobile frequencies. See Frequency Search. The frequencies are 150.7825, 150.7975, 151.0025, 151.0175, 151.0475, 151.0775,

(continued...)

Commission established separate frequency pools for public safety entities and I/B entities to increase spectrum efficiency, increase licensee flexibility to manage the spectrum more efficiently, and reduce administrative burdens on users as well as the Commission.<sup>30</sup> The Commission stated that, “a single pool, while maximizing certain efficiencies, poses too great a risk to the integrity of the communications operations of law enforcement, fire, and other public safety providers.”<sup>31</sup> From this, we can infer that allowing public safety entities to use I/B Pool frequencies poses a risk to the integrity of public safety communications operations.

8. The Petition fails to warrant reversal of the Bureau’s Dismissal Letter as it fails to meet the reversal criteria under Section 1.106. We continue to hold the view that it is not in the public interest to deplete spectrum from the I/B Pool, to the detriment of I/B entities, when the applicant has failed to show that no compatible frequencies are available in its own allotment within the Public Safety Pool. Accordingly, we conclude that the Bureau properly dismissed the application and denied the request for waiver. Based on the information before us, the Petition is denied.

9. However, we note that the Bureau dismissed the underlying waiver request without prejudice. Accordingly, Boone may refile the underlying request for the same frequency. Such a request, however, must demonstrate that the proposed use could not be met by using the available public safety spectrum.

#### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Boone County on February 22, 2008, IS DENIED.

11. 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

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

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151.1075, 151.1225, 151.1975, 151.2125, 151.2275, 151.2425, 151.2725, 151.2875, 151.3025, 151.3175, 151.3475, 151.3775, 151.3925, 151.4075, 151.4225, 151.4525, and 151.4675 MHz. *See id.*

<sup>30</sup> *See* Replacement of Part 90 By Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, *Second Report and Order*, 12 FCC Rcd 14307, 14315 ¶ 15 (1997).

<sup>31</sup> *Id.*