

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

In the Matter of)	
)	
WEST VIRGINIA DEPARTMENT OF HEALTH)	File Nos. 0005456978; 0005456980;
AND HUMAN RESOURCES/BUREAU OF)	0005457241; 0005457243; 0005457246;
PUBLIC HEALTH/STATE OFFICE OF)	0005457248; 0005457249; 0005457253;
EMERGENCY MEDICAL SERVICES)	0005457255; 0005457257; 0005457742;
)	0005457745; 0005462607; 0005526075; and
Request for Waiver and Application for UHF)	0005559553.
Industrial/Business Pool Channels for a Public)	
Safety Radio Communications System)	

ORDER

Adopted: May 14, 2013

Released: May 15, 2013

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

I. INTRODUCTION

1. The West Virginia Department of Health and Human Resources/Bureau of Public Health/State Office of Emergency Medical Services (“WVDH”) filed fifteen applications, each including an identical Waiver Request,¹ pursuant to Section 1.925 of the Commission’s rules,² of Section 90.35(a) and such other Commission rules as may be necessary, to use various Industrial/Business (I/B) Pool frequencies in the UHF band for public safety communications.³ The Waiver Request and the facts and circumstances underlying it are essentially identical to a waiver request submitted by WVDH in 2009, which was granted in the *2010 WVDH Order*.⁴ For the reasons stated below, we grant WVDH’s request.

¹ See File Nos. 0005456978 (filed Oct. 22, 2012, and amended on April 19, 2013); 0005456980 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457241 (filed Oct. 22, 2012, amended on April 19, 2013); 0005457243 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457246 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457248 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457249 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457253 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457255 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457257 (filed Oct. 22, 2012, and amended on Jan. 28, 2013, and April 24, 2013); 0005457742 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005457745 (filed Oct. 22, 2012, and amended on Jan. 24, 2013, and April 19, 2013); 0005462607 (filed Oct. 24, 2012, and amended on April 24, 2013); 0005526075 (filed Nov. 30, 2012, and amended on Jan. 24, 2013, and April 24, 2013); 0005559553 (filed Dec. 18, 2012, and amended on Jan. 24, 2013, April 15, 2013, and April 19, 2013); and associated “Request For Waiver” (Waiver Request).

² 47 C.F.R. § 1.925.

³ In total, the WVDH applications encompass 161 I/B Pool frequency assignments at multiple sites across the state of West Virginia. See File Nos. identified in note 1 *supra*.

⁴ See West Virginia Department of Health and Human Resources/State Trauma Emergency Care System, Order, 25 FCC Rcd 12566 (2010) (*2010 WVDH Order*).

II. BACKGROUND

2. WVDH currently operates a state-wide microwave network and transmitter sites that provides support for the West Virginia State Interoperable Radio Network (“WVSIRN”), a state-wide interoperable radio network comprised of a UHF digital Project 25-compliant, trunked radio system.⁵ According to WVDH, “there are approximately 15,000 radios operating on the system, from 530 different agencies, using 63 transmitter sites across the state with 22 additional sites that are in the planning and construction phase over the next 24 months.”⁶ In addition, according to WVDH, “[s]ince implementation in 2003, approximately \$120 million of Federal, State and local funding has been invested, with an additional \$20.7 million to be invested over the next 12 – 24 months.”⁷

3. WVDH indicates that the goal of WVSIRN is “to provide at least six channels at each site to ensure adequate capacity for its diverse and expanding base of public safety users.”⁸ According to WVDH, it initially sought to satisfy these capacity requirements through Public Safety Pool frequencies, but was informed by APCO Automated Frequency Coordination, Inc., that there are not enough Public Safety Pool channels available to meet WVDH’s additional capacity needs.⁹ Because there were insufficient Public Safety Pool channels, WVDH worked with PCIA - The Wireless Infrastructure Association (PCIA), an I/B Pool frequency coordinator, to identify unassigned UHF channels that could be used by the WVSIRN at the specified sites in the relevant areas of West Virginia, subject to appropriate waivers from the Commission.¹⁰

4. WVDH indicates that non-UHF frequencies would not satisfy the WVSIRN system requirements.¹¹ In this regard, WVDH asserts that “[t]he WVSIRN is an already-deployed system with an extensive, imbedded base of UHF transmitter sites and UHF mobile/portable radios . . . [that] would not work on 700/800 MHz channels or on VHF channels.”¹² WVDH also argues that the “VHF band . . . consists of unpaired channels and therefore would not meet the trunking requirements of the WVSIRN,” and that “[i]ntegrating 700/800 MHz into the WVSIRN infrastructure would also be a huge technical and financial challenge as the propagation characteristics of 700/800 MHz would be a poor fit for West Virginia’s unique geography.”¹³

5. WVDH seeks a waiver of Section 90.35(a) and such other Commission rules as may be necessary, pursuant to Section 1.925.¹⁴ In this regard, WVDH argues that a grant of its Waiver Request would “facilitate further deployment of a state-wide interoperable public safety radio network covering

⁵ See Waiver Request at 1-2.

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.*

⁹ See Waiver Request at 3. The APCO letter initially filed with each application indicated that there were insufficient Public Safety Pool channels in the VHF band (150-170 MHz); however, WVDH subsequently amended each application to attach a second letter from APCO indicating that there are insufficient Public Safety Pool channels in the UHF band (450-470 MHz). See File Nos. identified in note 1 *supra*.

¹⁰ See *id.* A letter from PCIA certifying the availability of the I/B Pool channels requested by WVDH was filed with each application. See, e.g., File No. 0005456980, Letter from Don Andrew, Director, Frequency Coordination Services, PCIA, to Federal Communications Commission WTB (dated Oct. 2, 2012) (filed on Oct. 22, 2012).

¹¹ See Waiver Request at 3.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1.

the unique terrain and remote communities of West Virginia.”¹⁵ WVDH further argues that “[a]pplication of the [I/B Pool channel eligibility restrictions] would also be inequitable, unduly burdensome, and contrary to the public interest as the frequencies in question are not currently assigned in the relevant areas of West Virginia.”¹⁶ WVDH also contends that it has “no reasonable alternative as there are not enough Public Safety Pool channels in the UHF band to meet its requirements, and other frequency bands are not compatible with the WVSIRN network or the geography of the area to be served.”¹⁷ WVDH also points to the *2010 WVDH Order*, which authorized WVDH to operate on I/B channels based on essentially the same facts and circumstances, as being equally applicable to its current waiver request.¹⁸

III. DISCUSSION

6. Section 1.925 of the Commission’s rules provides that to obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: “(i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest; or (ii) [i]n 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.”¹⁹ Applicants seeking a waiver face a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²⁰ We evaluate the Waiver Request using the first prong of Section 1.925 below, and find that WVDH has met the prong one waiver criteria. In so doing, we find that the rationale we applied in the *2010 WVDH Order* granting WVDH’s 2009 waiver request to operate on I/B channels to be applicable to the instant Waiver Request, because the underlying facts, circumstances and public interest considerations are essentially equivalent.

7. *Section 90.35.* We find that granting the Waiver Request for the specified frequencies will not frustrate the underlying purpose of Section 90.35(a). The Commission consolidated the private land mobile radio services below 800 MHz into the I/B Pool and Public Safety Pools in 1997 in order to increase spectrum efficiency, increase licensee flexibility to manage the spectrum more efficiently, and reduce administrative burdens on users as well as the Commission.²¹ The Commission maintained a separate Public Safety Pool (as opposed to a single pool covering all users) to maintain the integrity of the critical functions of the users included within this pool.²² We observe that PCIA determined that granting WVDH’s applications “will not create an inadequate supply of Industrial/Business channels for use in conventional or trunked systems in the relevant geographic areas for future Industrial/Business Pool eligible applicants” and approved of WVDH’s proposed use of these frequencies.²³ Based upon PCIA’s coordination efforts, we conclude that authorizing WVDH’s use of the I/B Pool frequencies it requested would not result in an inadequate supply of spectrum for the I/B Pool community, or otherwise result in

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 1.925(b)(3).

²⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1973), *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 Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²¹ *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).

²² *Id.* at 14316 ¶ 16.

²³ *See supra* note 10.

spectrum inefficiencies.²⁴ Further, no objection has been made by any other I/B Pool frequency coordinator against WVDH's proposed use of these frequencies.²⁵ In addition, because WVDH will be subject to the same technical requirements that apply to all other users of these I/B Pool frequencies, a grant of the Waiver Request should not result in any increased potential for interference to other users of these frequencies.

8. *Public Interest.* We find that granting the requested relief serves the public interest. WVDH's facilities are integrated into the WVSIRN, which is expanding to provide state-wide interoperable communications to any public safety agency (Federal, state, county, and municipal) that operates in West Virginia.²⁶ As WVDH observes, a grant of the Waiver Request would "facilitate further deployment of [the WVSIRN] covering the unique terrain and remote communities of West Virginia."²⁷ Utilization of the I/B Pool channels requested by WVDH will promote interagency communication, and enhance the ability of public safety agencies in West Virginia to protect the lives and property in their care, and we therefore conclude that the public interest is served by affording WVDH access to the spectrum to which the Waiver Request applies.

9. We note that this waiver is limited to the eligibility criteria set forth in Section 90.35(a).²⁸ WVDH's operations on the I/B Pool frequencies covered by this grant will be subject to all technical requirements that otherwise apply to operations on these frequencies, including any limitations that may apply under Section 90.35(c).

10. Based on the foregoing, we conclude that granting the instant applications would not frustrate the underlying purpose of Section 90.35(a) and is in the public interest. We therefore find that WVDH satisfies the first prong of the waiver standard set forth in Section 1.925. Accordingly, we grant WVDH a waiver of Section 90.35(a) pursuant to Section 1.925(b)(3) of the Commission's rules, to operate its public safety communications system on the I/B Pool frequencies identified in the above-referenced applications.

IV. ORDERING CLAUSES

11. 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(b)(3) of the Commission's rules, 47 C.F.R. § 1.925, that the Request for Waiver, as amended, associated with File Nos. 0005456978; 0005456980; 0005457241; 0005457243; 0005457246; 0005457248; 0005457249; 0005457253; 0005457255; 0005457257; 0005457742; 0005457745; 0005462607; 0005526075; and 0005559553, filed by the West Virginia Department of Health and Human Resources/Bureau of Public Health/State Office of Emergency Medical Services IS GRANTED, to the extent indicated herein.

12. IT IS FURTHER ORDERED that File Nos. 0005456978; 0005456980; 0005457241; 0005457243; 0005457246; 0005457248; 0005457249; 0005457253; 0005457255; 0005457257; 0005457742; 0005457745; 0005462607; 0005526075; and 0005559553, SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

²⁴ In addition to frequency coordination, future non-I/B Pool eligible applicants seeking waivers to deploy multiple I/B Pool channels on a wide-area basis will be expected to demonstrate that a grant of their application(s) would not result in an inadequate supply of I/B channels in the relevant geographic areas for future I/B Pool eligible applicants.

²⁵ Under 47 C.F.R. § 90.176, coordination of these frequencies requires that all I/B Pool frequency coordinators be placed on notice of any proposed use of these frequencies.

²⁶ See West Virginia State Interoperable Radio Network, Frequently Asked Questions, available at: <http://www.sirn.wv.gov/Pages/faq.aspx>.

²⁷ Waiver Request at 4.

²⁸ 47 C.F.R. § 90.35(a).

13. 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

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Public Safety and Homeland Security Bureau