

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

In the Matter of
TENNESSEE DEPARTMENT OF SAFETY
AND HOMELAND SECURITY
Request for Waiver of the Freeze on Inter-
Category Sharing
FCC File No. 0006812947

ORDER

Adopted: October 18, 2016

Released: October 18, 2016

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

I. INTRODUCTION

1. In this Order we grant a request by the Tennessee Department of Safety and Homeland Security (Tennessee) for a waiver to allow it to license an 800 MHz Business/Industrial/Land Transportation (B/ILT) channel for public safety communications.

II. BACKGROUND

2. Private Land Mobile Radio (PLMR) service frequencies in the 806-817/851-861 MHz bands (800 MHz band) are divided into the following categories or pools: (a) Specialized Mobile Radio (SMR), (b) Public Safety, (c) B/ILT and (d) General. As a general matter, applicants are licensed on frequencies in the category or categories for which they meet the eligibility criteria. However, Section 90.621(e) of the Commission's Rules permits "inter-category sharing" whereby applicants that are eligible for licensing in the 800 MHz Public Safety or B/ILT Categories can be licensed on channels outside their respective categories if no channels are available in the category for which the applicant is eligible.

3. On April 5, 1995, the Wireless Telecommunications Bureau (Bureau) suspended the acceptance of applications for inter-category sharing (inter-category sharing freeze) of all private land mobile radio service frequencies in the 806-817/851-861 MHz bands. The Bureau determined that the inter-category sharing freeze was warranted to ensure the successful resolution of the spectrum allocation

1 FCC File no. 0006812947 (filed May 22, 2015 and amended May 27, 2015) and accompanying Letter from Arnold Hooper, State of Tennessee, Department of Safety and Homeland Security (dated May 7, 2015) (Waiver Request).

2 47 C.F.R. §§ 90.615, 90.617.

3 47 C.F.R. § 90.621(e)(1). That provision also requires that no public safety systems are authorized on those channels under consideration to be shared. Further, the Commission's Rules require that the frequency coordinator certify that frequencies are not available in the applicant's own category, and that the frequencies are coordinated by an applicable out-of-category coordinator. See 47 C.F.R. § 90.621(e)(5).

4 Inter-Category Sharing of Private Land Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, Order, 10 FCC Rcd 7350 (WTB 1995).

issues raised in PR Docket No. 93-144, and that the future radio spectrum needs of the public safety community would not be compromised.⁵

4. Tennessee, a public safety eligible, seeks a waiver to license one B/ILT channel pair 810/855.8375 MHz statewide.⁶ Tennessee seeks to license this B/ILT channel pair for: “MO” (*i.e.* mobile stations), “simplex car to car communications”, “tactical field operations” in connection with temporary fixed base stations (FB2T), and a mutual aid channel for Tennessee field units and local, state and Federal agencies.⁷ Tennessee notes that the channel pair 810/855.8375 MHz is not licensed anywhere in Tennessee, but is designated as a B/ILT channel. The operations proposed by Tennessee do not qualify it as a B/ILT eligible entity.⁸ Stating that it has no other reasonable alternative, Tennessee seeks a waiver to license this B/ILT channel pair for statewide public safety use.

5. In support of its waiver request, Tennessee submits a letter from its frequency coordinator, Association of Public Safety Communications Officials-International, Inc. (APCO), stating that APCO searched the public safety and vacated spectrum database several times and was unable to find any frequencies within the public safety or vacated spectrum pools that could be assigned at all the points Tennessee requests.⁹ Tennessee also includes a letter from the United Telecom Council (UTC), a B/ILT frequency coordinator, stating that UTC “concur[s] with the use of frequency 855.8375 MHz as described in the referenced application for use on a secondary, non-interference basis.”¹⁰ In an email, UTC clarifies that the concurrence includes the frequency 810.8375 MHz.¹¹ Tennessee proposes to use frequency pair 810/855.8375 MHz for FB2T operations within nine geographical areas.¹²

6. Tennessee notes that the Boeing Company is licensed to operate channel pair 810/855.8375 MHz in Madison County, Alabama under call sign WNZH870.¹³ Tennessee acknowledges and accepts that Boeing’s operations in Madison County may cause interference to Tennessee’s field units

⁵ *Id.*, 10 FCC Rcd at 7352 paras. 5-7.

⁶ According to the Commission’s Vacated Channel Search Engine (VCSE) at http://wireless2.fcc.gov/reband800/search_basic.htm, the channel pair Tennessee seeks to license is available for licensing to public safety eligible entities at certain locations in Tennessee where it was vacated by Sprint Corporation as part of the 800 MHz band reconfiguration process but it is not available for public safety use at all locations sought by Tennessee throughout the state. *See* 47 CFR § 90.617(g)(1) and (2). Thus, Tennessee requires a waiver to license 810/855.8375 MHz in those areas where this frequency pair is available for B/ILT use.

⁷ Waiver Request at 1.

⁸ 47 CFR §§ 90.35 and 90.617.

⁹ Letter from Judy Stone, APCO to Federal Communications Commission (dated May 12, 2015) attached to FCC File no. 0006812947 (APCO Letter).

¹⁰ Letter from Kathy Garrett, UTC Spectrum Services to Federal Communications Commission (dated May 21, 2015) attached to FCC File no. 0006812947. A licensee that operates on a secondary basis must accept interference from primary operations and may not cause interference to primary operations. 47 CFR § 90.7.

¹¹ Email from Kathy Garrett, UTC Spectrum Services, to John Evanoff, FCC (dated Oct. 12, 2016).

¹² Each location is specified as a radius around a centerpoint latitude and longitude. Tennessee may not operate from the same location for more than a year without applying for and receiving a permanent authorization. 47 CFR § 90.137(b) (“When any unit or units of a base station or fixed station which are authorized for operation at temporary locations actually remain or are intended to remain at the same location for more than 1 year, an application for a separate authorization specifying the fixed location shall be made as soon as possible, but not later than 30 days after the expiration of the 1-year period.”).

¹³ Waiver Request at 1.

when they operate near Madison County.¹⁴ Nonetheless, as Tennessee has found no viable alternative for over three years, Tennessee submits that it is willing to go forward with the requested channel pair.¹⁵

7. On April 11, 2016, the Public Safety and Homeland Security Bureau (Bureau) released a public notice seeking comment on Tennessee's application and waiver request.¹⁶ In the public notice, the Bureau requested comment from any party who would be affected by Tennessee's use of this channel pair.¹⁷ The State of Maryland Department of Information Technology (Maryland) supports the waiver request citing Tennessee's need for spectrum to support flexible mobile only and temporary base stations statewide.¹⁸ Maryland adds that the Bureau should condition grant of the waiver request on Tennessee coordinating with Boeing to prevent interference.¹⁹ The Enterprise Wireless Alliance (EWA) "would not object to grant of the Waiver Request provided it is approved for operation on a secondary, non-interference basis, and the TDOSHS is fully aware that it cannot cause interference to and must accept interference from any current or future B/ILT entity on the Channel."²⁰

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;²¹ 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.²² An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²³

9. Under the circumstances presented, we are persuaded that grant of the Waiver Request to permit grant of the above-captioned application will not frustrate the underlying purpose of the inter-category sharing freeze—protecting channels for public safety use. Indeed, Tennessee, as a public safety entity, is a member of the class whose interests the freeze is intended to protect. Additionally, Tennessee requires the B/ILT channel because, as APCO confirms, there are no 800 MHz public safety channels available that would not impermissibly be short-spaced to co-channel users. Moreover, UTC, a B/ILT

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Public Safety and Homeland Security Bureau Seeks Comment on Application and Waiver Request Filed by The Tennessee Department of Safety and Homeland Security for 800 MHz Business/Industrial/Land Transportation Frequency*, Public Notice, 31 FCC Rcd. 3425 (PSHSB 2016).

¹⁷ *Id.* at 3426.

¹⁸ Letter from Norman J. Farley, CDR. USN (ret.), Maryland Department of Information Technology, to Federal Communications Commission (dated April 29, 2016) attached to FCC File no. 0006812947.

¹⁹ *Id.* at 2.

²⁰ Letter from Mark E. Crosby, EWA, to Federal Communications Commission at 3 (dated May 2, 2016) attached to FCC File no. 0006812947 (EWA Letter).

²¹ 47 CFR § 1.925(b)(3)(i).

²² 47 CFR § 1.925(b)(3)(ii).

²³ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *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).

frequency coordinator, has concurred in Tennessee's waiver request. We also find that granting Tennessee's application would further the public interest by providing Tennessee enhanced communications capabilities for tactical field operations and for the mutual aid of federal, state, and local agencies. Therefore, we grant Tennessee a waiver of the freeze on inter-category sharing and order that its application be processed.

10. However, we condition this waiver on Tennessee operating on B/ILT frequency pair 810/855.8375 MHz on a secondary, non-interference basis with respect to existing and future stations on that frequency pair. FB2T authorizations are generally (1) intended for base station facilities that are not intended to be operated permanently at a fixed location²⁴ and (2) licensed on a secondary basis.²⁵ Should Tennessee seek to operate a base station under an FB2T authorization for more than one year at the same location, then Tennessee shall file an application for a separate authorization specifying the location as soon as possible, but not later than 30 days after the expiration of the one year period.²⁶ Tennessee should be aware that an application for a separate permanent authorization at the same site would require frequency coordination²⁷ and, thus, that there is no assurance that permanent operation would be approved. Finally, within 30 days of the grant of the above-captioned application, Tennessee must notify Boeing, in writing, of Tennessee's FB2T operations on frequency pair 810/855.8375 MHz within 113 kilometers of Boeing's station, call sign WNZH870.²⁸

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the waiver request associated with ULS File No. 0006812947 filed by the Tennessee Department of Safety and Homeland Security, pursuant to Section 1.925 of the Commission's rules, 47 CFR § 1.925, IS GRANTED on a secondary non-interference basis, relative to existing and future stations operating on frequency pair 810/855.8375 MHz and the associated application, FCC File No. 0006812947, SHALL BE PROCESSED accordingly.

12. IT IS FURTHER ORDERED that the Tennessee Department of Safety and Homeland Security SHALL NOTIFY the Boeing Company, licensee of WNZH870, in writing, within 30 days of the grant of the above-captioned application: (1) that it has received the authorization requested hereunder, (2) that it may not interfere with, and must accept interference from, the Boeing station and (3) advise the Boeing Company of FB2T operations by the Tennessee Department of Safety and Homeland Security on frequency pair 810/855.8375 MHz within 113 kilometers of Boeing's station.

13. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 CFR §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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²⁴ 47 CFR § 90.137.

²⁵ See, e.g., *Letter to James B. Goldstein, Director-Spectrum Reconfiguration, Sprint Nextel Corp., from David L. Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau*, 22 FCC Rcd 2736, 2740-41 (PSHSB 2007) (providing guidance to 800 MHz licensees regarding Sprint's responsibility for retuning of facilities authorized under several types of secondary authorization other than STAs, including FB2T authorizations).

²⁶ 47 CFR § 90.137(b).

²⁷ 47 CFR §§ 90.175(e) and 90.621(a).

²⁸ 47 CFR § 90.621(b) (the required separation between co-channel systems is a minimum of 113 km (70 mi)).

Public Safety and Homeland Security Bureau