

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

In the Matter of)
STATE OF OHIO)
and)
FIRSTENERGY CORP.)
Request for Waiver of Section 90.179 of the)
Commission's Rules)

ORDER

Adopted: August 4, 2016

Released: August 4, 2016

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On December 18, 2015, the State of Ohio, through the Ohio Department of Administrative Services (DAS), Multi-Agency Radio Communications System (MARCS) Program, a public safety radio network, and three electric utilities in Ohio, all wholly-owned subsidiaries of FirstEnergy Corp. (collectively, FirstEnergy), jointly requested a waiver of Sections 90.179 and, if necessary, Section 90.523(b) of the Commission's rules to permit the FirstEnergy Companies to operate on a non-profit, cost shared basis on Public Safety frequencies licensed to MARCS in the 700 and 800 MHz bands. MARCS and FirstEnergy (collectively, the Parties) also request a waiver to permit MARCS to operate on 800 MHz Business/Industrial/Land Transportation (B/ILT) Radio Service Pool frequencies licensed

1 Ohio Edison Company, the Toledo Edison Company and the Cleveland Illuminating Company.

2 FirstEnergy is a holding company whose subsidiaries and affiliates are involved in the generation, transmission and distribution of electricity, as well as energy management and other energy-related services.

3 Letter from Robert Blair, Director, Ohio Department of Administrative Services and Mark A. Julian, VP, Utility Operations, FirstEnergy Companies, to Roger S. Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, FCC and Thomas J. Beers, Chief, Policy Division, Public Safety and Homeland Security Bureau, FCC (Dec. 18, 2015) (Waiver Request). The Waiver Request has been supplemented with several additional filings. See Letter from Jack Richards, Counsel for FirstEnergy, to Roger Noel, Zenji Nakazawa, FCC, dated April 7, 2016 (First Supplement); Letter from Jack Richards, Counsel for FirstEnergy to Admiral David Simpson, David Furth, FCC, dated April 22, 2016 (Second Supplement); Letter from Jack Richards, Counsel for FirstEnergy to Admiral David Simpson, David Furth, FCC, dated June 1, 2016 (Third Supplement); Letter from Jack Richards, Counsel for FirstEnergy, to Admiral David Simpson, David Furth, FCC, dated July 11, 2016 (Fourth Supplement).

4 47 CFR § 90.179 (shared use of radio stations).

5 47 CFR § 90.523(b) (eligibility).

6 Waiver Request at 1.

to FirstEnergy under the same terms and conditions (*i.e.*, on a non-profit, cost shared basis).⁷ For the reasons stated below, we grant the requested relief subject to certain conditions.

II. BACKGROUND.

2. FirstEnergy seeks access to the MARCS public safety frequencies for the following purposes: (1) for critical group communications between FirstEnergy's dispatch offices and its line workers and other field personnel; (2) to provide voice communications capacity necessary for the continued maintenance and operation of the electric grid; (3) to have quick response capability for emergency situations that could jeopardize the safety of company employees and the general public; and (4) to assist in the restoration of power after emergency events and natural disasters.⁸

3. On December 16, 2015, MARCS and FirstEnergy entered into a Radio Use Agreement (Agreement) to allow FirstEnergy to use MARCS frequencies while still protecting and preserving the integrity of the public safety network.⁹ The Agreement includes the following terms and conditions, among others:

- MARCS will conduct grade of service studies prior to approval of initial and additional radio activations by FirstEnergy to ensure additional devices will not adversely affect the communications capacity of the MARCS system.¹⁰
- If it is determined by MARCS that additional frequencies are necessary to accommodate FirstEnergy's additional radio activations, additional equipment will be installed at FirstEnergy's expense.¹¹
- If it is determined that FirstEnergy is drawing more capacity than originally anticipated, additional equipment will be installed at FirstEnergy's expense to accommodate FirstEnergy's additional radio activations.¹²
- MARCS reserves the right to temporarily "re-prioritize" or "inhibit" any devices and/or talk groups if FirstEnergy's transmissions adversely affect the capacity of the MARCS system.¹³

4. The Parties state that public safety first responders such as police, fire and emergency medical personnel, as well as the public at large, rely on the safe and reliable operation of the FirstEnergy electric grid.¹⁴ The Parties submit that first responders and FirstEnergy regularly cooperate in addressing mutual public safety concerns.¹⁵ For example, the Parties claim that public safety entities and FirstEnergy necessarily must coordinate closely in preparing for, preventing, and responding to

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4-5.

natural disasters, acts of vandalism or terrorism, and other emergencies.¹⁶

5. To facilitate joint operations with public safety entities and to promote the safe and efficient distribution of electric services, (1) FirstEnergy wishes to migrate several of its wireless operations to the MARCS network and (2) MARCS desires to access FirstEnergy's available 800 MHz frequencies on an "as needed" basis.¹⁷ The MARCS radios include a Talk Group feature, which will enable FirstEnergy crews to communicate quickly with first responders during emergencies.¹⁸ The Talk Group feature also will allow crews within FirstEnergy to communicate on a regular basis.¹⁹

6. Although construction of the MARCS network is substantially complete, the Parties submit that additional revenue is needed to support continued operation, maintenance, expansion and upgrade of the MARCS system.²⁰ The Parties add that under the proposed arrangement, FirstEnergy will provide substantial revenues to MARCS on a regular basis to support these efforts.²¹ Finally, MARCS and FirstEnergy state that FirstEnergy will solely be permitted to operate on the MARCS network on a conditional, secondary basis as appropriate, consistent with Commission precedent.²²

7. On June 1, 2016, the Parties submitted an Amendment to the Agreement with additional provisions clarifying MARCS's control over the system and setting forth limitations on FirstEnergy's use of 700 MHz frequencies in the MARCS system as a nongovernmental organization authorized by MARCS.²³ The Amendment limits FirstEnergy's operation on MARCS's 700 MHz narrowband channels to the following uses:

- communications necessary and essential to respond to or restore power outages and system restoration;
- emergency notifications necessary and essential to the safety of employees and the public and to protection of property, such as line energization, imminent threats to persons or infrastructure and other hazardous conditions;
- communication relating to the energization, de-energization, or reconfiguration of electric transmission lines, distribution lines, and substations, including the coordination of these activities; and
- other uses directly related to the protection of property or safety of FirstEnergy employees or the general public.²⁴

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See* Third Supplement.

²⁴ *Id.*

The Amendment provides that all other FirstEnergy communications on the MARCS system will be conducted on the system's 800 MHz channels.²⁵

8. In a second Amendment to the Agreement dated July 11, 2016 (Amendment No. 2), the Parties further clarified "that all licenses and frequencies issued by the FCC to MARCS as part of its statewide 700/800 MHz radio network may be made available to FirstEnergy under the terms and conditions of the Agreement, as determined by the Parties and approved by the Commission."²⁶ Amendment No. 2 included, as Schedule 1, a list of specific MARCS 700 MHz and 800 MHz frequencies to be made available to FirstEnergy. Amendment No. 2 also requested that subsequent changes to Schedule 1, as determined by the Parties and approved by the Commission, be incorporated automatically into the Agreement, and that such changes to Schedule 1 be deemed included in the Parties' Waiver Request.²⁷

III. DISCUSSION

9. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that grant of the waiver would be in the public interest and the underlying purpose of the rule(s) would be frustrated or not served by application to the present case; or that, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²⁹

10. Below, we apply this standard to the requested waiver of eligibility requirements for the 800 MHz frequencies in the public safety and B/ILT and pools, respectively. With respect to the 700 MHz public safety frequencies, the parties have demonstrated that the contemplated use of the 700 MHz spectrum, as limited by the restrictions contained in the Agreement, complies with the terms of Section 337 of the Communications Act of 1934, as amended, and Section 90.523(b) of the Commission's rules.

A. 800 MHz Frequencies

11. The Parties acknowledge that because the FirstEnergy Companies are electric utilities and operate on 800 MHz B/ILT Category frequencies, they are not eligible for a separate authorization to use Ohio's 800 MHz public safety spectrum absent a waiver.

12. As an initial matter, we note that the Commission has previously waived the eligibility requirements of Section 90.179 in similar circumstances on a number of occasions.³⁰ Indeed, in the *Ohio REC Order*, Bureau granted such a waiver for use by MARCS and the Ohio Rural Electric Cooperatives, Inc. In doing so, it noted that "we will require separate waivers for other utilities

²⁵ *Id.* at 1.

²⁶ Fourth Supplement at 2.

²⁷ *Id.*

²⁸ 47 C.F.R. § 1.925(b)(3).

²⁹ State of Ohio and Ohio Rural Electric Cooperatives, Inc., *Order*, 24 FCC Rcd 2289 para. 8 & n.28 (PSHSB 2009) (*Ohio REC Order*).

³⁰ See, e.g., *Michigan Order*, 30 FCC Rcd 10054; *Illinois Order*, 23 FCC Rcd 437; *Pennsylvania Order*, 14 FCC Rcd 14029; *State of Michigan, et al*, *Order*, 27 FCC Rcd 214 (PSHSB 2012); *Douglas Electric Cooperative*, *Order*, 21 FCC Rcd 11298 (PSHSB 2006); *State of South Carolina*, *Order*, 13 FCC Rcd 8787 (WTB 1997) (*South Carolina Order*).

seeking to use 800 MHz public safety spectrum in the MARCS network.”³¹

13. Similarly, in 1997, the Wireless Telecommunications Bureau (WTB) waived Section 90.179 and approved the Commonwealth of Pennsylvania’s request to share an 800 MHz public safety system with GPU,³² subject to certain conditions.³³ WTB found that the Commonwealth and GPU demonstrated that their sharing proposal involved unique circumstances (*i.e.*, the proposed system would cover a large territory, including remote and rural areas that currently have limited public safety communications infrastructure, where wireless communications are particularly important due to the distances that must be covered and the relative scarcity of wireline communications facilities)³⁴ and that the parties lacked reasonable alternatives.³⁵ WTB granted the waiver “with the understanding that Power Radio Service eligibles will contribute sufficient spectrum to the proposed system to meet their communications needs, so that the arrangement does not result in a net loss of public safety spectrum.”³⁶ The Public Safety and Homeland Security Bureau has granted similar waivers allowing utilities and public safety agencies to enter into sharing arrangements on 800 MHz public safety channels.³⁷

14. Here, we find that the Parties have shown that granting a waiver of Section 90.179 to permit MARCS to share its 800 MHz facilities with the FirstEnergy Companies would be consistent with precedent. In allowing such sharing arrangements, the Commission has considered whether the arrangement would result in a net loss of spectrum designated for public safety use.³⁸ The Parties’ have

³¹ *Ohio REC Order*, 28 FCC Rcd at 2292 para. 10.

³² FirstEnergy merged with GPU, Inc. (GPU) in 2001.

³³ *Commonwealth of Pennsylvania*, Order, 14 FCC Rcd 14029, 14033 para. 10 (WTB 1999) (*Pennsylvania Order*).

³⁴ In Pennsylvania, the Commonwealth expressed concern about its ability to complete its system on its own. *Id.* at 14031 para. 3. Pennsylvania and GPU proposed to integrate their systems into a single system with each entity contributing infrastructure, including towers). *Id.* Pennsylvania and GPU envisioned a state-of-the-art dispatch communications network that would be available to Public Safety and Power Radio eligibles throughout Pennsylvania on a non-profit, cost shared basis. *Id.* at para. 5. Although construction of the MARCS system is substantially complete, the Parties submit that the proposed sharing arrangement will support “the continued operation, maintenance, expansion, and upgrade of the system.” Waiver Request at 5.

³⁵ *Pennsylvania Order*, 14 FCC Rcd at 14035-36 paras. 13-14. In the *Pennsylvania Order*, WTB found that Pennsylvania and GPU demonstrated that there are no reasonable alternatives to the proposed 800 MHz system to meet their needs within the then existing rules, *Id.* at 14035 para. 12. The WTB noted that (1) Section 337 barred utilities and other public service providers from eligibility for 700 MHz public safety spectrum and (2) the 700 MHz band would not be available for use until 2006, at the earliest. *Id.* at para. 13. Unlike the proposed 800 MHz system that WTB addressed in 1999, MARCS has substantially completed construction of its combined 700/800 MHz system and the Agreement, as amended, ensures that FirstEnergy’s proposed operations comply with Section 337.

³⁶ *Id.* at 14036 para. 14 citing *State of South Carolina*, Order, 13 FCC Rcd 8787, 8793 (WTB 1997) (*South Carolina Order*). “Should experience show that the system relies disproportionately on public safety spectrum, we reserve discretion to reconsider whether the waiver granted herein still serves the public interest.” *Id.* The Bureau noted that requiring separate waivers for additional Power Radio eligibles to contribute spectrum to the system would aid in monitoring the system’s spectrum mix, and accords with Commission precedent. *Id.*

³⁷ See, e.g., *State of Michigan*, Order, 30 FCC Rcd 10054 (PSHSB 2015) (*2015 Michigan Order*); *State of Michigan, et al.*, Order, 27 FCC Rcd 214 (PSHSB 2012); *State of Ohio, et al.*, Order, 24 FCC Rcd 2289 (PSHSB 2009); *State of Illinois*, Order, 23 FCC Rcd 437 (PSHSB 2008) (*Illinois Order*); *Douglas Electric Cooperative*, Order, 21 FCC Rcd 11298 (PSHSB 2006).

³⁸ See, e.g., *Illinois Order*, 23 FCC Rcd 437; *Pennsylvania Order*, 14 FCC Rcd at 14036 para. 14; *South Carolina Order*, 13 FCC Rcd at 8795 para. 14.

stated that MARCS has adequate spectrum to accommodate sharing of its 800 MHz system and note that the Agreement provides for FirstEnergy to operate on the MARCS system on a conditional, secondary basis. Moreover, we find it important that the Parties have included a number of safeguards in the Agreement to ensure that public safety users have sufficient capacity on the MARCS system to meet their needs. Additionally, the Agreement provides that FirstEnergy will make its B/ILT frequencies and its tower sites available to MARCS. Thus, we find that grant of the waiver would not frustrate the purpose of Section 90.179 of ensuring that adequate public safety spectrum exists and that interference would not be caused to incompatible services.³⁹ We also find that grant of the waiver is in the public interest because it will improve the ability of MARCS and FirstEnergy to interoperate and coordinate in times of emergency.

15. Therefore, we grant the Parties' waiver request as to FirstEnergy's use of MARCS' 800 MHz frequencies as specified by the application. Because our decision is based on the specific facts before us, and the provisions of the Parties' agreement designed to ensure adequate capacity for public safety users, should any utility other than FirstEnergy seek to share the MARCS network, we will require submission of a separate waiver request. This condition is consistent with our precedent granting similar waivers of Section 90.179 to share public safety spectrum with electric power transmission companies.⁴⁰

16. With regard to the converse question - MARCS' use of 800 MHz B/ILT spectrum - Section 90.179(h) of the Commission's rules provides: "Notwithstanding paragraph (a) of this section, licensees authorized to operate radio systems on Industrial/Business Pool frequencies designated in § 90.35 may share their facilities with Public Safety Pool entities designated in § 90.20 and with Federal Government entities on a non-profit, cost-shared basis."⁴¹ Because the rules permit FirstEnergy to share its 800 MHz facilities with MARCS, we find this portion of the Waiver Request unnecessary and dismiss it as moot.

B. 700 MHz Frequencies

17. We have no authority to waive the requirements of Section 337 of the Communications Act, which limits the allocation of these 700 MHz channels to "public safety services" as defined therein, "according to the terms and conditions established by the Commission."⁴² However, based on the specific facts before us, we find that MARCS may share its 700 MHz public safety narrowband spectrum with FirstEnergy consistent with Section 337(f), subject to certain conditions that will ensure adherence to the statute and implementing regulations. Specifically, based on the application before us, we find that when operating on MARCS's 700 MHz channels, pursuant to the limitations in the amended Agreement, FirstEnergy will be providing services, consistent with Section 337(f)(1)(B), as a nongovernmental organization, authorized by an appropriate governmental entity, providing "public safety services."⁴³ As noted above, the amendment to the Agreement submitted on June 1, 2016, limits FirstEnergy's use of 700 MHz channels to such services, such as communications necessary and

³⁹ See, e.g., *2015 Michigan Order*, 30 FCC Rcd 10054.

⁴⁰ *Id.*

⁴¹ 47 CFR § 90.179(h). See *1998 Biennial Regulatory Review - 47 CFR Part 90 - Private Land Mobile Radio Services*, Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 92-235, 15 FCC Rcd 16673, 16684 para. 21 (2000) (determining that Industrial/Business licensees would be allowed to share their frequencies with public safety and Federal Government entities).

⁴² 47 U.S.C. § 337(a)(1).

⁴³ *Id.* Neither MARCS nor FirstEnergy makes its communications services available to the general public. See 47 CFR § 90.523(d).

essential to respond to or restore power outages and system restoration, emergency notifications necessary and essential to the safety of employees and the public and to protection of property, and the energization and de-energization or reconfiguration of electric transmission lines. In this respect, we note that the amended Agreement clearly describes the public safety communications permitted on the 700 MHz channels and the safeguards that the Parties have implemented to ensure that FirstEnergy's use of the 700 MHz channels will be limited to such permitted communications. The amended Agreement also makes clear that MARCS will retain effective control of the 700 MHz channels at all times and has sole discretion to preempt FirstEnergy's operations if MARCS determines that those operations adversely affect the MARCS system.

18. Under the specific circumstances present here, we conclude that FirstEnergy, when operating on the MARCS 700 MHz narrowband channels pursuant to the limitations in the amended Agreement, will be providing services whose sole or principal purpose are to protect the safety of life, health, or property. In accordance with Section 337, these services are also for FirstEnergy's internal use and not made commercially available to the public, and have been authorized pursuant to the amended RUA by MARCS, whose primary mission is the provision of such services.⁴⁴ In any event, the Commission has concluded that Section 337 authority to impose "terms and conditions" for the allocation of these frequencies affords it "broad discretion" to permit "secondary preemptible commercial use."⁴⁵ Accordingly, under these limitations, we conclude that FirstEnergy is eligible to use the MARCS 700 MHz channels on a secondary, preemptible basis.

C. Conditions

19. We recognize the increasingly critical role that combined public safety and electric utility systems provide the public. Here, the Parties envision that a shared 700/800 MHz system would provide the following immediate benefits and efficiencies: (1) promote interoperable communications between public safety entities and FirstEnergy during emergencies involving downed high-voltage electric power lines and power outages; (2) facilitate maintenance and operation of the electric grid; and (3) support maintenance and expansion of the MARCS system while ensuring that public safety entities enjoy priority access to the MARCS system. Although we provide the Parties the flexibility to implement their vision, we balance our decision with Section 337's mandate that 700 MHz spectrum be used to provide "public safety services."

20. We condition our finding that FirstEnergy's operations on the 700 MHz public safety narrowband channels are permissible on the outcome of the Commission's pending rulemaking addressing non-governmental use of 700 MHz public safety broadband spectrum under Section 337.⁴⁶ We note that, in response to a request for declaratory ruling filed by the City of Charlotte, North Carolina, the Commission declined to address the scope of permissible non-governmental use of 700 MHz broadband spectrum by utilities.⁴⁷ There, the Commission specifically stated that the decision on access by non-governmental entities "requires more detailed analysis to

⁴⁴ Waiver Request at 7.

⁴⁵ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd 15289, 15438-39 ¶ 419 (2007).

⁴⁶ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 26 FCC Rcd 733 (2011).

⁴⁷ See *Implementing a Nationwide, Broadband, Interoperable, Public Safety Network in the 700 MHz Band; Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Amendment of Part 90 of the Commission's Rules*, Order, 26 FCC Rcd 10799, 10803 para. 11 (PSHSB 2011).

fully consider the variety of legal theories and practical considerations at issue, including the factual basis for the assertion that such uses satisfy the statute, primary versus secondary access, how such access or authorization would be implemented, and the policy considerations associated with any permitted access to the network.”⁴⁸ Thus, we emphasize to the Parties that they accept the instant waiver at their own risk and that our decision does not prejudice the outcome of the pending rulemaking, *supra*, or any other future action the Commission may take to define permissible non-governmental use of 700 MHz public safety spectrum under Section 337(f) of the Communications Act of 1934, as amended. We further condition the instant *Order* on MARCS receiving prior approval from the Chief of the Public Safety and Homeland Security Bureau should MARCS seek to enter into sharing arrangements with any other non-governmental entity. Finally, we condition the instant *Order* on the MARCS obtaining prior Commission approval for any changes it seeks to make to the list of MARCS licenses and frequencies contained in Schedule 1 of Amendment No. 2 to the Agreement, in order for such changes to be deemed included in the instant waiver.

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Sections 1.925, and 90.179(a) of the Commission’s rules, 47 CFR §§ 1.925 and 90.179(a), the Waiver Request filed by the State of Ohio and FirstEnergy Corp., as supplemented, is GRANTED IN PART subject to the conditions specified in paragraphs 19 and 20 *supra*.

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

FEDERAL COMMUNICATIONS COMMISSION

David G. Simpson, Rear Adm. (ret), USN
Chief, Public Safety and Homeland Security Bureau

⁴⁸ *Id.*