

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

In the Matter of
STATE OF MICHIGAN
Request for Waiver of Section 90.179 of the
Commission’s Rules.

ORDER

Adopted: May 25, 2017

Released: May 25, 2017

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

I. INTRODUCTION

1. The State of Michigan Department of Telecommunications Management and Budget (Michigan) requests a waiver of Section 90.179(a) of the Commission’s rules. Michigan seeks to share use of the Michigan Public Safety Communications System (MPSCS), its statewide 800 MHz radio network, with DTE Energy Company (DTE). Based on the record, we grant Michigan’s requests subject to certain conditions.

II. BACKGROUND

2. The MPSCS provides communications for Michigan’s state agencies, the Michigan State Police, and over 1,490 other county, city, township, and tribal public safety agencies. There are approximately 74,000 radio users on the network, which has 246 tower sites and provides “infrastructure for fully interoperable communications throughout the entire State of Michigan.” The MPSCS uses frequencies primarily in the 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) band, which is allocated for public safety use.

3. In its waiver request, Michigan requests permission for DTE, a non-profit Critical Infrastructure provider, to share MPSCS’ 800 MHz public safety frequencies – but not its 700 MHz public safety frequencies. Michigan states that, with grant of the waiver, DTE “will have access to and

1 47 CFR § 90.179(a).

2 See Request for Waiver of Rule Section 90.179 for Michigan’s Public Safety Communications System (September 19, 2016) (Waiver Request). “MPSCS currently utilizes both 800 MHz and 700 MHz narrowband voice frequencies although the great majority of the system is 800 MHz.” Id. Michigan states that “[t]hrough system and radio configuration, DTE will be restricted from using 700 MHz frequencies on the MPSCS.” Id.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id. Michigan submits that DTE is a full-service, investor-owned utility company and is not eligible to use the 800 MHz public safety frequencies licensed to the MPSCS. Michigan adds that DTE provides utility service to 3.3 million customers throughout Michigan. Id. at 2.

use the MPSCS system for exchange of critical information with government agencies.”<sup>8</sup> Michigan adds that DTE “would have access to selected emergency and proprietary talk groups on the trunking system.”<sup>9</sup> DTE “would also have access to the 800 MHz analog mutual aid channels.”<sup>10</sup>

4. Michigan states that DTE’s use of Michigan’s 800 MHz public safety frequencies would be on a non-profit, cost sharing basis,<sup>11</sup> and has submitted copies of the agreements governing DTE’s proposed use of the system.<sup>12</sup> Michigan states that “[p]art of DTE’s commitment to the MPSCS is to fund the infrastructure (additional base stations) at approximately 100 MPSCS sites in areas where over 90% of their radio system traffic will impact system resource availability.”<sup>13</sup> These base stations, Michigan adds, “will be licensed using frequencies from the 800 MHz Business and Industrial Land Transportation (B/ILT) Pool.”<sup>14</sup> Therefore, Michigan public safety agencies in those areas “will have enhanced access to the system without having to exclusively use dedicated NPSPAC public safety frequencies or provide additional funding.”<sup>15</sup> Michigan states that “DTE has also agreed to share infrastructure, such as tower space, on an as needed basis.”<sup>16</sup>

5. Michigan estimates that “DTE would have a total of about 900 radios,” with an anticipated “100 active at any given time.”<sup>17</sup> Michigan submits that DTE’s radio use “occurs essentially during daylight working hours as their crews perform maintenance of their systems, and that the bulk of their use consists of brief communications for field crew coordination and distribution line switching.”<sup>18</sup> Michigan emphasizes “that the MPSCS has a 24/7/365 Network Communication Center (NCC) which constantly monitors the performance of the network.”<sup>19</sup> According to Michigan, “NCC personnel using the network management system can assign lower priority to DTE’s radios, restrict their access to only certain sites of the network, or shut down their access to the network entirely should it become evident that their use is negatively impacting public safety agencies access.”<sup>20</sup> Michigan “does not anticipate a

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.* See 47 CFR § 90.179(d). (“If the licensee shares the land station on a non-profit, cost shared basis to the licensee, this shared use must be pursuant to a written agreement between the licensee and each participant which sets out (1) the method of operation, (2) the components of the system which are covered by the sharing arrangements, (3) the method by which costs are to be apportioned, and (4) acknowledgement that all shared transmitter use must be subject to the licensee's control. These agreements must be kept as part of the station records.”).

<sup>12</sup> Waiver Request at 2. These agreements include the (1) Co-Location License Agreement; (2) Integration Agreement; (3) Member Subscriber Agreement. Michigan also provides a copy of the Motorola Communications System Agreement to migrate DTE to the MPSCS system.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Michigan submits that it will also consider spectrum “vacated” as part of 800 MHz rebanding to supplement capacity when B/ILT spectrum is unavailable in the interleaved band. *Id.* If spectrum remains unavailable, Michigan adds that it can limit DTE’s use of the system. *Id.*

<sup>15</sup> *Id.*

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

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*

network congestion problem but is able to quickly address any issues that could arise.”<sup>21</sup>

6. In further support of its waiver request, Michigan cites several benefits. First, Michigan believes that “allowing DTE to utilize the MPSCS enhances the rapid and orderly restoration of critical services to the citizens of Michigan, without costly and unnecessary duplication of communication infrastructure.”<sup>22</sup> Second, Michigan states that DTE “provide[s] mutual aid assistance to other utilities across the State of Michigan in emergency outage situations.”<sup>23</sup> Michigan notes that “[t]he state wide coverage of the MPSCS system would be invaluable to both the utilities and the public safety services to be able to maintain communications between utility organizations and public safety agencies across the state.”<sup>24</sup> Third, Michigan emphasizes that the public interest would be served by facilitating “emergency communications between [DTE] and Michigan’s government, emergency management, and public safety agencies.”<sup>25</sup>

### III. DISCUSSION

7. Section 90.179 of the Commission’s rules authorizes Michigan to enter into non-profit, cost sharing agreements with other entities; however, entities entering into such agreements with Michigan must themselves be eligible to be licensed for public safety frequencies.<sup>26</sup> Because DTE is not eligible for licensing on 800 MHz public safety spectrum, a waiver of Section 90.179(a) is required.

8. To obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: (1) the underlying purpose of the rule(s) would not be served or would be frustrated by the application to the present case, and that a grant of the waiver would serve the public interest;<sup>27</sup> or (2) 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.<sup>28</sup> An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.<sup>29</sup>

9. The Division has previously granted Michigan waivers of Section 90.179(a) under similar circumstances.<sup>30</sup> For example, the Division approved Michigan’s sharing agreements with Detroit Edison (DE) and ITC Transmission (ITC) for public safety use of the MPSCS network.<sup>31</sup> Because the Division’s decisions were based on the specific facts then before it, we stated that separate waivers would be required for any future sharing arrangements that contemplated Michigan’s sharing of its system.<sup>32</sup>

10. Here, we find that Michigan has shown good cause for a waiver. Michigan has

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4.

<sup>26</sup> 47 CFR § 90.179(a).

<sup>27</sup> 47 CFR § 1.925(b)(3)(i).

<sup>28</sup> 47 CFR § 1.925(b)(3)(ii).

<sup>29</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broadcasting Corporation, *Memorandum Opinion and Order*, 18 FCC Rcd 1414-1415, para. 6 (2003).

<sup>30</sup> *State of Michigan, et al.*, Order, 27 FCC Rcd 214 (PSHSB 2012) (*Michigan Order*).

<sup>31</sup> *Id.* at 218, para. 11.

<sup>32</sup> *Id.*

demonstrated that it has adequate spectrum to accommodate the planned sharing of its 800 MHz MPSCS network with DTE. Michigan has also demonstrated that DTE will fund construction of additional infrastructure using B/ILT frequencies to mitigate its impact on the MPSCS network. The shared use will improve the ability of public safety and DTE to communicate with one another and coordinate power restoration in times of emergency. Additionally, Michigan has shown that the sharing arrangement will be on a cost-shared, non-profit basis, thereby conforming to the Section 90.179 provisions. Michigan also has demonstrated that it will retain control over the system and outlines the conditions under which DTE may use subscriber units on the system. Thus, based on the record before us, we find that a grant of the waiver would not undermine or frustrate the purpose of Section 90.179(a) and that grant of the waiver serves the public interest.

#### **IV. ORDERING CLAUSES**

11. Accordingly, IT IS ORDERED, pursuant to §§ 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.925 and 90.179(a) of the Commission's rules, 47 C.F.R. §§ 1.925 and 90.179(a), that the Waiver Request submitted by the State of Michigan IS GRANTED.

12. 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 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm  
Acting Chief, Policy and Licensing Division  
Public Safety and Homeland Security Bureau