

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

In the Matter of
STATE OF ILLINOIS
Request for Waiver of Section 90.179(a) of the
Commission's Rules

ORDER

Adopted: January 17, 2008

Released: January 17, 2008

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. We have before us a request filed by the State of Illinois (Illinois) seeking a waiver of Section 90.179(a) of the Commission's rules to permit it to share use of its 700 MHz and 800 MHz public safety channels with AmerenIP, AmerenCIPS and AmerenCILCO (collectively Ameren), an electric and gas utility service provider in Illinois. The subject frequencies are part of Illinois's statewide public safety communications network called STARCOM21. Based on the record, we grant the request in part with respect to Illinois's 800 MHz public safety channels, and deny the request in part with respect to the 700 MHz public safety channels, as specified herein.

II. BACKGROUND

2. Illinois represents that the STARCOM21 network uses channels in the 700 MHz and 800 MHz bands to provide public safety communications to the Illinois State Police and other federal, state, county and local agencies. Illinois adds that it is expanding the scope of the STARCOM21 network to include public utilities such as Ameren. Illinois further states that Ameren operates a wide area radio network on Industrial/Business (I/B) channels in the 800 MHz band. Illinois indicates that, as a part of the expansion of the STARCOM21 network, Ameren will make its 800 MHz channels and stations available for use by public safety entities utilizing the network. In turn, Illinois asks that Ameren be

1 Request for Waiver of Section 90.179 of the FCC's Rules by Ameren in the State of Illinois (Dec. 20, 2006) ("Waiver Request").

2 47 C.F.R. § 90.179(a).

3 Illinois has been issued licenses for 800 MHz channels in the Public Safety Radio Pool, including NPSPAC channels, for use in its statewide communications system. Illinois also utilizes 700 MHz frequencies authorized under a statewide narrowband license, WPTZ798.

4 Waiver Request at 3, 23.

5 Id. at 3.

6 Id. at 4.

7 Id. Section 90.179(h) permits licensees of frequencies in the Industrial/Business Pool to share facilities with Public Safety Pool entities and Federal government entities on a non-profit, cost-shared basis. 47 C.F.R. § 90.179(h).

permitted to share use of the 700 MHz and 800 MHz public safety frequencies in the STARCOM 21 network.

3. Section 90.179(a) governs sharing of Part 90 frequencies, and provides that “persons may share a radio station only on frequencies for which they would be eligible for a separate authorization.”<sup>8</sup> Illinois concedes that because Ameren is an electric utility company licensed for I/B channels in the 800 MHz band, it would not be eligible for a separate authorization to use Illinois’s 800 MHz public safety spectrum.<sup>9</sup> With respect to the 700 MHz frequencies used by the statewide system, however, Illinois asserts that Ameren would be eligible to license the frequencies under section 90.523 of the Commission’s rules, and, by extension, appears to imply that Ameren would be permitted to share the Illinois 700 MHz frequencies under Section 90.179.<sup>10</sup> While somewhat unclear, Illinois does not, therefore, appear affirmatively to seek a waiver of Section 90.179(a) for Ameren’s use of the 700 MHz frequencies in the network, but instead apparently relies only on its assertion of Ameren’s eligibility.

4. Illinois believes that a waiver to permit Ameren to share Illinois’s 800 MHz frequencies would be in the public interest. Illinois claims that the corresponding addition of Ameren’s frequencies to the STARCOM21 network would fill in gaps in the network and increase the channel capacity of the network, thus enabling more state agencies to be served and to have better geographic coverage.<sup>11</sup> Illinois adds that Ameren’s communications capabilities would be enhanced<sup>12</sup> and that public safety communications would always have priority on the network.<sup>13</sup> Illinois also believes that its proposal is consistent with and supported by Commission precedent granting waivers of Section 90.179(a) to permit sharing arrangements between public safety and utilities to enhance the operations of both entities.<sup>14</sup> Illinois also states that the Region 13 800 MHz Regional Planning Committee (Region 13) has approved Illinois’s proposal to add Ameren to the STARCOM21 network.<sup>15</sup> Motorola supports the instant waiver request, citing enhanced interoperability, more effective emergency response, improved spectrum efficiency, and other tangible benefits to Illinois.<sup>16</sup>

5. With regard to Ameren’s proposed use of Illinois’s 700 MHz public safety channels, Illinois states only that, under Section 90.523(b), Ameren is eligible to share use of these frequencies, because “a principal purpose of Ameren’s service as an operator of critical infrastructure is the protection

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<sup>8</sup> 47 C.F.R. § 90.179(a).

<sup>9</sup> See 47 C.F.R. § 90.20.

<sup>10</sup> Waiver Application at 5.

<sup>11</sup> *Id.* at 6.

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

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

<sup>14</sup> *Id.* at 6 (citing Douglas Electric Cooperative, *Order*, 21 FCC Rcd 11298 (PSHSB 2006) (*Douglas*); State of South Carolina and SCANA Communications, Inc., *Order*, 13 FCC Rcd 8787 (WTB 1997) (*SCANA*)).

<sup>15</sup> Waiver Request at 19-22, Attachment C (showing the Region 13 Regional Conformance Review Committee November Meeting Minutes, which include the committee’s approval of the Illinois proposal to add Ameren to the STARCOM21 network subject to certain legal and operational requirements being met, including successful negotiations between Ameren and Motorola).

<sup>16</sup> See *id.* at Attachment D (Letter to Kenneth Moran, Acting Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission, from Richard O’Herron, STARCOM21 System Manager, Motorola (dated Nov. 6, 2006)).

of life, health and property.”<sup>17</sup> Illinois provides no additional information or evidence to support this assertion.

6. Section 90.523(b) implements Section 337(f)(1) of the Act, which defines “public safety services” in the 763-775 MHz and 793-805 MHz bands.<sup>18</sup> Under Section 337 of the Act, public safety services are services “the sole or principal purpose of which is to protect the safety of life, health, or property” that are provided by “State or local government entities” or by “nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services” and that are “not made commercially available to the public by the provider.”<sup>19</sup> In addition to implementing the definition of public safety services under Section 337 of the Act, Section 90.523(b) also specifies certain additional criteria that a non-governmental organization (NGO) like Ameren would be required to meet in seeking to use frequencies designated for public safety services, including maintaining the ongoing support of a governmental entity to operate a system, and using such a system “solely for transmission of communication essential to providing services the sole or principal purpose of which is to protect the safety of life, health or property.”<sup>20</sup> Under Section 90.523, only those entities that meet this definition are eligible to hold a Commission authorization for systems operating in the public safety frequencies in the 700 MHz band.<sup>21</sup>

### III. DISCUSSION

7. 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;<sup>22</sup> 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.<sup>23</sup> An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.<sup>24</sup> As discussed below, we find that Illinois has met its burden with regard to its proposal to share its 800 MHz channels. With respect to the 700 MHz frequencies in question, the information provided by Illinois in its application does not support a finding that the proposed use of the Illinois 700 MHz frequencies by Ameren would meet the definition of providing public safety services.

#### A. 800 MHz Public Safety Channels

8. We agree with Illinois that Ameren is not eligible for a separate authorization to use Illinois’s 800 MHz public safety spectrum under Section 90.20, and thus could not share Illinois’s public safety frequencies, unless we waive Section 90.179(a). Among other things, Section 90.179(a) is intended to ensure adequate spectrum for each service category (*i.e.*, public safety and

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<sup>17</sup> Waiver Request at 5.

<sup>18</sup> 47 C.F.R. § 90.523.

<sup>19</sup> 47 U.S.C. § 337(f)(1).

<sup>20</sup> 47 C.F.R. § 90.523(b)

<sup>21</sup> 47 C.F.R. § 90.523; 47 U.S.C. §§ 337(a), (f)(1).

<sup>22</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>23</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>24</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 (1972) (*quoting 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 ¶ 6 (2003).

business/industrial), and to avoid interference to communications from incompatible services.<sup>25</sup> Here, Ameren will increase the capacity of the STARCOM 21 network by contributing its own 800 MHz channels, so that public safety and Ameren can share the network without interference.<sup>26</sup> Further, Ameren has accepted a lower priority on the network and communications protocols have been established under which public safety communications will always have priority on the network.<sup>27</sup> Additionally, Ameren will be brought onto the system after Illinois's users.<sup>28</sup> Moreover, Motorola and Region 13 support the sharing proposal. Based on the record, we believe it is unlikely that the proposed sharing arrangement would result in a shortage of 800 MHz public safety spectrum or interference. We therefore find that Illinois has demonstrated that the underlying purpose of the rule would not be served or would be frustrated by application to the present case.

9. We also find that a grant of this waiver is consistent with prior waivers granted with respect to the use of 800 MHz public safety frequencies, and the public interest will be served by enabling an arrangement whereby Illinois will be able to benefit from the use of Ameren's 800 MHz I/B channels.<sup>29</sup> In sum, we find that Illinois has satisfied the waiver criteria with respect to the 800 MHz frequencies used in the STARCOM21 network. Because our decision is based on the specific application before us, however, we will require separate waivers for other utilities seeking to use 800 MHz public safety spectrum in the STARCOM21 network. Additionally, if Ameren's use were to extend beyond Region 13, we would require Illinois to obtain approval from the relevant RPC and to submit a new waiver request.

10. We also seek to ensure that grant of this waiver request does not adversely impact 800 MHz rebanding. Under the Commission's rebanding orders and rules, Sprint Nextel Corporation (Sprint) is required to reband Illinois's facilities operating in the pre-rebanding NPSPAC band to replacement channels in the new NPSPAC band (former Channels 1-120).<sup>30</sup> Ameren's I/B channels, however, are not subject to rebanding, and the timing and cost of making any changes necessary to integrate Ameren's channels into the STARCOM21 system are contractual matters between Illinois, Motorola, and Ameren. Therefore, we find grant of this waiver to be independent of band reconfiguration: Sprint is not required to pay any costs associated with implementing the waiver, nor may Illinois or Sprint rely on this waiver to request a delay in meeting its rebanding obligations.

## **B. 700 MHz Public Safety Channels**

11. With respect to the 700 MHz public safety channels, Illinois asserts that, under Section 90.523(b),<sup>31</sup> Ameren is eligible to use the channels because "a principal purpose of Ameren's service as

<sup>25</sup> See *Douglas*, 21 FCC Rcd at 11298 ¶ 7.

<sup>26</sup> Waiver Request at 20-21.

<sup>27</sup> *Id.* at 6, 20-21.

<sup>28</sup> *Id.* at 21.

<sup>29</sup> See, e.g., *SCANA*, 13 FCC Rcd at 8792 ¶ 9. See also *Commonwealth of Pennsylvania and GPU Energy, Order*, 14 FCC Rcd 14029 (WTB 1999).

<sup>30</sup> See generally *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) as amended by *Erratum*, 19 FCC Rcd 19651 (WTB PSCID 2004) and *Erratum*, 19 FCC Rcd 21818 (WTB PSCID 2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005), as amended by *Erratum*, 20 FCC Rcd 18970 (WTB PSCID 2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007) as amended by *Erratum*, 22 FCC Rcd 13657 (PSHSB 2007).

<sup>31</sup> See 47 C.F.R. § 90.523(b).

an operator of critical infrastructure is the protection of life, health and property.”<sup>32</sup> By extension, Illinois appears to imply that it should be permitted to share its 700 MHz frequencies with Ameren pursuant to Section 90.179. For the reasons discussed below, we reject Illinois’s contention, and deny its request to share the state’s 700 MHz frequencies with Ameren.

12. We find that Illinois’s request does not support a finding that Ameren’s use of the Illinois 700 MHz frequencies would satisfy the requirements of Section 90.523, which “implements the definition of public safety services contained in 47 U.S.C. § 337(f)(1).”<sup>33</sup> Under Section 90.179, in order to share its frequencies, Illinois must show that Ameren is eligible to hold such frequencies as a licensee. Under Section 90.523 of the Commission’s rules and Section 337 of the Act, nongovernmental organizations that provide services, the sole or principal purpose of which is to protect the safety of life, health, or property, are eligible to hold an authorization for a system operating in the 763-775 MHz and 793-805 MHz frequency bands for transmission or reception of communications essential to providing such services if (and only for so long as) the NGO, among other things, operates such authorized system solely for transmission of communication essential to providing services the sole or principal purpose of which is to protect the safety of life, health, or property.<sup>34</sup>

13. Illinois provides no explanation as to how or why Section 90.523(b)’s threshold requirements are met by Ameren. Illinois’s makes only a single, unsupported statement that “a principal purpose of Ameren’s service as an operator of critical infrastructure” is the protection of life, health and property. Beyond this statement, however, Illinois provides no grounds for the conclusion that Ameren’s use of the 700 MHz frequencies would meet the requirements of Section 90.523 and, by extension, Section 337 of the Act. Accordingly, we cannot find that the sole or principal purpose of Ameren’s service is to protect the safety of life, health, or property, nor can we further determine that its operations would be “solely for transmission of communication essential to providing” such services. Because Illinois does not justify how Ameren’s use of 700 MHz public safety frequencies, particularly in the course of its normal operations as a provider of electric and gas utility service, would meet the definition of “public safety services,” we must deny Illinois’s request.

#### **IV. CONCLUSION**

14. For the reasons stated herein, we grant the Waiver Request in part with respect to Illinois’s 800 MHz public safety channels and deny the Waiver Request in part with respect to the 700 MHz public safety channels.

#### **V. ORDERING CLAUSES**

15. IT IS ORDERED that pursuant to Sections 4(i), 303(r) and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 337, and Sections 90.179(a) and 90.523 of the Commission’s rules, 47 C.F.R. §§ 90.179(a), 90.523, the Waiver Request by the State of Illinois is GRANTED IN PART AND DENIED IN PART to the extent indicated herein.

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<sup>32</sup> Waiver Request at 5.

<sup>33</sup> 47 C.F.R. § 90.523.

<sup>34</sup> See 47 U.S.C. § 337(f)(1); 47 C.F.R. § 90.523(b).

16. 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

Derek K. Poarch  
Chief  
Public Safety and Homeland Security Bureau