

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

In the Matter of)	
)	
OHIO, STATE OF)	File No. 0005005421
)	
Request for Waiver of the 800 MHz Inter-category)	
Sharing Freeze and the Wave 4 Application)	
Freeze)	

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

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

I. INTRODUCTION

1. In this *Order*, we address the above-captioned application and waiver requests filed by the State of Ohio (Ohio) relating to its proposal to make use of two 800 MHz Specialized Mobile Radio (SMR) frequencies at a site in Canton, Ohio.¹ Ohio requests a waiver of the 800 MHz inter-category sharing freeze to operate on 800 MHz SMR frequencies 859.5875 MHz and 860.5875 MHz.² Ohio also seeks a waiver of the Wave 4 application freeze to implement its proposal.³ For the reasons stated below, we deny Ohio’s request for a waiver of the inter-category sharing freeze, but, on our own motion, we grant Ohio a waiver of Section 90.617(d)⁴ of the Commission’s rules and also grant Ohio’s request for waiver of the Wave 4 application freeze, subject to certain conditions.

II. BACKGROUND

2. Ohio currently operates a statewide 800 MHz Multi-Agency Radio Communications System (MARCS), which includes over 200 sites and 48,000 radio units used by over 700 local, state and federal agencies.⁵ This system is used to improve interoperability between public safety entities in the event of an emergency.⁶ According to Ohio, the city of North Canton has requested permission to join MARCS to

¹ See FCC File No. 0005005421 (filed Dec. 27, 2011 and amended June 18, 2012).

² See Letter dated July 7, 2011, from Darryl L. Anderson, Ohio Office of Information Technology, to the Federal Communications Commission Public Safety and Homeland Security Bureau (Inter-category Sharing Waiver Request).

³ See FCC File No. 0005005421 (amended June 18, 2012) at Letter dated May 18, 2012, from Darryl L. Anderson, Ohio Office of Information Technology, to the Federal Communications Commission Public Safety and Homeland Security Bureau (Application Freeze Waiver Request).

⁴ 47 C.F.R. § 90.617(d).

⁵ Inter-category Sharing Waiver Request at 1.

⁶ *Id.*

“enhance their daily operational capabilities as well as [to] improve interoperability with the State and surrounding local agencies.”⁷ Even though the additional load to MARCS would only be 150-200 radios, Ohio indicates that it conducted an evaluation of the North Canton region and found that MARCS is at present operating near maximum capacity in the area.⁸ Therefore, if North Canton were to join MARCS currently, the system would become “dangerously overloaded” and there would be “potentially serious adverse effects on public safety operational and interoperable communications.”⁹

3. As a result, Ohio states it requires more capacity in the form of additional radio frequencies in order to allow North Canton to join MARCS.¹⁰ Ohio claims, however, that no frequencies in the Public Safety Pool are available due to “numerous existing 800 MHz systems already operating in the area.”¹¹ To alleviate the channel shortage, Staley Technologies, Inc., a service provider in the North Canton area, has offered to donate two SMR frequency pairs to allow Ohio to expand MARCS to include North Canton.¹² Ohio, however, needs a waiver of the eligibility requirements established by the Commission to license channels from the SMR category.¹³ Absent such a waiver, Ohio, a public safety entity, is ineligible to license these channels.

4. Ohio seeks to license the SMR frequency pairs under the criteria established for inter-category sharing whereby the Commission allows an applicant to license channels outside its pool category, provided that the applicant demonstrates that no channels are available for licensing in the pool category for which it is eligible.¹⁴ The Wireless Telecommunications Bureau, however, has placed a freeze on the filing of new applications for inter-category sharing.¹⁵ Ohio seeks a waiver of the freeze.

5. In support of its waiver request, Ohio includes a letter from a frequency coordinator certifying that no Public Safety Pool frequencies are available for the proposed operation in Canton.¹⁶ Ohio also includes a letter of support from the 800 MHz Regional Planning Committee for Region 33.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² See Letter dated August 1, 2011, from Kerry Staley, Staley Technologies, Inc., to Federal Communications Commission (relinquishing two frequencies to Ohio, 859.5875 and 860.5875 MHz).

¹³ The PLMR frequencies in the 800 MHz band are divided into the following categories: (1) Specialized Mobile Radio (SMR), (2) Public Safety, (3) Business, (4) Industrial/Land Transportation (I/LT) and (5) General. See 47 C.F.R. §§ 90.615, 90.617.

¹⁴ See 47 C.F.R. § 90.621(e).

¹⁵ Inter-category Sharing Waiver Request at 1. See also Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands, *Order*, 10 FCC Rcd 7350, *aff'd on recon.*, 11 FCC Rcd 1452 (WTB 1995).

¹⁶ See Letter dated June 12, 2012, from Judy Stone, Association of Public-Safety Communications Officials, Inc. (APCO), to the Federal Communications Commission (APCO Concurrence); see also APCO Frequency Search Results attached to FCC File No. 0005005421.

6. Ohio also seeks a waiver of the freeze the Public Safety and Homeland Security Bureau (PSHSB) imposed on new applications along the Canadian border.¹⁸ PSHSB froze the filing of new applications in the National Public Safety Planning Advisory Committee (NPSPAC) regions along the Canadian border to preserve the spectral landscape while reconfiguration of the 800 MHz band progresses.¹⁹ In support of its request for waiver of the application freeze, Ohio includes a letter from the 800 MHz Transition Administrator (TA) stating that Ohio's application will not affect band reconfiguration along the border with Canada.²⁰

7. Finally, Ohio's proposed operation on the two SMR frequency pairs at the Canton site would impermissibly short-space "numerous" Sprint Nextel Corporation (Sprint) SMR sites.²¹ As a result, Ohio requires either (1) a waiver of the Commission's short spacing rules²² or (2) Sprint's concurrence to the proposed short-spacing.²³ Sprint concurs in a letter attached to Ohio's application provided Ohio (1) notifies Sprint 60 days prior to activating the new channels²⁴ and (2) submits an updated 800 MHz Expansion Band Election Form to the TA reflecting the new call sign for the subject frequencies.²⁵

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¹⁷ See Letter dated July 8, 2011, from Paul M. Mayer, Region 33 (Ohio) 800 MHz Planning Committee, to the State of Ohio.

¹⁸ Application Freeze Waiver Request at 1.

¹⁹ See Public Safety and Homeland Security Bureau Extends 800 MHz Application Freeze for Wave 4 Border Area NPSPAC and Non-NPSAPC Licensees Along the U.S.-Canada Border, *Public Notice*, 27 FCC Rcd 4037 (PSHSB 2012) (*Canada Border Freeze PN*).

²⁰ See Letter dated October 21, 2011 from Brett Haan, 800 MHz Transition Administrator, to the State of Ohio (TA Concurrence).

²¹ See Letter dated December 20, 2011, from Robin J. Cohen, Sprint Nextel to the Federal Communications Commission (Sprint Letter). Sprint states that it "is the Economic Area (EA) licensee for EA 51, 52, and 55, Block R, which includes these frequencies south of the Canton, Ohio area in the non-Canadian border region covered by these EAs." *Id.* at 1.

²² Section 90.621(b)(4) provides that applicants for facilities located at distances less than those prescribed in the short-spacing table must request a waiver and submit with the waiver request an interference analysis showing that existing co-channel stations will receive the same or greater interference protection than that provided in the table. 47 C.F.R. § 90.621(b)(4).

²³ The separation between co-channel systems may be less than the separation specified in the short-spacing table if an applicant submits with its application letters of concurrence indicating that the applicant and each short-spaced co-channel licensee agree to accept any interference resulting from the reduced separation. 47 C.F.R. § 90.621(b)(5).

²⁴ See Sprint Letter at 1-2.

²⁵ See *id.* at 2. SMR frequency 860.5875 MHz is located in the Expansion Band (815-816 MHz/860-861 MHz). As part of 800 MHz rebanding, public safety entities could elect to remain in the Expansion Band or relocate below 815 MHz. See Public Safety and Homeland Security Bureau Clarifies the Rights of 800 MHz Public Safety Licensees Electing to Remain in the 800 MHz Expansion Band, *Public Notice*, 22 FCC Rcd 6803 (PSHSB 2007).

III. DISCUSSION

8. As an initial matter, we note that Section 90.621(e) of the Commission's rules²⁶ does not permit inter-category sharing of SMR frequencies.²⁷ Therefore we deny Ohio's request for waiver of the freeze on inter-category sharing.²⁸ On our own motion, however, we treat Ohio's filing as a request for waiver of the SMR eligibility rule in Section 90.617(d).²⁹

9. 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 instant case, and where a grant of the requested waiver would be in the public interest;³⁰ 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.³¹ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.³²

10. We find that the underlying purpose of Section 90.617(d) of the Commission's rules would not be served by strict application of the rule here. Section 90.617(d) specifically states that the channels listed in that subsection are available only to applicants in the SMR category. The waiver sought by Ohio would enable it to use SMR spectrum to improve public safety communications. When the Commission adopted Section 90.617(d) of the Rules, "it sought to avoid a potential scarcity of radio frequencies for Private Land Mobile Radio (PLMR) use by stopping the then prevailing practice of incorporating Business and I/LT channels into SMR systems."³³

11. Here, however, a public safety licensee seeks to gain access to a channel in the SMR category where no public safety channels are available. Under similar circumstances, the Wireless Telecommunications Bureau previously granted Ohio a waiver of the General Category freeze, Section 90.617(d), and other rules, to license SMR spectrum that was essential to MARCS' implementation at the time.³⁴ Further, we note that Staley Technologies and Sprint, the EA licensee, have both agreed to

²⁶ 47 C.F.R. § 90.621(e) ("[f]requencies in the 809–817/854–862 MHz bands listed as available for eligibles in the Public Safety and Business/Industrial/Land Transportation Categories are available for inter-category sharing").

²⁷ Under Section 90.617(d) Ohio's requested channels are part of the SMR Category available after January 21, 2005, for site-based licensing. 47 C.F.R. § 90.617(d) Table 4B.

²⁸ See *American Electric Power Service, Memorandum Opinion and Order*, 22 FCC Rcd 4176, 4179 ¶ 7 (WTB 2007) (denying, without prejudice, applicant's request for waiver of the intercategory sharing freeze to license an SMR frequency because Section 90.621(e) does not apply to SMR spectrum).

²⁹ 47 C.F.R. § 90.617(d).

³⁰ See 47 C.F.R. § 1.925(b)(3)(i).

³¹ See 47 C.F.R. § 1.925(b)(3)(ii).

³² See *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)).

³³ See *Metropolitan Transit Authority of Harris County, Texas, Order*, 20 FCC Rcd 12011, 12012 ¶ 4 (WTB 2005).

³⁴ See *State of Ohio, Memorandum Opinion and Order*, 17 FCC Rcd 439 (WTB 2002). The General Category freeze was intended to prevent the filing of new applications for channels in order to preserve the licensing landscape of the General Category spectrum so that the Commission could implement its new licensing approach (continued....)

accommodate Ohio's proposed operations.³⁵ Thus, a waiver of Section 90.617(d) of the Commission's rules does not undermine the underlying purpose of the SMR eligibility rules.

12. We also find that granting the waiver would be in the public interest. Ohio, a public safety entity, has demonstrated that there are no 800 MHz public safety channels available for its use, but that it has identified two SMR frequencies that could be used at its proposed site in Canton, Ohio.³⁶ In support of its contention regarding lack of an available public safety channel, Ohio includes letters from APCO and the 800 MHz Regional Planning Committee for Region 33.³⁷ Ohio claims that MARCS is operating near maximum capacity in the North Canton region and that the two SMR frequencies are necessary to provide improved public safety services there.³⁸

13. Ohio has also met the standards for grant of a waiver of the Wave 4 application freeze to enable Ohio to make use of the SMR channels within the Canada border region. The Wave 4 application freeze was established to maintain a stable spectrum environment during 800 MHz rebanding and to minimize adverse effects on incumbent public safety licensees that demonstrate a legitimate need for an exception to the freeze.³⁹ Ohio seeks to address capacity constraints by making use of these SMR channels. We are mindful of the operational needs of public safety licensees during 800 MHz rebanding and that denial of Ohio's waiver request could unduly delay Ohio and North Canton's system implementation plans.⁴⁰ Further, the TA concurs that Ohio's proposal will not impact 800 MHz rebanding.⁴¹ Accordingly, we grant Ohio's request for waiver of the Wave 4 application freeze.

14. Finally, we find that Ohio does not require a waiver of the Commission's "interleaved spectrum Orders." As part of rebanding, spectrum vacated by licensees relocating to the Enhanced SMR (ESMR) band above 817/862 MHz will become available to public safety and critical infrastructure industry entities.⁴² We analyzed Ohio's request and determined that its use of the subject SMR

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for the spectrum effectively. *Id.* at 448-49 ¶ 18. We also note that Sprint filed a Petition for Stay and Reconsideration of the Ohio Order. On July 24, 2012, Sprint withdrew its Petition for Reconsideration of this Order and noted that the Stay Request was dismissed in April 2002. *See* Sprint Nextel Request for Withdrawal of Petition for Reconsideration (dated July 24, 2012) *re* WPVR872.

³⁵ *See, e.g.,* County of Mecklenburg, *Memorandum Opinion and Order*, 17 FCC Rcd 15608, 15611-12 ¶¶ 9-10 (WTB 2002) (granting a public safety licensee a waiver of the General Category freeze, Section 90.617(d) and other rules, to permit public safety agency's licensing of SMR spectrum in light of the EA licensee's support).

³⁶ Frequency 859.5875 MHz is located in the 800 MHz Interleaved Band and frequency 860.5875 MHz is located in the 800 MHz Expansion Band. The Interleaved Band consists of the 809-815 MHz/854-860 MHz segment and the Expansion Band consists of the 815-816 MHz/860-861 MHz segment of the 800 MHz band. *See* Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15053-54 ¶¶ 154-156 (2004).

³⁷ *See* APCO Concurrence.

³⁸ *See* Inter-category Sharing Waiver Request at 1.

³⁹ *See* Canada Border Freeze PN.

⁴⁰ *See* County of Tompkins, New York, *Order*, 22 FCC Rcd 10215 (PSHSB 2007); County of Tuscarawas, Ohio, *Order*, 22 FCC Rcd 1717 (PSHSB 2007).

⁴¹ *See* TA Concurrence.

⁴² *See* 47 C.F.R. § 90.617(g).

frequencies will result in only a *de minimis* extension of Staley Technologies' currently licensed interference contour on the requested frequencies.⁴³ Therefore, we conclude that Ohio's use of these SMR frequencies will have no significant effect on the future availability of vacated spectrum to other public safety eligible entities.

15. *Conditions.* As noted above, Sprint conditions its short-spacing concurrence on (1) Ohio providing Sprint 60-day notice prior to commencing operations on the SMR channels and (2) Ohio submitting an updated election form to the TA.⁴⁴ We agree that the conditions should be imposed. First, it is reasonable to require Ohio to provide Sprint with 60 days notice prior to commencing operations on the SMR channels at issue in order for Sprint to take all necessary precautions to avoid interference. Second, Sprint notes that, on December 1, 2011, Ohio submitted an 800 MHz Expansion Band Election Form to the TA,⁴⁵ and that the TA required Ohio to resubmit the form updating the new call sign when it is issued.⁴⁶ Consequently, we also condition Ohio's grant on it updating its Expansion Band election form with the TA.

IV. ORDERING CLAUSES

16. For the reasons discussed herein, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.925, the State of Ohio's request for waiver of the freeze on inter-category sharing dated December 27, 2011 IS DENIED to the extent Ohio seeks relief under Section 90.621.

17. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.925 and 90.617(d) of the Commission's Rules, 47 C.F.R. §§ 1.925 and 90.617(d), the State of Ohio's waiver request of the Wave 4 application freeze IS GRANTED WITH CONDITIONS outlined in Paragraph 15.

18. IT IS FURTHER ORDERED that the State of Ohio's application, FCC File No. 0005005421, SHALL BE PROCESSED in accordance with this *Order*.

19. 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

Michael J. Wilhelm
Deputy Chief
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⁴³ We compared the 22 dBu F(50,10) contour of Ohio's proposed operation to the 22 dBu F(50,10) contour of Staley Technologies' Station WPEF809. The contour of Station WPEF809 was calculated using a maximum ERP of 1000 watts.

⁴⁴ See Sprint Letter at 1-2.

⁴⁵ See *id.* at 2 n.2.

⁴⁶ See *id.*