

Supplement to Commonwealth of Pennsylvania and FirstEnergy Corp. Request for Clarification or Amendment of Waiver

August 19, 2019

The Commonwealth of Pennsylvania (“Commonwealth”) and FirstEnergy Corp. (“FirstEnergy”)(together, the “Parties”) hereby supplement their March 12, 109 letter (“Letter”) regarding the Commission’s August 31, 1999 Order granting a waiver for the Commonwealth and FirstEnergy to share public safety and utility wireless facilities.¹ The Letter requests the Commission clarify or amend the Waiver so that FirstEnergy and the Commonwealth can share VHF Band channels to be incorporated into the shared system as part of a planned upgrade to P25. The Parties hereby provide additional information in support of the Letter.

I. Background

In 1998, the Commonwealth and GPU Energy (“GPU”), a predecessor-in-interest to FirstEnergy, requested a waiver of Section 90.179(a) of the Commission’s rules to permit non-profit sharing of a statewide Public Safety/Power Radio system. At the time, the system relied solely on the 800 MHz band. The Commission granted that request, stating, “[t]his *Order* grants [the] request for waiver to permit [the Parties] to construct and operate a shared network on Public Safety and I/LT frequencies (including *any* stations they subsequently add to the system) to be used by Public Safety and Power Radio eligibles on a non-profit, cost-shared basis.”² The Commonwealth and FirstEnergy have successfully shared use of a State-wide network for two decades pursuant to the Waiver and now seek to expand use to include VHF channels as part of a planned system upgrade to P25 technology.

II. Request for Clarification

As stated in the Letter, FirstEnergy and the Commonwealth interpret the Waiver as allowing any Part 90 Business/Industrial channels licensed to FirstEnergy and any Part 90 Public Safety channels licensed to Pennsylvania Public Safety to be added to the statewide system. Section 90.179(a) of the rules, which was waived by the Commission, applies equally to VHF and 800 MHz channels. In addition, it is not uncommon for radio systems to rely on several channel bands. For example, one band may be used for wide area coverage while another may be used for mobile repeaters.

In this instance, the Commonwealth and FirstEnergy have determined that VHF is far better suited to provide coverage in vast areas of rugged terrain and densely forested areas in Pennsylvania. This was evidenced by the recent Eric Frein manhunt in northeast Pennsylvania, the largest manhunt in Commonwealth history. During that event, four deployable 800 MHz sites were dispatched and still failed to cover the entire search area. It was ultimately necessary to employ VHF to adequately cover the area. As a further benefit, using a non-proprietary VHF

¹ In the Matter of COMMONWEALTH OF PENNSYLVANIA and GPU ENERGY Request for Waiver of Section 90.179 of the Commission's Rules, *Order*, released August 31, 1999, DA 99-1756 (1999)(“Waiver”).

² Waiver at para. 15 (Emphasis added).

solution resulted in increased interoperability with state, federal, and local responders that otherwise would not have been available with the legacy system alone.

In addition, the legacy 800 MHz system is over reliant on wooden poles in lieu of actual antenna tower sites to provide coverage. The legacy system utilizes 450 wooden poles that do not have equipment shelters, adequate backup power, or robust backhaul. Upgrading all of these sites to support conversion to P25 would impose overwhelming financial and logistics burdens. Strategically incorporating use of VHF frequencies greatly diminished those burdens by allowing hardened tower sites to provide significantly larger coverage footprints, reducing the number of wooden pole upgrades.

Thus, the Commonwealth and FirstEnergy are proposing to incorporate VHF channels into the system for coverage in less populated areas. The upgraded system will continue to use 800 MHz frequencies in the following counties and surrounding areas for added capacity in high population areas: Erie, Allegheny, Cumberland, Dauphin, York, Chester, Philadelphia, Bucks, and Lehigh.

As further described in the Letter, the Commonwealth and FirstEnergy believe this is consistent with the Waiver's statement that "any stations" may be added to the shared system and the Parties request the Commission confirm this view.

III. Alternative Request for Waiver

In the event the Commission disagrees that the Waiver only authorizes sharing of 800 MHz sites (even though that condition is not specified in the Waiver), the Commonwealth and FirstEnergy request an amendment to the Waiver to permit sharing of VHF channels.

The Commission may grant a waiver under Section 1.3 of its rules where good cause is shown.³ Good cause may be demonstrated by showing that "particular facts would make strict compliance inconsistent with the public interest."⁴ To make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.⁵ Similarly, waiver may be granted under Section 1.925 of the Commission's rules if it is shown that:

³ 47 C.F.R. § 1.3. See also *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (D.C. Cir. 2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁴ *Northeast Cellular*, 897 F.2d at 1166; see also *ICO Global Communications*, 428 F.3d at 269 (quoting *Northeast Cellular*); *WAIT Radio*, 418 F.2d at 1157-59.

⁵ See, e.g., *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule);

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; *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.⁶

The current 800 MHz system is proprietary and beyond the end of its lifecycle. System upgrade plans entail migrating from proprietary technology to P25 standards. In addition, as described above, VHF sites are being incorporated into the system to increase coverage outside of certain more highly populated areas.

In addition to increased coverage, benefits of migrating to the new shared system include increased interoperability associated with adopting P25 standards, spectral efficiency by implementing P25 phase 2 TDMA operation, increased competition for radio purchases, and new opportunities for counties to join the statewide radio system as opposed to constructing their own stand-alone systems resulting in savings to taxpayers. The P25 system is initially scaled to support 50,000 users and is upwards migratable to support additional users in the future. Several counties have elected to join the upgraded system, whereas, in the past, there was virtually no interest from counties to join the proprietary statewide system.

Agencies and partners to be served include the following:

- Department of Agriculture
- Department of Conservation & Natural Resources
- Department of Corrections
- Department of Environmental Protection
- Department of General Services - Capitol Police
- Department of Health
- Department of Military & Veterans Affairs
- Department of Transportation
- Office of Attorney General

(...continued)

Northeast Cellular, 897 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

⁶ 47 C.F.R. § 1.925(b)(3) (emphasis added).

- Office of Inspector General
- Pennsylvania Board of Probation & Parole
- Pennsylvania Emergency Management Agency
- Pennsylvania Game Commission
- Pennsylvania House of Representatives
- Pennsylvania Office of Administrative Services
- Pennsylvania Public Utility Commission
- Pennsylvania Treasury Department
- Pennsylvania Turnpike Commission
- State System of Higher Education
- Pennsylvania State Police
- US DOJ-ATF
- US DOJ-DEA
- US DOJ-US Marshalls
- US DOI-National Park Service
- Warren County
- Mifflin County
- Montour County
- Columbia County
- FirstEnergy

The Waiver noted the public interest benefits inherent in a shared Public Safety/Power Radio Service system, including the fact that public safety services in Pennsylvania will be able to communicate with one another throughout a wide area of coverage while reducing the cost of constructing an entire backbone system. The *Waiver* also pointed out that granting the waiver would facilitate interoperability between public safety agencies and electric utilities, especially in disaster situations.⁷

All of these objectives have been proven out over the successful 20-year life of the legacy system. The Commission's waiver of Section 90.179, has enabled the Commonwealth and FirstEnergy to integrate Public Safety and I/LT 800 MHz channels and move forward with a single radio system serving their collective needs throughout much of Pennsylvania. Deployment of a statewide system is a significant undertaking. Each party would not have had access to the same level of radio service absent the Commission's Waiver and resulting shared system. Not only due to funding, but also because of issues such as limited rights-of-way and tower space. Shared use by public safety and critical infrastructure has increased the gains by both Parties.

⁷ *Waiver*, Para. 11.

In the same way, the Commonwealth and FirstEnergy cannot separately achieve the level of service proposed for the upgraded system. Extension of the waiver to the upgraded system to allow incorporation of VHF channels on a shared use basis will promote radio coverage for both public safety and critical infrastructure services. The ability to share scarce resources such as costs, capacity, tower sites, rights-of-way, etc., is an efficient arrangement that allows each party to achieve radio coverage that would not be independently possible. Further, each party will benefit from the wide area coverage to be achieved through the use of VHF channels. In addition, the shared system allows coordination between critical infrastructure and public safety during incident response.

FirstEnergy is fully aware of its spectrum sharing responsibilities under the *Waiver* and will continue to contribute sufficient spectrum to satisfy its own needs.⁸ The addition of VHF channels to enhance capacity and coverage of the shared system will benefit public safety. Thus, the underlying purpose of the rule, to ensure adequate spectrum is available for Public Safety, will not be undermined by the shared use proposal. In fact, shared use will support additional spectrum capacity for Public Safety and is in the public interest.

The Parties respectfully request that, to the extent needed, the 1999 *Waiver* be amended to allow for the inclusion of VHF channels. The Parties the relief apply to existing stations and any future stations that may be added later, consistent with the *Waiver*, to avoid the unnecessarily burdensome administrative task of refiling a waiver request each time a site is constructed or modified.

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Should the Commission require additional information, it is requested to contact Greg Kunkle, Keller and Heckman LLP, 1001 G Street NW, Washington, DC 20001; 202-434-4178; e-mail: Kunkle@khlaw.com.

⁸ *Waiver*, Para. 14.