

DOCKET FILE COPY ORIGINAL
Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Implementing a Nationwide, Broadband,)
Interoperable Public Safety Network in)
the 700 MHz Band)
)
Development of Operational, Technical and)
Spectrum Requirements for Meeting Federal,)
State and Local Public Safety Communications)
Requirements Through the Year 2010)

PS Docket No. 06-229

FULL TIME

WT Docket No. 96-86

ORDER

Adopted: November 14, 2007

Released: November 14, 2007

By the Commission:

I. INTRODUCTION

1. On July 31, 2007, we adopted a *Second Report and Order* revising the rules governing the 700 MHz band.¹ In the *Second Report and Order*, we redesignated ten megahertz of public safety 700 MHz spectrum (763-768/793-798 MHz) for the purpose of establishing a nationwide, interoperable broadband public safety communications network. In order to accommodate this broadband allocation, we consolidated the public safety narrowband channels so that they are located at 769-775/799-805 MHz.² Subject to certain conditions and limitations, we determined that the Upper 700 MHz Band D Block licensee will pay the costs associated with relocating public safety narrowband operations to the consolidated channels.³ To facilitate the relocation process, and clearly define the costs that would be entitled to reimbursement, we required every 700 MHz band public safety licensee, whether holding individual narrowband authorizations or operating pursuant to a State License, to certify the number of narrowband mobile and portable handsets and base stations serving these handsets in operation as of August 30, 2007 (30 days following adoption of the *Second Report and Order*).⁴ We also prohibited authorization, whether pursuant to individual license or State License, of any new narrowband operations

¹ Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*Second Report and Order*).

² *Id.* at ¶ 329.

³ *Id.* at ¶ 336.

⁴ *Id.* at ¶¶ 336-337. In the April 2007 *Further Notice* we adopted prior to the *Second Report and Order*, we specifically requested the public safety community to provide estimates of the costs associated with relocating narrowband operations to the consolidated channels, as well as up-to-date information regarding how many narrowband radios are currently deployed and how many are actively being used. *See id.* at ¶ 333. As noted in the *Second Report and Order*, however, no public safety licensees responded to this call for information, and only Motorola filed comments submitting cost data. *Id.*

outside of the consolidated channels as of August 30, 2007, and cautioned that any equipment deployed outside of the consolidated channels after August 30, 2007 would be ineligible for relocation funding.⁵

2. On August 30, 2007, Commonwealth of Virginia, Virginia State Police (Virginia) requested waiver relief concerning narrowband operations outside of the consolidated channels.⁶ Specifically, Virginia requests waiver of the following provisions of the *Second Report and Order*: (1) the prohibition on authorization of new narrowband operations outside the consolidated channels as of August 30, 2007, (2) the limitation on cost reimbursement to equipment that was in operation as of August 30, 2007, to allow Virginia to include in the costs eligible for relocation funding all handsets and vehicle-mounted repeaters which it expects to deploy after August 30, 2007 in connection with its partially-implemented Statewide Agencies Radio System (STARS),⁷ and (3) the requirement that public safety entities submit certifications of narrowband equipment in operation as of August 30, 2007, to allow Virginia to list all handsets and vehicle mounted repeaters it expects to deploy after August 30, 2007 as part of its STARS project.⁸ For the reasons discussed below, we grant in part and deny in part the Waiver Request, and defer action on the Waiver Request in all other aspects.

II. DISCUSSION

3. As an initial matter, we note that after filing its waiver, Virginia filed a Petition for Reconsideration on September 24, 2007.⁹ In its Petition, Virginia includes among its requested relief the same relief it seeks in its Waiver Request.¹⁰ The Commission released a Public Notice listing the filing of the Petition, and other petitions for reconsideration, on September 27, 2007.¹¹ The Public Notice was published in the Federal Register on October 2, 2007, establishing dates for the filing of oppositions (October 17, 2007) and replies to oppositions (October 29, 2007).¹² While the pleading cycle with respect

⁵ *Id.* at ¶ 339.

⁶ Letter from Captain John E. Furlough, Communications Officer, Virginia State Police, to Marlene H. Dortch, Secretary, FCC, filed Aug. 30, 2007 (Waiver Request).

⁷ While not clear from the Waiver Request, it appears that Virginia intends to use 700 MHz spectrum only as a vehicle repeater-to-portable communications link. See Waiver Request at 3. In this regard, we note that Section 90.247 requires the use of mobile channels for mobile repeater applications to extend the range of hand-carried units. 47 C.F.R. § 90.247. Accordingly, we assume that Virginia is not using the base side of the frequency pair for its vehicle repeater transmissions, because it would require a waiver to do so, which it does not request. Further, it is not clear how Virginia ensures that its use of State License channels in a vehicle repeater manner would not present difficulties near borders with states that use their State License frequencies in a more conventional manner, *i.e.*, as part of a shared, wide area, trunked, interoperable infrastructure to address interstate public safety concerns. See Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements For Priority Access Service, WT Docket No. 96-86, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19867 ¶ 53 (2000).

⁸ *Id.* at 1-2. Virginia supplemented its Waiver Request in response to a request for information by staff of the Commission's Public Safety and Homeland Security Bureau (PSHSB). See Letter from Captain John E. Furlough, Communications Officer, Virginia State Police, to Jeffrey S. Cohen, Senior Legal Counsel, PSHSB, FCC, filed Sept. 19, 2007 (Waiver Supplement).

⁹ Petition for Reconsideration, PS Docket No. 06-229, WT Docket No. 96-86 (filed Sept. 24, 2007) (Petition).

¹⁰ *Id.* at 11-12.

¹¹ See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding, Report No. 2833, *Public Notice* (rel. Sept. 27, 2007).

¹² See 72 Fed. Reg. 56074 (Oct. 2, 2007); 47 C.F.R. § 1.429(e)-(g). Petitions for reconsideration that rely on facts that have not been previously presented to the Commission must either relate to events that have occurred or changed circumstances since the last opportunity to present them to the Commission, or been unknown to the petitioner until after the last opportunity to present them to the Commission and could not have been learned through the exercise of due diligence prior to such opportunity. *Id.* at Section 1.429 (b). The Commission may nevertheless determine that consideration of the facts relied on is required in the public interest. *Id.*

to the Petition has recently closed, we do not address in this Order the merits of the Petition as we have not yet completed our review of the record. In the interests of public safety, however, we provide Virginia limited waiver relief of the prohibition on new narrowband operations outside of the consolidated channels after August 30, 2007. As further explained below, we will determine the duration of such relief, and whether Virginia is entitled to reimbursement for relocation of equipment installed after August 30, 2007, after fully considering the Petition and associated public record.

4. Section 1.925 states that 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 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,¹³ or the applicant has no reasonable alternative.¹⁴ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁵

5. In its Waiver Request, Virginia makes a number of generalized claims of public harm should it be unable to continue to deploy additional narrowband operations under its STARS program following August 30, 2007. Virginia states that it has completed installation of approximately sixty-four percent of its STARS 700 MHz portable radios and mobile repeaters, all in the lower half of the channels assigned in its State License and thus outside of the consolidated narrowband channels.¹⁶ Virginia asserts that, with respect to its entire, remaining 700 MHz radio and repeater deployments, "[t]o change to the new frequencies within the consolidated narrowband spectrum now will force law enforcement and other STARS users to operate in two disparate frequency sets with one group unable in some cases to communicate with the other."¹⁷ Virginia adds that "[e]ven if we were to introduce the new frequencies on September 1, 2007, and operate in some to-be-determined, degraded mode of operation, subscriber installations could take months to resume."¹⁸ Virginia thus asserts that "[b]oth cases are critical officer and citizen safety issues that need to be avoided," adding that "[f]orcing the project to cease installation of 700 MHz portable/repeater equipment in inventory will effectively force STARS users to revert to a mobile-only system, presenting the Commonwealth with extreme officer safety and operational issues."¹⁹ Virginia does not offer any additional technical data or facts explaining why commencing new narrowband operations in the consolidated bands would lead to communications difficulties.²⁰ Virginia also does not fully explain why it necessarily must complete its entire STARS deployment in frequencies that must eventually be re-banded, rather than switching immediately to the new consolidated segments, particularly since it has yet to deploy 2827 portables and repeaters, as compared to 3167 deployed as of

¹³ 47 C.F.R. § 1.925(b)(3)(i).

¹⁴ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁵ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969)(*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

¹⁶ Waiver Request at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2, 4.

²⁰ For example, we lack a detailed technical description of the system, specific examples of potential communications problems, and information concerning the extent to which other frequency bands already in use could mitigate the concerns Virginia raises.

August 30, 2007.²¹ Virginia states only that it “cannot simply cease installing equipment as of [August 30, 2007] without jeopardizing officer and citizen safety and even the project itself.”²²

6. Virginia does not, however, provide any additional factual support or technical showings explaining the basis for its assertions, particularly concerning why it cannot at any point deploy new narrowband operations in the consolidated bands. An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²³ We thus counsel Virginia, and other public safety agencies seeking similar waiver relief, that the Commission’s waiver criteria require waiver applicants to fully justify, for example through detailed technical and operational reasons, why portable and base station radios to be deployed after August 30th could not be programmed to operate in the consolidated narrowband spectrum only in the first instance and thus not require relocation.

7. Nevertheless, it was not our intent in establishing the prohibition on new narrowband operations to create hardship or delay systems needed to protect the safety of life and property. It is in the public interest, therefore, to provide interim waiver relief for continued deployment outside of the consolidated narrowband channels where there has been a showing of potential public harm and there is evidence of a comprehensive 700 MHz deployment plan that predates August 30, 2007 for which equipment has been received and/or deployed. Accordingly, because Virginia has made claims of potential public harm should it be required to cease adding new narrowband operations after August 30, 2007 in frequencies outside of the consolidated segments, and because there is evidence of a comprehensive 700 MHz system, the purchase and deployment of which predates August 30, 2007, we find it to be in the public interest to grant Virginia limited interim waiver relief to deploy new narrowband operations outside the consolidated bands following August 30, 2007, until we rule on Virginia’s Petition and the issues in this Waiver Request that we are deferring.

8. We defer ruling on the continued duration of this limited waiver relief, and whether Virginia would be entitled to cost reimbursement for any new narrowband operations deployed following August 30, 2007, until we fully consider Virginia’s Petition and the associated public record. Accordingly, our decision to permit Virginia to continue to place new narrowband radios into operation after August 30, 2007 is without prejudice to our subsequent ruling on these outstanding waiver issues – including whether Virginia would be entitled to reimbursement for the costs associated with relocating any additional narrowband operations outside of the consolidated narrowband channels that Virginia deploys after August 30, 2007, and on its Petition.²⁴ Finally, because we grant limited waiver relief as described herein, and must still address the outstanding waiver issues and Virginia’s Petition, we deny Virginia’s request that it be permitted to include in the narrowband certifications due October 23, 2007 all handsets and vehicle mounted repeaters it expects to deploy after August 30, 2007.²⁵

²¹ Supplement at 2.

²² Waiver Request at 4.

²³ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad Corp., Memorandum Opinion and Order*, 18 FCC Rcd. 1414, 1415 (2003).

²⁴ In this regard, we note that we capped the total costs of reimbursement at \$10 million, based on the only information we received in the record, submitted by Motorola, Virginia’s equipment vendor, concerning the costs of reprogramming the impacted narrowband systems, which was not disputed. *Second Report and Order* at ¶ 341.

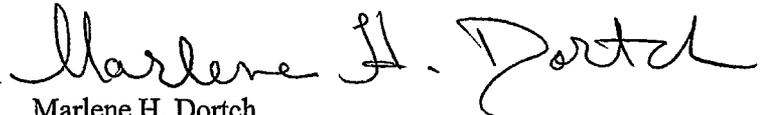
²⁵ See Public Safety and Homeland Security Bureau Announces an October 23, 2007 Deadline for Filing 700 MHz Relocation Certification Information, PS Docket No. 06-229, WT Docket No. 96-86, *Public Notice*, DA 07-4168 at 2 n. 7 (PSHSB Oct. 5, 2007); (the pendency of waiver requests does not eliminate the obligation to comply with the Commission’s rules; thus, if a public safety entity has requested waiver relief or filed a Petition for Reconsideration it still must provide the information and follow the procedures in exact accordance with this Public Notice.)

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 301, 303, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303, and 332, and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, THIS ORDER in PS Docket No. 06-229, and WT Docket No. 96-86, is ADOPTED.

10. IT IS FURTHER ORDERED that the Waiver Request filed by the Commonwealth of Virginia, Virginia State Police, filed August 30, 2007, is GRANTED IN PART AND DENIED IN PART, and, that action on the Waiver Request is DEFERRED IN ALL OTHER RESPECTS.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary