



Federal Communications Commission  
Washington, D.C. 20554

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DA 14-35

Mr. Mark E. Crosby  
President and CEO  
Enterprise Wireless Alliance  
8484 Westpark Drive, Suite 630  
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Mr. William K. Brownlow  
Chair  
Public Safety Communications Council  
c/o AASHTO  
444 N Capitol St. NW, Suite 249  
Washington, DC 20001

Dear Messrs. Crosby and Brownlow:

By letter of July 16, 2013<sup>1</sup> the Enterprise Wireless Association (EWA) asked the Public Safety and Homeland Security Bureau (PSHSB) and the Wireless Telecommunications Bureau (WTB) to provide guidance and to confirm new standards for consideration of public safety licensee requests to use Industrial/Business (I/B) frequencies below 470 MHz. We take this opportunity to clarify the FCC process for reviewing such requests. To the extent that the issues posited by EWA arise, we believe they can be addressed through the existing process.

We appreciate EWA's concerns regarding this matter, and welcome this opportunity to explain how the Federal Communications Commission (Commission) handles public safety entities' requests for I/B spectrum. The Commission established separate frequency pools for public safety entities and I/B entities in order to increase spectrum efficiency, increase licensee flexibility to manage the spectrum more efficiently and reduce administrative burdens on users as well as the Commission.<sup>2</sup> Generally, these goals are best advanced by restricting licensees to the pool for which they are eligible. As further discussed below, however, under certain circumstances it is appropriate to grant public safety entities waivers of these rules. These waiver requests, which are relatively infrequent, are reviewed *de novo* by Commission staff in both PSHSB and WTB even though the frequency selection has been approved by a certified I/B coordinator.

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<sup>1</sup> Letter to Mr. David Turetsky, Chief, Public Safety and Homeland Security Bureau and Ms. Ruth Milkman, Chief, Wireless Telecommunications Bureau, from Mr. Mark E. Crosby, President and Chief Executive Officer, the Enterprise Wireless Alliance, July 26, 2013 (EWA Letter).

<sup>2</sup> See Replacement of Part 90 By Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, *Second Report and Order*, 12 FCC Rcd 14307, 14315 ¶ 15 (1997).

EWA specifically seeks “guidance regarding the appropriate standard for EWA, an I/B frequency advisory committee (“FAC”) to use when evaluating requests” from public safety entities seeking waivers to use I/B frequencies below 470 MHz.<sup>3</sup> Further, EWA requests that the Commission confirm that EWA may follow certain proposed standards when considering public safety licensee requests to use below-470 MHz I/B frequencies.<sup>4</sup> The first standard would disqualify conventional public safety applicants from seeking waivers to use I/B frequencies. These conventional licensees would be required to share a frequency with a licensee or licensees in the public safety pool.<sup>5</sup> The second standard would disqualify trunked public safety applicants from seeking an I/B frequency unless the applicant demonstrated that “all potentially available PS frequencies already have achieved FB8 [exclusive use] status so that there are no assignable, shared PS frequencies.”<sup>6</sup>

By letter of August 16, 2013<sup>7</sup> the Public Safety Communications Council (PSCC) responded to the EWA letter, arguing against EWA’s “abstract fashion” of addressing waiver requests and urging that the “Commission should not be panned in by arbitrary constraints that ignore the unique and unusual circumstances typically at issue in a request for waiver.”<sup>8</sup> In PSCC’s view, the Commission should consider waiver requests from public safety applicants seeking I/B frequencies when a shared public safety frequency “is unusable for public safety communications because of the substantial potential for harmful interference, either to the applicant’s proposed operations or to an existing licensed facility.”<sup>9</sup> In such a case, PSCC states, “the Commission properly expects a demonstration (supported with a statement from a Public Safety frequency coordinator) that the applicant’s requirements cannot be met with Public Safety Pool channels.”<sup>10</sup>

By letter of September 9, 2013<sup>11</sup> EWA replied to the PSCC letter. It asserts that PSCC’s position conflicts with Section 90.173(a) of the Commission’s Rules,<sup>12</sup> which states that frequencies generally are

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<sup>3</sup> EWA Letter at 1.

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Letter to Mr. David Turetsky, Chief, Public Safety and Homeland Security Bureau and Ms. Ruth Milkman, Chief, Wireless Telecommunications Bureau, from Mr. William K. Brownlow, Chair, Public Safety Communications Council, August 13, 2013 (PSCC Letter).

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* citing State of Maine, *Order*, 27 FCC Rcd 8891 (PSSHB 2012); State of Maine, *Order*, 28 FCC Rcd 7388 (PSSHB 2013); Shelby County, Alabama, *Order*, 27 FCC Rcd 388 (PSSHB 2012); West Virginia Dept. of Health and Human Services/State Trauma Emergency Care Sys., *Order*, 25 FCC Rcd 12566 (PSSHB 2010).

<sup>11</sup> Letter to Mr. David Turetsky, Chief, Public Safety and Homeland Security Bureau and Ms. Ruth Milkman, Chief, Wireless Telecommunications Bureau, from Mr. Mark E. Crosby, President and Chief Executive Officer, the Enterprise Wireless Alliance, September 9, 2013 (EWA Reply).

<sup>12</sup> 47 C.F.R. § 90.173(a).

assigned on a shared basis, and Section 90.187,<sup>13</sup> which provides that only trunked systems below 470 MHz are eligible for exclusive frequencies.<sup>14</sup>

We believe the Commission's existing processes accommodate the scenarios EWA describes; we therefore decline to confirm that EWA's proposed standards conform to the Commission's rules and policies respecting public safety licensees' access to I/B frequencies. As EWA notes, Section 90.175 of the Commission's rules "does not differentiate between PS and IB applicants."<sup>15</sup> Rather, the rule requires FACs to recommend the "most appropriate frequency," with no express limitation to the spectrum pool for which the applicant is eligible.<sup>16</sup> Precedent establishes that, in the proper case, a FAC may identify an "appropriate frequency" in a spectrum pool other than the pool for which the applicant is eligible.<sup>17</sup>

We can foresee circumstances in which a FAC could suitably recommend an out-of-pool frequency as "most appropriate" for a new entrant or an existing licensee seeking to expand its system. For example, a case could arise in which the public safety pool is so heavily used that requiring a new entrant to use a shared frequency would materially deteriorate the grade of service required by incumbent licensees. In such a case the "appropriate frequency" could be an unused I/B frequency, assuming that such a frequency were available without creating a spectrum shortfall or materially deteriorating the grade of service in the I/B pool – even if both the incumbent operations and the proposed operations would be in conventional mode and therefore ordinarily required to share spectrum pursuant to Section 90.173.

As is generally its practice with respect to waiver requests, the Commission takes a case-by-case approach to evaluating proposals from public safety entities that seek I/B frequencies.<sup>18</sup> The Commission defers to the FAC's technical determination that there is no suitable public safety pool spectrum available

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<sup>13</sup> 47 C.F.R. § 90.187.

<sup>14</sup> EWA Reply at 1-2.

<sup>15</sup> EWA Letter at 1. *See* 47 C.F.R. § 90.175.

<sup>16</sup> 47 C.F.R. § 90.175; *see also* 47 C.F.R. § 90.7 (defining frequency coordination as "[t]he process of obtaining the recommendation of a frequency coordinator for a frequency(ies) that will most effectively meet the applicant's needs while minimizing interference to licensees already operating in a given frequency band.").

<sup>17</sup> *See, e.g.,* West Virginia Department of Health and Human Resources/Bureau of Public Health/State Office of Emergency Medical Services, *Order*, 28 FCC Rcd 7089 (PSHSB 2013)(waiver to use I/B frequencies granted where suitable public safety frequencies not available and sufficient I/B frequencies remained after waiver granted.); City of Augusta, Maine, *Order* 28 FCC Rcd. 4706 (PSHSB 2013)(public safety licensee granted waiver to share I/B frequencies upon a demonstration that suitable public safety frequencies were not available because licensee was close to the Canada border); State of Maine, *Order*, 28 FCC Rcd 988 (PSHSB 2013)(licensee demonstrating that suitable public safety frequencies were not available despite extensive frequency reuse in its system granted waiver to use I/B and railroad frequencies); Shelby County, Alabama, *Order*, 27 FCC Rcd. 388 (PSHSB 2012)(notwithstanding contrary comments by EWA, allowing County to use I/B frequencies on a showing that suitable public safety frequencies were not available); City of Los Angeles, *Order*, 23 FCC Rcd 8720 (PSHSB 2008)(public safety licensee granted access to I/B frequencies on showing that suitable public safety pool frequencies were not available.)

<sup>18</sup> EWA's standards would amount to *per se* tests. The first would be a *per se* test for new conventional public safety entrants who would be denied access to I/B frequencies no matter how heavily public safety frequencies in the area are used. EWA Letter at 2. The second would be a *per se* test that a new trunked public safety entrant could not seek a waiver to use I/B frequencies unless it showed that all public safety pool licensees had exclusive "FB8" status on all public safety pool frequencies. *Id.* at 3.

and that the selected I/B frequencies are appropriate and avoid or minimize interference to other users, and reviews *de novo* the legal issue of whether the applicant meets the Commission's well-established waiver standard.<sup>19</sup> Only when a proponent of use of I/B frequencies by a public safety entity satisfies the Commission's waiver standards will the Commission grant the requested waiver.

In evaluating public safety entities' requests for I/B frequencies, the Commission will continue to carefully review FAC's recommendations and ensure that the applicant satisfies the Commission's waiver criteria. We emphasize that FACs must carefully and accurately ascertain that no suitable public safety frequencies are available before recommending recourse to I/B frequencies. We see no need, however, to change our traditional case-by-case analysis of such requests. Thus, in response to EWA's request for "FCC guidance regarding the appropriate standard for EWA . . . to use in evaluating such requests,"<sup>20</sup> we refer EWA to the cases cited herein and to this letter's explanation of how the Commission responds to waiver requests filed by new entrants or existing public safety licensees seeking use of I/B channels.

Should you need any additional information or would like to discuss this matter further, please contact me at (202) 418-1300 or by e-mail at david.simpson@fcc.gov or Roger Sherman at (202) 418-0656 or by e-mail at roger.sherman@fcc.gov.

Sincerely,

David G. Simpson  
Rear Admiral, USN (Ret.)  
Chief, Public Safety and Homeland Security Bureau

Roger C. Sherman  
Acting Chief  
Wireless Telecommunications Bureau

cc: Elizabeth Sachs, Esq.

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<sup>19</sup> See 47 C.F.R. § 1.925 ("The Commission may grant a request for waiver if it is shown that: (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."); 47 C.F.R. § 90.175(h)(FAC recommendations "advisory" in nature).

<sup>20</sup> EWA Letter at 1.