

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

In the Matter of)
COUNTY OF FLATHEAD, MONTANA) File No. 0005696877
Request For Waiver Section 90.35(a) of the)
Commission's Rules)

ORDER

Adopted: February 10, 2015

Released: February 10, 2015

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On March 19, 2013, Flathead County, Montana (the County) filed an application to address coverage deficiencies in its VHF land mobile radio system in northwest Montana near the U.S./Canada border. The County obtained Canadian concurrence for the use of the frequencies identified in its application. However, since the County seeks to add frequencies that are part of the Industrial/Business Pool (I/B Pool), the County seeks a waiver of Section 90.35(a) of the Commission's rules. For the reasons detailed below, we grant the County's waiver request.

II. BACKGROUND

2. The County filed the instant application proposing to operate on eight I/B Pool frequencies at and around the Mt. Aeneas and Swan Hill sites in an exclusive use "FB8/MO8" configuration. The County states that its request is "critical to the public safety communications network deployed within the County which migrated from analog technology to a [Project 25 (P25)] digital network." The County claims that in changing from analog to digital P25 technology, its network became "far less effective" due to "[l]oss of coverage and severe multipath problems" in two major areas of operation.

1 See File No. 0005696877 (filed Mar. 19, 2013, amended Mar. 28, 2013, Aug. 29, 2013, Aug. 30, 2013, Dec. 23, 2013, and Aug. 4, 2014).

2 47 C.F.R. § 1.928.

3 See Waiver Request (dated Nov. 1, 2012) (Waiver Request) and Use of IB Channel Request (dated August 28, 2013) (Amended Waiver Request) attached to FCC File No. 0005696877.

4 FB8 refers to a repeater operating within a centralized trunked radio system which has exclusive use of the designated frequency within a given geographic area. MO8 refers to a mobile or hand-held transceiver operating in a centralized trunked radio system within an exclusive geographic area.

5 These frequencies include: 151.8500 MHz; 151.9100 MHz; 152.420 MHz; 152.9375 MHz; 157.680 MHz; 159.6975 MHz; 159.7425 MHz; and 159.7650 MHz.

6 Waiver Request at 1. The County notes that all public safety licensees in the area use its radio system including "the Sheriff's Office, 3 Police Departments, Fire and Rescue, County Roads, Local Fire, Fish, Wildlife, and Parks, and Federal agencies such as USFS, US Marshalls Service, FBI, ATF, and soon the US Border Patrol." Id.

7 Id.

Therefore the County seeks to address this coverage gap by adding the base stations proposed in its application.⁸

3. In support of its waiver request, the County includes a letter from the Association of Public Safety Communications Officials-International, Inc. (APCO) Montana Frequency Advisor (Frequency Advisor) describing how the high terrain at the proposed sites and the sites' proximity to Canada foreclose the County from using public safety frequencies.⁹ According to the Frequency Advisor, Flathead first searched for frequencies at a high elevation site but Missoula County, Lake County, the Montana Department of Natural Resources, and the Montana Department of Transportation all denied letters of concurrence due to "[t]he propagation characteristics of VHF frequencies at these mountaintop locations."¹⁰ Next, Flathead searched for frequencies at a lower elevation site, but according to the Frequency Advisor, the "eight [Public Safety Pool] frequencies thought to be clear at the low altitude Marion Montana site in Flathead County resulted in rejections from Canada on all but one close to one year ago."¹¹ Canada, however, has concurred with the County's proposed use of eight I/B Pool frequencies at the two base station locations listed in its application.¹²

4. The Frequency Advisor also states that public safety frequencies in the UHF, 700 MHz and 800 MHz bands are not a viable option for the County because its system is part of the State of Montana P25 digital trunking system, which is completely VHF and primarily licensed on an "exclusive" FB8/MO8 basis.¹³ The County also provides letters of concurrence from AAA, a Commission-certified I/B Pool frequency coordinator, concurring that the I/B Pool channels the County seeks to license were properly coordinated.¹⁴ Additionally, the County obtained letters of concurrence for its proposed operations on frequency 157.680 MHz from co-channel licensees Kenneth Scott (WNDL238) and Handley Transportation (WPEQ706).¹⁵ Should any interference occur, the County agrees to eliminate the interference or vacate the frequency.¹⁶

5. On October 30, 2013, the Public Safety and Homeland Security Bureau (Bureau or PSHSB) sought comment on the County's waiver request.¹⁷ The Enterprise Wireless Alliance (EWA) opposes

⁸ *Id.*

⁹ See Letter from APCO Montana Frequency Advisor to FCC (dated Mar. 18, 2013) (APCO Letter) attached to FCC File No. 0005696877.

¹⁰ *Id.*

¹¹ *Id.* at 1. "Marine band VHF channels were used at the Marion location, and this action has used up all Public Safety VHF resources in the NW Montana area." *Id.*

¹² See File No. 0005696877 and associated COSER numbers.

¹³ APCO Letter at 2. See also FRN 0004535787 formerly 0004535803. In that connection, we note that the State of Montana -PSSB has assigned many of its VHF licenses to the Montana Highway Patrol.

¹⁴ See letters from RS/AAA to the Federal Communications Commission (June 29, 2012) and (Aug. 21, 2012) (AAA Concurrence) attached to File No. 0005696877.

¹⁵ See Letter from Jack Spillman, Flathead County, and Kenneth Scott (dated Apr. 14, 2014) and Letter from Jack Spillman, Flathead County, and Handley Transportation (dated Apr. 7, 2014) attached to FCC File No. 0005696877.

¹⁶ Waiver Request at 2 ("Flathead County agrees to terminate any use of channels that cause interference should any be detected in both the US and in Canada.").

¹⁷ See Public Safety and Homeland Security Bureau Seeks Comment on Application and Waiver Filed by Flathead County, Montana for 150 MHz Industrial/Business Frequencies, *Public Notice*, 28 FCC Rcd 14848 (PSHSB 2013).

the waiver request. It questions whether the Commission should sanction the use of Project 25 technology, “at least in the VHF band,”¹⁸ given the coverage difficulties and multipath propagation problems encountered by the County.¹⁹ EWA also contends that the “relief requested [by the County] raises a fundamental question about Public Safety frequency assignment standards,” and finds it “extraordinary that there are no assignable VHF Public Safety frequencies in one of the more rural counties in the nation.”²⁰ EWA also faults the State of Montana for not concurring in the County’s proposal to use frequencies used by the state as part of its mutual aid system.²¹ It also “wonders” why the County has not used its other VHF frequencies – currently dedicated to, *e.g.*, emergency medical services, and the Sheriff’s department – in place of the requested I/B channels.²² The County requests authority for 250 mobile units and EWA questions why so many mobile units are needed for a County with a population of only 91,000 persons.²³ Finally, EWA disagrees with the concurrence letter from AAA – an FCC-certified frequency coordinator – stating that the requested I/B frequencies were properly coordinated.

6. The County responds that it anticipated coverage difficulties given the reduced bandwidth of Project 25 transmissions, and that multipath problems are inherent in digital systems operated in rugged terrain such as that in Montana.²⁴ Addressing EWA’s assertion of the relatively small population of the County, the County points out that “hundreds of thousands” of visitors take advantage of the recreational opportunities in the County.²⁵ Moreover, the County points out, 250 mobile units are not unreasonable for a system that serves “two Sheriff’s Departments, Three Police Departments, twenty three Rural Fire Departments, two Hospitals, 11 Ambulances [sic] Services, two City Fire Departments, US Forest Service Law Enforcement, Glacier National Park, Bureau of Land Management, US Marshals Service, US Customs, County Roads, US Border Patrol, Bureau of Alcohol Tobacco and Firearms, two SWAT units, Montana Highway Patrol and others from the State.”²⁶

III. DISCUSSION

7. EWA’s questioning of the appropriateness of VHF Project 25 technology in mountainous terrain is irrelevant to the County’s waiver request. The technology is accepted world-wide and is the product of decades of developmental effort. The effects that EWA complains of – limited coverage as a function of reduced bandwidth and multipath propagation – can be overcome just as the County proposes, by erecting additional sites. To the extent that EWA has issues with “Public Safety frequency assignment standards”²⁷ those issues appropriately may be raised in a rule making proceeding but are not material here. EWA may well regard the lack of VHF public safety spectrum in the County as

¹⁸ Comments of the Enterprise Wireless Alliance, Nov. 27, 2013 (EWA Comments) at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.* at 4.

²⁴ Response to Comments of the Enterprise Wireless Alliance, Dec. 3, 2013 (County Response) at 1.

²⁵ *Id.* at 2.

²⁶ *Id.* at 3.

²⁷ EWA Comments at 2.

“extraordinary,” but we note that EWA has failed to show that such spectrum is available. EWA’s criticism of the State of Montana for not concurring with the County’s request for use of certain frequencies used by the State does not change the fact that concurrence was denied, most likely for a valid reason. With regard to EWA’s claims that AAA’s coordination was faulty, we note that the County resolved the issues identified by EWA by obtaining concurrence letters from the relevant I/B co-channel licensees.²⁸ Finally, we note that EWA has not asserted – much less demonstrated – that the proposed use of the proposed I/B frequencies will result in a shortage of I/B frequencies in or around Flathead County.

IV. DECISION

8. A party seeking waiver of a Commission rule must show that “[t]he 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 [....]”²⁹ Alternatively, a party must show that “[i]n 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.”³⁰ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.³¹

9. “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.”³² “The Commission defers to the [frequency coordinator’s] technical determination that there is no suitable public safety pool spectrum available 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.”³³ We find this guidance instructive in analyzing the County’s request.

10. First, we concur with the frequency coordinator’s determination that there are no suitable Public Safety Pool VHF frequencies available and that the selected I/B Pool VHF frequencies are appropriate. The County’s primary justification for the proposed sites is to address multipath issues that

²⁸ See note 15, *supra*. We note that the County does not require concurrence from B&N Livestock (WQIJ561) for its proposed operations on frequency 159.7425 MHz. The control point for Station WQIJ561 is located in Brusett, Montana which is over 400 kilometers from Flathead County. We believe that the center coordinates listed on B&N Livestock’s license for its mobile area of operation are in error since these coordinates have B&N Livestock’s mobile units as operating within Flathead County.

²⁹ 47 C.F.R. § 1.925(b)(3)(i).

³⁰ 47 C.F.R. § 1.925(b)(3)(ii).

³¹ *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 Radio 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).

³² See Letter to Mark E. Crosby, CEO, Enterprise Wireless Association, William K. Brownlow, Chair, Public Safety Communications Council, from David G. Simpson, Rear Admiral, USN (Ret.), Chief, Public Safety and Homeland Security Bureau, and Roger C. Sherman, Acting Chief, Wireless Telecommunications Bureau, *Letter*, 29 FCC Rcd 250, 252 (PSHSB and WTB 2014).

³³ *Id.* at 252-253.

have affected the digital P25 system since the inception of the project.³⁴ The use of other public safety bands, such as UHF, 700 and 800 MHz, is not an option for the County because the proposed system is part of the State of Montana P25 digital trunking system, which is a VHF system, and the cost of retuning the County's and the State of Montana system to alternative bands would be cost prohibitive.³⁵ Having established that VHF is the most appropriate band to address the County's coverage issues and to integrate into the Statewide P25 system, we now turn to whether the County has exhausted its options in the VHF public safety pool.

11. Here, the County demonstrates the problems of obtaining Canadian approval. Canada rejected a number of applications submitted by the County and the State for VHF Public Safety Pool frequencies due to "Harmful Interference Anticipated" (HIA) to Canadian operations.³⁶ As a general matter, "Canada will approve or reject a U.S. coordination proposal based on whether or not harmful interference to an incumbent station in Canada is likely to occur from the proposed U.S. assignment."³⁷

12. The County correctly points out, that Canada does not differentiate between public safety and I/B pool applicants. Rather, Canadian concurrence is provided on a first-come, first-served basis regardless of the spectrum pool for which the U.S. applicant is eligible.³⁸ Thus, we find it significant that Canada approved the proposed I/B Pool frequencies at the sites that the County believes will satisfactorily address its daily coverage and domestic interoperability needs. Additionally, our precedent establishes that a public safety applicant may obtain a waiver of Section 90.35 of the rules to license I/B Pool frequencies in the regions bordering Canada when demonstrating that suitable Public Safety Pool frequencies are unavailable.³⁹

13. We agree with the County that its proposal avoids and minimizes interference potential to I/B Pool incumbents. We note that AAA, a certified I/B Pool frequency coordinator, concurred with the County's proposal. Furthermore, the County obtained concurrence from co-channel I/B incumbents for its operations on 157.680 MHz. Additionally, the County agrees to terminate any use of channels that cause interference should any be detected in both the U.S. and Canada and that a given frequency can be deactivated via microwave link without travelling to the site.⁴⁰ Having established that there are no suitable public safety pool frequencies available and that the selected I/B frequencies are appropriate and avoid or minimize interference to other users, we now review *de novo* the legal issue of whether or not the County meets the Commission's waiver standard.

³⁴ Multipath is a propagation phenomenon that results in radio signals reaching the receiving antenna by two or more paths. Causes of multipath include reflection from terrestrial objects, such as mountains and buildings.

³⁵ Montana Department of Transportation, County of Jefferson, Montana, *Order*, 28 FCC Rcd 11836, 11843 ¶ 31 (PSHSB 2013).

³⁶ See Letter from Jack Spillman, Flathead County to FCC (dated Aug. 28, 2013) attached to FCC File No. 0005696877; see, e.g., Notice of Return for Canadian Objections Reference No.5636859 (dated Aug. 13, 2013) attached to FCC File No. 0005696877.

³⁷ Public Safety and Homeland Security Bureau, the Wireless Telecommunications Bureau, and the International Bureau Provide Guidance to Part 22 and Part 90 Applicants Seeking VHF and UHF Frequencies Along the U.S./Canada Border, *Public Notice*, 24 FCC Rcd 5578 (PSHSB, IB and WTB 2009).

³⁸ *Id.*

³⁹ See, e.g., City of Augusta, Maine, *Order* 28 FCC Rcd. 4706 (PSHSB 2013); State of Maine, *Order*, 28 FCC Rcd 988 (PSHSB 2013).

⁴⁰ Waiver Request at 2.

14. We conclude that in view of the unique factual circumstances of this case, strict application of Section 90.35(a) would be unduly burdensome to the County. Specifically, we find that the I/B Pool frequencies are the most suitable frequencies that will (1) function at the Mt. Aeneas and Swan Hill sites, (2) address the County's daily coverage issues, (3) conform to interoperability requirements with the Montana statewide P25 system, and (4) will not cause interference to Canadian operations or U.S. operations in the public safety and I/B Pools. Additionally, the County's proposed use would be in the public interest because it will improve first responder communications in a relatively remote part of Montana that borders Canada.

V. CONCLUSION

15. Based on the foregoing, we conclude the County has made a sufficient showing for a waiver under Section 1.925 of the Commission's rules of the eligibility requirements listed in Section 90.35(a). Consequently, we grant the County a waiver of the eligibility requirements of Section 90.35(a) of the Commission's rules to permit the County to license the eight I/B Pool frequencies listed in its application.

VI. ORDERING CLAUSES

16. Accordingly, the Waiver Request associated with the captioned application filed by the County of Flathead, Montana, IS GRANTED pursuant to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, and the associated application, Federal Communications Commission File No. 0005696877, as amended, SHALL BE PROCESSED accordingly.

17. 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

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