

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

In the Matter of
PENNSYLVANIA TURNPIKE COMMISSION
Request for Waiver of Sections 90.20 or 90.173(h)
of the Commission's Rules

ORDER

Adopted: September 5, 2014

Released: September 5, 2014

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

I. INTRODUCTION

1. The Pennsylvania Turnpike Commission (the Turnpike) uses frequencies 159.045 MHz and 159.075 MHz as mobile relay repeater (FB2) transmit channels in its statewide system. After more than 40 years using these frequencies, the Turnpike recently discovered the secondary status of its operations, and now requests a waiver of either Section 90.20 or 90.173(h) of the Commission's rules in order to operate on these channels on a co-primary basis relative to public safety mobile operations. For the reasons set forth below, we conclude that grant of the requested waivers is not warranted.

II. BACKGROUND

A. Frequencies 159.045 MHz and 159.075 MHz.

2. In 1958, the Commission allocated frequencies 159.045 MHz and 159.075 MHz to the former Highway Maintenance Radio Service for mobile station only operation. At that time, the

1 The Turnpike Commission was created by Pennsylvania state law in 1937 to construct, finance, operate, and maintain the Pennsylvania Turnpike. See Request for Waiver filed by Pennsylvania Turnpike Commission at 1 (dated April 17, 2014) (Waiver Request).

2 The Turnpike's system includes call Signs KFX326, KFX327, KFX328, KFX329, KFZ742, WPRR650 and WPRS452. Id. at 3.

3 Id. In 2000, the Commission authorized the Turnpike's operations on these frequencies under call signs WPRS452 and WPRR650. See File No. D146214 (Aug. 25, 2000) re WPRS452 and File No. D147715 (Oct 11, 2000) re WPRR650.

4 47 C.F.R. § 90.20.

5 47 C.F.R. § 90.173(h).

6 Waiver Request at 1.

7 Amendment of Part 10 of the Commission's Rules Governing the Public Safety Radio Services to Modify Existing Services, Create New Services, and Effect Changes in the Availability of Frequencies, Docket No. 11990, Report and Order, 42 FCC 770 at Appendix (1958) (PLMRS Report and Order) (amending former Section 10.405(e) of the Commission's rules, which listed the Highway Maintenance Radio Service frequencies and the class of station to which they are normally available, as well as specific assignment limitations).

Commission also established that frequencies available for assignment to mobile-only stations may also be authorized for use by base stations provided that applications are coordinated with affected licensees in the area and subject to the condition that no harmful interference is caused to any mobile station using the particular frequency.⁸

3. In the mid-1990's, as part of the *Refarming* proceeding, the Commission consolidated the six former Public Safety Radio Services (*i.e.* Emergency Medical, Fire, Forestry Conservation, Highway Maintenance, Police, and Local Government) and the former Special Emergency Radio Service into one Public Safety Pool from which any eligible could apply for any public safety frequency.⁹ Currently, Sections 90.20 and 90.173(h) of the Commission's rules establish that frequencies 159.045 MHz and 159.075 MHz are available to any eligible public safety user either for (1) primary mobile station operations or (2) secondary base station operations.¹⁰ Section 90.7 of the Commission's rules provides that "[s]econdary operations may not cause interference to operations authorized on a primary basis and they are not protected from interference from primary operations."¹¹

B. Modification Applications.

4. On January 14, 2014, the Turnpike filed seven modification applications, and a request for waiver of Section 90.20 of the Commission's rules, to modify its FB2 operations on frequencies 159.045 MHz and 159.075 MHz from secondary to primary status.¹² The Public Safety and Homeland Security Bureau's (PSHSB) licensing staff dismissed four of the modification applications for lack of frequency coordination¹³ and dismissed the remaining three applications for failure to respond to staff requests for additional information.¹⁴

C. Waiver Request.

5. On April 17, 2014, the Turnpike again filed a request for waiver of Section 90.20.¹⁵ Alternatively, the Turnpike stated in a footnote, "this can be viewed as a request to waive the limitation in Section 90.173(h) that base stations on mobile channels are considered secondary."¹⁶

6. In its waiver request, the Turnpike states that it operates a statewide VHF 2-way voice

⁸ *Id.* (amending former Section 10.405 of the Commission's rules to add new paragraph (g) permitting base station operations on Highway Maintenance mobile only frequencies on a non-interference basis).

⁹ 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*, PR Docket No. 92-235, 12 FCC Rcd 14307, 14317-18 ¶ 20, 14319-20 ¶ 23 (1997) (*Refarming Second Report and Order*).

¹⁰ 47 C.F.R. §§ 90.20(d) and 90.173(h).

¹¹ 47 C.F.R. § 90.7.

¹² Request for Waiver accompanying FCC File Nos. 0006100018 (filed Jan. 14, 2014) *re* KFX326; 0006100037 (filed Jan. 14, 2014) *re* KFX327; 0006100153 (filed Jan. 14, 2014) *re* KFX328; 0006100219 (filed Jan. 14, 2014) *re* KFX329; 0006100250 (filed Jan. 14, 2014) *re* KFZ742; 0006100254 (filed Jan. 14, 2014) *re* WPRR650; and 0006100255 (filed Jan. 14, 2014) *re* WPRS452.

¹³ *See* Notice of Dismissal Nos. 5741907 (Feb. 21, 2014) *re* KFX326; 5741908 (Feb. 22, 2014) *re* KFX328; 5741909 (Feb. 22, 2014) *re* KFX329; and 5741910 (Feb. 22, 2014) *re* KFZ742.

¹⁴ *See* Notice of Dismissal Nos. 5788962 (May 13, 2014) *re* KFX327; 5788963 (May 13, 2014) *re* WPRR650; and 5788961 (May 13, 2014) *re* WPRS452. The Turnpike did not seek reconsideration of the application dismissals.

¹⁵ Waiver Request at 1.

¹⁶ *Id.* at note 2.

communications system, which consists of 26 conventional mobile relay repeaters and 3000 mobile units supporting public safety activities including: routine highway maintenance, inclement weather highway maintenance and interoperable personnel dispatch with Pennsylvania State Police, maintenance utility workers, ambulance crews, firefighting crews and towing companies.¹⁷ The Turnpike states that it uses the system to coordinate with local law enforcement, military personnel and the Pennsylvania Department of Transportation.¹⁸ The Turnpike claims that its “[s]ystem is used primarily for Public Safety.”¹⁹ The Turnpike’s system was designed to ensure that mobile units hear each other’s radio traffic along with transmissions from the Traffic Operations Center located in Highspire, Pennsylvania.²⁰ Status updates are relayed via the system to the Traffic Operations Center every 15 minutes to facilitate notifications to the travelling public via various means, including dynamic message boards, highway advisory radio, local news outlets, and the Turnpike preferred traveler Emergency Notification System (ENS).²¹

7. The Turnpike claims that the Commission recently placed a condition on the license for two of its call signs stating that use of 159.045 MHz is on a secondary basis.²² Although the Turnpike states that the remaining call signs carry no such condition, it notes that FCC staff advised the Turnpike that all repeater transmissions on 159.045 MHz and 159.075 MHz are secondary pursuant to Section 90.173(h) of the rules.²³ The Turnpike claims that this secondary condition presents a serious concern to public safety and that the secondary designation has technically, financially and operationally placed immense challenges and impediments on the Turnpike’s present and future use of its system.²⁴ The Turnpike states that it cannot rely on secondary authorization for emergency response operations, the use of which could be impaired in the event of harmful interference from another user.²⁵ The Turnpike asserts that if interference occurs it may have to discontinue operation on a moment’s notice thereby harming public safety operations on those channels.²⁶

8. The Turnpike claims that primary status would not create new interference potential for existing licensees, but would merely ensure that frequency coordinators identified the channels used by the Turnpike as primary.²⁷ The Turnpike claims that the relief requested is unique and unlikely to be used by others given the particular facts here.²⁸

9. The Turnpike also argues that strict application of the rule would be inequitable and that the Turnpike has no reasonable alternative.²⁹ In that connection, the Turnpike states that it engaged a consultant to search the availability of VHF frequencies and that the results revealed no feasible

¹⁷ *Id.* at 1-2.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

²⁸ *Id.* at 4-5.

²⁹ *Id.* at 5.

replacement channels for statewide usage.³⁰

10. The Turnpike seeks to operate its mobile relay repeaters on a co-primary basis with public safety mobile-only operations.³¹ The Turnpike recognizes that primary status does not mean it will have exclusivity, but finds “the co-primary regime under Part 90 is vastly preferable to being forced to immediately shut the system down if problems develop.”³² The Turnpike thus requests primary status to allow it to work with other licensees to resolve interference, rather than being forced to shut down immediately at some point in the future if interference problems with any existing or new licensee develop.³³

11. Finally, the Turnpike claims that the significant investment and maintenance costs of the system preclude the Turnpike from migrating to 700 MHz.³⁴ Additionally, the Turnpike claims that it cannot migrate onto the Pennsylvania State Police “StarNet” system due to the Turnpike’s unique coverage needs.³⁵ In sum, the Turnpike fears that “if an interference complaint is received, [the Turnpike] would be required to discontinue the use of 159.045 MHz or 159.075 MHz, which would threaten mission critical communications functions.”³⁶

III. DISCUSSION

12. The stations at issue are currently authorized with secondary status. As the Turnpike recognizes, absent a waiver of Section 90.20 or 90.173(h), the subject licenses would remain secondary.

13. 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 waiver would be in the public interest;³⁷ 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.³⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.³⁹ Based on the record before us, we find that the Turnpike has failed to justify a waiver.

14. As a general matter, the Commission’s rules specify frequencies that are available to any eligible public safety user on a shared basis.⁴⁰ The Public Safety Pool designates frequencies on which base and/or mobile station operations will occur in order to minimize interference and promote spectrum

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 5-6.

³³ *Id.*

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 47 C.F.R. § 1.925(b)(3)(i).

³⁸ 47 C.F.R. § 1.925(b)(3)(ii).

³⁹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969), *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).

⁴⁰ 47 C.F.R. §§ 90.20 and 90.173.

efficiency.⁴¹ In allocating the frequencies at issue for mobile station only operations, the Commission recognized that if a high-powered base station is assigned to a frequency that would normally be assigned to public safety mobile stations, then the lower-powered mobile operations may be subject to interference that would otherwise not occur.

15. Section 90.173(h) of the Commission's rules, however, permits base stations to operate on a secondary basis on frequencies below 450 MHz that are available to mobile stations.⁴² Section 90.173(h) provides some needed spectrum for base station operations to a greater number of public safety eligibles, while, at the same time, ensuring that mobile stations in the below 450 MHz bands can operate free of interference from high-power base stations by virtue of the secondary status of the base station authorizations.

16. Because base station use of the frequencies at issue was made secondary to protect mobile-only licensees from interference, the underlying purpose of 90.173(h) of the Commission's rules would not be served by a waiver in the present case. Moreover, the Turnpike has not shown that there are unique or unusual factual circumstances that distinguish it from any other licensee operating base stations on a secondary basis relative to mobile-only operations. Finally, the Turnpike has the clear alternative of continuing to operate on the mobile-only frequencies on a secondary basis as it has for the past 40 years.

17. We are not persuaded by the Turnpike's hyperbolic claim that secondary operation "has technically, financially and operationally placed immense challenges and impediments on the Turnpike's present and future use of its system."⁴³ The claim is, in the first instance, undocumented: the Turnpike has failed to show how it has been burdened financially by operating in secondary status, and it has not shown what "immense" challenges have impeded its secondary-status operations. The claim that – after 40 years of apparently interference-free operation – it is going to have to cease operations on a moment's notice is wholly speculative.

18. Based on the record before us, we find that the Turnpike has not justified its request for a waiver to operate on frequencies 159.045 MHz and 159.075 MHz on a primary basis. Accordingly, we deny the waiver request.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, 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, that the waiver request filed by the Pennsylvania Turnpike Commission IS DENIED.

20. 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

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⁴¹ 47 C.F.R. § 90.20(d).

⁴² 47 C.F.R. § 90.173(h).

⁴³ Waiver Request at 3.