

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

In the Matter of Applications of)	
)	
STATE OF OHIO)	FCC File Nos. A051346, A051773,
)	A051775, A051776, A052254,
For 800 MHz General Category)	A052257, A053871, A054250,
Channels and Request for Waiver)	A054249, A054251, A051347 and
Pursuant to Section 337(c) of the)	A056624
Communications Act of 1934, and)	
Section 1.925 of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 2001

Released: January 7, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us twelve applications¹ for eleven General Category channels and associated requests for waiver of the 800 MHz General Category freeze filed by the State of Ohio (Ohio).² Subsequently, Ohio supplemented its requests with a request for waiver of Sections 90.615, 90.617(d) and 90.681 of the Commission's Rules³ pursuant to Section 337 of the Communications Act of 1934, as amended (the Act).⁴ For the reasons discussed below, we conclude that Ohio has not made the required showing under Section 337(c) of the Act, but has sufficiently demonstrated that grant of a waiver is warranted under Section 1.925 of the Commission's Rules. Accordingly, we grant Ohio's waiver requests pursuant to Section 1.925 of the Commission's Rules.

¹ FCC File Nos. A501346 and A051347 were filed on February 25, 2000. FCC File Nos. A051773, A051775, and A051776 were filed on March 3, 2000. FCC File Nos. A052254 and A052257 were filed on March 13, 2000. FCC File No. A053871 was filed on April 13, 2000. FCC File Nos. A054249, A054250 and A054251 were filed on April 24, 2000. FCC File No. A056224 was filed on June 9, 2000 (Initial Applications).

² Waiver requests for FCC File Nos. A051346 and A051347 were filed on March 13, 2000. Waiver requests for FCC File Nos. A051773, A051775, A051776, A052254 and A052257 were filed on March 20, 2000. A waiver request for FCC File No. A053871 was filed on April 17, 2000. Waiver requests for FCC File Nos. A054249, A054250, and A054251 were filed on May 1, 2000. A waiver request for FCC File No. A056224 was filed on June 16, 2000 (collectively Initial Waiver Request).

³ See 47 C.F.R. §§ 90.615 (spectrum blocks available in the General Category for 800 MHz SMR (Specialized Mobile Radio), 90.617(d) (lists available SMR channels) and 90.681 ((EA-based SMR service areas).

⁴ State of Ohio Supplemental Waiver Request (filed Jul. 14, 2000) (Supplemental Waiver Request).

II. BACKGROUND

2. Ohio's public safety agencies currently operate their radio communications systems in the "VHF Low Band"⁵ and a variety of other public safety frequencies.⁶ According to Ohio, the current systems (a) lack the capability for interoperability between agencies and users that must jointly respond to emergencies, (b) commonly experience harmful interference from distant radio systems, (c) have insufficient channel capacity to handle the increasing demands of the participating public safety agencies, (d) include radio coverage "holes" in some areas of Ohio, and (e) lack the capability to accommodate a state-of-the-art data communications network.⁷ In response to these problems, Ohio appointed a task force on emergency response and communications in 1990 to explore methods of improving public safety communications in the state. The task force recommended the establishment of a digital trunked radio system to include mobile data links and a new emergency operations center.⁸ In 1992, Ohio established the Multi-Agency Radio Communications System (MARCS) to implement the task force's recommendations through the planning, construction, and operation of a new 800 MHz band statewide communications network.⁹

3. During Ohio's consideration of improvements to its public safety communications infrastructure, the Commission, in 1994, proposed a new licensing framework for SMR systems in the 800 MHz band.¹⁰ Shortly thereafter, the Wireless Telecommunications Bureau (Bureau) received a significant increase in the number of requests for General Category channels made by SMR applicants and licensees. On October 4, 1995, the Bureau suspended the filing of new applications for 800 MHz General Category channels (General Category freeze) to ensure that resolution of the spectrum allocation issues raised in the *Further Notice* would not be compromised.¹¹ The Commission subsequently reallocated the General Category channels exclusively to the 800 MHz SMR service, whereby mutually exclusive initial applications would be subject to competitive bidding.¹² In December 1995, the Commission partially lifted the freeze on General Category channels to permit potential Economic Area (EA)

⁵ For purposes of this Memorandum Opinion and Order, the term VHF Low Band refers to public safety channels in the 25-50 MHz bands.

⁶ Supplemental Waiver Request at 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, PP Docket No. 93-253, 10 FCC Rcd 7970 (1994) (*Further Notice*).

¹¹ See Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz bands, *Order*, 10 FCC Rcd 13190 (WTB 1995).

¹² Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order* and *Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, 11 FCC Rcd 1463 (1995) (*800 MHz SMR Report and Order*), and *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972 (1997) (*800 MHz SMR Memorandum Opinion and Order*).

applicants¹³ to relocate incumbents from the upper 10 MHz block of 800 MHz band SMR spectrum to the General Category channels.¹⁴ In 1997, the Commission reconsidered its decision concerning eligibility and indicated that entities proposing non-SMR services would be eligible to apply for General Category Channels under the new licensing framework.¹⁵ In all other respects, the Commission maintained the General Category application freeze.¹⁶

4. In 1999, the Commission adopted a geographic area licensing framework consisting of twenty-five channels in each channel block for the General Category channels.¹⁷ The Commission determined that its new 800 MHz General Category rules would promote competition and provide SMR licensees with flexibility to deploy multiple technologies in response to a changing marketplace, and would further the Congressionally mandated goal of establishing regulatory symmetry between 800 MHz SMR licensees and other competing providers of Commercial Mobile Radio Services (CMRS).¹⁸ Specifically, the Commission stated that “[g]eographic area licensing will increase the flexibility afforded to licensees to manage their spectrum, and will reduce administrative burdens and operating costs by allowing licensees to modify, move, or add to their facilities within specified geographic areas without need for prior Commission approval. Geographic area licensing will also ensure that licensees on these channels have operational flexibility similar to that afforded to SMR licensees on the upper 200 channels as well as to cellular and Personal Communications Services licensees.”¹⁹

5. On March 23, 2000, the Wireless Telecommunications Bureau (Bureau) announced that it would hold an auction of licenses for the 800 MHz General Category band beginning on August 23, 2000.²⁰ On May 18, 2000, the Wireless Telecommunications Bureau issued a public notice regarding the procedures and minimum opening bids for the upcoming auction of licenses for the 800 MHz Specialized Mobile Radio Service for General Category and Upper Band Frequencies (“Auction No. 34”).²¹ The

¹³ In the *800 MHz SMR Report and Order*, the Commission adopted geographic licensing for the upper 10 MHz of the 800 MHz SMR service. It adopted rules defining the geographic service areas based on EAs. *See 800 MHz SMR Report and Order*, 11 FCC Rcd at 1484 ¶¶ 24-25. The U.S. Department of Commerce Bureau of Economic Analysis has established 172 EAs, which cover the continental United States. *See Final Redefinition of the BEA Economic Areas*, 60 Fed. Reg. 31,114 (Mar. 10, 1995).

¹⁴ *See 800 MHz SMR Report and Order*, 11 FCC Rcd at 1508 ¶¶ 74-75.

¹⁵ *800 MHz SMR Memorandum Opinion and Order*, 12 FCC Rcd at 9975 ¶ 4.

¹⁶ *Id.*, 11 FCC Rcd at 1509 ¶ 76.

¹⁷ *800 MHz SMR Memorandum Opinion and Order*, 14 FCC Rcd at 17566 (1999). *See also, 800 MHz Second Report and Order*, 12 FCC Rcd 19079 (1997).

¹⁸ *800 MHz Second Report and Order*, 12 FCC Rcd at 19082 ¶ 2.

¹⁹ *Id.* at 19087 ¶ 10.

²⁰ Auction of Licenses For 800 MHz Specialized Mobile Radio (SMR) Service General Category Frequencies in the 851-854 MHz Band Scheduled for August 23, 2000, *Public Notice*, 15 FCC Rcd 5637 (WTB 2000).

²¹ Auction of Licenses For 800 MHz Specialized Mobile Radio (SMR) Service In The General Category Band (851-854 MHz) and Upper Band (861-865 MHz), *Public Notice*, 15 FCC Rcd 8868 (WTB 2000).

short-form filing deadline was July 17, 2000,²² and the long-form filing deadline was September 20, 2000.²³

6. Between February 25, 2000 and June 9, 2000, Ohio filed twelve applications²⁴ for eighteen 800 MHz General Category channels at a total of 46 locations.²⁵ These channels were listed as available in the March 23, 2000, public notice announcing the 800 MHz General Category Auction.²⁶ Between March 13, 2000 and June 16, 2000, the Association of Public Safety Communications Officials International, Inc. (APCO) filed twelve corresponding requests for waiver of the 800 MHz General Category freeze on behalf of Ohio.²⁷ The Branch, seeking further analysis, returned the Initial Applications to APCO.²⁸ On July 14, 2000, Ohio filed a supplemental request for waiver of Sections 90.615, 90.617(d) and 90.681 of the Commission's Rules,²⁹ seeking the waivers pursuant to Section 337(c) of the Act and the Commission's Rules.³⁰ In response to the Branch's return, Ohio reduced the number of requested channels. In its amended applications, Ohio seeks to utilize a total of eleven General Category channels at a total of twenty-three locations.³¹

7. According to Ohio, the requested frequencies are essential for its implementation of MARCS, Ohio's \$272 million statewide interoperable public safety communications project.³² Ohio also states that the vast majority of the radio frequencies for MARCS would be from the 821 MHz National Public Safety Planning Committee (NPSPC) and 806 MHz Public Safety Pool channels. Ohio further explains, however, that there are insufficient channels currently available in those bands to meet Ohio's

²² *Id.* at 8884.

²³ 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, *Public Notice*, 15 FCC Rcd 17162, 17167 (WTB 2000).

²⁴ Initial Applications.

²⁵ See Letter from Robert M. Gurss, Esq., counsel for State of Ohio, to D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed Sept. 28, 2000) stating "[t]he original request was for 46 sites, but only 18 unique General Category channels".

²⁶ Auction of Licenses For 800 MHz Specialized Mobile Radio (SMR) Service In The General Category Band (851-854 MHz) and Upper Band (861-865 MHz), Attachment A, *Public Notice*, 15 FCC Rcd 8868 (2000).

²⁷ Initial Waiver Request.

²⁸ The Licensing and Technical Analysis Branch asked Ohio by telephone to provide additional contour analysis. In its Supplemental Waiver Request, Ohio included an analysis (TRW Report) which, it believes, fulfills the Branch's request.

²⁹ 47 C.F.R. § 90.615 lists the available spectrum blocks in the 800 MHz General Category; § 90.617(d) notes the channels and conditions for SMR stations and eligible end users; and § 90.681 provides that EA licenses in certain spectrum blocks are available in 175 EAs, as defined in 47 C.F.R. § 90.7.

³⁰ Supplemental Waiver Request at 1.

³¹ Supplemental Waiver Request at 4. The channels requested are: 852/807.2875, 852/807.7625, 854/809.2875, 851/806.1125, 853/808.0125, 851/806.0625, 851/806.1125, 852/807.0375, 851/806.7625, 851/806.1375, and 853/808.4125 MHz.

³² *Id.* at 1.

communications requirements.³³ Thus, Ohio is seeking authorization for certain General Category channels that it contends were unassigned when it filed its applications.³⁴

8. After Ohio submitted its applications and waiver requests, the Commission conducted an auction for the 800 MHz General Category spectrum (Auction 34). Ohio's waiver request was included on the due diligence announcement released on August 11, 2000.³⁵ The auction commenced on August 16, 2000, and ended on September 1, 2000.³⁶ Nextel Communications, Inc. (Nextel) and Motient Communications Company (Motient) were the high bidders for the General Category spectrum blocks containing the channels at issue.³⁷

9. On September 25, 2000, we requested public comment on Ohio's waiver request.³⁸ We received seven comments and one reply comment.³⁹ Four of the comments, which were from various divisions of the government of the State of Ohio and all four MARCS participants, gave general support to Ohio's waiver request.⁴⁰ Motient, while not necessarily opposed to granting Ohio's request, asked that any such grant be conditioned upon Ohio not using one of the channels (namely channel 97) in the Dayton-Springfield EA won by Motient, or that Ohio be required to cooperate with Motient to ensure that both Ohio and Motient can operate effectively together on that channel.⁴¹

³³ Letter from Robert M. Guss, Shook, Hardy & Bacon LLP, Counsel for the State of Ohio, to D'Wana Terry, Chief Public Safety and Private Wireless Division (dated July 14, 2000).

³⁴ *Id.*

³⁵ See Due Diligence Announcement for Upcoming 800 MHz Auctions, *Public Notice*, 15 FCC Rcd 14935 (2000) (Due Diligence PN).

³⁶ See 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854) MHz and Upper Band (861-865 MHz) Auction Closes, *Public Notice*, 15 FCC Rcd 17143 (2000).

³⁷ *Id.* Nextel won channels blocks D, DD, E, EE and FF in EA049, Cincinnati; D, E, EE, F and FF in EA051, Columbus; D, DD, E, EE, F and FF in EA052, Wheeling, West Virginia; D, DD, E, EE, F and FF in EA055, Cleveland; and D, DD, E, EE, F and FF in EA056, Toledo. Motient was the high bidder for channel blocks F in BEA049, Cincinnati; EE in EA050, Dayton-Springfield; and EA051, Columbus.

³⁸ See Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by State of Ohio to Obtain Licenses for Twelve 800 MHz General Category Channels, *Public Notice*, DA 00-2167 (WTB PSPWD rel. Sept. 25, 2000) (Although the public notice stated that 12 channels were requested by Ohio, this matter was later clarified by Ohio). Comments were due on October 10, 2000 and reply comments were due on October 17, 2000. On October 13, 2000, Ohio filed a motion for extension of time to file reply comments. On October 25, 2000, the Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau granted the Motion.

³⁹ We received comments from Motient; Nextel; the Ohio Department of Public Safety, Ohio State Highway Patrol; the Ohio Department of Public Safety, Emergency Management Agency; the Ohio Department of Natural Resources; the Ohio Department of Rehabilitation and Correction; the Missouri State Highway Patrol Frequency Coordinator; and a reply comment from Ohio.

⁴⁰ Ohio State Highway Patrol; Ohio Emergency Management Agency; Ohio Department of Natural Resources; and Ohio Department of Rehabilitation and Correction.

⁴¹ Motient Comments at 2.

10. For its part, Nextel argues that Ohio failed to satisfy any of the requirements under Section 337 (c) of the Act⁴² that a public safety entity must meet to obtain relief thereunder. In this regard, Nextel first argues that, with respect to Section 337(c)(1)(D), the unassigned frequencies that Ohio seeks were not “unassigned” as that term is traditionally understood, but rather had not been available because of the General Category freeze.⁴³ Nextel states that Ohio should have known that the General Category spectrum it sought was not “unassigned” when it filed its initial applications.⁴⁴ Nextel also contends that granting Ohio’s relief would run contrary to the public interest because of the “adverse impact” such a grant would have on the integrity of the Commission’s auctions process.⁴⁵ Nextel adds that Ohio has failed to affirmatively demonstrate, as it is required, that no other public safety spectrum in bands other than the 800 MHz public safety spectrum is available.⁴⁶ Nextel further contends that Ohio’s proposed use is not technically feasible without causing harmful interference,⁴⁷ and that the use of General Category channels in the 800 MHz band for public safety operations is not consistent with “typical” 800 MHz General Category use.⁴⁸

III. DISCUSSION

A. Section 337(c) of the Act Analysis⁴⁹

11. Section 337 provides public safety entities with a statutory means of obtaining a waiver of the Commission’s Rules to the extent necessary to permit use of unassigned frequencies for the provision of public safety services.⁵⁰ Subsection (c)(1) of Section 337 provides as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.--

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--

(A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;

⁴² See para. 11 *infra* for discussion of the five elements a public safety entity must satisfy prior to being granted a waiver under Section 337.

⁴³ Nextel Comments at 6-7.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 13-14.

⁴⁷ *Id.* at 18-20.

⁴⁸ *Id.* at 20-21.

⁴⁹ We note, as an initial matter, that the Initial Waiver Request did not address 47 U.S.C. § 337. Thus, this analysis addresses those arguments raised in Ohio’s Supplemental Waiver Request.

⁵⁰ See 47 U.S.C. § 337; *see also* Balanced Budget Act, § 3004.

- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.⁵¹

12. When considering requests under Section 337, we first must determine whether the applicant is "an entity seeking to provide public safety services."⁵² Ohio is a governmental entity and states that it plans to use the requested General Category channels for its MARCS program.⁵³ MARCS will provide digital voice communications and mobile data systems for law enforcement, fire prevention, natural resource protection, prison security, emergency management, and other public safety services throughout Ohio.⁵⁴ Ohio states that these channels would enable it to construct and operate a statewide multi-agency radio system.⁵⁵ Based upon the record herein, we find that the purpose of the service proposed by Ohio is to protect the safety of life, health, or property, as required by Section 337(c). As a result, we conclude that Ohio has met the threshold eligibility requirement.

13. We now turn to whether Ohio meets the remaining statutory criteria for grant of a waiver under Section 337(c)(1) of the Act. The plain language of subsection (c) provides that a waiver request under this section is to be granted only upon a finding that all five conditions are met regarding the spectrum specifically sought by an applicant.⁵⁶ If any one of the five conditions is not met, the subject waiver will not be granted.⁵⁷ As discussed in further detail below, we find that Ohio has not met all of the statutory criteria for grant of a waiver under subsection 337(c) of the Act. Specifically, we find that Ohio has failed to affirmatively demonstrate, as it must under subsection 337(c)(1)(A), that "no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service

⁵¹ 47 U.S.C. § 337(c)(1); *see also* Balanced Budget Act, § 3004.

⁵² 47 U.S.C. § 337(c). Section 337(f) defines the term "public safety services" as "services—
(A) the sole or principal purpose of which is to protect the safety of life, health, or property;
(B) that are provided—
(i) by State or local government entities; or
(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
(C) that are not made commercially available to the public by the provider."

47 U.S.C. § 337(f).

⁵³ Supplemental Waiver Request at 1.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *See* 47 U.S.C. § 337(c)(1). *See also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted).

⁵⁷ *Balanced Budget Act Report and Order*, 15 FCC Rcd 22709 at 22768-69 ¶ 131 (footnotes omitted).

use.” Because Ohio has failed to satisfy one of the five criteria, we need not and do not address their arguments regarding the remaining four criteria.⁵⁸

14. *No other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.* In its request, Ohio states that there is no “sufficient” public safety spectrum available to satisfy the needs of MARCS. Ohio’s Initial Waiver Request, filed by APCO, states that additional frequencies are necessary to fully implement the MARCS and that frequency searches were conducted by selecting a site and searching the Bureau’s land mobile radio licensing databases for all existing and pending 800 MHz users within a 70-nautical mile radius.⁵⁹ APCO explained that although the frequency search shows possible public safety frequencies available for short-spacing, these frequencies either failed short-spacing analysis (*i.e.*, additional study showed that short-spacing was not feasible) or are allocated to other sites in the system.⁶⁰ Thus, APCO concluded that the public safety frequencies are completely saturated for the sites in question.⁶¹ After analyzing additional channel restrictions and rules, APCO determined that there are no other alternatives available to Ohio.⁶²

15. We disagree with this conclusion because, based on the information before us, we believe Ohio has not given adequate consideration to frequencies outside the 800 MHz band. In its applications and waiver requests, Ohio attached a July 11, 2000, letter from the Ohio APCO Local Frequency Advisor indicating that there were no channels available in the 800 MHz public safety band, and “[c]hannels in other Public Safety Pools (VHF and 450 MHz) would not satisfy MARCS requirements and, in any event, are also heavily congested and generally unavailable.”⁶³ The Commission recently stated:

With regard to the statutory requirement that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” several Section 337 applicants apparently have interpreted this provision as only requiring a showing that no public safety frequencies are currently available in the same band as the frequencies being requested. We disagree with this interpretation. We believe that the statutory language is clear in that it expressly requires that no other spectrum allocated to public safety services be available without any qualification. Thus, we believe that the statute requires that there be no unassigned public safety spectrum, or

⁵⁸ See, e.g., Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, Bureau did not address remainder); New Hampshire Department of Transportation (NHDOT), *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, Bureau noted that it “need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.”)

⁵⁹ Initial Waiver Request at 1.

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

⁶² *Id.* at 3.

⁶³ See Ohio Supplemental Request for Waiver, Attachment C.

not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.⁶⁴

The Bureau has previously rejected the argument that an applicant must only show the unavailability of frequencies in its preferred public safety band.⁶⁵ The Bureau has also rejected the argument that the higher cost or less desirable propagation characteristics of the 800 MHz band made that spectrum “unavailable” for Section 337 purposes although frequencies in the 800 MHz band were available to an applicant.⁶⁶ Since an applicant seeking relief under Section 337 must show that there is insufficient public safety spectrum “in any band” in the geographic area, we conclude that this showing is insufficient to satisfy the applicable requirement under Section 337(c)(1)(A).

16. Furthermore, we agree with Nextel that the mere statement that those channels are congested and “generally unavailable” is “not a sufficient showing of unavailability.”⁶⁷ The TRW Report contained in Ohio’s Supplemental Waiver Request only analyzed the 800 MHz band because the MARCS is an 800 MHz trunked radio system, and Ohio is only interested in 800 MHz channels. Ohio states that the UHF/VHF frequencies would not work on Ohio’s 800 MHz system, and that these channels would not provide for interoperability with other aspects of MARCS.⁶⁸ In its Reply Comments, Ohio submits a study analyzing the availability of VHF and UHF frequencies in Ohio.⁶⁹ We find that the study was based solely upon an analysis of the distances between Ohio’s proposed sites and existing co-channel and adjacent channel licensees.⁷⁰ We find that the study states that it is “only the first step in a process to determine their suitability for use.”⁷¹ We believe that this analysis is inadequate to show the unavailability of VHF and UHF public safety frequencies at the sites in question because it is admittedly only a preliminary analysis, and Ohio has not supplemented the record to provide a “final” analysis. Based upon our review of the record currently before us, we believe that a sufficient showing would have included a complete analysis of the availability of VHF and UHF public safety frequencies (taking into account service area contours and terrain), or the results of a frequency coordinator’s thorough search of VHF and UHF frequencies to determine whether VHF or UHF public safety spectrum was available when the request was filed. We also note that our review of Ohio’s submission shows that at least two VHF or UHF channels are available at six of Ohio’s twenty-three proposed sites.⁷² Accordingly, we conclude that

⁶⁴ *Balanced Budget Act Report and Order*, 15 FCC Rcd 22709 at 22768 ¶ 132 (footnotes omitted); *see also* Conference Report at 579-80 (“spectrum must not be immediately available on a frequency already allocated to public safety services.”).

⁶⁵ State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000).

⁶⁶ New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 ¶ 8 (WTB 1999).

⁶⁷ Nextel Comments at 15.

⁶⁸ Supplemental Waiver Request at 8.

⁶⁹ Ohio Reply Comments at Attachment 3.

⁷⁰ *Id.*

⁷¹ *Id.*

Ohio has not met its burden of demonstrating that no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service.

B. Section 1.925 Waiver Analysis

17. Although Ohio did not explicitly request a waiver pursuant to Section 1.925(b)(3) of the Commission's Rules initially, Ohio later makes general statements requesting such relief.⁷³ As a result, we will also consider the Initial Waiver Request and Supplemental Waiver Request pursuant to Section 1.925(b)(3) of the Commission's Rules.⁷⁴ Section 1.925(b)(3) of the Commission's rules permits waiver of the Commission's rules if a petitioner can satisfy either of the following conditions: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and that grant of the requested waiver would be in the public interest, or (ii) in view of the unique or unusual 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.⁷⁵ We believe, as a general matter, that a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.⁷⁶

18. Ohio seeks a waiver of Sections 90.615, 90.617(d), and 90.681 of the Commission's Rules, as well as "such other of its rules as may be necessary to grant" Ohio's applications.⁷⁷ Section 90.615 makes the channels at issue available to SMR licensees and end users.⁷⁸ Sections 90.617(d) and 90.681 of the Commission's Rules collectively limit the eligibility for some of the channels Ohio requests to SMR licensees and end users with EA licenses. The purposes of the new licensing framework for the 800 MHz SMR General Category channels were to afford EA licensees operational flexibility, to promote competition with CMRS providers, and to encourage technological innovation.⁷⁹ Ohio would also be required to obtain a waiver of the General Category freeze, which was intended to prevent the filing of new applications for General Category channels in order to preserve the licensing landscape of the

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⁷² State of Ohio Reply Comments, Attachment 3. The locations are Harrisburg (one UHF channel and one VHF channel), New Castle (seven UHF channels and two VHF channels), St. Louisville (seven UHF channels and two VHF channels), Wapakoneta (24 UHF channels), Germano (two UHF channels), and Paulding (12 UHF channels and one VHF channel).

⁷³ Initial Waiver Request at 1 (requesting a waiver per order 95-2119); Supplemental Waiver Request at 1 (requesting a waiver under the Commission's rules). We note that Ohio's July 12, 2000, Supplemental Request for Waiver sought relief under Section 337(c) "and Section 90.151 of the Commission's Rules." In its November 7, 2000, Reply Comments, Ohio corrects the caption to seek waiver under 337(c) "and Section 1.925 of the Commission's Rules."

⁷⁴ 47 C.F.R. § 1.925(b)(3).

⁷⁵ *Id.*

⁷⁶ *WAIT Radio v. FCC*, 418 F.2d 1135, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1972).

⁷⁷ 47 C.F.R. § 90.615, 90.617(d), 90.681. See Supplemental Waiver Request at 1.

⁷⁸ See 47 C.F.R. § 90.615 (listing channel blocks available for 800 MHz SMR General Category licensees).

⁷⁹ See ¶ 4 *supra*.

General Category spectrum so the Commission could implement its new licensing approach for the spectrum effectively.⁸⁰

19. Based on the information before us, we believe that Ohio has shown that the underlying purposes of the rules and provisions (*i.e.*, technical flexibility, spectrum efficiency, and prevention of harmful interference) would not be frustrated if Ohio is granted a waiver. In this case, based upon the specific facts presented, we conclude that Ohio has demonstrated that grant of the instant waivers would not harm the public interest by interfering with the auction process and the benefits associated with a geographic area licensing approach.⁸¹ We are not persuaded by Nextel's assertion that granting Ohio's request would undermine the Commission's auctions process.⁸² Specifically, Nextel argues that "due to the timing of [Ohio's] request, the integrity of the Commission's auction processes will be adversely impacted if licensees can attempt to encumber licenses after the auction has occurred."⁸³ We disagree with Nextel's characterization of the timing of Ohio's request because Ohio filed all of its applications before Nextel or any of the other Auction No. 34 participants filed short-form applications. Indeed, all of Ohio's applications were on file over a month before the short-form filing deadline for the General Category auction, and 11 of Ohio's 12 applications were filed prior to the May 18, 2000, *Auction Notice*. We also find it significant that Ohio's applications and waiver requests were included on the Due Diligence PN.⁸⁴ The Due Diligence PN explicitly advised potential bidders, "Resolution of these matters could affect the availability of spectrum for licensees in the 800 MHz bands. While the Commission will continue to act on such pending matters, some of these matters may not be resolved by the time of the 800 MHz auctions."⁸⁵ Thus, we believe that Nextel, Motient, and other potential bidders had notice of Ohio's applications prior to the start of the auction and, consequently, had the opportunity to consider the potential impact of the grant of such applications in developing their auction strategies and associated business plans. Given that notice, and the fact that Ohio filed its applications well before the auction date, we do not believe that consideration of Ohio's waiver request would be unduly disruptive of the auction process. Instead, we believe it was incumbent upon potential bidders to consider Ohio's applications, and the possibility that those applications would be granted, when developing their bidding strategies for the subject channels.

20. We also conclude that grant of a waiver would not frustrate the purposes of the General Category freeze because it has not been shown that a grant of Ohio's applications would significantly alter the ability of the EA licensees to use the General Category spectrum effectively. As noted above, the freeze was intended to prevent the filing of new applications for General Category channels in order to preserve the licensing landscape of the General Category spectrum pending the Commission's implementation of a new licensing approach for such spectrum.⁸⁶ We nonetheless note that Nextel argues

⁸⁰ See *800 MHz SMR Report and Order*, 11 FCC Rcd 1508 ¶¶ 74-75.

⁸¹ *Id.*

⁸² *Id.* at 12 ("[Granting] Ohio's request would harm the public interest by interfering with the auction process and the benefits geographic-area licensing bring to the public.")

⁸³ Nextel Comments at 10.

⁸⁴ Due Diligence PN, *supra*.

⁸⁵ *Id.*

⁸⁶ See *800 MHz SMR Report and Order*, 11 FCC Rcd 1508 ¶¶ 74-75.

that granting Ohio's waiver request is contrary to the public interest because it would encroach upon Nextel's use of its EA licenses.⁸⁷ Similarly, Motient expresses concern that one of Ohio's proposed stations would potentially limit its use of a specific channel in the Dayton-Springfield market.⁸⁸ We reject these arguments because neither Nextel nor Motient demonstrate that a grant of Ohio's applications would substantially encumber utilization of its EA licenses. In this regard, we note that Ohio is requesting to use no more than four of the 150 General Category channels in any given EA.⁸⁹ Given that there are other incumbents for which Nextel and Motient must provide interference protection and Ohio's applications were included in the pre-auction due diligence public notice, we do not believe that grant of Ohio's applications would be inconsistent with the public interest. Moreover, Nextel and Motient have not demonstrated that designing their systems in such a way so as to use the subject channels elsewhere in the EA and use other channels near Ohio's proposed stations without substantial adverse effect on their operations is not a viable option. While we recognize that the presence of Ohio's stations could possibly complicate Nextel's and Motient's planning in the use of their General Category channels, they have not demonstrated that the presence of Ohio's stations would impair significantly their ability to provide service utilizing their EA licenses.

21. Accordingly, we find that the record before us does not demonstrate that grant of an authorization for the limited number of General Category channels to Ohio under the circumstances presented would hinder the ability of EA licensees to utilize their licenses or limit in a substantial way their ability to serve the public. In this connection, we note that we have granted waivers of the General Category freeze when we have determined that the waiver would not have a significant adverse impact on the EA licensee's operations. For example, in *City of Denton, Texas*,⁹⁰ we granted a waiver of the General Category freeze to a public safety licensee that wished to relocate its tower 3.3 miles in order to improve its coverage. We concluded that grant of a waiver in that instance would be consistent with the underlying purposes of the freeze because the licensee was already short-spaced to the affected licensees, the frequency coordinator found that there would be no interference to existing facilities, the effect on the auctioned spectrum would be minimal since the applicant was relocating existing facilities, and the relevant EA licensees did not object to the waiver request.⁹¹ Also, in *State of Florida*,⁹² we waived the General Category freeze to allow a licensee to use offset channels. We concluded there would be no impact on the EA licensees because Florida's existing facilities virtually precluded use of the offset channels by the EA licensees, and the EA licensees did not oppose the waiver request.⁹³ In this case, while Nextel and Motient oppose Ohio's request,⁹⁴ we conclude that granting Ohio a waiver under the circumstances presented is consistent with our other General Category waiver decisions.

⁸⁷ Nextel Comments at 10 ("Contrary to Ohio's position, these additional licenses are not *de minimis* encroachments on Nextel's EA licenses and would substantially encumber the EA licenses.")

⁸⁸ See Motient Comments at 2.

⁸⁹ See Ohio Reply Comments at 8.

⁹⁰ 15 FCC Rcd 23643 (2000).

⁹¹ *Id.* at 23646 ¶ 7.

⁹² 16 FCC Rcd 2174 (2001).

⁹³ *Id.* at 2179 ¶ 12.

⁹⁴ Further, Nextel and Motient both argue that Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) requires denial of Ohio's waiver request. See Nextel Comments at 8-9; Motient Comments at 5-6. We, however, find (continued....)

22. We also conclude, based on the record before us, that a grant of a waiver would be in the public interest. Specifically, we find that Ohio has demonstrated that there are major public safety benefits associated with its proposed full implementation of the MARCS system. Neither Nextel nor Motient disputes that Ohio's current communications system does not fully meet its public safety communications needs or that the MARCS system will lead to major improvements in public safety communications in Ohio. We also find that Ohio has also made a persuasive showing that access to the subject 800 MHz General Category channels is essential to its full implementation of the MARCS system. For example, at 17 MARCS sites, the only available channel for data communication is a General Category channel.⁹⁵ Thus, Ohio has shown that it needs the 800 MHz band in order to construct an interoperable network that would promote effective public safety communications. While the need for a particular band does not establish the unavailability of public safety spectrum for purposes of Section 337, we find under Section 1.925 that, in combination with the other circumstances of this case, a waiver for such purpose is in the public interest. On the other hand, for the reasons stated above, we find that Nextel and Motient have failed to demonstrate that they will suffer significant harm if Ohio's waiver request is granted. Against this backdrop, we believe that, on balance, the public interest strongly favors the grant of Ohio's waiver request. Therefore, we conclude that grant Ohio's waiver request pursuant to Section 1.925 of the Commission's Rules is warranted under the circumstances presented.

IV. CONCLUSION AND ORDERING CLAUSES

23. For the foregoing reasons, we conclude that Ohio has not made the requisite showing under Section 337(c) of the Act for a waiver of the Commission's Rules, but has made a sufficient showing for grant of its requested waiver under Section 1.925 of the Commission's Rules. Accordingly, we grant Ohio's waiver requests and the associated applications pursuant to Section 1.925 of the Commission's Rules.

24. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), the "Supplemental Waiver Request" filed by the State of Ohio on July 14, 2000, **IS DENIED** to the extent Ohio seeks relief under Section 337(c) of the Act.

25. **IT IS FURTHER ORDERED** that pursuant to Sections 1.925, 90.615, 90.617(d) and 90.681 of the Commission's Rules, 47 C.F.R. §§ 1.925, 90.615, 90.617(d) and 90.681, the waiver requests filed by the State of Ohio, filed with the above-captioned applications, **ARE GRANTED**.

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Hennepin County to be distinguishable from the instant matter primarily because of the timing of the respective filings. In *Hennepin County*, the applicant did not file its application until after the Commission had begun accepting short-form applications for the auction in question, and only two weeks before the Location and Monitoring Service (LMS) auction was scheduled to begin. See *Hennepin County*, 14 FCC Rcd at 19423 ¶10. The applicant filed its petition for waiver three months after the release of the auction notice for the LMS auction. In contrast, Ohio filed its applications well before the deadline for filing of short-form applications; thus, potential General Category bidders had time to consider the possible impact of Ohio's request prior to the submission of their short-form applications. We therefore believe that the circumstances presented in this matter are readily distinguishable from those in *Hennepin County*.

⁹⁵ See Letter from Robert M. Gurss, Esq., counsel for State of Ohio, to D'wana Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed Aug. 23, 2001) at 3.

26. **IT IS FURTHER ORDERED** that the Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division **SHALL PROCESS** the associated applications, FCC File Nos A051346, A051773, A051775, A051776, A052254, A052257, A053871, A054250, A054249, A054251, A051347 and A056624 in accordance with this *Memorandum Opinion and Order*.

27. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau