

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

In the Matter of )
STATE OF OHIO and )
OHIO RURAL ELECTRIC COOPERATIVES, )
INC. )
Request for Waiver of Section 90.179(a) of the )
Commission's Rules )

ORDER

Adopted: February 20, 2009

Released: February 23, 2009

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

I. INTRODUCTION

1. The State of Ohio ("Ohio") and the Ohio Rural Electric Cooperatives, Inc. ("OREC") (collectively, "Petitioners") seek a waiver of Section 90.179(a) of the Commission's rules to permit Ohio to share use of its Statewide 800 MHz radio network with OREC member cooperatives. Based on the record, we grant the request.

II. BACKGROUND

2. Ohio is the licensee of a statewide 800 MHz radio network known as the Multi-Agency Radio Communications System ("MARCS"), which provides communications for state and local public safety agencies. Petitioners state that the MARCS voice system, which "operates from 156 transmitter sites on 679 total frequency pairs, providing radio coverage to 99.7% of the state," is used by "the State Highway Patrol, Ohio Department of Natural Resources, Ohio Office of Emergency Management, Ohio Department of Rehabilitation and Correction, Ohio National Guard, and Ohio Fire Marshall." Petitioners note that "the most significant demand for service on MARCS is in the urban and suburban regions."

3. OREC is "an association of Ohio electric cooperatives that provide[s] service to approximately 380,000 homes and businesses, mostly in rural portions of Ohio." Petitioners state that

1 47 C.F.R. § 90.179(a).

2 Request for Waiver of Section 90.179 of the FCC's Rules by the State of Ohio and Ohio Rural Electric Cooperatives, Inc. in the State of Ohio (June 3, 2008) ("Waiver Request"). Petitioners attach a list of OREC member cooperatives seeking waiver relief pursuant to the instant request. See Attachment A of the Waiver Request.

3 See Waiver Request at 1. Ohio operates this license under call sign WPQC881.

4 Id. at 1.

5 Id.

6 Id. at 2.

7 Id.

“[t]here are approximately 940 mobile and portable radios in use on OREC members’ systems” that are “used for dispatching and coordinating repair crews, emergency communications during service interruptions and coordinating electric transmission and delivery” in the VHF and UHF bands.<sup>8</sup> However, Petitioners state that “OREC members’ current operating systems are increasingly unreliable due to the advancing age of equipment and network infrastructure. The current systems also lack trunking capability, which limits efficiency and the ability to form talk groups.”<sup>9</sup> Petitioners state that these deficiencies pose a direct impact on public safety:

A critical gap for OREC members’ radio systems is its lack of interoperability with public safety agencies with whom utilities must often communicate during major storms and other emergencies that cause power outages. For example, downed power lines often block roadways after storms or automobiles accidents involving utility poles. In those situations, the safety of power company crews, law enforcement officers, EMS teams, firefighters, highway maintenance personnel and the public is at risk and depends upon coordinated on-scene communications.<sup>10</sup>

4. Petitioners state that OREC members operate primarily in the rural parts of Ohio, and have minimal communications needs in the metropolitan areas.<sup>11</sup> Petitioners request that OREC be permitted to share use of the 800 MHz public safety frequencies in the MARCS network. Most of the public safety agencies with which OREC member cooperatives need to communicate operate on MARCS or plan to do so in the near future.<sup>12</sup>

5. Section 90.179(a) governs sharing of Part 90 frequencies, and provides that “persons may share a radio station only on frequencies for which they would be eligible for a separate authorization.”<sup>13</sup> Ohio acknowledges that because OREC is an electric utility member association whose member cooperatives operate on Industrial/Business Pool frequencies, it is not eligible for a separate authorization to use Ohio’s 800 MHz public safety spectrum in the absence of a waiver.<sup>14</sup> Accordingly, Petitioners request a waiver of Section 90.179(a).

6. In support of their waiver request, Petitioners state that “MARCS has sufficient capacity to accommodate the land mobile radio requirements of OREC member cooperatives without limiting its public safety operations.”<sup>15</sup> In this regard, Petitioners state that “OREC member cooperatives intending to join MARCS serve the public in 49 of Ohio’s 88 counties,” and that “those [49] counties are provided MARCS coverage by an aggregate total of 150 voice sites, ... for an average of 3 sites providing [MARCS] coverage per county.”<sup>16</sup> Petitioners calculate that, given 150 sites have “an aggregate total of 654 voice channels,”<sup>17</sup> “dividing the 654 voice channels by the 49 counties provide[s] an average greater

<sup>8</sup> *Id.* OREC members are licensed to operate in the Industrial/Business (I/B) radio service pool.

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

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* & Att. B (depicting OREC’s service area map, which includes services areas for electric cooperatives that do not intend to join MARCS at the present time).

<sup>13</sup> 47 C.F.R. § 90.179(a).

<sup>14</sup> 47 C.F.R. § 90.20.

<sup>15</sup> Waiver Request at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

than 13 voice channels per county [for MARCS].”<sup>18</sup> Because OREC member cooperatives plan to use 526 RF units,<sup>19</sup> Petitioners calculate that “[s]preading 526 RF units over the 49 service area counties averages less than 11 radios per county.”<sup>20</sup> Given that MARCS has an average of greater than 13 voice channels per county, Petitioners therefore anticipate “negligible impact on its system in day-to-day operations.”<sup>21</sup>

7. Petitioners state that a waiver of Section 90.179(a) to permit OREC to share Ohio’s 800 MHz frequencies would promote interoperability and enhance spectrum efficiency, thus serving the public interest.<sup>22</sup> Petitioners add that “the State intends to enter into a Use Agreement with OREC...to establish the terms and conditions of OREC members’ use of MARCS, which will be on a non-profit basis [and]...set forth public safety agency priorities in the unlikely event that MARCS capacity is inadequate in a particular location or at a particular time to accommodate both public safety and [OREC] use of the system.”<sup>23</sup> Petitioners believe that this proposal is consistent with and supported by Commission precedent granting waivers of Section 90.179(a) to permit sharing arrangements between public safety and utilities to enhance the operations of both entities.<sup>24</sup> Finally, Petitioners provide a letter from the Region 33 (Ohio) 800 MHz Regional Planning Committees (“Region 33”) supporting interagency and inter-service coordination and approving Ohio’s proposal to add OREC to the MARCS network.<sup>25</sup>

### III. DISCUSSION

8. 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;<sup>26</sup> 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.<sup>27</sup> An

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The Petitioners calculate that “OREC’s member cooperatives currently plan to operate 379 mobile radios, 122 portable radios and 25 control stations on MARCS, for a total of 526 RF units.” *Id.*

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> Waiver Request at 4.

<sup>23</sup> *Id.* at 3-4; see Letter from Ken A. Keylor, Vice President Statewide Services, Ohio Rural Electric Cooperatives, Inc., to Darryl Anderson, Program Director, Ohio MARCS, dated Oct. 8, 2008 (confirming mutual intention between OREC and Ohio MARCS to share frequencies “as needed”) (Keylor Letter).

<sup>24</sup> Waiver Request at 3-4 (citing State of Illinois, *Order*, 23 FCC Rcd 437 (PSSB 2008) (*Illinois*); Douglas Electric Cooperative, *Order*, 21 FCC Rcd 11298 (PSSB 2006) (*Douglas*); Dominion Virginia Power, *Order*, 19 FCC Rcd 12254 (WTB PSCID 2004); State of South Carolina and SCANA Communications, Inc., *Order*, 13 FCC Rcd 8787 (WTB PSPWD 1997) (*SCANA*)).

<sup>25</sup> *Id.* at 4, Att. C., Letter from Gregory C. Berquist, Vice Chairman, Region 33 (Ohio) 800 MHz Planning Committee, dated May 22, 2008.

<sup>26</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>27</sup> 47 C.F.R. § 1.925(b)(3)(ii).

applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.<sup>28</sup>

9. We agree with Ohio that OREC is not eligible for a separate authorization to use MARCS under Section 90.20, and thus cannot share Ohio's public safety frequencies unless we waive Section 90.179(a). This rule, among other things, is intended to ensure that adequate spectrum is available for each service category (*i.e.*, Public Safety and Industrial/Business), and to avoid interference to communications from incompatible services.<sup>29</sup> In this instance, we find the standard for grant of a waiver to be met. We accept Petitioners' position that Ohio has adequate spectrum to accommodate sharing of its 800 MHz MARCS network with members of the OREC cooperative.<sup>30</sup> Moreover, we find it important that as part of its sharing agreement with OREC, Ohio intends to include provisions that would prioritize public safety agency use in the event network capacity proves inadequate. We also note that Region 33 supports the instant proposal, which further evidences that there would be sufficient spectrum to support the requested sharing arrangement. We also find it unlikely that the proposed sharing agreement would result in interference, especially given that MARCS has relatively light usage in rural areas where electric cooperatives primarily operate. We therefore find that the Petitioners have demonstrated that the underlying purpose of the rule would not be served or would be frustrated by application to the present case.

10. We also find that a grant of this waiver would serve the public interest by improving OREC's ability to communicate and interoperate with public safety particularly in times of emergency.<sup>31</sup> In sum, we find that Ohio has satisfied the waiver criteria with respect to the 800 MHz frequencies used in the MARCS network. Because our decision is based on the specific application before us, however, we will require separate waivers for other utilities seeking to use 800 MHz public safety spectrum in the MARCS network. Additionally, if OREC's use were to extend beyond Region 33, we would require Ohio to obtain approval from the relevant RPC and to submit a new waiver request.

11. We also seek to ensure that grant of this waiver request does not adversely impact 800 MHz rebanding. Under the Commission's rebanding orders and rules, Sprint Nextel Corporation (Sprint) is required to reband Ohio's facilities operating in the pre-rebanding NPSPAC band to replacement channels in the new NPSPAC band (former Channels 1-120).<sup>32</sup> OREC's I/B channels, however, are not subject to rebanding, and the timing and cost of making any changes necessary to integrate OREC's channels into the MARCS system are contractual matters between Ohio, Motorola, and OREC. Therefore, we determine that grant of this waiver is independent of band reconfiguration, and that Sprint is not required to pay any costs associated with implementing the modifications authorized by this waiver.

---

<sup>28</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *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 Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

<sup>29</sup> *Douglas*, 21 FCC Rcd at 11298 ¶ 7.

<sup>30</sup> *See* Keylor Letter.

<sup>31</sup> *See, e.g., SCANA*, 13 FCC Rcd at 8792 ¶ 9. *See also* Commonwealth of Pennsylvania and GPU Energy, *Order*, 14 FCC Rcd 14029 (WTB PSPWD 1999).

<sup>32</sup> *See generally*, *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) as amended by *Erratum*, 19 FCC Rcd 19651 (WTB PSCID 2004) and *Erratum*, 19 FCC Rcd 21818 (WTB PSCID 2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005), as amended by *Erratum*, 20 FCC Rcd 18970 (WTB PSCID 2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007) as amended by *Erratum*, 22 FCC Rcd 13657 (PSHSB 2007).

In addition, neither Ohio nor Sprint may rely on the grant of this waiver to delay meeting its rebanding obligations.

#### IV. CONCLUSION

12. For the reasons stated herein, we grant the Waiver Request with respect to Ohio's 800 MHz public safety channels.

#### V. ORDERING CLAUSES

13. IT IS ORDERED that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.925, 90.179(a) and 90.523 of the Commission's rules, 47 C.F.R. §§ 1.925, 90.179(a), 90.523, the Waiver Request by the State of Ohio and the Ohio Rural Electric Cooperatives, Inc. is GRANTED.

14. 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 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers  
Chief, Policy Division  
Public Safety and Homeland Security Bureau