

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
State of Maine) File Nos. 0004980650 et al.
Waiver Request to Use)
160 MHz Railroad Frequencies)

To: Chief, Public Safety and Homeland Security Bureau

**COMMENTS
OF THE
ENTERPRISE WIRELESS ALLIANCE**

The Enterprise Wireless Alliance (“EWA” or “Alliance”), in accordance with Section 1.45 of the Federal Communications Commission (“FCC” or “Commission”) rules, respectfully submits its comments in the above-entitled proceeding.¹ The Commission has requested comment on a waiver request (“Waiver Request”) filed by the State of Maine (“State” or “Maine”) in which the State seeks authority to utilize certain VHF frequencies (“Frequencies”) for which the Association of American Railroads (“AAR”) has been designated by the FCC as the primary frequency advisory committee, but which have not been allocated exclusively for railroad use.² The Frequencies would be integrated into a new, statewide, narrowband VHF trunked Project 25 radio system that will be available to all public safety agencies in the State and also permit interoperability with federal public safety entities.³ As described in the Waiver Request, Maine’s efforts to secure AAR’s concurrence either directly or through customary

¹ *Public Safety and Homeland Security Bureau Seeks Comment on Applications and Waiver Request Filed by the State of Maine for 160 MHz Band Railroad Frequencies*, Public Notice, DA 12-74 (rel. Jan. 23, 2012) (“Public Notice”).

² See 47 C.F.R. §§ 90.35(b)(2)(iv) and 90.35(b)(3).

³ Waiver Request at 4.

frequency coordination procedures to permit the use of the Frequencies by the State have been unsuccessful.⁴

EWA supports the State's Waiver Request. Maine has demonstrated that it has exhausted all reasonable alternatives for meeting its defined communications requirements and that a grant of its request would serve the public interest. However, as the Commission has recognized,⁵ there is a broader issue raised in the Waiver Request that also warrants consideration. Specifically, as the available spectrum for Private Land Mobile Radio ("PLMR") systems becomes increasingly encumbered, how should channel exclusivity be defined and to what extent should applicants consider the use of shared rather than exclusive channel assignments for certain applications, particularly in light of trunked system technologies that can promote greater spectrum sharing among licensees without jeopardizing operational objectives?

I. INTRODUCTION

EWA is a national trade association representing business enterprises, wireless sales and service providers, hardware and software system vendors, and technology manufacturers. The Alliance also is a Federal Communications Commission ("FCC")-certified frequency advisory committee ("FAC") that has processed in excess of 10,000 FCC licensing application preparation, frequency selection and certification transactions annually. EWA is a member of the Land Mobile Communications Council ("LMCC"), an association of organizations representing virtually all users of PLMR systems. The LMCC member organizations include all FACs, thereby enabling LMCC to provide a forum for consideration of spectrum management policies and related matters that affect the frequency coordination process. As a FAC and on

⁴ *Id.* at 8-9.

⁵ Public Notice at 2.

behalf of its business, industrial and commercial members, the Alliance has a profound interest in the matters raised in the Waiver Request.

II. THE AVAILABILITY OF THE FREQUENCIES REQUESTED BY THE STATE MUST BE EVALUATED BASED ON THE SAME CRITERIA AS OTHER SPECTRUM ALTERNATIVES AND NOT RESERVED FOR FUTURE RAILROAD USE

In its Waiver Request, Maine details the efforts it has made to secure VHF channels for its proposed system.⁶ It explains that it has “mined [the Public Safety Pool for VHF channels]... to the maximum extent possible under relevant frequency coordination policies, good engineering practices, and FCC rules.”⁷ Having exhausted that spectrum source, its equipment vendor purchased Part 22 VHF licenses for assignment to the State, the State initiated discussions with the National Telecommunications and Information Administration (“NTIA”) and is exploring the use of certain Federal Government spectrum, and the State worked with EWA to secure VHF channels from the Industrial/Business (“I/B”) Pool via waiver.⁸ Some of the frequencies were from the general I/B Pool while others required concurrence from the American Automobile Association (“AAA”) or the Utilities Telecom Council (“UTC”). Clearly, many parties have demonstrated a commitment to working with the State in an effort to satisfy its requirements.

⁶ The Waiver Request rests on the predicate that the State cannot use either 700 MHz or 800 MHz spectrum of which there presumably is a plentiful supply for public safety applicants in the proposed service area. *See* Waiver Request at 4-6. While EWA understands the considerations that have caused the State to reach that conclusion, waiver relief is more problematic when there is available spectrum that has been allocated specifically for the applicant’s eligibility category.

⁷ Waiver Request at 6.

⁸ *Id.* at 7.

By contrast, according to the Waiver Request, AAR has been entirely intransigent with regard to Maine’s proposed use of frequencies designated as LR⁹ for which AAR’s concurrence is required. Rather than evaluating the State’s request on the site-by-site, frequency-by-frequency basis that is the foundation of responsible Part 90 coordination, AAR rejected the request based on the inaccurate observation that the State is “ineligible to use LR frequencies per 90.35(a)(5).”¹⁰ This conclusion is directly at odds with the FCC’s express determination in 2007 in response to a proposal to bundle all VHF LR spectrum into a single geographic license to be held by AAR.¹¹ While acknowledging the complexity of narrowbanding the nation’s VHF railway communications systems, in the 2007 Order the FCC stated the following:

It thus appears that grant of AAR’s Petition would in effect remove the LR channels from the I/B Pool, and reserve them for the exclusive use of the railroad industry....[T]he proposed geographic area license is directly at odds with the fundamental principle of shared spectrum use in the PLMR bands below 512 MHz.¹²

Given this unequivocal FCC position, AAR’s contention that it need not even consider the State’s request because Maine is not eligible to use LR frequencies cannot be credited.

Apparently AAR also has relied on a footnote in the 2007 Order suggesting that it could deny concurrence if a particular request “would thwart implementation of the new [narrowband] railroad channel plan.”¹³ But such a denial presumes a site- and frequency-specific analysis of a proposed operation. It does not permit a unilateral determination that the use of any VHF LR frequency at any location in the United States would be inconsistent with the railroad industry’s

⁹ See 47 C.F.R. § 90.35.

¹⁰ Waiver Request at 8.

¹¹ In the Matter of Association of American Railroads, *Order*, FCC File Nos. 0002282007 et al., 22 FCC Rcd 1304 (2007) (“2007 Order”).

¹² *Id.* at ¶¶ 8-9.

¹³ *Id.* at n. 36.

migration to narrowband operation. It is now only ten months from the date by which all railroad VHF operations, like the operations of other Part 90 licensees, must satisfy the long-standing narrowband requirement set out in FCC Rule Section 90.209(b). In its request that resulted in the 2007 Order, AAR stated that the railroad industry had adopted a channel plan to achieve compliance with that requirement.¹⁴ The plan itself was dated 1999 and AAR's reference to it was in 2005. Surely more than 12 years after creation of that plan, seven years after identifying it as the blueprint for narrowband conversion, and less than one year before the mandatory transition to narrowband, AAR should be in a position to determine whether concurrence with the State's request would, in fact, adversely affect implementation of the railroad industry's narrowband conversion. Assuming Maine's information is correct, that task should be simplified substantially by the fact that there are no Class I railroads and only a small number of short lines that operate in the State.¹⁵ The likelihood that new railroad operations will be deployed within the State of Maine seems extremely remote and, in any event, the possibility that the "unborn applicant" might someday emerge simply cannot form the basis for sound spectrum management decisions or responsible frequency coordination today.

¹⁴ In that same filing, AAR analogized its VHF proposal to a previous request that prompted the FCC to authorize AAR as the exclusive licensee of six 900 MHz channel pairs to be used for specific, nationwide critical train operations. See *In Re Petition of the Association of American Railroads for Modification of Licenses for Use in Advanced Train Control Systems and Positive Train Control Systems*, *Order*, 16 FCC Rcd 3078 (2001). Since the Class I railroads have selected 220 MHz for Positive Train Control ("PTC") operations and other transit entities also plan to deploy PTC in the 216-222 MHz bands, the FCC may wish to seek clarification about how that exclusive allocation is being utilized, or whether it remains necessary to support future railroad wireless purposes given the railroad industry's spectrum planning efforts at 160 MHz and 220 MHz. See *Public Notice*, *Wireless Telecommunications Bureau Seeks Comment on Spectrum Needs for the Implementation of the Positive Train Control Provisions of the Rail Safety Improvement Act of 2008*, WT Docket No. 11-79, 26 FCC Rcd 6704 (2011).

¹⁵ Waiver Request at 8.

For these reasons, EWA agrees with the State that the FCC should authorize Maine's use of the Frequencies¹⁶ absent an AAR determination that a particular Frequency(s) is unavailable at a specific site based on the requirements of FCC Rule Section 90.187. Additionally, however, the State's request has highlighted a critical fact in the PLMR spectrum environment. The American Association of State Highway and Transportation Officials ("AASHTO"), Maine's Public Safety FAC, has certified, and EWA does not doubt, that there are not sufficient VHF Public Safety frequencies to meet the State's needs "under relevant frequency coordination policies, good engineering practices, and FCC rules."¹⁷ Even recognizing that most public safety systems in the State operate in this band,¹⁸ it nonetheless is sobering that the sixteen counties and other municipalities in one of the most sparsely populated states in the nation have entirely exhausted that spectrum resource such that even a narrowband system cannot be fully accommodated.

Thus, the Commission has raised a critical point in questioning whether Maine might "be able to use other VHF frequencies by operating its statewide system on a shared basis."¹⁹ All applicants, whether Industrial/Business or Public Safety and whether proposing trunked or conventional systems, prefer exclusive channels. But the FCC has noted that its rules provide for both centralized and decentralized trunked operations.²⁰ In the PLMR world of limited spectrum resources, rising demand, and no expectation of additional allocations, and particularly when

¹⁶ As noted in the Public Notice, Maine still will need to run the gauntlet of Canadian clearance for facilities located above Line A. In EWA's experience, the State should expect an exorbitant number of Canadian determinations of Harmful Interference Anticipated in response to the State's applications.

¹⁷ Waiver Request at 6.

¹⁸ *Id.* at 4-5.

¹⁹ Public Notice at 2. The State already has volunteered that it would modify its spectrum plan, presumably to vacate or share the AAR channels, in the event that AAR in the future demonstrated that the Frequencies were needed for railroad operations. Waiver Request at 8. This would seem to be a reasonable approach for both the State and prospective railroad operations.

²⁰ Public Notice at n. 15.

available allocations such as 700 MHz and 800 MHz are deemed unusable, applicants may need to trim their exclusive spectrum expectations. It may be necessary to distinguish operations that must have channel assignment exclusivity from those whose communications could tolerate use of a shared channel where channel access exclusivity is achieved through technological capabilities. Such choices would not have to be made in a world of unlimited frequencies. This issue, as evidenced by this matter, cannot be ignored in the current PLMR spectrum environment.

ENTERPRISE WIRELESS ALLIANCE

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CERTIFICATE OF SERVICE

I, Linda J. Evans, with the law firm of Lukas, Nace Gutierrez and Sachs, LLP, hereby certify that I have, on this 13st day of February, 2012 caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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