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November 14, 2011

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: DA 11 – 1518  
Shelby County, Alabama Request for Waiver  
FCC File No. 0004776280

Dear Ms. Dortch:

On September 8, 2011, the Federal Communications Commission (“FCC”) issued the above-referenced Public Notice in which it invited comment on a waiver request from Shelby County, Alabama (the “County”) to operate a digital, trunked public safety system using 150-170 MHz Industrial/Business Pool frequencies and to operate at greater power than permitted under the Part 90 “safe harbor” rules. On September 28, 2011, EWA submitted a letter to the FCC in which it raised a number of issues associated with the County’s frequency selections.<sup>1</sup> On November 7, 2011, the County, through its counsel, submitted a letter to the FCC responding to EWA’s comments.<sup>2</sup> This letter responds to this most recent County filing with the FCC.

The issue presented is not complex: has the County demonstrated that its requirements cannot be met on frequencies allocated for use by public safety entities. Absent such a showing, the County would not satisfy the FCC’s standard for a waiver to use spectrum allocated primarily for Industrial/Business licensees. The County is proposing an exclusive, centralized, trunked system governed by Section 90.187 of the FCC Rules. An analysis of the availability, or unavailability, of public safety frequencies for assignment to the County for such a system, as well as the availability of the proposed Industrial/Business channels, should be straight-forward. As stated in the County’s own November 7<sup>th</sup> Letter, “In such an environment, land mobile radio systems are separated based upon FCC and coordinator agreed separation guidelines.”<sup>3</sup> Yet the County’s showings in both respects have been less than clear.

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<sup>1</sup> See letter from Mark E. Crosby, President, EWA, to Marlene H. Dortch, Secretary, FCC.

<sup>2</sup> See letter from Alan S. Tilles, Esq. to Marlene H. Dortch, Secretary, FCC (“November 7<sup>th</sup> Letter”). The County’s objection to the timeliness of EWA’s filing is unavailing. The FCC may consider information about an applicant’s non-compliance with applicable licensing requirements at any time, even after a grant is issued and final.

<sup>3</sup> November 7<sup>th</sup> Letter at 2.

In its initial letter to the FCC, EWA questioned a number of public safety frequencies that the County indicated had been rejected based on an insufficient separation from seemingly distant co-channel licensees.<sup>4</sup> The County's November 7<sup>th</sup> letter now states that those channels are not available because of the proximity of adjacent channel licensees, again as defined by mileage separations.<sup>5</sup> However, EWA is unaware of any "FCC and coordinator agreed separation guidelines" for the VHF band that use distance alone to determine whether sufficient protection would be afforded to adjacent channel licensees. FCC Rule Section 90.187 specifies the use of contour calculations for such an analysis. Perhaps the FCC will perform those calculations on its own, but EWA believes it is incumbent on waiver applicants to provide the documentation needed to support their requests. The need to confirm that adjacent channel contour overlap disqualifies those public safety frequencies for exclusive trunked use is heightened in this instance, since certain Industrial/Business frequencies requested in the initial application now have been deleted, presumably in response to EWA's analyses demonstrating that they would not provide the FCC-required protection with regard to adjacent or co-channel systems.<sup>6</sup> The FCC rules in this area are clear and well-known. The County simply needs to demonstrate that it has complied with them.

The County also appears to take the position that there need be no distinction between the use of public safety versus Industrial/Business pool channels when an applicant proposes centralized trunked utilization: "...the artificial separation of services is meaningless in the context of the system being proposed, which is a[n] exclusive use trunked system."<sup>7</sup> Of course, that is not the case, and EWA doubts that the public safety community would accept the reverse situation, wherein an Industrial/Business applicant requested public safety frequencies for a centralized trunked system. It also is incorrect to claim that the County's proposed use would have "exactly zero impact on any...potential applicant..."<sup>8</sup> While the FCC has provided new spectrum at 700 MHz and 4.9 GHz for public safety entities, as well as substantial additional 800 MHz spectrum as it is vacated by Sprint Nextel Corporation, the Industrial/Business user has not had access to new spectrum since the 900 MHz band was made available a quarter of a century ago. As entities like the Shelby County Board of Education<sup>9</sup> abandon their use of Industrial/Business spectrum, as it says it has, those frequencies should become available for eligible Industrial/Business applicants, given

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<sup>4</sup> 151.1825 MHz, 151.2425 MHz, 151.4525 MHz, 159.2926 MHz, and 159.4275 MHz.

<sup>5</sup> These adjacent channel licensees all are subject to the January 1, 2013 narrowbanding deadline. If they comply with that obligation, in less than 14 months Rule Section 90.187 would not consider them "affected" licensees for purposes of a contour overlap analysis, assuming they would be so classified today. Although the County has not requested extended implementation authority, it is likely that these adjacent channel systems will have converted to narrowband operation before the County deploys its system.

<sup>6</sup> Specifically, 160.0425 MHz, 155.0925 MHz, and 159.9750 MHz were deleted from the County's application.

<sup>7</sup> November 7<sup>th</sup> Letter at 2.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> Unlike the County, the current licensee has primary eligibility for this spectrum as an educational institution.

the very limited alternatives available to this user group. Assignment of the spectrum to a non-eligible public safety entity is not a matter of right, but must be justified based on a demonstration that there are no public safety frequencies that could be used.

In that regard, EWA does believe that the County, first, should look to waivers that would allow it to use available public safety spectrum before turning its sights on Industrial/Business channels. The County has rejected EWA's proposal that the County consider frequencies in the 170 MHz band that are subject to Limitation 49 on the basis that the FCC is without authority to waive that rule as the frequencies are controlled by NTIA.<sup>10</sup> Interestingly, that same argument has been raised by the Forestry Conservation Communications Association in opposition to a Petition for Rule Making filed by counsel for the County, seeking to allow frequencies subject to this same Limitation 49 to be used by public safety entities for vehicular repeater operations.<sup>11</sup> Apparently, in that instance, NTIA's primary use of these frequencies was not viewed as a barrier to the FCC's authority to expand their use for other public safety purposes. The FCC will need to determine which of these seemingly inconsistent positions is correct.

To be clear, EWA supports the County's efforts to improve its communications system. If the County is able to demonstrate that using "FCC and coordinator agreed separation guidelines," there are no public safety frequencies that could be assigned for this purpose, including pursuant to a waiver, and provided the Industrial/Business frequencies selected also are coordinated pursuant to the FCC rules and applicable coordination standards, then the FCC's requirements will have been satisfied. But the County first must seek a public safety spectrum solution that will accommodate its mission critical operations before seeking spectrum allocated for Industrial/Business users.

Respectfully submitted,

Mark E. Crosby

Mark E. Crosby  
President/CEO

MEC:

cc: Alan S. Tilles  
APCO  
AAA  
David Furth  
Tracy Simmons  
Scot Stone

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<sup>10</sup> November 7<sup>th</sup> Letter at 4.

<sup>11</sup> See Petition for Rule Making of the Pyramid Communications, Inc., RM-11635.