

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

In the matter of
Chevron USA, Inc.
and Sprint Nextel
Mediation No. TAM-11179
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 2006

Released: October 6, 2006

By the Associate Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Order, we address a case referred to us for de novo review from Wave 1, Phase 1 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between Chevron USA, Inc. (Chevron) and Sprint Nextel Corporation (Sprint). Specifically, this Memorandum Opinion and Order addresses whether Chevron, which currently holds mobile-only authorizations in the Channel 1-120 segment of the 800 MHz band, is entitled to relocate these facilities at Sprint's expense.

2. We hold that (a) Chevron's mobile-only authorizations are inherently secondary in nature and not entitled to relocation, (b) if Chevron wishes to relocate these authorizations, neither the Transition Administrator nor Sprint is obliged to find replacement channels for Chevron, (c) Chevron may apply for modification of license to relocate its mobile-only operations to the interleaved portion of the 800 MHz band, (d) that if granted such a modification, Chevron must retune its mobile units at its own expense; and (e) Chevron may also elect to remain on its current channels subject to the continuing condition of not being protected against interference from, and not causing interference to, other stations.

II. BACKGROUND

3. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a frequency relocation agreement (FRA) with each 800 MHz licensee that is subject to rebanding. The FRA must provide for relocation of the licensee's system to its new channel assignment at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required. Sprint must provide the relocating licensee with "comparable facilities" on the new channel(s), and must provide

1 Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) as amended by Erratum, 19 FCC Rcd 19651 (2004), and Erratum, 19 FCC Rcd 21818 (2004) (800 MHz Report and Order); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order); and Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) as amended by Erratum, DA 05-3061 rel. Nov. 25, 2005.

2 The channel change(s) are commonly referred to as a "retuning" of the system. In some instances, however, a channel change requires that equipment must be replaced rather than retuned. For convenience, unless the context requires otherwise, "retuning" as used herein also encompasses equipment replacement if existing equipment cannot be retuned.

for a seamless transition to enable licensee operations to continue without interruption during the relocation process.<sup>3</sup>

4. To facilitate FRA negotiations, the Commission established a three-month voluntary negotiation period and a three-month mandatory negotiation period for Sprint to negotiate with each relocating licensee.<sup>4</sup> If a licensee and Sprint are unable to negotiate a FRA at the end of the mandatory negotiation period, they must enter into a thirty-day mediation period under the auspices of a TA-appointed mediator. If the parties do not reach agreement by the end of the mediation period, the mediator forwards the mediation record and a recommended resolution to the Commission.<sup>5</sup> Within ten business days of the mediator's submission of the record and recommended resolution, the parties may file position statements. Position statements may not, however, raise issues not presented during mediation.<sup>6</sup> Thereafter, we conduct a *de novo* review of the mediation record, evaluate the parties' position statements and the mediator's recommended resolution, and issue an order disposing of all disputed issues.<sup>7</sup>

5. The instant case involves the reconfiguration of Chevron's 800 MHz radio system operating at an oil refinery in Richmond, California. This refinery covers 2,900 acres, has 5,000 miles of pipelines and hundreds of large tanks that can hold up to fifteen million barrels of oil products. The site employs 2,600 people on site with "round the clock" operations.<sup>8</sup> Sprint and Chevron have successfully negotiated an FRA with regard to main portion of the system, a complex, trunked system.<sup>9</sup> However, at issue is the disposition of frequency pair 807/852.4625 MHz, authorized as part of Station WNAY606, and discrete frequencies 851.8375 MHz and 852.9125 MHz, authorized as Station WPCM983. These frequencies are licensed for mobile-only use.<sup>10</sup> Chevron contends that its mobile-only facilities are critical to maintaining safety in the refinery, and in particular for communications between crane operators, their spotters, and other on-site personnel. Sprint contends that these frequencies are licensed on a secondary basis and therefore are not subject to relocation at Sprint's expense under the terms of the *800 MHz R&O* and subsequent orders. The parties were unable to come to a mutually agreeable resolution to their dispute, and on February 21, 2006, the mediator forwarded the mediation record and his initial Recommended Resolution.

6. In the *800 MHz Supplemental Order* the Commission held that it was not necessary to

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<sup>3</sup> Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201.

<sup>4</sup> "Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan," *Public Notice*, 20 FCC Rcd 5159, 5160 (2005).

<sup>5</sup> Wireless Telecommunications Bureau Announces Procedures For De Novo Review In The 800 MHz Public Safety Proceeding, *Public Notice*, 21 FCC Rcd 758 (WTB 2006) (*De Novo Review PN*). The Commission originally delegated authority to the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau to resolve cases referred to the Commission for *de novo* review. See 47 C.F.R. § 90.677(d) (2005).

However, on September 25, 2006, the Commission delegated this authority to the Public Safety and Homeland Security Bureau. See Establishment of Public Safety and Homeland Security Bureau, *Order*, FCC 06-35, rel. Sep. 25, 2006.

<sup>6</sup> *De Novo Review PN* at ¶ 4.

<sup>7</sup> *Id.* at ¶¶ 4, 10.

<sup>8</sup> See Proposed Resolution Memorandum of Chevron USA Inc., filed January 10, 2006 by Chevron with the TA (Chevron PRM) at 5.

<sup>9</sup> *Id.* at 5, 15-16.

<sup>10</sup> A mobile-only authorization means that a licensee may only operate hand-held or vehicular-mounted radios on the designated frequency in communication with other mobile units. The licensee may not operate or communicate with base stations on the frequency.

relocate mobile-only systems. Specifically, paragraph 56 of the *800 MHz Supplemental Order* reads as follows:

Currently, public safety and CII licensees operate fewer than fifty mobile-only systems on former 800 MHz Channels 1-120 on a secondary basis. The *800 MHz R&O* does not specifically address whether these secondary, mobile-only systems must be moved from former Channels 1-120. Because these stations are secondary, and do not have as great a potential for interference as base stations, we do not believe it is necessary to remove them from former Channels 1-120 and will continue to accept public safety and CII applications for such secondary, mobile-only operations on these channels.<sup>11</sup>

7. Chevron argues that the *800 MHz Supplemental Order* does not apply to its mobile-only channels at Richmond because these authorizations are neither secondary, nor are they mobile-only systems.<sup>12</sup> Chevron contends that the licenses for stations WNAY 606 and WPCM 983 do not indicate that there is any secondary status attached to these channels and further argues that it is unaware of any provision in the Commission's rules that automatically accords secondary status to mobile-only operations.<sup>13</sup> Chevron also notes that its mobile-only channels at Richmond do not constitute a separate system, but are integrated into its larger 800 MHz trunked radio system that serves the Richmond refinery.<sup>14</sup>

8. Chevron further argues that in order to protect its employees, the public, and the environment, it is essential that Chevron's mobile-only channels not be compromised as a result of the 800 MHz reconfiguration process and that there can be no interruptions in those communications.<sup>15</sup> Chevron is also concerned that after reconfiguration is complete, the mobile-only channels will be at risk of interference from NPSPAC systems that will be relocated to those channels.<sup>16</sup> If such interference occurs, it argues, safety will be compromised and it will not have received facilities that are comparable to those the Licensee had prior to the reconfiguration process, as mandated by the Commission.<sup>17</sup>

9. Sprint contends that the *800 MHz Supplemental Order* precludes it from retuning Chevron's mobile-only frequencies, because they are secondary and not associated with any base stations.<sup>18</sup> Sprint rejects Chevron's contention that its mobile-only frequencies do not constitute mobile-only systems arguing that, without an association with a base station, the mobile-only frequencies are secondary, mobile-only frequencies and Chevron is not entitled to reimbursement for their retuning.<sup>19</sup> While Sprint does not contest Chevron's argument that its mobile-only frequencies serve an important public safety function, it does contest Chevron's assertion that retuning these frequencies is integral to Chevron's receiving "comparable facilities."<sup>20</sup> Sprint argues that because Chevron's mobile-only frequencies were never protected from interference, protecting them from interference now would be, in fact, providing

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<sup>11</sup> See *800 MHz Supplemental Order*, 19 FCC Rcd 25144 ¶ 56.

<sup>12</sup> Chevron PRM at 14-15.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 5.

<sup>16</sup> The TA intends to relocate three NPSPAC systems to the frequencies in question, and these systems will operate at sites as close to 16.51 km to the Richmond refinery.

<sup>17</sup> *Id.* at 15-16; citing *800 MHz R&O*, 19 FCC Rcd at 15077 (¶ 201); see also 47 C.F.R. § 90.699(d).

<sup>18</sup> See Reply of Nextel Communications Inc. to the Proposed Resolution Memorandum of Chevron USA, Inc., filed January 13, 2006 with the TA (Sprint Reply) at 5-6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 6-7.

Chevron with a superior system, which is not permitted under the 800 MHz rebanding guidelines.<sup>21</sup>

### III. DISCUSSION

10. We find that the authorizations at issue are not associated with any base station, and are therefore mobile-only systems with secondary status. Although Chevron contends that its mobile-only authorizations do not contain any indication that the frequencies in question have secondary status, the Commission has always treated mobile-only authorizations as secondary, as demonstrated by the fact that the Commission has never devised interference protection rules for mobile-only systems. If the Commission had intended to convey primary status upon mobile-only systems, it would have created rules to provide them protection from other systems; however, the main interference protection provisions governing operations in the 800 MHz band are based upon separation of base stations.<sup>22</sup>

11. We also reject the argument that Chevron's mobile-only facilities should be afforded primary status based on their alleged "integration" into Chevron's larger trunked system. The fact that most of Chevron's system is licensed on a primary basis does not make its mobile-only frequencies primary. The Commission's licensing records show that the Commission has licensed the frequencies at issue on a primary basis to other licensees in the area of the Richmond refinery, which would not be possible if Chevron's mobile-only authorizations were primary. Chevron's mobile-only license for Station WNAY606 authorizes Chevron to operate mobiles on frequency pair 807/852.4625 on a state-wide basis. A search of the Commission's records shows other licensees with primary status on this frequency pair in California. If Chevron's mobile authorizations on this frequency pair enjoyed primary status, these other operations could not be licensed. Similarly, Chevron's mobile-only license for Station WPCM983 authorizes mobile operations on its two frequencies within an eight kilometer radius. This radius is far smaller than the 113 kilometer radius that primary land mobile authorizations in the 800 MHz band enjoy, and the Commission has in fact licensed numerous other land mobile stations within 113 km of WPCM983, which would be impossible if Chevron's authorization had primary status. Moreover, the special conditions field of WPCM983 notes that the Commission granted the authorization pursuant to a 1993 waiver. The waiver as well as the waiver request contains a statement acknowledging that Chevron would have no recourse should its mobile-only operations receive interference.

12. Given that Chevron's mobile-only licenses are secondary, the plain language of the *800 MHz Supplemental Order* indicates that Chevron is neither required nor entitled to relocate these facilities. We acknowledge, however, that there may be a public safety benefit in allowing Chevron to relocate its mobile-only facilities out of Channels 1-120 so that they will not conflict with use of the band be relocated NPSPAC systems. We therefore will allow Chevron to modify its mobile-only authorizations to move these frequencies out of the NPSPAC portion of the band to suitable frequencies in the non-ESMR portion of the band.<sup>23</sup> Since this is a voluntary relocation outside of the scope of the rebanding process, neither Sprint nor the TA is obligated to assist Chevron in finding suitable channels, and Sprint is not required to pay for relocation. Any license modifications and system retuning will be at Chevron's expense, and Chevron's mobile-only authorizations will retain their secondary status after retuning, *i.e.*, Chevron may not cause interference to primary users of the channels and is not entitled to protection from interference caused by primary users of the channels. Similarly, if Chevron chooses to continue to

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

<sup>22</sup> See 47 C.F.R. § 90.621(b), which specifies how frequencies are assigned on the basis of distance between base stations. See also Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 MHz, *Notice of Proposed Rulemaking*, PR Docket 93-60 8 FCC Rcd 2454, 2459-60 ¶ 16 (1993) ("Historically, we have not considered the effect of mobile units when determining protection criteria. All considerations have been limited to base-to-base interference because one cannot predict where a mobile unit will be at any time.")

<sup>23</sup> Chevron may not relocate into the ESMR portion of the band because its mobile-only authorizations are incompatible with the system architecture employed in the ESMR portion of the band. See generally *800 MHz R&O*, 19 FCC Rcd 15059-61 ¶¶ 170-174.

operate its mobile-only authorizations on its current channels, it must continue to operate under secondary status.

#### **IV. ORDERING CLAUSES**

13. Accordingly, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 90.677, of the Commission's rules, 47 C.F.R. § 90.677, it is ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

14. 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

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