

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

In the Matter of)
County of Rockland, New York)
and Sprint Nextel) WT Docket No. 02-55
Mediation No. TAM-12282)

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 2007

Released: April 26, 2007

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us from mediation by the 800 MHz Transition Administrator (TA) involving a Wave 1, Stage 2 800 MHz rebanding dispute between the County of Rockland, New York (Rockland) and Sprint Nextel Corporation (Sprint). The parties dispute whether Sprint must retune Rockland’s system, which operates on offset channels in the 800 MHz Expansion Band on a secondary basis. Based on our de novo review of the mediation record and the related filings, we resolve the dispute in Rockland’s favor and direct the TA to convene a meeting of the parties to develop a Frequency Relocation Agreement (FRA) consistent with the instant Order.

II. BACKGROUND

A. Issue in Dispute

2. Rockland operates a four-site 800 MHz public safety data system on a single channel pair in the 800 MHz Expansion Band under call sign WPED556. Rockland’s paired channel assignment is on channels that are “offset” from the regularly assigned 800 MHz channels because of the limited availability of regularly spaced channels in the greater New York metropolitan area. Rockland’s license

1 See 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) (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); Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) (800 MHz MO&O).

2 The Expansion Band consists of the 815-816/860-861 MHz portion of the 800 MHz band. See 800 MHz Report and Order, 19 FCC Rcd at 15053-15054, ¶¶ 154-156.

3 Rockland states that its system operates at four sites. County of Rockland Proposed Resolution Memorandum, filed December 28, 2006, at 13 (Rockland PRM). However, the Commission’s database reflects only three sites. With respect to the site that does not appear in the database, we direct Rockland to file an appropriate modification application.

4 “Offset” channels are employed most frequently when, as here, regularly spaced (25 kHz spacing) channels are not available because of the intense use of the 800 MHz band in an area.

also contains a condition making Rockland's use of offset channels secondary to non-offset 800 MHz stations in the area, *i.e.*, Rockland may not cause interference to, and must accept interference from, such other stations.

3. The parties dispute whether Sprint is obligated to retune Rockland's offset channel system. On March 19, 2007, after Sprint and Rockland were unable to resolve this dispute through negotiation and mediation, the TA mediator forwarded the record to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review and resolution.⁵

B. Parties' Positions and Mediator Recommendation

4. *Rockland Position.* Rockland contends that while its system is secondary, it is entitled to retuning at Sprint's expense.⁶ Rockland argues that its position is supported by the Bureau's February 12, 2007 letter regarding retuning of various types of secondary facilities operated by public safety licensees, in which the Bureau found that Sprint could be obligated to pay for retuning of secondary offset facilities under some circumstances.⁷ Rockland contends that its system meets the criteria identified in the *Bureau Letter* that support requiring Sprint to pay for retuning. Rockland notes that its system has operated for more than fifteen years, that the service provided on the station is integral and critical to the County's law enforcement efforts, and that there is no non-offset channel pair available in the congested metropolitan New York City area to accommodate Rockland's operations.⁸ Rockland acknowledges that it has the option of remaining in the Expansion Band, but expresses concern that it could receive interference from new commercial stations in the band, and that the secondary nature of its license would preclude recourse against such stations.⁹ Rockland adds that requiring it to remain in the Expansion Band could impose an economic burden on Rockland as it lacks the financial resources to replace the services it provides or to cope with the potential increase in interference.¹⁰

5. *Sprint Position.* Sprint contends that it is not responsible for paying Rockland's retuning costs because Rockland's system is secondary.¹¹ Sprint contends that Rockland does not meet the criteria set forth in the *Bureau Letter* that would justify retuning at Sprint's expense.¹² Sprint also challenges whether Rockland's system is entitled to be retuned at all. Specifically, Sprint claims that: (a) the TA lacks authority to designate replacement offset channels for Rockland,¹³ (b) designating a primary channel for Rockland would be an "upgrade" in contravention of the "comparable facilities" standard established

⁵ New York and Nextel Communications, Inc., Mediation No. TAM-12282, Recommended Resolution, filed March 19, 2007, at 1-2 (RR). Following submission of the record, Sprint filed a Statement of Position with the Bureau. Statement of Position of Nextel Communications, Inc., filed April 2, 2007 (Sprint SOP). Rockland did not file a position statement.

⁶ Rockland PRM at 14-16.

⁷ Letter dated February 22, 2007 from John Weslowski, Rockland County Dept. of Law, to Francis Fletcher, TA Mediator, at 2 (Rockland Letter), *citing* Letter dated February 12, 2007 from David L. Furth, Associate Chief, Public Safety and Homeland Security Bureau, to James B. Goldstein, Director – Spectrum Reconfiguration, Sprint Nextel Corp., 22 FCC Rcd 2736 (PSHSB 2007) (*Bureau Letter*).

⁸ Rockland Letter at 2-3; PRM at 15-16..

⁹ *Id.*

¹⁰ *Id.*

¹¹ Proposed Resolution Memorandum of Nextel Communications, Inc., filed December 16, 2006, at 4-5 (Sprint PRM)..

¹² Sprint SOP at 4-5.

¹³ Sprint PRM at 4.

by the Commission,¹⁴ (c) Rockland has failed to show that its current channel pair is so susceptible to interference that relocation is justified,¹⁵ (d) Rockland may be more susceptible to interference on a replacement channel pair than its current channel pair, and (e) assigning Rockland a replacement channel pair on offset channels would violate the Commission's rules governing the minimum spacing between stations absent consent of other affected licensees.¹⁶ Sprint recommends that Rockland not be reconfigured at this time, but that after band reconfiguration is complete, the Commission should find a non-offset channel for Rockland.¹⁷

6. *Mediator Recommendation.* In his Recommended Resolution, the mediator recommends that the Commission find Rockland eligible for retuning at Sprint's expense.¹⁸ The mediator also recommends rejection of Sprint's arguments that the TA has exceeded its authority and that Rockland should not be retuned.¹⁹ With respect to Sprint's claim that relocating Rockland to a non-offset channel would constitute an improper "upgrade" rather than "comparable facilities," the mediator notes that Rockland has since agreed to be reconfigured to an offset channel, and therefore recommends that this issue be deemed moot.²⁰

III. DISCUSSION

7. Based on our *de novo* review of the record, we find that Sprint is required to retune Rockland's system. The Bureau addressed the issue of Sprint's obligation to retune secondary offset facilities in the *Bureau Letter*, which responded to an inquiry from Sprint on this as well as other issues. The *Bureau Letter* stated:

The determination of whether Sprint is required to pay for retuning of secondary offset facilities will be determined on a case-by-case basis depending on the particular facts present. Key factors in such determinations may include how long the offset facility has been part of the licensee's system and the degree to which it is a necessary part of the licensee's overall system. If the licensee can demonstrate that not retuning the offset facility would significantly degrade or compromise the system's operation in comparison to its pre-rebanding operation, this will weigh in favor of the facility being retuned at Sprint's expense.²¹

8. Rockland has made a sufficient showing to justify requiring Sprint to pay for retuning in this case. Rockland has operated its facilities since 1991. Rockland's system is the "only source of mobile data" for the County's municipal and county law enforcement agencies, and it affords users of the system with access to databases and other communications critical to the delivery of public safety services.²² Although Rockland has the option of remaining in the Expansion Band, it has elected not to do so because, if it receives interference from new commercial systems in the Expansion Band, the secondary

¹⁴ *Id.* at 4-5.

¹⁵ Sprint SOP at 5.

¹⁶ *Id.* at 5-6

¹⁷ *Id.* at 6.

¹⁸ RR. at 6-8. The TA Mediator also recommended that the Commission direct Sprint to respond to Rockland's December 11, 2006 rebanding proposal. *Id.* at 8.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 7.

²¹ *Bureau Letter*, 22 FCC Rcd at 2740.

²² Rockland PRM at 2-3; RR at 5.

nature of its license precludes recourse against the interfering stations.²³ Rockland adds that requiring it to remain in the Expansion Band could impose an economic burden on Rockland as it lacks the financial resources to replace the services it provides or to cope with the potential increase in interference.²⁴

9. We do not agree with Sprint's contention that Rockland's concerns about remaining in the Expansion Band are speculative and thus do not satisfy the criteria set forth in the *Bureau Letter*. Indeed, we find Sprint's reading of the *Bureau Letter* in this regard to be excessively narrow. The *Bureau Letter* did not require a licensee to show the prospect of degraded performance as a "condition" of relocation, but said only that such a showing would "weigh in favor" of a licensee seeking relocation. Moreover, the Commission in the *800 MHz R&O* relieved public safety licensees of the need to demonstrate potential interference in the Expansion Band as a condition of relocation, concluding that the band's proximity to the ESMR band justified giving all public safety licensees in the band the right to relocate.²⁵ In light of these factors, we find that Rockland's concerns about remaining in the Expansion Band are readily sufficient to support its request for relocation at Sprint's expense.

10. We also reject Sprint's various arguments that Rockland should not be allowed to retune its facility during rebanding, but must wait until rebanding is complete.²⁶ Sprint's claim that Rockland's replacement channel could be subject to greater interference than its current channel is speculative and unsupported. Sprint contends that Rockland "has enjoyed a long, interference-free run" on its current channel assignment,²⁷ but Rockland operates on an offset basis precisely because no primary channels are available in the spectrum-congested New York area. Equally unpersuasive is Sprint's argument that Rockland's replacement channel will violate the Commission's minimum spacing rules and that Rockland must obtain concurrence of neighboring licensees.²⁸ The rules cited by Sprint do not apply where, as here, the licensee's secondary authorization will be conditioned on the licensee not causing interference to, and accepting interference from, other stations.

11. Having decided, for the reasons stated above, that Sprint must pay for the retuning of Rockland's station, we need not reach Sprint's claim that the TA mediator exceeded its authority. We also need not address Sprint's argument that allowing an offset licensee to relocate to a non-offset channel on a primary basis would violate the Commission's comparable facilities standard because the licensee would receive a "better" authorization than previously.²⁹ In this particular case, the issue is moot because Rockland has agreed to relocate to an offset channel on a secondary basis.³⁰

IV. ORDERING CLAUSE

12. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; 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.

13. IT IS FURTHER ORDERED, that the Transition Administrator shall convene a meeting of

²³ Rockland Letter at 2-3.

²⁴ *Id.* at 3.

²⁵ *800 MHz R&O*, 19 FCC Rcd at 15053 ¶ 154.

²⁶ Sprint SOP at 6.

²⁷ *Id.* at 5.

²⁸ *Id.* at 6.

²⁹ Sprint PRM at 5.

³⁰ RR at 7.

the parties within seven days of the date of this Order for the purpose of negotiating a Frequency Relocation Agreement consistent with the resolution of issues set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

David L. Furth
Associate Bureau Chief
Public Safety and Homeland Security Bureau