

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

In the Matter of)	
)	
COMMONWEALTH OF PENNSYLVANIA)	WT Docket 02-55
)	
Request for Waiver re Payment of Retuning Costs for Certain 800 MHz Facilities)	FCC File No. 0002886293 et al.
)	

ORDER

Adopted: April 26, 2007

Released: April 27, 2007

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

I. INTRODUCTION

1. In this *Order* we grant the Commonwealth of Pennsylvania's January 25, 2007 Request for Waiver, in which the Commonwealth seeks reimbursement by Sprint Nextel Corporation (Sprint) of Pennsylvania's costs for retuning facilities in its statewide 800 MHz system that have been licensed under "FB2T" temporary site authorizations.¹ Pennsylvania's request is unopposed. As discussed below, we grant the waiver request and require Sprint to pay the cost of retuning these facilities.

II. BACKGROUND

2. The Pennsylvania Request states that the Commonwealth obtained two FB2T authorizations in early 2002 for the purpose of initial construction of its statewide 800 MHz NPSPAC system.² Under the umbrella of these two authorizations, Pennsylvania constructed base stations at 74 sites that operate on a total of 78 channels.³ The Commonwealth seeks clarification that Sprint must pay the cost of retuning these facilities under the criteria set forth in the *STA Public Notice* released in WT Docket 02-55 by the Public Safety and Homeland Security Bureau (Bureau) on December 20, 2006.⁴ Alternatively, the Commonwealth seeks a waiver to require payment of these costs by Sprint.⁵

3. In the *STA Public Notice*, the Bureau provided guidance on certain circumstances in which Sprint would be obligated to pay for retuning of 800 MHz public safety radio facilities authorized pursuant to Special Temporary Authorization (STA). The Bureau stated that "as a general rule, Sprint must pay the cost of relocating facilities that are authorized on a licensee's old frequency band before the end of the [800 MHz application] freeze in the applicable region, including facilities authorized by STAs

¹ See Request for Waiver filed by the Commonwealth of Pennsylvania (filed Jan. 25, 2007) (Pennsylvania Request).

² Pennsylvania Request at 3-4. Pennsylvania states that in obtaining these authorizations, it consulted with the Regional Planning Committees whose areas include portions of the state, and that it used available channels in the regional plans or conducted engineering studies to identify compatible channels.

³ *Id.* at 4.

⁴ *Id.* at 5. See Public Safety And Homeland Security Bureau Provides Guidance For Public Safety Licensees With Regard To License Application And Special Temporary Authorization Procedures And Payment Of Frequency Relocation Costs For Public Safety Facilities Added During 800 MHz Band Reconfiguration, *Public Notice*, 21 FCC Rcd 14658 (PSHSB 2006) (*STA Public Notice*).

⁵ Pennsylvania Request at 6-8.

or waivers granted during the freeze.”⁶ The *STA Public Notice* provides that Sprint is generally not required to pay for retuning of public safety facilities authorized by STA after the applicable freeze has ended, but allows public safety licensees to seek a waiver.⁷

4. On February 12, 2007, after the Pennsylvania Request was filed, the Bureau issued a letter providing additional guidance to 800 MHz licensees regarding Sprint’s responsibility for retuning of facilities authorized under several types of secondary authorization other than STAs, including FB2T authorizations.⁸ With respect to FB2Ts, the *Bureau Letter* clarified that Sprint’s cost responsibility will depend on the specific facts and circumstances of each case.⁹ If the FB2T facility is “intended for short-term use only, *i.e.*, a year or less, it typically will not require retuning and we will therefore not hold Sprint financially responsible.”¹⁰ On the other hand, the *Bureau Letter* noted that FB2T authorizations are also used for mobile command center facilities that are used on a recurring basis to respond to emergencies, and concluded that “we will generally hold Sprint financially responsible for retuning such facilities.”¹¹

III. DISCUSSION

5. The facts of this case are somewhat different from either of the FB2T examples noted in the *Bureau Letter*. As noted above, Pennsylvania obtained FB2T authorizations in early 2002 for the purpose of constructing multiple base stations in its statewide 800 MHz NPSPAC system.¹² As we indicated in the *Bureau Letter*, FB2T authorizations are “generally intended for base station facilities that are not intended to be operated permanently at a fixed location.”¹³ Because the base stations deployed by Pennsylvania were clearly intended to be fixed and permanent, we have advised Pennsylvania that the classification of these facilities as FB2T temporary facilities was inappropriate and that the Commonwealth should request STAs for these facilities pursuant to the procedures set forth in the *STA Public Notice*.¹⁴ Pennsylvania has done so, and the Bureau has granted STAs for these facilities.¹⁵ However, these STAs were granted after the lifting of the 800 MHz application freeze for Wave 1 NPSPAC systems,¹⁶ which requires us to address whether Sprint is obligated to pay for retuning of these facilities.

⁶ *STA Public Notice*, 21 FCC Rcd at 14661.

⁷ *Id.*

⁸ See Letter to James B. Goldstein, Director-Spectrum Reconfiguration, Sprint Nextel Corp., from David L. Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau, 22 FCC Rcd 2736, 2740-41 (PSHSB 2007) (*Bureau Letter*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Pennsylvania Request at 3-4.

¹³ *Bureau Letter*, 22 FCC Rcd at 2740 (*citing* 47 C.F.R. § 90.137).

¹⁴ Pennsylvania states that it used the FB2T process for permanent sites because the modification application process for such facilities was too time-consuming and it had an urgent need to “fill gaps” in its system. Pennsylvania Request at 4. This is not a proper use of the FB2T process. Nevertheless, Pennsylvania has remedied this situation by replacing the FB2T authorizations with STAs, which will be eligible for conversion to permanent licenses on post-rebanding frequencies under the procedures set forth in the *STA Public Notice*.

¹⁵ See, e.g., FCC File Nos. 0002886293 (Jan. 22, 2007); 0002886300 (Jan. 22, 2007); 0002886302 (Jan. 22, 2007); 0002888949 (Jan. 24, 2007); 0002888957 (Jan. 24, 2007); 0002888963 (Jan. 24, 2007); 0002888966 (Jan. 24, 2007); 0002888968 (Jan. 24, 2007); 0002888970 (Jan. 24, 2007); 0002889089 (Jan. 24, 2007); 0002889197 (Jan. 24, 2007); 0002890857 (Jan. 25, 2007).

¹⁶ The application freeze for Wave 1 NPSPAC systems ended on December 14, 2006.

6. As noted above, the *STA Public Notice* provides that Sprint is generally not required to pay for retuning of public safety facilities authorized by STA after the applicable freeze has ended, but allows public safety licensees to seek a waiver.¹⁷ To obtain a waiver, 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; 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,¹⁸ or the applicant has no reasonable alternative.¹⁹

7. We find the waiver standard to be met here. The waiver discussion in the *STA Public Notice* focuses on facilities that public safety licensees seek to construct and activate after the freeze has ended.²⁰ In this case, however, the facilities in question were largely constructed before rebanding began and the remainder were constructed before the freeze ended. Moreover, Pennsylvania has demonstrated that these facilities are an integral part of its statewide system, enhance the system's coverage, and support interoperability among multiple public safety agencies within the Commonwealth.²¹ Based on these factors, we conclude that Pennsylvania has shown that requiring Sprint to pay for retuning of these facilities would not frustrate the underlying purpose of the rule articulated in the *STA Public Notice* and would serve the public interest in facilitating rebanding. Therefore, we conclude that Sprint should pay for retuning of these facilities, notwithstanding the fact that they were incorrectly classified as temporary facilities and that STAs for the facilities were granted after the freeze.

IV. ORDERING CLAUSE

8. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the waiver request filed, by the Commonwealth of Pennsylvania in connection with application FCC File No. 0002886293 IS GRANTED to the extent discussed herein. 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, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁷ *STA Public Notice*, 21 FCC Rcd at 14661.

¹⁸ 47 C.F.R. § 1.925(b)(3)(i).

¹⁹ 47 C.F.R. § 1.925(b)(3)(ii).

²⁰ *Id.* The Bureau stated that licensees seeking a waiver to require payment by Sprint for retuning of post-freeze facilities would be expected to demonstrate that “(a) the need for the facility could not reasonably have been anticipated before the end of the mandatory negotiation period; and (b) safety considerations dictate that the modified facilities must be activated before band reconfiguration is completed in the relevant NPSPAC region.”

²¹ Pennsylvania Request at 5, 8-9.