

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

In the Matter of
State of New York and
Sprint Nextel
Mediation No. TAM-12235
Mediation No. TAM-12379
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 2007

Released: May 4, 2007

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we address a case referred to us for de novo review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) concerning an 800 MHz band reconfiguration dispute between the State of New York (New York) and Sprint Nextel Corporation (Sprint). The parties have agreed on all elements of a Frequency Relocation Agreement (FRA) for New York's "Metro-21" 800 MHz NPSPAC public safety communications system except the date for deployment of the Metro-21 system in the new NPSPAC band. New York seeks a firm date for deployment while Sprint proposes to defer deciding the date. We find that Sprint must either accept the date proposed by New York or promptly propose an alternative date. We order the parties to meet within fifteen days to negotiate a FRA consistent with the instant Order.

II. BACKGROUND

2. The Metro-21 system is a ten-channel NPSPAC public safety communications system serving the metropolitan New York City area and licensed to the State of New York under call signs WNNU667 and WPZQ258. Metro-21 is used by the New York State Police, the Metropolitan Transportation Authority Police Department, Department of Environmental Conservation law enforcement personnel, the New York State Attorney General's office, and several other law enforcement agencies in the New York City area. The current Metro-21 system is an EDACS system manufactured by M/A-Com, Inc. (M/A-Com). Although Sprint would ordinarily be required to pay for retuning of this

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 (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).

2 See New York State Proposed Resolution Memorandum, filed February 19, 2007 (New York PRM); New York State Reply to Nextel PRM, filed February 26, 2007 (New York Reply).

3 New York Reply at ¶ 2.

4 New York PRM at ¶ 22.

system to the new NPSPAC band (806-809/851-854 MHz), New York does not propose to retune the EDACS system. Instead, New York proposes to replace it with a new M/A-Com “OpenSky” system that will be deployed in the new NPSPAC band at New York’s own expense.⁵ New York proposes that while the OpenSky system is undergoing installation and testing, it will continue to operate the EDACS system in the current NPSPAC band (821-824/866-869 MHz) to maintain functionality and interoperability.⁶

A. Procedural History

3. The parties commenced negotiation of the FRA during 2006, and developed a draft agreement on most issues by December 2006.⁷ In November 2006, the parties were assigned to TA-sponsored mediation in an effort to resolve remaining issues. During mediation, New York proposed that the FRA include a date certain for Sprint to vacate sufficient channels so that installation of the OpenSky system could begin in the new NPSPAC band.⁸ New York proposed several possible dates in early 2007 for installation to commence.⁹ Sprint, however, rejected the proposal to include any specific date in the FRA, and instead proposed that the FRA contain a recital that deployment of the OpenSky system would begin on a date “to be determined.”¹⁰

4. When the parties were unable to resolve this issue in mediation, the TA mediator, at the direction of PSHSB, referred the issue to the Bureau for *de novo* review.¹¹ On February 27, 2007, the TA mediator transmitted the record to the Bureau, including Proposed Resolution Memoranda (PRM) and replies prepared for the mediator by each party. To expedite its referral to the Bureau, the TA mediator did not prepare a Recommended Resolution in this case. Accordingly, our *de novo* review is based on the record forwarded by the TA mediator and the parties’ PRMs and replies.¹²

B. Parties’ Positions

5. *New York Position.* New York states that it is ready to begin installation and testing of the Metro-21 OpenSky system immediately, and that there is an urgent need to do so to meet pressing public safety needs in the state.¹³ New York contends that Sprint is obligated to provide it with a specific timetable for vacating sufficient channels in the band to enable New York to deploy the system. New York notes that it has already purchased equipment for the system that is programmed to operate in the new NPSPAC band, and that the equipment must be warehoused until channels in the new band are made available.¹⁴ New York also objects to Sprint’s proposal that New York deploy the OpenSky system in the old NPSPAC band and then retune the system to the new NPSPAC band at an undetermined later date at Sprint’s expense. New York acknowledges that the OpenSky system could be initially deployed in the

⁵ *Id.* at ¶¶ 22-23; New York Reply at ¶¶ 9-11.

⁶ New York Reply at ¶ 11.

⁷ New York PRM at ¶ 16.

⁸ *Id.* at ¶ 23.

⁹ *Id.* New York initially proposed a commencement date of February 2, 2007. Subsequently, New York offered to extend the commencement date to April 2, 2007.

¹⁰ Proposed Resolution Memorandum of Nextel Communications, Inc., filed February 19, 2007, at 4-5 (Sprint PRM).

¹¹ Order of Charles F. Donley, TA Mediator, February 9, 2007.

¹² The parties elected not to file Statements of Position with the Bureau. Filing of such statements is optional. See Wireless Telecommunications Bureau Announces Procedures For De Novo Review In The 800 MHz Public Safety Proceeding, *Public Notice*, 21 FCC Rcd 758, 759 (2006).

¹³ New York PRM at ¶ 19, 24.

¹⁴ *Id.* at ¶ 22; New York Reply at ¶ 9.

old NPSPAC band, but argues that the FRA still requires a timetable for retuning the system to the new NPSPAC band to ensure that New York can plan for and address critical public safety needs during the transition.¹⁵

6. *Sprint Position.* Sprint contends that it cannot negotiate an implementation timetable for the New York system “in a vacuum,” because band reconfiguration is meant to be a “planned, deliberative process involving local and regional coordination of licensees.”¹⁶ If Sprint were to vacate channels for the Metro-21 system immediately, Sprint asserts, it would need to modify its own network channel configuration, which could cause interference to other 800 MHz public safety systems in the New York metropolitan area and degrade the performance of Sprint’s own network.¹⁷ Sprint contends that the Commission’s orders do not entitle New York to retuning “on demand,” and suggests the retuning timetable for the Metro-21 system should remain indefinite until the Commission acts on a February 15, 2007 letter that was jointly filed by Sprint and several public safety organizations regarding the overall schedule for retuning of NPSPAC systems.¹⁸ Finally, Sprint contends that the OpenSky system could cause interference upon deployment, citing alleged instances of interference caused by a similar OpenSky system in Pennsylvania.¹⁹ In light of these concerns, Sprint argues that installation of the OpenSky system in the new NPSPAC band must be deferred until a coordinated schedule has been developed for retuning of all NPSPAC licensees in the area.²⁰

III. DISCUSSION

7. We find that under the circumstances presented in this case, in which New York has proposed a firm date for implementation of the FRA, Sprint must either accept the date proposed by New York or promptly propose an alternative date. Seeking to defer the issue through inclusion of “to be determined” language in the FRA is insufficient in this case to fulfill Sprint’s obligation to negotiate in good faith and is insufficient for furthering the goal of timely and efficient rebanding.²¹

8. The *800 MHz Report and Order* requires that rebanding occur in a timely manner.²² As a result, FRAs between Sprint and relocating licensees must provide for timely initiation and completion of the necessary steps in the rebanding process. The *800 MHz Report and Order* also requires each party to FRA negotiations to negotiate in good faith.²³ This requirement includes the obligation to make a

¹⁵ New York PRM at ¶¶ 23-26; New York Reply at ¶ 12.

¹⁶ Sprint PRM at 7; Reply Memorandum of Nextel Communications, Inc., filed February 26, 2007, at 1-2 (Sprint Reply).

¹⁷ Sprint PRM at 5-7.

¹⁸ *Id.* at 8-9, *citing* Letter dated February 15, 2007, from Wanda McCarley, President, Association of Public-Safety Communications Officials-International; Harlin McEwen, Chairman, Communications & Technology Committee, International Association of Chiefs of Police, Communications Advisor, Major City Chiefs Association, National Sheriffs Association, and Major County Sheriffs Association; Alan Caldwell, Senior Advisor, Government Relations, International Association of Fire Chiefs; and Patricia Tikkala, Vice President – Spectrum Management, Sprint Nextel Corporation, to Kevin J. Martin, Chairman, Federal Communications Commission (February 15 Letter).

¹⁹ Sprint PRM at 9-11; Sprint Reply at 3-4.

²⁰ Sprint PRM at 11.

²¹ Our decision here does not preclude the negotiation of FRAs in which both parties agree to leave implementation dates to be determined at a later date. Such language, however, does not obviate the parties’ obligations to comply with the Commission’s rules and orders regarding the timing of rebanding.

²² *800 MHz Report and Order*, 19 FCC Rcd at 14977 ¶ 11.

²³ *Id.* at 15075 ¶ 201; 47 C.F.R. § 90.677(c).

reasonable counter-offer if one rejects an offer made by the other party.²⁴ In this case, New York has made clear in negotiations that it is prepared to deploy its OpenSky system in the new NPSPAC band without cost to Sprint, and that obtaining access to the necessary channels in the band is important to meet the public safety needs of the community. New York has therefore proposed several dates in early 2007 for installation of the system. Sprint has rejected these dates but has also refused to propose an alternative date, stating that the issue should be deferred indefinitely until relocation of all NPSPAC licensees in the New York region has been coordinated and planned.

9. We conclude that the obligation to negotiate in good faith requires Sprint to do more here. By insisting on deferral of the timing issue, Sprint is effectively making a unilateral decision to delay reconfiguration of the Metro-21 system. Moreover, Sprint is taking this position notwithstanding the fact that all other FRA issues have been resolved and New York has offered to relieve it in this case from most of the rebanding obligations that are imposed by the Commission's orders in this proceeding. Because New York is proposing to deploy the new OpenSky system at no cost to Sprint, obligations that Sprint must undertake in most FRAs—planning funding, cost of retuning or replacing mobile and portable radios, and cost of infrastructure retuning—are not present here. Sprint is not being asked to reconfigure the Metro-21 system but solely to make spectrum available for its deployment.

10. We acknowledge Sprint's concerns about the desirability of local and regional coordination and planning before it vacates spectrum in the New York metropolitan market to allow deployment of the Metro-21 OpenSky system. As Sprint points out, relinquishing channels in the new NPSPAC band to make room for Metro-21 will require it to implement channel swaps and other adjustments to its own network, which could have an impact on other relocating licensees in the area and on Sprint's own network.²⁵ Accordingly, this Order does not require Sprint to accept the accelerated date proposed by New York. However, these concerns do not justify Sprint refusing to propose any alternative schedule for vacating spectrum in its negotiations with New York. Sprint is responsible for planning for these contingencies and has had ample opportunity to do so: it has been on notice since the *800 MHz Report and Order* was adopted of the need to vacate spectrum to accommodate multiple relocating licensees in the New York area. The Commission has also established mechanisms that enable Sprint to prepare for and mitigate spectrum shortfalls it may experience in accommodating rebanding by other licensees, *e.g.*, by providing access to 900 MHz spectrum and crediting Sprint with credit for the cost of constructing additional cell sites to increase capacity.²⁶

11. Finally, regardless of any other contingency, the *800 MHz Report and Order* requires that Sprint vacate the entire 806-809/851-854 MHz band—not just the portion of the band required to accommodate Metro-21—in time to complete rebanding by the end of the 36-month transition period on June 26, 2008.²⁷ Thus, the burden is on Sprint to propose a definitive timetable that vacates the band in time to provide Metro-21 and all other NPSPAC licensees in the New York metropolitan area with access to the band on or before that date.

12. We disagree with Sprint's contention that the timetable for implementing retuning of the Metro-21 system can remain indefinite pending Commission action on the February 15, 2007 letter regarding NPSPAC rebanding that was jointly filed by Sprint and several public safety organizations. The February 15 letter asks the Commission to direct the TA to work with all 800 MHz stakeholders to

²⁴ *800 MHz Supplemental Order*, 19 FCC Rcd at 25153 ¶ 73.

²⁵ Sprint PRM at 5-7.

²⁶ See *800 MHz Report and Order*, 19 FCC Rcd at 15079 ¶ 207; *800 MHz Supplemental Order*, 19 FCC Rcd at 25150 ¶ 69.

²⁷ *800 MHz Report and Order* at 14977 ¶ 11 (requires Sprint "to vacate all of its 800 MHz band spectrum holdings below 817 MHz/861 MHz").

establish a schedule for completing the NPSPAC phase of the rebanding process.²⁸ However, the mere filing of a letter does not have the effect of staying ongoing band reconfiguration for all licensees—licensees who are ready to reconfigure their systems should not be prevented from doing so. Moreover, the filing of the letter does not alter Sprint’s clear obligations under the *800 MHz Report and Order* to negotiate in good faith and to complete rebanding in accordance with the 36-month time frame established by the order.

13. Finally, Sprint contends that the Metro-21 OpenSky system should not be deployed in the new NPSPAC band because it could cause interference to other systems in the band, including Sprint’s system, upon deployment.²⁹ Sprint cites alleged instances of interference caused by Pennsylvania’s OpenSky system, and argues that implementation of the Metro-21 system should be deferred pending further testing.³⁰ This argument is speculative and unpersuasive. New York points out that its OpenSky system is more modern and more technically advanced than the Pennsylvania system, and does not pose an interference risk.³¹ Moreover, if time for interference testing is needed, it can be accommodated in the FRA timetable without deferring implementation indefinitely.

14. We therefore direct Sprint to accept New York’s proposal or make a counter-offer in accordance with the terms of this Order. We further direct the parties to commence negotiations within fifteen days to incorporate an agreed-upon completion date for the Metro-21 system into an FRA. Should Sprint and New York not resolve the issue, we reserve jurisdiction to specify a mandatory reconfiguration date and such other provisions as may be required.

IV. ORDERING CLAUSES

15. 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.

16. **IT IS FURTHER ORDERED**, that the Transition Administrator shall convene a meeting of the parties within fifteen 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

²⁸ February 15 Letter at 1.

²⁹ Sprint PRM at 9-11; Sprint Reply at 3-4.

³⁰ Sprint PRM at 11.

³¹ New York Reply at ¶¶ 14-28.