

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

In the matter of Applications of)
COMMONWEALTH OF PENNSYLVANIA) WT Docket 02-55
Request for Waiver regarding Payment of) FCC File Nos. 0002944393; 0002943944;
Retuning Costs for Certain 800 MHz facilities) 0002944400; 00029464870; 0002965006;
) 0002965016; 0002965111; 0002965116;
) 0002964873; 0002948902; 0002955453;
) 0002960924; 0002991949

ORDER

Adopted: June 26, 2007

Released: June 26, 2007

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

I. INTRODUCTION

1. On May 7, 2007, the Commonwealth of Pennsylvania (Pennsylvania) submitted a letter request for clarification (Request)1 of our April 27, 2007, Pennsylvania Order granting Pennsylvania’s January 25, 2007 Request for Waiver, in which Pennsylvania sought reimbursement by Sprint Nextel Corporation (Sprint) of Pennsylvania’s costs for retuning facilities in its statewide 800 MHz system that had been licensed under “FB2T” temporary site authorizations.2 Specifically, the Request seeks confirmation that the relief granted by the Pennsylvania Order “was not intended to be limited to just the applications listed therein but was also intended to be generally applicable to STAs granted post-freeze as part of the Statewide system rollout.”3 The Request was served on Sprint, which has not opposed it.

2. As discussed below, we extend the relief granted by the Pennsylvania Order to all facilities installed as part of the Pennsylvania statewide system before the end of the Wave 1, NPSPAC application freeze and authorized by Special Temporary Authority (STA) after the freeze. In addition, on our own motion, we require Sprint to pay for retuning of the five STA facilities that have been authorized and constructed as part of the Pennsylvania statewide system since the freeze.

II. BACKGROUND

3. In the Pennsylvania Order, we required Sprint to pay for retuning of sites in the Pennsylvania system that had been inappropriately classified as FB2T temporary facilities and for which Pennsylvania had obtained STAs after the Wave 1 application freeze ended. In Footnote 15 of the Pennsylvania Order, we cited, by way of example, certain STA requests filed by Pennsylvania and granted by the Commission.4 In the instant Request, Pennsylvania seeks clarification that the relief

1 Letter from William K. Keane, Esq., on behalf of the Commonwealth of Pennsylvania to David L. Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau (May 7, 2007) (Request).

2 See Commonwealth of Pennsylvania, Order, 22 FCC Rcd 7730 (PSHSB 2007) (Pennsylvania Order).

3 Request at 1-2.

4 Request at 1 citing Pennsylvania Order at note 15.

granted by the *Pennsylvania Order* extends to facilities covered by similar STA grants that were not specifically referenced in the *Pennsylvania Order*. Specifically, Pennsylvania has submitted two attachments to its Request listing additional facilities authorized by STA that it seeks to have retuned at Sprint's expense. Attachment A to the Request lists eight STAs for facilities that were installed prior to the expiration of the Wave 1 freeze, but which Pennsylvania previously overlooked when it filed its January 25, 2007 waiver request.⁵ Attachment B to the Request lists five STAs for facilities that have been installed since the end of the freeze as part of the statewide system rollout.⁶

III. DISCUSSION

4. We extend the relief granted by the *Pennsylvania Order* to the STA facilities referenced in Attachment A. In the *Pennsylvania Order*, we found that "the facilities in question were largely constructed before rebanding began and the remainder were constructed before the freeze ended."⁷ Based on this circumstance and Pennsylvania's showing that those facilities are an integral part of its system rollout, we concluded that a waiver was appropriate to require Sprint to pay for retuning of these facilities.⁸ Attachment A lists additional post-freeze STAs granted for facilities that were constructed prior to the expiration of the Wave 1 freeze. We find that the rationale underlying the *Pennsylvania Order* applies equally to these facilities, notwithstanding that they were not listed in Pennsylvania's January waiver request. Therefore, we require Sprint to pay for retuning of the STA facilities listed in Attachment A.

5. We conclude that the five STA facilities referenced in Attachment B are not covered by the *Pennsylvania Order* because they were constructed after the expiration of the Wave 1 freeze. Nevertheless, we find that Pennsylvania is entitled to a waiver to compel payment by Sprint for retuning of these facilities under the waiver standard articulated in our December 2006 *STA Public Notice*.⁹ 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, or the applicant has no reasonable alternative.¹⁰ Here, Pennsylvania has shown that the facilities authorized by the five post-freeze STAs listed in Attachment B are integral to achieving Pennsylvania's goal of deploying a comprehensive statewide, interoperable public safety system. Further, Pennsylvania has shown that expedited deployment of these facilities is essential to ensure that Pennsylvania's statewide rollout remains on track, and that operation in the old NPSPAC band is necessary because it is

⁵ *Id.* at Attachment A citing FCC File Nos. 2944393 (Mar. 11, 2007); 2943944 (Mar. 11, 2007); 2944400 (Mar. 11, 2007); 29464870 (filed Mar. 23, 2007); 2965006 (filed Mar. 23, 2007); 2965016 (filed Mar. 23, 2007); 2965111 (filed Mar. 23, 2007); 2965116 (filed Mar. 23, 2007).

⁶ *Id.* at Attachment B citing FCC File Nos. 0002964873 (Mar. 12, 2007); 0002948902 (Mar. 12, 2007); 0002955453 (Mar. 19, 2007); 0002960924 (Mar. 21, 2007); 0002991949 (Apr. 12, 2007).

⁷ *Id.*

⁸ *Id.*

⁹ 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*).

¹⁰ 47 C.F.R. § 1.925(b)(3). In the *STA Public Notice*, we stated that in support of a waiver request, licensees 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. *STA Public Notice*, 21 FCC Rcd at 14661.

too early in the transition to commence operation in the new NPSPAC band. Therefore, we conclude that the waiver standard has been met and that Sprint should pay for retuning of these facilities.

6. In its Request, Pennsylvania also notes that its rollout of the statewide system is ongoing, and that it anticipates requesting additional STAs to install approximately 20 sites per month.¹¹ In connection with future STA applications, Pennsylvania may request under the *STA Public Notice* waiver standard that the relief granted by this Order be extended to cover Sprint's payment for retuning of facilities covered by such applications.

IV. ORDERING CLAUSES

7. 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 Request filed, by the Commonwealth of Pennsylvania in connection with the applications FCC File Nos. 0002944393; 0002943944; 0002944400; 00029464870; 0002965006; 0002965016; 0002965111; 0002965116 IS GRANTED to the extent discussed herein.

8. IT IS FURTHER 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, we grant, on our own motion, a waiver to the Commonwealth of Pennsylvania in connection with the applications FCC File Nos. 0002964873; 0002948902; 0002955453; 0002960924; 0002991949 IS GRANTED to the extent discussed herein.

9. 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

¹¹ Request at 2.