

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

In the Matter of)	
)	
State of Connecticut, Department of Corrections and Sprint Nextel)	WT Docket No. 02-55
)	
Mediation No. TAM-12371)	

MEMORANDUM OPINION AND ORDER

Adopted: September 17, 2007

Released: September 17, 2007

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a dispute referred to us for *de novo* review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) and involving a dispute between State of Connecticut, Department of Corrections (CDOC) and Sprint Nextel Corporation (Sprint). At issue is whether Sprint must provide CDOC with NPSPAC-capable radios to replace existing radios that are not NPSPAC-capable but could be technically modified to become NPSPAC-capable. We find that the “comparable facilities” standard requires Sprint to provide CDOC with radios that match the current operational capability of its radios, but does not require Sprint to provide upgraded radios. Applying this principle to the facts of this case, Sprint is not obligated to provide CDOC with NPSPAC-capable radios to replace radios that are not currently NPSPAC-capable, regardless of whether such radios could be modified to become NPSPAC-capable.

II. BACKGROUND

2. 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.¹ 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.² Sprint must provide the relocating licensee with “comparable facilities” on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.³ If the parties cannot reach agreement on a FRA, the case is referred to mediation. Issues that cannot be resolved in mediation are referred to the Public Safety and Homeland Security Bureau

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).

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

³ *Id.* at 14986 ¶ 26.

(PSHSB) for *de novo* review.⁴

A. Issue in Dispute

3. This case concerns CDOC's conventional non-NPSPAC 800 MHz radio system operating under call sign WPAR691.⁵ As a public safety licensee, CDOC also may operate on the five NPSPAC mutual-aid channels on a mobile-only basis, but it is not licensed and does not operate on the non-mutual aid NPSPAC channels. CDOC has approximately 1900 radios in its system, which fall into two categories. The first category (Category A) consists of NPSPAC-capable radios, *i.e.*, radios that have the existing technical capability to operate on non-mutual aid channels in the current NPSPAC band.⁶ The second category of radios (Category B) consists of radios that are not NPSPAC-capable, but that allegedly could be modified to become NPSPAC-capable. According to CDOC, it is possible to modify the Category B radios to operate on the current non-mutual aid NPSPAC channels by replacing certain components in each radio and making other technical adjustments.⁷ However, if the Category B radios are retuned, CDOC maintains that it will no longer be able to modify them in this manner to be operable on the new NPSPAC channels.⁸

4. The parties agree that under the precedent established by the Bureau's *Tazewell* order,⁹ Sprint must replace CDOC's NPSPAC-capable Category A radios with radios that are fully NPSPAC-capable in the new NPSPAC band.¹⁰ The parties disagree, however, whether *Tazewell* also requires Sprint to replace CDOC's Category B radios with NPSPAC-capable radios. CDOC argues that Sprint must provide it with radios that are capable post-rebanding of being modified to add NPSPAC-capability, and that if Sprint cannot do this, it must replace the Category B radios with radios that are fully NPSPAC-capable.¹¹ Sprint argues that because the Category B radios are not currently NPSPAC-capable, replacing these radios with NPSPAC capable radios would constitute an upgrade beyond the scope of its obligation to provide CDOC with comparable facilities.¹²

5. The parties entered into mediation on November 1, 2006. The mediation period ended on December 14, 2006, but was extended to allow continued mediation of issues.¹³ When the parties were unable to resolve their dispute over the extent of Sprint's obligation to provide CDOC with NPSPAC-capable radios, the mediator forwarded the mediation record and his Recommended Resolution to PSHSB.¹⁴

⁴ *Id.* at 15076 ¶ 201.

⁵ Proposed Resolution Memorandum of Nextel Communications, Inc., June 1, 2007 at 2 (Sprint PRM).

⁶ Recommended Resolution, filed by the TA Mediator July 12, 2007 at 4 (RR).

⁷ *Id.*

⁸ *Id.* at 7.

⁹ County of Tazewell, IL and Sprint Nextel, WT Docket No. 02-55, *Memorandum Opinion and Order*, 22 FCC Red 8675 (PSHSB 2007) (*Tazewell*).

¹⁰ The parties agree that CDOC's existing Category A radios cannot be retuned to provide NPSPAC capability in the new NPSPAC band. Therefore, they must be replaced with NPSPAC-capable radios.

¹¹ State of Connecticut Department of Correction Statement of Position at 1-2 (CDOC SOP); State of Connecticut Department of Correction Reply to Proposed Resolution Memorandum of Nextel Communications at 3 (CDOC Reply).

¹² Sprint PRM at 3.

¹³ RR at 2.

¹⁴ *Id.* at 3.

B. Parties' Positions

6. *CDOC Position.* CDOC contends that under the Commission's *Tazewell* decision, Sprint is required to replace all of its Category B radios with NPSPAC-capable radios.¹⁵ CDOC acknowledges that the Category B radios are not currently NPSPAC-capable but asserts that the radios can be converted to full NPSPAC capability by replacing the TXCO (temperature-compensated crystal oscillator), replacing a filter, and adjusting the radio's deviation.¹⁶ CDOC contends that because it can modify its existing Category B radios to operate on the old NPSPAC channels, but the radios will not be modifiable post-rebanding, Sprint must provide it with replacement radios that are fully NPSPAC-capable after rebanding. Otherwise, CDOC argues, its old and new radios will not be "technically and operationally comparable."¹⁷

7. *Sprint Position.* Sprint asserts that retuning Connecticut's Category B radios to match their current operational capability is sufficient to provide Connecticut with comparable facilities. Sprint contends that *Tazewell* does not require it to replace CDOC's Category B radios with NPSPAC-capable radios, because *Tazewell* would only apply if the Category B radios were currently NPSPAC-capable.¹⁸ Sprint notes that the manufacturer's web page lists the Category B radios as not NPSPAC-capable and argues that retuning these models would not cause CDOC to lose radio capability.¹⁹ Sprint further argues that replacing these models with NPSPAC-capable radios would constitute an unwarranted equipment upgrade rather than the provision of comparable facilities.²⁰

8. *Mediator Recommendation.* The mediator recommends finding that the radios in Category A are governed by the *Tazewell* decision and therefore must be replaced.²¹ With regard to the Category B radios, the mediator recommends finding that Sprint is obligated to provide replacement radios that preserve, but do not exceed, the existing radios' capability to be upgraded (*i.e.*, radios that are not NPSPAC-capable but can be converted to this capability).²² However, if such replacement radios are not available, the mediator recommends that Sprint provide CDOC with upgraded radios that are fully NPSPAC-capable.²³

III. DISCUSSION

9. We conclude that Sprint is not required to replace CDOC's non-NPSPAC-capable Category B radios with NPSPAC-capable radios. Under the *800 MHz Report and Order*, Sprint must provide all relocating licensees with comparable facilities.²⁴ In defining "comparable facilities" for 800 MHz rebanding purposes, the Commission adopted the long-standing definition of the term that had been applied in an earlier 800 MHz rulemaking, and codified this definition in Section 90.699(d) of the

¹⁵ CDOC Reply at 3.

¹⁶ CDOC Reply at 2. CDOC notes that it examined a small sample of these radios and found evidence that some have already been converted. *Id.*

¹⁷ *Id.* Reply at 3-4.

¹⁸ Sprint PRM at 8-9.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 9.

²¹ RR at 7.

²² *Id.* at 8.

²³ *Id.* at 10.

²⁴ *800 MHz Report and Order*, 19 FCC Rcd at 15076 ¶ 201.

Commission's rules.²⁵ Under this definition, the licensee responsible for relocation "must provide the relocated incumbent with a comparable system."²⁶ The characteristics of a comparable system are "defined functionally from the end user's point of view," and include both base station facilities "and all mobile units associated with those base stations."²⁷

10. In the *Tazewell* decision, we applied this definition of comparable facilities to a situation in which the licensee had radios that were technically capable of operation on NPSPAC channels but the licensee was not licensed to use NPSPAC channels.²⁸ We found that under the comparable facilities standard, the licensee was entitled to receive radios that have "the same technological and operational capability as its existing radios," regardless of whether its license authorized full use of that capability.²⁹ Thus, we concluded that the licensee was entitled to receive radios that are NPSPAC-capable in the new NPSPAC band, whether this is accomplished through retuning or replacement of the radio. In the present case, we agree with the parties that *Tazewell* similarly applies to CDOC's Category A radios, because these radios are currently NPSPAC-capable.³⁰

11. The radios in Category B present a different scenario. It is undisputed in the record that these radios are not currently NPSPAC-capable. CDOC contends, however, that it should receive NPSPAC-capable radios because after rebanding, it will no longer be able to upgrade its Category B radios by modifying and replacing certain components to add NPSPAC capability. We disagree with Connecticut's interpretation of the comparable facilities standard. The Commission has never included a radio's ability to be upgraded as one of the criteria it evaluates as part of "comparable facilities."³¹ The Commission has consistently defined comparable facilities in terms of a system's existing technological and operational capabilities, based on criteria such as functionality, throughput, quality of service, and operating costs.³² We decline to depart from the Commission's long-standing definition of comparable facilities in this case. Comparing radio equipment based on the ability to implement hypothetical upgrades rather than the equipment's existing operational capabilities is inherently speculative. In addition, expanding the comparable facilities definition to encompass hypothetical upgrades could lead to manipulation of the standard by parties seeking to obtain upgraded equipment. We therefore conclude that with respect to CDOC's Category B radios, Sprint is only obligated to retune Connecticut's radios to

²⁵ The comparable facilities definition for the 800 MHz band was adopted in 1997 when the Commission provided for relocation of site-based licensees in the "Upper 200" channels by Economic Area (EA) licensees. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket 93-144, 12 FCC Rcd 19079, 19111-19115 ¶¶ 89-95 (1997) (*800 MHz SMR 2nd R&O*). See 47 CFR § 90.699(d). The Commission expressly adopted the same definition of comparable facilities for purposes of 800 MHz rebanding. *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201 n.526; *800 MHz MO&O*, 20 FCC Rcd at 16032 ¶ 38 n.79.

²⁶ *800 MHz SMR 2nd R&O*, 12 FCC Rcd at 19112 ¶ 91. In addition, the facilities must be comparable in terms of channel capacity, quality of service, and operating costs. *Id.* at 19112-19114 ¶¶ 92-95.

²⁷ *Id.*

²⁸ *Tazewell*, 22 FCC Rcd at 8675 ¶ 3.

²⁹ *Id.* at 8676 ¶ 8.

³⁰ *Id.*

³¹ See, e.g., *800 MHz SMR 2nd R&O*, 12 FCC Rcd at 19112 ¶ 89 (comparable facilities standard requires licensee to pay "the minimum cost the incumbent would incur if it sought to replace, but not upgrade, its system").

³² *800 MHz SMR 2nd R&O*, 12 FCC Rcd at 19112-19114 ¶¶ 92-95. See also Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, ET Docket 95-18, 15 FCC Rcd 12315, 12344-12345 ¶¶ 91-94 (2000); Redesignation of the 17.7-19.7 GHz Frequency Band, *First Order on Reconsideration*, ET Docket 98-172, 16 FCC Rcd 19808, 19833-34 ¶¶ 57-59 (2001).

match their existing operational capabilities.³³

IV. ORDERING CLAUSES

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 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

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³³ See *Tazewell* 22 FCC Rcd at 8679 ¶ 13.