

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

In the matter of
City of Boston, Massachusetts
And Sprint Nextel
Mediation No. TAM-11155
WT Docket No. 02-55

ORDER

Adopted: February 6, 2007

Released: February 7, 2007

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

I. INTRODUCTION

1. In this Order, we address a petition for reconsideration filed by multiple 800 MHz licensees (Petitioners) in response to the December 20, 2006 Memorandum Opinion and Order adopted by the Public Safety and Homeland Security Bureau (Bureau), which addressed the rebanding dispute between the City of Boston (Boston) and Sprint Nextel Corporation (Sprint). Petitioners, who are not parties to the Boston proceeding, seek reconsideration of the portion of the Boston Order that addressed the issue of whether Boston had established the need for a "second touch" of mobile and portable radios to remove pre-rebanding channels. Petitioners also request a stay of the Boston Order.

2. We dismiss the petition for reconsideration for lack of standing because the Boston Order is limited to the facts presented in the record of that proceeding and does not adversely affect Petitioners.

1 Petition for Reconsideration filed December 21, 2006 (Petition). The following licensees are parties to the Petition: Cities and Counties of Memphis, Tennessee; Oakland, California; DFW Airport, Texas; Brevard County, Florida; Osceola County Florida; Orlando, Florida; Hillsborough County, Florida; Egg Harbor Township, New Jersey; Brigantine, New Jersey; Township of Galloway, New Jersey; Atlantic County, New Jersey; Ocean City, New Jersey; Cherry Hill Township, New Jersey; Town of Cary, North Carolina; Durham, North Carolina; Ottawa County, Ohio; Mobile County, Alabama; St. Clair Transit District, Missouri; Washoe County, Nevada; and New York Communications Company. The City of Philadelphia, Pennsylvania and Baltimore City, Maryland filed comments in support of the Petition. See Philadelphia Statement of Support of Petition for Reconsideration (filed Jan. 19, 2007); Baltimore Statement of Support of Petition for Reconsideration (filed Jan. 11, 2007).

2 City of Boston Massachusetts and Sprint Nextel, Mediation No. TAM-11155, Memorandum Opinion and Order, DA 06-2556 (PSHSB, rel. December 20, 2006) (Boston Order).

3 For purposes of this order, a "touch" refers to the physical modification of a mobile or portable radio as part of the rebanding process, typically through installation of software to change the radio's channel configuration, or through replacement of an old radio with a new radio. With few exceptions, 800 MHz radios require at least one "touch" in order to be capable of operating on their new channel assignments under the revised 800 MHz band plan.

4 Petition at 3, 16.

5 The City of Boston has also filed an appeal of the Boston Order and has requested a de novo hearing on all disputed issues before an Administrative Law Judge under the procedures established in the 800 MHz Report & Order. See City of Boston Petition for De Novo Review, filed Dec. 28, 2006. The instant order is without prejudice to Boston's appeal, which will be addressed separately.

We also deny Petitioners' stay request. However, pursuant to Section 1.41 of the Commission's rules, we treat the Petition as an informal request for Commission action for the purpose of explaining with greater specificity the conditions under which Sprint may be required to pay for multiple touches of 800 MHz mobile and portable radios during rebanding.

II. BACKGROUND

3. In the *Boston Order*, we addressed Boston's claim that the purchase of inventory-tracking and management software from MCM Technology LLC (MCM) was a recoverable rebanding-related expense. We found that Boston failed to present sufficient evidence in the record before us to justify purchase of the MCM software.⁶ In the proceeding, Boston contended that one of the reasons that it needed the MCM software was that its personnel would be required to touch each radio at least twice during rebanding, "first to program in the new 800 MHz channels that the system will use after rebanding, and then a second time to remove the pre-rebanding channels from the radio once the system has begun operation on the new channels."⁷ Boston contended that the need for each radio to be touched twice increased the necessity for the inventory-tracking software. We rejected this contention, however, because Boston presented no record evidence that its radios required a second touch. We further stated that Boston's argument was based on a mistaken assumption about the minimum number of touches required by the Commission's orders to complete the rebanding process:

[T]he Commission's rebanding orders do not mandate a "second touch" to remove pre-rebanding channels from mobiles and portables because such a step is unnecessary to the rebanding process. The process contemplates that each mobile and portable in an 800 MHz system will be touched once to program in new channels, with the old channels being kept in the radio so that it can continue to operate until the transition to the new channels has occurred. However, once a system has been retuned, and the base stations are operating on their new channels, there will no longer be any base stations operating on the old channels through which the mobile and portable radios can communicate. Thus, the ability of the radios to tune to channels that are no longer in use poses no operational impediment to the licensee's operation of its system. Because removal of the old channels from mobiles and portables is not operationally necessary to 800 MHz rebanding, it was not contemplated by the *800 MHz R&O*. However, if for any reason a licensee wished to remove the old channels from its radios, it could do so at its own expense any time after 800 MHz band reconfiguration is complete in its area. For example, the licensee could remove the channels as part of routine radio maintenance, adding slight, if any, incremental cost to the maintenance procedures.⁸

4. Petitioners ask the Bureau to reconsider this portion of the *Boston Order*. Petitioners claim that they are entitled to reconsideration of the "second touch" issue because they are adversely affected by the *Boston Order* and were not able to challenge it earlier.⁹ In support of their petition, Petitioners argue that "in most cases, it is critical that programming for the old frequencies be removed [from mobile and portable radios] after rebanding has been completed."¹⁰ Petitioners contend that in some conventional (*i.e.*, non-trunked) radio systems, leaving old channels in the radios may lead to operator confusion and error.¹¹ Petitioners also assert that some trunked radio systems will experience technical problems if old

⁶ *Boston Order* at ¶ 16.

⁷ *Id.* at ¶ 20.

⁸ *Id.* at ¶ 21 (footnotes omitted).

⁹ Petition at 3-4.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 6-9.

channels are not removed due to the way that radios in these systems are designed to search for and select usable channels.¹² Finally, Petitioners contend that the *Boston Order* puts numerous other rebanding agreements and negotiations at risk in which Sprint has agreed to pay for removal of old channels from mobile and portable radios after rebanding has been completed.¹³

5. In a letter response to the Petition, Sprint supports the Bureau's decision in the *Boston Order* but expresses concern that the language in the order "may create confusion regarding reimbursability of costs related to 'second touches' to public safety radios."¹⁴ Sprint urges the Bureau to clarify that its statements in the *Boston Order* "should be interpreted in light of the specific facts and circumstances presented in that case, *i.e.*, the City's purported justification for certain management and tracking software." Sprint also asks the Bureau to make clear that its rejection of Boston's demand for software was based on "multiple factors" and that clarifying the second touch issue as suggested by Sprint "would in no way undercut or modify the Bureau's holding on the contested software issue."¹⁵

III. DISCUSSION

A. Petitioners' Standing and Stay Arguments

6. As a threshold matter, we find that Petitioners, as non-parties to the Boston proceeding, lack standing to seek reconsideration of the *Boston Order*. To establish standing under such circumstances, Petitioners must show that their "interests are adversely affected" by the order.¹⁶ Petitioners allege that each Petitioner has been adversely affected because it has either (1) negotiated a band reconfiguration agreement with Sprint that includes a second touch to remove old channels from the system radios, or (2) is seeking to negotiate such an agreement.¹⁷ Petitioners further contend that the *Boston Order's* discussion of the second touch issue was a statement of general applicability, not limited to the facts of the Boston case, and therefore has a real, not merely speculative, effect on their existing or potential agreements.¹⁸

7. We find that Petitioners have not established standing because our findings in the *Boston Order* – including the discussion of the "second touch" issue – are limited to the specific facts presented to the Bureau in the record before it. In the *Boston Order*, we found that Boston had failed to introduce

¹² *Id.* at 10-16. Petitioners contend that failure to remove old programming from certain models of trunked radios creates system issues. *Id.* at 10. For example, Petitioners claim that rebanded radios that are part of networks using the EDACs trunked protocol could spend an inordinate amount of time searching for a valid control channel among rebanded and abandoned channels. *Id.* at 11. Petitioners also contend that licensees using ProScan radios containing extraneous old channels may scan to a system not operated by the licensee. *Id.* at 12.

¹³ *Id.* at 16-17.

¹⁴ Letter dated January 9, 2007, from James B. Goldstein, Sprint Nextel Corporation, to David L. Furth, Associate Chief, Public Safety and Homeland Security Bureau (Sprint Letter).

¹⁵ *Id.*

¹⁶ *AT&T Corp. v. Business Telecom, Inc.*, *Order on Reconsideration*, 16 FCC Rcd 21750, 21751-52 ¶ 5 (2001) (*ATT v. BTI*). In evaluating the "adversely affected" prong of the standard, the Commission has "applied the same test that courts employ in determining whether a person has standing under Article III to appeal a court order: the person must show (1) a personal injury 'in fact'; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, not merely speculative, that the requested relief will redress the injury." *Id.* at ¶ 7. Accordingly, a petition for reconsideration filed by a non-party that does not meet these requirements will be dismissed as inconsistent with Section 1.106(b)(1). *See, e.g.*, *Instapage Network Ltd.*, *Order on Reconsideration*, 19 FCC Rcd. 20356, 20359 ¶ 10 (WTB 2004).

¹⁷ Petition at 3.

¹⁸ *Id.* at 4.

any evidence that a second touch of its radios was operationally necessary to complete the rebanding process.¹⁹ This holding is specific to the parties in the Boston proceeding, and does not preclude licensees in other cases from asserting that two (or more) touches are operationally necessary for rebanding of their particular systems, or from providing for multiple touches in their rebanding agreements with Sprint.²⁰ To the extent that the *Boston Order* addressed the second touch issue more generally, its essential finding was that the Commission did not require multiple touches in all rebanding cases because it did not contemplate that removal of pre-rebanding channels was operationally necessary in all cases.²¹ Thus, parties in other cases may still assert that the specific facts of their case render multiple touches operationally necessary, and are not precluded by the *Boston Order* from asserting in their own cases that the order is distinguishable.²² Based on these factors, we find that the *Boston Order* has not caused injury to Petitioners that would give them standing in this case.

8. For similar reasons, we deny Petitioners' request to stay the *Boston Order*. A stay will be granted only if Petitioners can show that: (i) Petitioners are likely to prevail on the merits; (ii) Petitioners will suffer irreparable harm absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest favors grant of the stay.²³ We find that Petitioners have failed to meet this standard. On the merits, Petitioners have not established that the limited discussion of the multiple touch issue in the *Boston Order* is erroneous or likely to be overturned. Petitioners also are not threatened with irreparable harm, because as noted above, the *Boston Order* is limited to its facts and does not prevent them from seeking to negotiate agreements that provide for multiple touches. We likewise conclude that other parties could be harmed if a stay were granted, because a stay could cause uncertainty and delay in numerous rebanding negotiations in which the parties have agreed to implement rebanding through a single touch of the licensee's radios. Finally, a stay would not benefit the public interest, but would in fact frustrate the Commission's core objective of timely completing the rebanding process and protecting public safety systems from harmful interference.

B. Circumstances Under Which Multiple Touches May Generate Recoverable Rebanding Expenses

9. Although we dismiss Petitioners' request for reconsideration, we will nonetheless treat the Petition as an informal request for Commission action pursuant to Section 1.41 of the Commission's rules,²⁴ so that we may explain with greater specificity the conditions under which Sprint may be required to pay for multiple touches of 800 MHz mobile and portable radios during rebanding.

10. In the *Boston Order*, we stated that the Commission's orders "do not mandate" a second touch to remove old channels because the removing old channels is not operationally necessary to the

¹⁹ *Boston Order* at ¶ 21 n.37.

²⁰ Petitioners do not claim that Sprint has reneged on any existing agreements that provide for multiple touches, or that it has changed its position on this issue in ongoing negotiations as a result of the order. Moreover, Sprint's response to the Petition does not indicate any intent to do so. To the contrary, Sprint indicates that it believes the *Boston Order* should be interpreted "in light of the specific facts and circumstances presented in that case. Sprint Letter at 1.

²¹ *Id.* at ¶ 21 n.37.

²² The Commission has affirmed that the mere possibility of an adverse precedent does not confer standing. See *AT&T v. BTI*, 16 FCC Rcd at 21753-54 ¶ 7.

²³ See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

²⁴ See 47 C.F.R. § 1.41.

rebanding process.²⁵ However, we specifically acknowledged in the order that multiple touches could be required in some circumstances.²⁶ For example, in some systems, rebanding may proceed more efficiently and with less burden on first responders if the initial installation or programming of mobiles and portables begins early in the process, possibly in conjunction with the licensee's normal maintenance cycle, and all of the radios are then touched a second time relatively late in the process for final programming of specific channels and talk groups. In such cases, the expense of the additional touches is potentially recoverable by the licensee because it facilitates timely rebanding and a smooth transition. Indeed, under the "minimum reasonable cost" standard articulated in the Commission's orders,²⁷ such expenses may be recovered even if rebanding based on a single-touch approach later in the band reconfiguration process would be less expensive, because delaying retuning of mobile and portable radios to the later stages of the process could jeopardize timely completion of rebanding.

11. More complex issues are raised where the purpose of a multiple-touch process is to remove pre-rebanding channels from radios after the licensee's system has been successfully retuned and is operating on its new channel assignments. Unlike touching radios multiple times to make them operable on new channels, adding a touch to the process after retuning to remove pre-rebanding channels will lengthen the time required to complete rebanding and may add substantial cost. Thus, we reaffirm our statement in the *Boston Order* that the Commission did not regard the post-rebanding removal of old channels as a necessary component of the rebanding process in all cases. Nonetheless, Petitioners have suggested a number of specific scenarios in which they contend that removal of old channels is operationally necessary, and therefore should be a recoverable expense. For example, Petitioners contend that the expense of an added touch should be recoverable where keeping the old channels could lead to operator error,²⁸ or where certain specific system designs create a risk of communication delays or other technical problems if old channels are not removed.²⁹

12. We do not address these scenarios in detail – as we have noted above, Petitioners and other parties may raise them in the context of their individual cases. We emphasize, however, that in each case, the licensee must present a reasonable factual basis for the recovery of such costs. In general, for such costs to be recoverable, the licensee should be able to demonstrate a factual nexus between the need to remove the old channels and compliance with the "comparable facilities" standard,³⁰ *i.e.*, the licensee should be able to demonstrate that without removal of the old channels, operation on the new channels is likely to be compromised or degraded in comparison to the licensee's pre-rebanding operation. The licensee may be able to meet this standard based on the technical configuration of its particular system, or on factors such as the likelihood of operator error.³¹ Ultimately, the determination of recoverable costs

²⁵ *Boston Order* at ¶ 21.

²⁶ *Id.* at ¶ 21 n.37.

²⁷ See *800 MHz Report and Order*, 19 FCC Rcd. 14969, 15073-74 ¶ 198 (2004) (cost must be "minimum necessary to provide facilities comparable to those presently in use"); *800 MHz Supplemental Order*, 19 FCC Rcd. 25120, 25152 ¶ 71 (2004) (TA may authorize the disbursement of funds for "any reasonable and prudent expense directly related to the retuning of a specific 800 MHz system").

²⁸ Petition at 6-9.

²⁹ *Id.* at 10-16. See note 12 *supra*.

³⁰ The Commission stated that: "[c]omparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs." *800 MHz Report and Order*, 19 FCC Rcd. at 15076-77 ¶ 201 (footnotes omitted).

will be made based on the facts of each individual case in accordance with the standards established by the Commission's orders in this proceeding.

IV. ORDERING CLAUSES

13. 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 Sections 1.102 and 1.106 of the Commission's Rules, 47 C.F.R. § 1.102 and 1.106, the Petition For Reconsideration in the City of Boston and Sprint Nextel case (Mediation No. TAM-1115) filed by the Petitioners on December 21, 2006 is DISMISSED, and Petitioners' Request for Stay is DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.191(f) and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191(f) and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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

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³¹ We note, however, that if the licensee seeks recovery of expenses for removal of old channels from radios solely to avoid the risk of operator error, it will face a particularly high burden of justification, *i.e.*, it should be able to show that the risk of error cannot be adequately addressed through training or ordinary maintenance of the system.