

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

In the Matter of)	
)	
Colorado CallComm, Inc. and Sprint Nextel Corporation)	WT Docket No. 02-55
)	
Mediation No. TAM-12391)	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 2010

Released: March 26, 2010

By the Deputy 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 mediation by the 800 MHz Transition Administrator (TA) arising from negotiations between Colorado CallComm, Inc. (CallComm) and Sprint Nextel Corporation (Sprint). The parties dispute the geographic scope of the coverage area in which CallComm will be entitled to operate when it relocates to the Enhanced Specialized Mobile Radio (ESMR) portion of the 800 MHz band¹ in two markets where CallComm holds 800 MHz Economic Area (EA) licenses. We find in favor of Sprint on this issue.

II. BACKGROUND

2. Under the *800 MHz Report and Order* and subsequent orders in this docket,² 800 MHz Specialized Mobile Radio (SMR) licensees that operate non-ESMR systems may relocate to the ESMR band at their own expense if they operate under EA geographic licenses and elect to convert to ESMR operations.³ However, a non-ESMR licensee that elects to relocate on this basis does not obtain the right to operate throughout its EA on an unencumbered basis. Instead, the Commission determined in the *800 MHz Supplemental Order* that the relocating licensee only obtains the right to operate in those unencumbered portions of the EA where it was entitled to operate prior to relocation as of November 22, 2004, the date that the *800 MHz Report and Order* was published in the Federal Register.⁴ The Commission defined the unencumbered area of the EA (referred to as “white area”) based on the 40 dBµV/m service contours of incumbent site-based licensees within that EA.⁵ Thus, the relocated licensee

¹ Enhanced Specialized Mobile Radio (ESMR) systems employ multiple, interconnected, multi-channel transmit-receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-cellular technology. See 47 C.F.R. § 90.7.

² 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). Under the reconfigured 800 MHz band plan, the post-rebanding ESMR band is located at 817-824/862-869 MHz. *800 MHz Report and Order*, 19 FCC Rcd at 14977 ¶ 11.

³ *Id.* at 15056-15057 ¶ 162.

⁴ *800 MHz Supplemental Order*, 19 FCC Rcd at 25155-15156, ¶¶ 79-80.

⁵ *Id.* at ¶ 79 (A non-ESMR licensee relocating to the ESMR band receives “only the analog of comparable facilities, the same unencumbered area that it had before it relocated, *i.e.*, its ‘white area.’ We emphasize that the ‘white area’

may only operate in the ESMR band in portions of the EA that are outside those contours.⁶

3. CallComm is a non-ESMR operator that holds 800 MHz EA licenses for SMR systems in the New Orleans (EA-083) and Denver-Boulder-Greeley (EA 141) markets.⁷ These EAs are also encumbered by site-based authorizations held by Sprint. On January 28, 2005, CallComm elected to relocate its systems in these markets to the ESMR band, entitling it to white area within each EA as described above.⁸ However, CallComm and Sprint disagree on the scope of the areas encumbered by Sprint's site-based licenses and therefore on the amount of white area that CallComm is entitled to receive. In October 2007, the parties entered into mediation regarding this issue before a mediator assigned by the 800 MHz Transition Administrator (TA). The parties were unable to resolve their dispute in mediation, at which point the mediator forwarded the mediation record and a Recommended Resolution to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.⁹

4. CallComm contends that Sprint has improperly expanded the service area contours established by its site-based licenses, thus depriving CallComm of white area within the New Orleans and Denver EAs to which it is entitled. CallComm asserts that its white area should be defined based on the 40 dB μ V/m contours of Sprint's site-based facilities as they existed on December 15, 1995, when the Commission imposed a "freeze" on site-based licensing of 800 MHz SMR frequencies in connection with the adoption of geographic area licensing rules.¹⁰ CallComm contends that Sprint has improperly added stations to its system since December 15, 1995 that have significantly expanded its service area contours in both of the EAs at issue. CallComm argues that Sprint's resulting licensed contours that existed as of November 22, 2004 therefore do not merit protection and should not be considered when calculating CallComm's white area.¹¹

5. Sprint responds that, as provided in the *800 MHz Supplemental Order*, CallComm's white area should be determined based on the contours of Sprint's site-based facilities as they existed on November 22, 2004. Sprint disputes CallComm's contention that Sprint has improperly expanded its service contours since the December 15, 1995 freeze.¹² Sprint asserts that under the freeze rules adopted in 1995, site-based incumbents were permitted to add sites and otherwise modify their facilities provided that the actual 22 dB μ V/m interference contour of the new or modified facilities did not extend beyond the 22 dB μ V/m contour of their pre-freeze stations, which was calculated based on the maximum effective radiated power (ERP) allowed by the Commission's rules. Sprint asserts that all modifications it

the non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the 'white area' that existed before it relocated and which it had on the date the *800 MHz R&O* was published in the Federal Register").

⁶ *Id.*

⁷ The CallComm licenses included in this FRA are WPSA489, WPSA492, and WPSA494 in EA-083, and WPSA491, WPZH447, WPZY509, WNXS842, and WPUR767 in EA-141. Recommended Resolution, filed by the TA Mediator June 16, 2008, 2 (RR); and Letter of the 800 MHz Transition Administrator, LLC, to Colorado CallComm, Inc. dated September 25, 2008.

⁸ The TA determined that CallComm's systems are non-ESMR systems under the technical definition established by the Commission in this proceeding. Although CallComm initially disputed this finding, the TA mediator has not referred the issue of CallComm's non-ESMR status to the Commission. *See* RR at 1, n. 2. In its subsequent Statement of Position, CallComm states that it is not requesting the FCC to reassess the TA's finding in this regard. *See* Statement of Position of Licensee, filed June 30, 2008 at 3, n. 5. (CallComm SOP).

⁹ *See* 47 C.F.R. §§ 90.676(b)(5) and 90.677(d)(2).

¹⁰ *See* CallComm SOP at 5 ("[T]he white area as of November 22, 2004 should be the same as the EA licensee's white area as of December 15, 1995").

¹¹ Proposed Resolution Memorandum of Licensee, filed by Colorado CallComm, Inc., May 7, 2008, at 3-6 (CallComm PRM).

¹² Proposed Resolution Memorandum of Nextel Communications Inc, February 19, 2008, at iii. (Sprint PRM).

has made since December 15, 1995 have complied with this requirement and were expressly declared by the Commission to be in accordance with Section 90.693.¹³

6. The TA mediator recommends that the Commission use November 22, 2004 as the reference date for determining the contours established by Sprint's site-based licenses and the resulting amount of white area that CallComm will receive when it relocates to the ESMR band.¹⁴ The mediator declines to make a recommended finding as to whether any of the modifications obtained by Sprint after 1995 improperly expanded its contours in contravention of the Commission's rules, stating that he considers any arguments regarding the validity of these licenses to be beyond his purview.¹⁵ Nonetheless, the mediator observes that there is no record that CallComm challenged or sought reconsideration of any of Sprint's post-1995 modifications at the time they were made.¹⁶

III. DISCUSSION

7. CallComm's argument rests on the contention that Sprint added facilities after December 15, 1995 that violated the Commission's freeze on site-based licensing, and that the contours of these post-1995 facilities should not be included in calculating CallComm's white area for rebanding purposes. However, CallComm misconstrues the effect of the Commission's 1995 freeze decision. In Section 90.693 of the Commission's rules, which codified the freeze, the Commission specifically gave incumbent licensees the flexibility to relocate existing stations or establish new co-channel stations – which could generate new and potentially expanded 40 dB μ V/m contours – provided the 22 dB μ V/m contours of the new or modified facilities remained within the 22 dB μ V/m contour of the original station.¹⁷ Moreover, the rule defined the original 22 dB μ V/m contour for this purpose as the contour generated by the original station operating at maximum ERP.¹⁸ Thus, so long as Sprint complied with these requirements, it was entitled to add or relocate stations after the 1995 freeze, and these stations are properly included in calculating CallComm's white area.

8. We find no evidence that Sprint has failed to comply with the freeze requirements described above. The evidence proffered by CallComm shows only the 40 dB μ V/m contours of various Sprint and CallComm co-channel stations within CallComm's EA license areas.¹⁹ This is not sufficient to demonstrate that Sprint activated post-1995 stations whose 22 dB μ V/m contours fell outside its pre-freeze 22 dB μ V/m contour calculated based on the maximum ERP allowed for its pre-freeze stations. Moreover, Sprint notes that its post-1995 licenses include notations that the licenses were granted "pursuant to the flexibility rules and interference protection requirements of Section 90.693."²⁰

9. CallComm contends that the TA mediator should nonetheless have required Sprint to demonstrate in the mediation that its post-1995 licenses in the New Orleans and Denver EAs complied with Section 90.693. Because the mediator declined to require such a showing from Sprint, CallComm

¹³ *Id.* at 9.

¹⁴ RR at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ See 47 C.F.R. § 90.693(b) ("Incumbent licensees are permitted to add, remove, or modify transmitter sites within their original 22 dB μ V/m field strength contour without prior notification to the Commission so long as their original 22 dB μ V/m field strength contour is not expanded").

¹⁸ *Id.* (The "original 22 dB μ V/m field strength contour" is calculated "using the maximum ERP and the actual height of the antenna above average terrain"). See North Sight Communications, Inc., *Order*, 17 FCC Rcd 6018, 6019 (WTB 2002) (Site-based incumbent licensee's 22 dB μ V/m contour for determining permissible expansion of coverage within an EA is defined by the maximum allowable ERP, not the licensee's actual ERP).

¹⁹ CallComm PRM at Appendix A4-A18.

²⁰ Sprint PRM at 9. The notation on Sprint's licenses is: "This license is authorized in accordance with Rule 90.693." See, e.g., File No. 0003443886 (Apr. 19, 2008) (WPXL787).

further argues that the Commission should independently investigate whether Sprint's post-freeze licenses on CallComm's channels were improperly issued. We disagree.

10. First, we agree with the TA mediator that for rebanding purposes, the determination of CallComm's post-rebanding licensing area should be based upon the licenses that Sprint held as of November 22, 2004. We also agree with the TA mediator that it is beyond the scope of the TA's authority to "look behind" Sprint's 2004 licenses to determine their validity.

11. We also find no cause to initiate our own review of whether Sprint's post-freeze licenses complied with Section 90.693. As noted above, CallComm has presented no evidence to support its assertion that Sprint improperly expanded its contours in the relevant EAs after the freeze. Moreover, the record indicates that CallComm never challenged any of Sprint's post-1995 authorizations at the time they were made.²¹ Although CallComm correctly notes that the Commission has authority under Section 316 of the Communications Act to initiate license modification proceedings at any time,²² the record before us does not warrant *sua sponte* review of these authorizations. We also conclude that further consideration of this issue is unnecessary to enable this rebanding transaction to proceed and would unnecessarily delay the rebanding process. Conversely, requiring the parties to proceed with rebanding based on Sprint's November 22, 2004 license contours does not prejudice CallComm. To the extent that CallComm may have any claim against Sprint that is not already time-barred,²³ our decision today is without prejudice to CallComm's right to pursue it after the parties have migrated to their post-rebanding channels.

12. Finally, we deny CallComm's request that the Commission defer action on the issue of CallComm's white area pending resolution of other issues before the TA mediator.²⁴ CallComm contends that there are additional stations that are part of CallComm's system that should have been included in the FRA with Sprint, that it has provided information on these stations to the TA, and that it has not yet received a response. CallComm argues that, as a matter of administrative efficiency, the Commission should refrain from taking action on the issue before us while the matter of CallComm's additional stations is before the TA.²⁵ CallComm's request is in the nature of a stay request governed by Section 1.44(e) of the Commission's rules.²⁶ We find that CallComm has not met the criteria for a stay, *i.e.*, it has not demonstrated that it will suffer irreparable injury in the absence of a stay, or that it is likely to prevail on the merits.²⁷

13. In sum, we resolve this matter in Sprint's favor, and determine that calculation of CallComm's white area for rebanding purposes is to be based on the 40 dB μ V/m contours of Sprint's stations as those contours existed on November 22, 2004. We direct the TA Mediator to convene a meeting of the parties not later than 15 business days of the release date hereof to reach an FRA consistent with this order.

²¹ See RR at 8.

²² CallComm SOP at 6, n.14 (*citing* 47 U.S.C. § 316).

²³ While we do not decide the issue here of whether such a claim would be time-barred, we note that petitions for reconsideration must ordinarily be filed within thirty days of the public notice that the Commission had granted the authorization in question. See *Nextel License Holdings 4, Inc.; Nextel WIP License Corp., Order*, 17 FCC Rcd 7028, 7032 ¶¶ 11-12 (2002), *citing* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b).

²⁴ See CallComm SOP at 4.

²⁵ *Id.*

²⁶ 47 C.F.R. § 1.44(e). We note that this rule requires stay requests to be made separately, not integrated into other pleadings.

²⁷ See, e.g., *Washington Area Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C.Cir.1958).

IV. ORDERING CLAUSES

14. 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.

FEDERAL COMMUNICATIONS COMMISSION

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