

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

In the Matter of
County of Genesee, New York
and
Sprint Nextel Corp.
WT Docket No. 02-55
Mediation No. TAM-43102

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 2011

Released: September 9, 2011

By the Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from Wave 4, Canada Border Region mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the County of Genesee, New York (Genesee) and Sprint Nextel Corporation, (Sprint) (collectively, the Parties). In dispute is whether a rebanding plan offered by Sprint will provide Genesee with comparable facilities following band reconfiguration.

2. Based on our review of the mediation record, the Recommended Resolution1 submitted by the TA-appointed mediator in this case, and the Parties' Statements of Position, we find the rebanding plan proposed by Sprint will provide Genesee with comparable facilities after band reconfiguration. Consequently, we find in Sprint's favor and direct Genesee to timely provide a cost estimate, and, thereafter, to timely negotiate and execute a Frequency Relocation Agreement (FRA) for the rebanding of its system consistent with this Memorandum Opinion and Order.

II. BACKGROUND

3. The 800 MHz Report and Order and subsequent orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee that is subject to rebanding.2 The FRA must provide for retuning of the licensee's system to its replacement channel assignments at Sprint's expense, including

1 Recommended Resolution, TAM-43102 at 1 (filed July 20, 2011) (TA RR).

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, 15075-77 ¶ 201 (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).

the expense of retuning or replacing the licensee's radio units as required.³ Sprint must provide the rebanding licensee with "comparable facilities"⁴ on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.⁵

4. Genesee submitted a Request for Planning Funding to Sprint in 2007 and the Parties executed a Planning Funding Arrangement (PFA) in January 2009 which the TA approved in February 2009. In September 2009, however, Genesee submitted a change notice request seeking to amend the PFA to fund a change in scope for Motorola, the manufacturer of Genesee's radio system.⁶ Genesee submitted the change notice request because it concluded, based on information provided to it by Motorola during the planning phase, that an equipment upgrade is necessary for Genesee to receive comparable facilities.⁷ Sprint opposes the proposed amendment, characterizing it as an unnecessary upgrade to Genesee's system.⁸ The Parties were unable to resolve this dispute despite participating in multiple TA Mediator-conducted conferences.⁹

5. When parties cannot reach agreement on an issue during mediation, the case is referred to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.¹⁰ Because the Parties were unable to resolve their dispute over the change notice request submitted by Genesee, the TA Mediator ordered them to file Proposed Resolution Memoranda (PRMs).¹¹ The TA Mediator submitted

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

⁴ "Comparable 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." *Id.* at 15077 ¶ 201 (footnotes omitted).

⁵ *Id.* at 14986 ¶ 26.

⁶ The change order request sought funds for Motorola to "design and modify the current 3 site, 7 SmartNet channel Simulcast system to a SmartZone 4.1 mixed mobile system with 2 channels being ASTRO digital equipped." Letter from Gary T. Maha, Sheriff, Genesee County, N.Y. to Omer Saeed, Sprint Nextel Corp. at 2 (Sept. 24, 2009) (Genesee Letter).

⁷ TA RR at 2-3.

⁸ *Id.* at 3.

⁹ Genesee estimates that the design of the modified system, and associated legal fees, would cost \$108,320. Genesee Letter at 3. The record, however, lacks any specific information on the cost of the required equipment, or labor and management fees. Sprint contends that converting the system as Genesee proposes would be a "several million dollar project." Statement of Position of Nextel Communications, Inc., TAM-43102 (filed August 3, 2011) (Sprint SOP) at 10. Genesee disagrees and contends that the conversion could be done such that "no repeaters need to be replaced." Proposed Resolution Memorandum of the County of Genesee, New York, TAM-43102 (filed April 7, 2011) (Genesee PRM) at 13. The claim, however, is not supported and there is no record evidence of the specific equipment to be replaced, or its cost.

¹⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201.

¹¹ Genesee PRM, *supra* n. 9; Proposed Resolution Memorandum of Nextel Communication, Inc., TAM-43102 (filed March 30, 2011) (Sprint PRM); Reply of Nextel Communications, Inc. to the Proposed Resolution Memorandum of the County of Genesee, New York, TAM-43102 (filed April 15, 2011) (Sprint Reply); Reply to (continued....)

his Recommended Resolution on July 20, 2011. The Parties submitted Statements of Position in response to the Recommended Resolution on August 3, 2011.¹²

III. DISCUSSION

A. Standard of Review

6. The Commission's orders in this docket assign Genesee the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use" (Minimum Cost Standard).¹³ The Commission subsequently clarified that the term "minimum necessary cost" does not mean the absolute lowest cost under any circumstances, but the "minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner."¹⁴ The Minimum Cost Standard thus takes into account not only cost, but all of the objectives of the proceeding, including completing the rebanding process in a timely and efficient manner, minimizing the burden that rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety's ability to operate during the transition.¹⁵

B. Burden of Proof

7. The Commission's orders in this docket assign Genesee the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum cost necessary to provide facilities comparable to those presently in use."¹⁶ Sprint is assigned the burden of proving that Genesee will receive, post-rebanding, facilities comparable to those presently in use.¹⁷

C. Issues in Dispute

8. Genesee operates a Motorola 800 MHz three-site system licensed for six trunked simulcast and two conventional channel pairs in the 806-809 / 851-854 MHz segment of the band.¹⁸ All of Genesee's channels – formerly in the pre-rebanding General Category band segment – now fall in the relocated "new" NPSPAC band. The network operates with four analog FM voice channels and two

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Proposed Resolution Memorandum of the County of Genesee, New York, TAM-43102 (filed April 20, 2011) (Genesee Reply).

¹² Sprint SOP, *supra* n. 9; Statement of Position of the County of Genesee, New York (filed August 3, 2011) (Genesee SOP).

¹³ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71.

¹⁴ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007) (*Rebanding Cost Clarification Order*).

¹⁵ *Id.* at 9820 ¶¶ 6, 8.

¹⁶ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25151-52 ¶ 71.

¹⁷ *Id.*

¹⁸ TA RR at 4. The call signs involved in this reconfiguration are WPQF924 and WNMD429. *Id.* at 1.

analog/digital encrypted digital voice channels using the “FRED” system.¹⁹ FRED is a modulation scheme used within certain Motorola simulcast systems to improve coverage of encrypted channels in a simulcast network.²⁰ Of the approximately 1,400 radios on the system, only 203 are FRED capable.²¹ The FRED capable units are used for secure public safety communications, *e.g.*, undercover operations.²²

9. Because Genesee’s system operates in a Canada border region where the 800 MHz band is shared with Canada, and few U.S. primary channels are available, the TA initially requested that Genesee “reband in place,”²³ *i.e.*, remain on its original channels. To reband in place, Genesee would simply reduce the transmitter deviation²⁴ on its currently licensed channels rather than change its operating frequencies as typically occurs during rebanding. The reduced deviation is required to satisfy the more stringent emission mask required in the new NPSPEC band after band reconfiguration.²⁵

10. During the planning stage, Motorola informed Genesee that reducing the deviation would inhibit Genesee’s ability to operate FRED.²⁶ Therefore, Genesee requested permission from the Region 55 Regional Planning Committee (Region 55) to continue operating with a wider emission mask after band reconfiguration.²⁷ Region 55 rejected Genesee’s request and later declined to reconsider its decision.²⁸ Therefore, Sprint offered to provide Genesee with two replacement channels above the new NPSPEC band where Genesee could continue to operate its FRED channels with their current deviation and thus avoid any potential negative impact on the two FRED channels.²⁹

¹⁹ Genesee PRM at 1. FRED is an acronym for Four-level Recovery for Extended Distance.

²⁰ TA RR at 2. *See also* Four-level Recovery for Extended Distance (FRED) and 800 MHz Rebanding Ver.3.00.

²¹ Genesee PRM at 1-2; Sprint PRM, Appendix 2 at Page 14 of 160.

²² Genesee PRM at 2.

²³ TA RR at 2. *See also* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Second Report and Order*, 23 FCC Rcd 7605 (2008) (*800 MHz Second Report and Order*).

²⁴ Deviation refers to the amount by which a frequency modulated (FM) signal deviates (changes in frequency) above and below the carrier center frequency. Reference Data for Radio Engineers, Chapter 21-6, Howard W. Sams and Company, Inc. 1972.

²⁵ The Commission’s rules do not directly limit the deviation of 800 MHz land mobile transmitters, but do specify an “emission mask” to which the transmitter output waveform must conform. Because channels are more closely spaced in the NPSPEC band than in the remainder of the 800 MHz band (with exceptions not relevant here), the emission mask requirements for operation in the NPSPEC band are more stringent than in the non-NPSPEC portion of the band, thus requiring a reduction in deviation to stay within the mask. *See* 47 C.F.R. § 90.210.

²⁶ TA RR at 2; Genesee PRM at 2.

²⁷ *Id.* at 2-3. The Region 55 Regional Planning Committee is responsible for administering NPSPEC spectrum in Region 55 which includes Genesee County. *See* 47 C.F.R. § 90.16.

²⁸ TA RR at 3.

²⁹ Sprint PRM at 2-3. Sprint offered to provide Genesee with replacement channels 819.1875/864.1875 MHz and 819.4375/864.4375 MHz for its FRED operations. Sprint PRM at 3 n.3. These channels are located on US (continued....)

11. The Parties disagree on whether Genesee's entire six-channel system or only the two FRED channels would be negatively impacted if rebanded in place. Genesee claims that rebanding in place will result in a loss of coverage on both sets of channels.³⁰ Genesee also argues that retuning its FRED channels – as Sprint proposes – above the NPSPAC band to replacement channels within 1 MHz of Sprint's operations in the ESMR band would violate Commission rules.³¹ Sprint, however, submits that rebanding in place would impact only the FRED channels and that it has offered a viable alternative for the FRED channels, *i.e.*, moving them above the NPSPAC band.

1. Non-FRED Channels

12. *Sprint Position.* Sprint argues that Genesee can reband its non-FRED channels in place by reducing the deviation on these channels without “material changes in system performance.”³² To support its argument, Sprint references a report from Genesee's technical consultant which states that “analog FM voice performance is unaffected by a narrower deviation.”³³ Although Sprint acknowledges that reduced deviation on the non-FRED channels would result in an outbound loss of 1.3 dB, it maintains that “any loss stemming from rebanding in place that is 2 dB or less is inconsequential to coverage, or so *de minimis* that it is essentially noise and cannot be detected or deemed to be a change adverse enough to implicate [a] comparable facilities obligation.”³⁴

13. *Genesee Position.* Genesee claims that the 1.3 dB loss resulting from reduced deviation on the non-FRED channels would result in Genesee not receiving comparable facilities post rebanding.³⁵ In support of its argument, Genesee claims “[i]t is not possible to generically state that a certain dB reduction will have no (or little) impact in every situation.”³⁶

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primary spectrum above the NPSPAC band in a segment of the band designated for the General Category. *See* 47 C.F.R. § 90.619(b)(7).

³⁰ Genesee PRM at 4-5. Reducing deviation does not reduce coverage *per se*, for example, the 40 dB μ V/m service contour of a land mobile station remains constant with changes in deviation. Reduced deviation, however, can alter the signal to noise ratio of a land mobile system such that, all other things being equal, a reduction in deviation can render the recovered audio signal less intelligible in areas in which the received signal is relatively weak.

³¹ *Id.* at 8. The TA will establish the dividing line between the ESMR and non-ESMR segments of the band along the Canada border once all replacement frequencies are assigned and negotiations are complete. *800 MHz Second Report and Order*, 23 FCC Rcd at 7613 ¶17. Current projection is that that the dividing line in Region 55 will be at, or a few channels above or below, 819.5750/864.5750 MHz. Consequently, under almost any scenario, the replacement channels offered by Sprint will be located within 1 MHz of the ESMR dividing line.

³² Sprint PRM at 2-3.

³³ *Id.* at 3, n. 2 and Appendix 8 at page 49 of 160.

³⁴ Sprint Reply at 5-6.

³⁵ Genesee PRM at 5.

³⁶ Genesee Reply at 2.

14. *TA Mediator.* The TA Mediator concludes that Genesee will receive comparable facilities on the non-FRED channels by rebanding in place and reducing deviation.³⁷ The TA Mediator contends that “a fair reading” of the report by Genesee’s consultant supports the conclusion that “rebanding in place will not have a material impact on service quality for the non-FRED operations.”³⁸

15. *Decision.* We agree with the TA Mediator that Genesee will receive comparable facilities on its non-FRED channels by rebanding in place. We are persuaded by the report from Genesee’s consultant stating that analog FM voice performance will be unaffected by a narrower deviation,³⁹ *i.e.*, that Genesee’s Quantar base station receiver “shows no loss in receiver sensitivity as measured by 20dB SINAD between 25 kHz and NPSPAC channels.”⁴⁰ Because the inbound path is the worst case, the report concludes that “operation on the NPSPAC channels should, on average, not degrade performance.”⁴¹ Thus we find the theoretical loss in coverage as a consequence of a 1.3 dB reduction in the inbound signal to be *de minimis*.

2. FRED Channels

16. *Sprint Position.* Sprint acknowledges that rebanding in place poses operational considerations for Genesee’s FRED channels.⁴² Nonetheless, Sprint claims it has taken these operational considerations fully into account by “offering to provide a safe harbor for the two FRED encrypted channels in a non-NPSPAC portion of the revised band plan that avoids the need to tighten the FRED emission mask and deviations.”⁴³

17. As a general matter, Sprint agrees with Genesee that spectral separation between Sprint’s ESMR and Genesee’s FRED operations would be preferable but cites a lack of available spectrum in the Canada border to accommodate non-NPSPAC operations.⁴⁴ Furthermore, Sprint argues that Genesee “cannot reasonably assert that its replacement frequency assignments are not comparable to its existing frequency assignments” on the basis of potential for interference since Genesee will receive full interference protection on its replacement channels in the non-NPSPAC segment of the band.⁴⁵

18. Furthermore, Sprint contends that – if Genesee were to reband in place and reduce the deviation of its FRED channels – the coverage loss occasioned by reducing deviation on the FRED channels could be compensated for by implementing the remedies suggested by Genesee’s consultant,

³⁷ TA RR at 16.

³⁸ *Id.*

³⁹ Sprint PRM, Appendix 8 at page 49 of 160.

⁴⁰ *Id.*, Appendix 8 at page 68 of 160.

⁴¹ *Id.*

⁴² Sprint PRM at 2.

⁴³ *Id.*

⁴⁴ Sprint Reply at 7.

⁴⁵ *Id.* at n.10.

e.g., installing more efficient tower-top amplifiers, elevating the base station antennas, switching the positions of the base station transmit and receive antennas or replacing the portable and mobile unit antennas with higher gain antennas.⁴⁶ These measures, Sprint submits, could bring the consultant's estimated 3.6 dB loss from reduced deviation to an acceptable level of 2 dB.⁴⁷

19. *Genesee Position.* Genesee asserts that reducing the deviation of its FRED channels will negatively impact the coverage of its system, thus, violating the Commission's standards with regard to comparable facilities.⁴⁸ To support its assertion, Genesee cites its consultant's report demonstrating a 3.6 dB loss on inbound traffic. Genesee details how such a reduction of the inbound signal would result in a coverage loss of 50.1 square miles or approximately ten percent of Genesee's geographic area.⁴⁹ Genesee also notes it explored the possibilities, recommended by its consultant, for recovering the 3.6 dB loss but found "there was no combination of mitigation steps that would recover the entire loss."⁵⁰

20. Genesee also contends that relocating the two FRED channels to the channels proposed by Sprint would be inconsistent with the initial purpose of the 800 MHz proceeding – to spectrally separate public safety systems from ESMR systems.⁵¹ Thus, Genesee contends, it should be provided with at least 1 MHz separation between its and Sprint's operations.

21. In claiming that it is entitled to a 1 MHz "buffer" from Sprint's operations, Genesee cites the *800 MHz Second Report and Order* which established the Canada band plan. Therein, the Bureau directed Sprint "... to maintain at least one MHz separation from the highest Canada primary channels used by public safety licensees in the region."⁵² Consequently, Genesee submits that "it is contrary to the Commission's rules to move any of Genesee's channels to within one MHz of Nextel's operations."⁵³

22. Finally, Genesee contends that if the Bureau were to decide that the non-NPSPAC channels recommended by Sprint are adequate, it should raise the "ESMR line" to provide at least 1 MHz separation relative to Genesee's channels.⁵⁴ In the alternative, Genesee recommends that the Bureau overrule Region 55's determination, and waive Section 90.209 of the Commission's rules⁵⁵ to allow Genesee to operate in the NPSPAC band with emissions that exceed the NPSPAC emission mask. It argues that, contrary to Sprint's suggestion, any such waiver should be permanent, not temporary,

⁴⁶ *Id.* at 10-13.

⁴⁷ *Id.* at 12.

⁴⁸ Genesee PRM at 8.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 9.

⁵¹ Genesee PRM at 7-8; Genesee SOP at 6-11.

⁵² *800 MHz Second Report and Order*, 23 FCC Rcd at 7616 ¶ 25 (2008).

⁵³ Genesee PRM at 8 (emphasis in original).

⁵⁴ Genesee SOP at 14.

⁵⁵ 47 C.F.R. § 90.209.

because “Genesee cannot be artificially constrained by some limited amount of time to replace its system.”⁵⁶

23. *TA Mediator’s*. The TA Mediator concludes the two replacement channels offered to Genesee in the non-NPSPAC segment of the band constitute comparable facilities for its FRED operations.⁵⁷ In support of its conclusion, the TA Mediator observes the challenges of rebanding in the Canadian border and Genesee’s own history of operating in spectral proximity to Sprint.⁵⁸

24. The TA Mediator notes that the Parties agree that the 3.6 dB inbound loss⁵⁹ for the FRED technology is material,⁶⁰ and concludes that the “better solution” for overcoming the coverage loss is for Genesee to use the two non-NPSPAC channels recommended by Sprint.⁶¹ The TA Mediator observes, however, that if Genesee were to continue to use the current two FRED channels in the NPSPAC band, but with reduced deviation, that the potential remedial steps proposed by Genesee’s consultant and Sprint “provide a reasonable alternative.”⁶²

25. The TA Mediator, noting that Section 90.699(d)(3) the Commission’s rules defines “service quality” in terms of “the end user enjoy[ing] the same level of interference protection on the new system as on the old system,”⁶³ acknowledges Genesee’s concern about receiving interference if it operates within 1 MHz of the ESMR band.⁶⁴ The TA Mediator concludes, however, that Genesee has overlooked “two pertinent issues specific to its situation – the challenges of rebanding in the Canadian border region and its own history in operating in proximity to Sprint Nextel.”⁶⁵ With respect to the latter, the TA Mediator notes that “both [FRED] channels, if moved to the two proposed General Category Channels, will have greater separation [from Sprint’s operations] after rebanding than they currently have.”⁶⁶

⁵⁶ Genesee SOP at 14.

⁵⁷ TA RR at 18-19.

⁵⁸ *Id.* at 18.

⁵⁹ “Inbound loss” refers to the degradation of signal to noise ratio that reduced deviation causes on the mobile/portable to base station receiver link.

⁶⁰ TA RR at 16.

⁶¹ *Id.* at 17.

⁶² *Id.*

⁶³ 47 C.F.R. § 90.699(d)(3).

⁶⁴ TA RR at 17-18.

⁶⁵ *Id.* at 18-19.

⁶⁶ *Id.* citing email from J. Markoski to J. Mullins dated July 1, 2011. (The email notes that the proposed channels, 864.1875 MHz and 864.4375 MHz, would be separated from the ESMR band by, respectively, 400 kHz and 150 kHz.)

26. Finally, the TA Mediator notes that the proposed non-NPSPAC replacement channels “are entitled to full interference protection against harmful interference by Section 90.673 of the FCC rules.”⁶⁷ The TA Mediator recommends, therefore, that the Commission find that the two proposed non-NPSPAC replacement channels will provide Genesee with comparable facilities.⁶⁸

27. *Decision.* We agree with the TA Mediator that the replacement channels offered by Sprint for Genesee’s FRED operations are comparable to its existing FRED channels. On these replacement channels, Genesee may operate its FRED technology, as before, without the need to conform to the more restrictive NPSPAC emission mask.⁶⁹ Consequently, when operating with FRED technology on these non-NPSPAC channels, Genesee will not encounter the 3.6 dB loss which it would otherwise be subjected to if it retained its FRED channels in the NPSPAC band.

28. We disagree with Genesee that retuning its FRED-enabled channels to within 1 MHz of the ESMR band is contrary to Commission rules or would somehow fail to constitute comparable facilities. When establishing channel plans for the Canada border, the Bureau stated “[b]ecause of the limited amount of U.S. primary spectrum available in the Canadian border regions, we do not create an Expansion Band or Guard Band in Regions 1-6.”⁷⁰ In declining to establish an Expansion Band or Guard Band, however, the Bureau noted that “licensees operating in the non-ESMR portion of the band . . . will be entitled to full interference protection from Sprint’s ESMR operations . . .”⁷¹ Further, the Bureau observed that the band plans adopted in the regions along the Canada border ensure “that all relocating licensees will receive comparable facilities.”⁷² It is therefore clear from the *800 MHz Second Report and Order* that the Bureau contemplated that the TA could provide non-ESMR licensees with replacement channels within 1 MHz of the ESMR band and that those licensees would receive comparable facilities by virtue of the absolute rules prohibiting Sprint from causing objectionable interference to the relocated licensees.⁷³

29. Against this background, we cannot conclude that Genesee is entitled to reject the replacement channels offered by Sprint and designated by the TA for operation of its FRED-enabled channels. Its claim that the assignment of these replacement channels somehow undercuts the purpose of 800 MHz band reconfiguration is wrong and constitutes an untimely request for reconsideration of the *800 MHz Second Report and Order*.

30. Additionally, Genesee misconstrues the Bureau’s statements in the *800 MHz Second Report and Order* regarding the requirement for Sprint to maintain a 1 MHz megahertz separation to public safety licensees operating on Canada primary channels. The Bureau established a 1 MHz buffer only for Sprint operations that remain in the non-ESMR segment of the band, post rebanding, where

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See supra* n.25.

⁷⁰ *800 MHz Second Report and Order*, 23 FCC Rcd at 7613 ¶18.

⁷¹ *Id.* at 7613-14 ¶ 18.

⁷² *Id.* at 7608 ¶ 7.

⁷³ *See* 47 C.F.R. § 90.673.

Sprint will continue to operate in an interleaved environment with public safety and other non-cellular licensees. Genesee, however, operating on the channels proposed by Sprint will not be operating on an interleaved basis relative to Sprint stations located above the ESMR line. Nonetheless, Genesee will have the benefit of the 1 MHz “buffer” established in the *800 MHz Second Report and Order* relative to any Sprint stations located below the ESMR line.

31. Although we agree with Genesee that spectral separation between licensees in the ESMR and non-ESMR segments of the band is preferable, instituting a buffer – a guard band – at the edge of the ESMR band along the Canada border region proved impossible because of the limited number of channels primary to the U.S. in the Canada border regions. Thus, instead of creating a guard band, the Bureau placed strict responsibility on Sprint to avoid objectionable interference to non-ESMR licensees.⁷⁴ To discharge this responsibility, Sprint may have to avoid using channels at the lower end of the ESMR band, thus creating a *de facto* guard band. Our mandating a *de lege* guard band, however, by moving the ESMR line, as Genesee requests,⁷⁵ would run contrary to the *800 MHz Second Report and Order* and would represent an unnecessary and inefficient use of spectrum in an area in which U.S. spectrum is scarce. Furthermore, Genesee’s claim that it should not be required to use the non-NPSPAC channels offered by Sprint because Sprint’s “technical toolbox” is insufficient to remedy interference⁷⁶ ignores the fact that, if “technical toolbox” methods are inadequate, Sprint must avoid use of the interfering frequency. Finally, having decided that the two replacement channels above the NPSPAC band will provide Genesee with comparable facilities for its FRED operations, we need not reach the question of whether we should grant a rule waiver to permit Genesee to operate in the NPSPAC band with a wider emission mask.

3. Modifying All of Genesee’s Trunked Channels to FRED Operation

32. *Genesee Position.* Genesee disputes Sprint’s assertion that only Genesee’s two existing FRED-enabled stations are entitled to retain FRED capability after band reconfiguration.⁷⁷ Instead, Genesee claims that because its non-FRED channels have the latent capability to be modified to FRED operation for “less than \$12,000 with equipment readily available,”⁷⁸ that they should retain that latent capability post-rebanding. In support of its theory, Genesee analogizes its circumstance to that in the *Tazewell* case where Sprint was required to supply replacement radios when “the County’s radios were all NPSPAC capable, but the County had no NPSPAC infrastructure (other than mutual aid).”⁷⁹

33. *Sprint Position.* Sprint states that, although Genesee may have the theoretical capability of expanding its FRED operations to all channels in its trunked system, “any such expansion, as a

⁷⁴ *800 MHz Second Report and Order*, 23 FCC Rcd 7613-14 ¶ 18. Note that the Commission spoke at length in the *800 MHz Report and Order* about the remedial steps which can be taken to reduce interference once rebanding is complete. See *800 MHz Report and Order*, 19 FCC Rcd at 15045-47 ¶¶ 143-146.

⁷⁵ Genesee SOP at 14.

⁷⁶ Genesee PRM at 7.

⁷⁷ Genesee PRM at 10.

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

practical matter, would require a number of modifications to its network to accomplish.”⁸⁰ Sprint cites the declining number of radios that can actually access FRED because “Motorola no longer technically supports FRED operation and no longer sells radios or systems capable of using FRED encryption.”⁸¹

34. *TA Mediator.* The TA Mediator concludes there is no need to retain the ability to modify Genesee’s non-FRED channels to FRED technology because: (1) Genesee has never operated FRED on any of the other four channels in its trunked systems; (2) there is a legitimate question about the availability of parts and equipment for any expansion of FRED operations; and (3) Motorola no longer supports the FRED technology.⁸²

35. *Decision.* We find unavailing, Genesee’s reliance on the *Tazewell* case⁸³ to support its position that Sprint should pay to replace its FRED system.⁸⁴ In *Tazewell*, the licensee’s pre-rebanding radios were already capable of operating – without modification – on the full old NPSPAC band.⁸⁵ If the *Tazewell* radios were retuned, however, the ability to operate on the full new NPSPAC band would be lost. The Bureau therefore allowed replacement of the *Tazewell* radios at Sprint’s expense, finding that “rebanding licensees are entitled to receive systems with comparable technological and operational capability.”⁸⁶ Here, however, unlike the situation in *Tazewell*, Genesee’s four other trunked radio channels currently could operate with FRED only if they were modified, *i.e.*, presently, they have only the latent capability of operating with FRED technology. This brings Genesee’s situation closer to that in the *Connecticut* case⁸⁷ where we found that the latent capability of the licensee’s radios to be modified to operate on the NPSPAC channels did not justify replacement of the radios. There, we said:

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.⁸⁸

⁸⁰ Sprint PRM, Summary, at unnumbered page 3.

⁸¹ *Id.* at 13.

⁸² RR at 15.

⁸³ County of Tazewell, Illinois and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 8675 (PSPWD 2007) (*Tazewell*).

⁸⁴ Genesee PRM at 10-11.

⁸⁵ *Id.* at 8676 ¶5.

⁸⁶ *Id.* at 8677 ¶8.

⁸⁷ State of Connecticut Department of Corrections and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 16890 (PSHSB 2007).

⁸⁸ *Id.* at 16894 ¶ 11. In *Connecticut*, the licensee’s radios, pre-rebanding, could be modified to operate on NPSPAC channels if certain component changes were made to the radios. The hypothetical ability to modify the radios to operate on the NPSPAC channels would be lost, however, when the radios were retuned to operate on the licensee’s replacement frequencies. *Id.* at 16891 ¶ 3.

36. In the instant case, we find Genesee's ability to modify its four non-FRED channels to FRED operation is even more speculative than the *Connecticut* licensee's ability to convert its radios to operate in the NPSPAC band. The FRED technology is obsolete and unsupported by its manufacturer, and the availability of FRED parts is, at best, problematic. Accordingly, we agree with the TA Mediator that Genesee need only be provided with wide deviation capability on its two existing FRED-enabled channels – a capability realized by relocating the FRED-enabled channels above the NPSPAC band. Genesee's other four trunked channels may remain in the NPSPAC band with narrower deviation with only a *de minimis* effect on coverage.

4. Genesee's Assertions That the Recommended Resolution Should be Disregarded and That Genesee is Entitled to Post-PRM Legal Fees.

37. Genesee disputes the validity of the Recommended Resolution submitted by the TA and seeks reimbursement for post-PRM legal fees.

38. *Genesee Position.* Genesee claims the TA Mediator erred by failing to include evidence in the record that it took steps to mitigate the coverage loss expected from "FRED narrow-deviation operation"⁸⁹ and ignored its "efforts to reach a successful conclusion in this matter."⁹⁰ Consequently, Genesee requests the Bureau ignore the TA RR and find that Genesee's motion to include the excluded documents in the record is a recoverable expense.⁹¹

39. *Decision.* We decline to accede to Genesee's request that we disregard the Recommended Resolution because of "significant errors of fact and analysis" and transmission of an "incomplete record" to the Bureau.⁹² We find no material factual errors in the Recommended Resolution and largely agree with the TA Mediator's analysis. In any event, Genesee has had full opportunity to present its account of the facts and its theory of the case in its Proposed Resolution Memorandum and Statement of Position. Genesee's allegation of the record being incomplete was rendered moot by our grant of Genesee's motion to accept the documents appended to its Statement of Position.⁹³ Therefore, Genesee has not been prejudiced by the fact that the documents were not contained in the record submitted by the TA Mediator.⁹⁴ We decline to award Genesee its legal fees for preparation of the referenced motion. The Commission has determined that any appeal from a TA Mediator's Recommended Resolution must be at the appellant's own expense.⁹⁵ We lack the authority to overturn the Commission's determination.

⁸⁹ Genesee SOP at 2.

⁹⁰ *Id.* at 4.

⁹¹ *Id.* at 5-6.

⁹² Genesee SOP at 15.

⁹³ Genesee's Motion was granted by *Order* on August 15, 2011.

⁹⁴ We observe that the documents were generated after PRMs were submitted and that Genesee did not request the TA Mediator to reopen the record to accept the documents.

⁹⁵ Improving Public Safety Communications in the 800 MHz Band, Docket No. 02-55, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467, 10484 (2007).

IV. ORDERING CLAUSES

40. Accordingly, pursuant to the authority of 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.

41. IT IS FURTHER ORDERED, that Genesee County, New York, SHALL PRODUCE a cost estimate consistent with this *Memorandum Opinion and Order* within thirty working days of the release date hereof.

42. IT IS FURTHER ORDERED, that, upon the production of the cost estimate, *supra*, the 800 MHz Transition Administrator Mediator SHALL CONVENE a meeting of representatives of Genesee County and Sprint Nextel Corporation, each with the authority to bind its principal, to negotiate the terms of a Frequency Reconfiguration Agreement consistent with this *Memorandum Opinion and Order*.

43. IT IS FURTHER ORDERED, that the parties shall negotiate a minimum of 3 hours per business day until an agreement in principle is reached. The agreement in principle shall be reduced to writing, executed, and submitted to the 800 MHz Transition Administrator as a Frequency Reconfiguration Agreement within 15 business days of the date on which agreement in principle is reached.

44. 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

Michael J. Wilhelm
Deputy Chief - Policy and Licensing Division
Public Safety and Homeland Security Bureau