

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

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| In the Matter of   | ) |                 |
|  | ) |                 |
| Improving Public Safety Communications<br>in the 800 MHz Band        | ) | WT Docket 02-55 |
|  | ) |                 |
| New 800 MHz Band Plan for Puerto Rico and<br>the U.S. Virgin Islands | ) |                 |
|  | ) |                 |

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 2011**

**Released: February 7, 2011**

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

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* we dismiss or deny, as appropriate, petitions for reconsideration of the *Third Report and Order and Third Further Notice of Proposed Rule Making* in the captioned proceeding, released April 20, 2010 by the Public Safety and Homeland Security Bureau (Bureau).<sup>1</sup> The petitions have been filed by: (a) jointly, Smartcomm, L.L.C. (Smartcomm), Kenneth Fry (Fry) and Preferred Spectrum Investments, LLC (PSI) (collectively, Smartcomm);<sup>2</sup> (b) jointly, Preferred Communications Systems, Inc., its subsidiary Preferred Acquisitions Inc. and its shareholder Charles D. Guskey (Guskey) (collectively, Preferred);<sup>3</sup> and (c) Concepts to Operations, Inc. (CTO)<sup>4</sup>

**II. BACKGROUND**

2. The *Third Report and Order* adopted the 800 MHz band plan for the Commonwealth of Puerto Rico recommended by the 800 MHz Transition Administrator (TA). The band plan differs from that applicable to most of the United States in only two respects: (1) the Expansion Band is somewhat

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<sup>1</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Third Report and Order and Third Further Notice of Proposed Rule Making*, 25 FCC Rcd. 4443 (PSHSB 2010) (*Third Report and Order*). The *Third Further Notice of Proposed Rule Making* proposed adopting for the U.S. Virgin Islands the same 800 MHz band plan adopted in the *Third Report and Order* for Puerto Rico. *Id.* at 4452 ¶¶ 24-25.

<sup>2</sup> Petition for Reconsideration filed by Smartcomm, L.L.C., Kenneth Fry and Preferred Spectrum Investments, LLC, July 22, 2010.

<sup>3</sup> Joint Petition for Reconsideration filed by Preferred Communications Systems, Inc., Preferred Acquisitions Inc., and Charles D. Guskey, July 22, 2010.

<sup>4</sup> Petition for Reconsideration filed by Concepts to Operations, Inc. (filed July 22, 2010). On August 2, 2010 Sprint Nextel Corp. (Sprint) filed an Opposition to Petitions for Reconsideration, (Sprint Opposition). On September 2, 2010 Motorola, Inc. filed an Opposition to Petitions for Reconsideration (Motorola Opposition). On September 13, 2010, the Preferred Petitioners and the Smartcomm Petitioners each filed a Reply to Oppositions to Petitions for Reconsideration (respectively, Preferred Reply and Smartcomm Reply).

larger; and (2) the Guard Band is somewhat smaller.<sup>5</sup> The adjustment in the Expansion and Guard Bands was made to accommodate the atypical distribution of public safety, Business/Industrial Land Transportation (B/ILT), Specialized Mobile Radio (SMR) and Enhanced Specialized Mobile Radio (ESMR) licensees in Puerto Rico.<sup>6</sup>

3. The distribution of ESMR-eligible licensees in Puerto Rico is also atypical to the extent that all ESMR-eligible licensees cannot be accommodated in the ESMR band (817-824 MHz/862-869 MHz). Accordingly, the *Third Report and Order* established a proration procedure whereby Sprint must surrender ESMR spectrum to the extent necessary to accommodate the two other ESMR-eligible licensees, North Sight Communications, Inc. (North Sight) and Preferred Acquisitions, Inc. (PAI), a wholly owned subsidiary of Preferred Communication Systems, Inc. (PCSI).<sup>7</sup>

4. It may prove unnecessary, however, to accommodate PAI in the ESMR band. PAI and PCSI were the subject of an enforcement proceeding in which they were ordered to show cause why their licenses in Puerto Rico and elsewhere should not be revoked.<sup>8</sup> The presiding Administrative Law Judge (ALJ) terminated the proceeding pursuant to a settlement agreement between the Commission's Enforcement Bureau and PAI and PCSI.<sup>9</sup> Under the settlement agreement, PAI and PCSI would make a voluntary \$100,000 payment to the United States Treasury and would retain their licenses. A named party to the license revocation proceeding, Pendleton Waugh (Waugh), however, and Michael Judy, *et al.* filed appeals of the ALJ's approval of the settlement agreement.<sup>10</sup> Those appeals remain pending before the Commission. Additionally, PAI did not timely complete construction of its authorized facilities in Puerto Rico and has a request for extension of time to construct pending before the Commission's Wireless Telecommunications Bureau.<sup>11</sup> Thus, if the settlement agreement is disapproved by the Commission, and PAI's licenses are revoked, or if PAI's extension request is denied, the need to accommodate PAI in the ESMR band in Puerto Rico would be obviated.<sup>12</sup>

### III. DISCUSSION

5. Petitioners raise multiple issues. Smartcomm asserts it has standing to participate in the proceeding.<sup>13</sup> It also argues that Sprint's opposition to the reconsideration petitions should be dismissed

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<sup>5</sup> *Third Report and Order*, 25 FCC Rcd at 4444 ¶ 5. In most of the United States, the 1 MHz Expansion Band extends from 815-816 MHz/860-861 MHz and the 1 MHz Guard Band extends from 816-817 MHz/861-862 MHz. In Puerto Rico, the Expansion Band is 1.5 MHz wide and extends from 815-816.5 MHz/860-861.5 MHz, and the Guard Band is correspondingly narrower, a 0.5 MHz segment extending from 816.5-817 MHz/861.5-862 MHz.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4446 ¶ 9. PAI and PCSI are legally unrelated to petitioner PSI.

<sup>8</sup> Preferred Communications Systems, Inc., *et al.*, *Order to Show Cause and Notice of Opportunity for Hearing*, 22 FCC Rcd 13363, 13367 (2007) (*Preferred Order*).

<sup>9</sup> Preferred Communications Systems, Inc. *et al.*, *Order*, FCC 09M-51 (ALJ Aug. 6, 2009) (granting motion for approval of settlement agreement); Preferred Communications Systems *et al.*, *Memorandum Opinion and Order*, FCC 09M-57 (ALJ Sept. 25, 2009) (renewing *Order* FCC 09M-51).

<sup>10</sup> See Pendleton C. Waugh, Notice of Appeal, Oct. 5, 2009; Pendleton C. Waugh, Appeal from Presiding Officer's Final Ruling, Oct. 26, 2009; Michael D. Judy, *et al.* Appeal, Oct. 12, 2009.

<sup>11</sup> See PAI Request for Waiver, Dec. 1, 2005.

<sup>12</sup> See *Preferred Order*, 22 FCC Rcd at 11383-84 ¶¶ 57-58.

<sup>13</sup> Smartcomm Petition at 5-6.

as prematurely filed.<sup>14</sup> In addition, Smartcomm contends that the Commission should have expanded the ESMR band in Puerto Rico as it did in the Southeast United States.<sup>15</sup> Both Smartcomm and Preferred argue that ESMR-eligible licensees should receive unencumbered spectrum if they have elected to relocate to the ESMR portion of the band.<sup>16</sup> Smartcomm claims that Sprint would receive a “windfall” if PAI’s licenses are revoked.<sup>17</sup> It also suggests that the Bureau may have exceeded its delegated authority in adopting the rules contained in the *Third Report and Order*.<sup>18</sup> Preferred contends that it has the right to relocate its unconstructed site-based licenses to the ESMR band.<sup>19</sup> It also argues that it should receive the channels of its choice when relocating to the ESMR band, and that Sprint should not be entitled to 1.9 GHz spectrum in Puerto Rico.<sup>20</sup> CTO contends that the Bureau should have adopted CTO’s earlier-proposed band plan for Puerto Rico.<sup>21</sup> Those issues are addressed below, *seriatim*.

## A. Procedural Matters

### 1. Standing

6. Smartcomm claims to be an interested party for the purpose of the instant rule making proceeding because “it is interested in applying for commercial radio licenses and advising licensees in the 800 MHz Expansion Band and Guard Band.” It deems itself a “potential licensee” – and thus a competitor of Sprint – “in the CMRS markets, including Puerto Rico,” and asserts that it has standing to participate in the rule making proceeding under the Supreme Court’s *Sanders Brothers* decision.<sup>22</sup> Smartcomm also claims standing because Waugh – a Smartcomm principal – is a “related party” to the PAI/PCSI license revocation proceeding, *supra*. It contends that Fry is an interested party for purposes of the rule making proceeding because he once held a conventional SMR license that he transferred to PCSI in 1999.<sup>23</sup> He is also averred to have standing because he intervened in a Delaware Chancery Court proceeding “asserting rights” related to the conventional SMR license that he transferred to PCSI. Michael D. Judy, president of PSI, is a plaintiff in the Delaware Chancery Court proceedings, *supra*, and “PSI supports him in those efforts.”<sup>24</sup>

7. Sprint contends that Smartcomm lacks standing because it did not “participate in the notice and comment period of this proceeding where comments were filed nearly two years ago.”<sup>25</sup>

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<sup>14</sup> Smartcomm Reply at 9-10.

<sup>15</sup> Smartcomm Petition at 6-8.

<sup>16</sup> *Id.* at 8-12; Preferred Petition at 20-21.

<sup>17</sup> Smartcomm Petition at 12-13.

<sup>18</sup> *Id.* at 13-15.

<sup>19</sup> Preferred Petition at 20.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> CTO Petition at 2.

<sup>22</sup> Smartcomm Petition at 5 and n.16, *citing FCC vs. Sanders Brothers*, 309 U.S. 470, 477 (1940). Smartcomm also recites that it has “an interest in avoiding interference,” *id.*, and, therefore, has standing under *FCC v. N.B.C.*, 319 U.S. 239, 247 (1943). *Id.*

<sup>23</sup> Smartcomm Petition at 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Moreover, Sprint argues that Smartcomm should not be afforded standing because its principal, Waugh, is a convicted felon, “calling into question whether it can ever obtain its own FCC license.”<sup>26</sup> Sprint asserts that another party to the Smartcomm petition, PSI, “presumably” has Waugh, a convicted felon, in a leadership position, because PSI has the same business address as Smartcomm.<sup>27</sup> Fry, the third party to the Smartcomm petition, once held an 800 MHz license in Puerto Rico, but, according to Sprint, has no interest in the band plan and reconfiguration plan for current 800 MHz licensees there.<sup>28</sup> CTO lacks standing, Sprint claims, because “CTO’s Petition raises nothing new – it summarizes the alternative band plan Preferred submitted in response to the *Second Further Notice of Proposed Rulemaking*.”<sup>29</sup> Smartcomm asserts that Sprint’s standing arguments are wrong because the Commission’s rules allow any “interested person” to participate in a rule making proceeding.<sup>30</sup>

8. Smartcomm is correct. Although its interest, and that of its constituent parties, in this proceeding is tenuous at best, this is a rule making proceeding governed by Section 1.429 of the Commission’s rules which permits petitions for reconsideration to be filed by any “interested person.”<sup>31</sup> Sprint has cited no case in which a party has been denied participation in a rule making proceeding because of the factors cited by Sprint in its opposition.<sup>32</sup>

## 2. Timeliness of Sprint’s Opposition

9. Smartcomm cites the Commission’s decision in Implementation of Section 207 of the Telecommunications Act of 1996 for the proposition that “Sprint’s Opposition must be dismissed because it is procedurally defective.”<sup>33</sup> We note, however, that in the cited case, the Commission, although stating that premature petitions for reconsideration may be dismissed, accepted the prematurely filed petition on its own motion.<sup>34</sup> We do so here with respect to Sprint’s Opposition. Smartcomm has not shown that it, or any other party, was prejudiced by Sprint’s premature filing.

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<sup>26</sup> Sprint also contends that Smartcomm solicits investors to pay several thousands of dollars to apply for 800 MHz licenses, whereas the usual FCC application and coordination fee is only about \$300. *Id.* at 3.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Smartcomm Reply at 1.

<sup>31</sup> 47 C.F.R. § 1.429.

<sup>32</sup> See Amendment of Procedures for Reconsideration of Actions in Notice and Comment Rulemaking Proceedings, *Memorandum Opinion and Order*, 57 FCC 2d 699 (1975) (Liberalizing the standing requirements for the filing of petitions for reconsideration in rule making proceedings.)

<sup>33</sup> See Smartcomm Reply at 9 *citing* Implementation of Section 207 of the Telecommunications Act of 1996, *Order on Reconsideration*, 14 FCC Rcd 19924 (1999).

<sup>34</sup> Implementation of Section 207 of the Telecommunications Act of 1996, *Order on Reconsideration*, 14 FCC Rcd 19924, 19925 ¶3 (1999).

## B. Other Matters.

### 1. Expansion of the ESMR Band in Puerto Rico

10. Petitioner Smartcomm contends that the Bureau should have enlarged the ESMR band in Puerto Rico as it did in the Southeastern United States to accommodate ESMR licensees Southern LINC and Sprint.<sup>35</sup> Sprint points out that, in the Southeastern United States, there were, and are, two operating ESMR systems – Sprint’s and SouthernLINC’s – and that not expanding the ESMR spectrum there would have been “significantly detrimental to their customers.”<sup>36</sup> In Puerto Rico, Sprint argues, there are no operating ESMR systems, and potential ESMR operators “would have a far greater ability to design ESMR networks from scratch for the expected spectrum capacity they will have.”<sup>37</sup> Smartcomm counters that the differences Sprint articulated between the status of the 800 MHz band in the Southeast United States and the status of the 800 MHz band in Puerto Rico are “immaterial.”<sup>38</sup>

11. Smartcomm’s petition, to the extent that it argues that the ESMR band should be expanded, is untimely because the decision to prorate – rather than expand – the ESMR band in Puerto Rico was made in the *800 MHz Second Memorandum Opinion and Order* in 2007.<sup>39</sup> Were we to reach Smartcomm’s arguments on the merits, however, we would find them lacking. The expansion of the ESMR band in the United States was necessary to accommodate two operational ESMR systems - those of SouthernLINC and Sprint. Had we required both systems to share spectrum in the ESMR band segment applicable to the rest of the United States, that would have required a major redesign and reconfiguration of both systems at a cost that would have been passed on to the systems’ subscribers. We therefore approved an agreement between SouthernLINC and Sprint apportioning channels in an expanded ESMR band. In Puerto Rico, however, no such agreement exists, there are no operational ESMR systems, and the apportionment of channels in the ESMR band can be accomplished as a “paper change” with no adverse public interest effects. By comparison, had we expanded the ESMR band in Puerto Rico, we would have reduced the amount of spectrum available to public safety and other “non-ESMR” users. In that connection, we note that Smartcomm has provided no analysis of the effects that expansion of the ESMR band in Puerto Rico would have on non-ESMR licensees, present and future. Finally, we note that under the proration process adopted in the *Third Report and Order* the only licensee subject to losing ESMR spectrum is Sprint, which has not opposed the prorating of ESMR spectrum.

### 2. Unencumbered ESMR Spectrum

12. Smartcomm claims that the 2004 *800 MHz Supplemental Order* is unfair to non-Sprint ESMR-eligible licensees seeking to relocate to the ESMR band because they can relocate only the unencumbered portion of their Economic Area (EA) licenses to the ESMR band.<sup>40</sup> Similarly, Preferred

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<sup>35</sup> Smartcomm Petition at 6-8.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467, 10478-10481 ¶¶29-36 (2007) (*Second Memorandum Opinion and Order*).

<sup>40</sup> Smartcomm Petition at 8-12. Under 47 C.F.R. § 90.683(a)(1) of the Commission’s rules,<sup>40</sup> an EA licensee must protect incumbent site-based stations, *i.e.*, stations that were licensed prior to the EA licensee acquiring its license through auction. These site-based stations are said to “encumber” the EA license. Conceptually, the encumbering (continued....)

contends that it should be entitled to more than its “white space” when its EA licenses are moved to the ESMR band.<sup>41</sup> In countering Preferred’s claim that its Puerto Rico ESMR spectrum should be unencumbered, Sprint submits that Preferred is trying to relitigate settled matters – that the *800 MHz Supplemental Order* established that an EA licensee relocating to the ESMR band is entitled to “only the analog of comparable facilities, the same unencumbered area that it had before it relocated, *i.e.*, its ‘white area.’”<sup>42</sup>

13. We agree with Sprint. The *800 MHz Supplemental Order* made it clear that, when an EA licensee elects to relocate to the ESMR band, its license remains encumbered. Thus, in terms of authorized service area, the relocating licensee receives no more or no less area than it had prior to the effective date of the *800 MHz Report and Order*, *i.e.*, it receives only its unencumbered “white area.”<sup>43</sup> Thus, Smartcomm and Preferred have raised claims that already fully have been considered and rejected by the Commission in the *800 MHz Supplemental Order*. We therefore find that Smartcomm’s and Preferred’s claims that an EA licensee should receive unencumbered spectrum when relocating to the ESMR band are untimely and, on that account, procedurally defective.

### 3. Smartcomm’s “Windfall” Claim

14. Smartcomm claims that Sprint would receive a “windfall” if PAI’s licenses are revoked, because, then – under the proration provisions of the *Third Report and Order* – Sprint would lose only five channels from its existing Puerto Rico licenses whereas, if PAI’s licenses are not revoked, Sprint would lose 130 channels from its existing Puerto Rico licenses.<sup>44</sup> From this, Smartcomm concludes that “the *Third Report and Order* appears to hold the promise of a further, totally unencumbered award of channels to Sprint that will leave it with a significantly greater share of the ESMR band than it had before rebanding.”<sup>45</sup> Petitioners are wrong. Sprint currently has a pre-rebanding complement of 165 channels. If Preferred’s licenses were revoked, Sprint would receive only 160 channels in the ESMR band – a five channel shortfall, not a windfall.

### 4. Disposition of Preferred’s Channels if its Licenses are Revoked.

15. Smartcomm also submits that, if Preferred’s licenses are revoked, “they should be treated as vacant channels, thus available for licensing by general application in the I/B Radio Pool.” The majority of Preferred’s channels, however, are not in the I/B Radio Pool – they are in the new NPSPAC band (806-809 MHz/851-854 MHz) which the Commission has determined must be vacated by non-public safety licensees. Accordingly, Smartcomm’s proposal is unworkable and fundamentally inconsistent with the Commission’s rebanding structure. In any event, Smartcomm’s proposal is moot

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licensees create “holes” in the EA licensee’s coverage area. The holes accompany the license when the EA licensee migrates to the ESMR band.

<sup>41</sup> Preferred Petition at 21.

<sup>42</sup> Sprint Opposition at 11 n.26, *citing*, Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120, 25155 ¶ 79 (2004) (*Supplemental Order*).

<sup>43</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

<sup>44</sup> Smartcomm Petition at 13.

<sup>45</sup> *Id.*



because Preferred has allowed all but one of its site-based Puerto Rico licenses to expire.<sup>46</sup>

### 5. Delegated Authority to Codify the TA's Puerto Rico Band Plan.

16. Smartcomm suggests that the Bureau may have exceeded its delegated authority in adopting the *Third Report and Order*. Smartcomm concedes that the Commission delegated to the Bureau the authority “to approve or modify the proposed band plan and timetable [from the TA], subject to the guidance provided below,”<sup>47</sup> but claims that it is “unclear” whether the Bureau had the delegated authority to codify the approved band plan into the Commission’s rules.<sup>48</sup>

17. We disagree with Smartcomm’s contention that the Bureau’s delegated authority did not extend to adopting conforming rules once the proposed band plan was approved. First, we note that the delegation of authority rules are a matter between the Commission and its staff and do not create rights in private parties such as Smartcomm.<sup>49</sup> Second, the authority delegated to the Bureau to approve or modify the band plan proposed by the TA necessarily carried with it the authority to accomplish the ministerial task of incorporating the revised Puerto Rico band plan into the Commission’s rules. Had the Commission wished to reserve that ministerial task to itself, it would have so stated in the *800 MHz Second Report and Order*.<sup>50</sup>

### 6. Relocation of Site-Based Stations

18. Preferred claims that it is entitled to relocate its unconstructed site-based licenses to the ESMR band based on the statement in the *Third Report and Order* that: “Accordingly, we direct the TA to reserve replacement spectrum in its channel assignment plan for PCSI’s and PAI’s site-based licenses and EA licenses.”<sup>51</sup>

19. Sprint points out that Preferred’s claim that it is entitled to relocate its site-based licenses to the ESMR band is essentially moot because Preferred allowed all but one of those licenses to expire and that they were cancelled, in most cases, over a year ago.<sup>52</sup> In any event, Sprint argues, Preferred could not relocate its site-based licenses to the ESMR band because those site-based licenses were not part of an “integrated communications system” as of November 22, 2004, the date that the *800 MHz Report and Order* was published in the Federal Register.<sup>53</sup>

20. Preferred disputes Sprint’s claim that Preferred’s site-based licenses have been canceled, claiming that the validity of the licenses “is confirmed in, and governed by the Settlement Agreement (between the Enforcement Bureau and Preferred) in FCC Enforcement Bureau action No. 07-147.”<sup>54</sup> We

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<sup>46</sup> See *infra* ¶ 19.

<sup>47</sup> Smartcomm Petition at 13-14, quoting *Second Memorandum Opinion and Order*, 22 FCC Rcd at 10479-80 ¶ 33.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Beehive Telephone, Inc. and Beehive Telephone Nevada vs. The Bell Operating Companies*, *Memorandum Opinion and Order*, 2 FCC Rcd 17930, 17939 (1997).

<sup>50</sup> *800 MHz Second Memorandum Opinion and Order*, 22 FCC Rcd at 10479-80 ¶ 33.

<sup>51</sup> Preferred Petition at 18, quoting *Third Report and Order*, 25 FCC Rcd at 4448 ¶ 13.

<sup>52</sup> Sprint Opposition at 9.

<sup>53</sup> *Id.* citing *Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

<sup>54</sup> Preferred Reply at 1.

note, however, that, with one exception, Preferred has let its site-based licenses expire without Preferred filing a renewal application and paying the required fee.<sup>55</sup> The remaining Preferred site-based license cannot be relocated to the ESMR band because, as Sprint points out, the facilities authorized by that license were not even constructed by the Federal Register publication date of the *800 MHz Report and Order*,<sup>56</sup> much less part of an “integrated communications system.” Moreover, Preferred’s reliance on the quoted language, *supra*, from the *Third Report and Order* is unavailing because it requires only that the TA reserve “replacement spectrum” for site-based licenses. “Replacement spectrum” does not equate to “ESMR spectrum.” Thus, for example, Preferred’s site-based licenses, if located in the “new” NPSPAC band, would have been relocated to the interleaved channels, not the ESMR band.

21. Accordingly, there are two reasons why Preferred’s site-based licenses cannot be relocated to the ESMR band: (1) the licenses, with one exception, have expired by their own terms without being renewed, and (2) the channels that Preferred seeks to relocate were not part of an “integrated communications system” because Preferred never constructed its authorized facilities.

22. Finally, the issue of the eligibility of site-based licenses for relocation into the ESMR band was thoroughly considered by the Commission in the *800 MHz Report and Order* the *Supplemental Order* and the *Memorandum Opinion and Order*. Consequently, Preferred’s attempt to raise the issue again here is untimely and repetitious, and we therefore are dismissing that portion of Preferred’s pleadings addressing the eligibility of site-based licenses for relocation to the ESMR band.

## 7. Choice of Channels

23. Preferred also submits that it should be relocated to the channels of its choice in the ESMR band, *i.e.*, “contiguous channels beginning at 869 MHz, then working downward.”<sup>57</sup> It claims that “[t]his specification by the FCC may be helpful in avoiding any delays that could occur in the relocation negotiation process.”<sup>58</sup> Again, Preferred has raised a settled issue. The question of a licensee’s entitlement to channels of its choice was definitively answered in the *Supplemental Order*: “As with all incumbents relocated in the course of band reconfiguration – EA licensees or otherwise – incumbents are entitled only to comparable facilities not their choice of channels.”<sup>59</sup> Accordingly, we are dismissing that portion of Preferred’s pleadings dealing with an ESMR licensee’s choice of channels.

## 8. Sprint’s Entitlement to 1.9 GHz Spectrum

24. Preferred points out that it has previously argued that it was “generally improper” for the Commission to allocate 1.9 GHz spectrum to Sprint because it was “tantamount to a private sale.”<sup>60</sup> It submits that its prior arguments are “even more applicable in Puerto Rico as there have been no reported incidents of interference with public safety communications” and because Sprint “did not build and/or

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<sup>55</sup> 47 C.F.R. § 1.949.

<sup>56</sup> 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 (2004) (*800 MHz Report and Order*).

<sup>57</sup> Preferred Petition at 23.

<sup>58</sup> *Id.*

<sup>59</sup> *Supplemental Order*, 19 FCC Rcd at 25154 ¶ 76.

<sup>60</sup> Preferred Petition at 24.



operate a wireless system in Puerto Rico as it did in the remainder of the U.S.”<sup>61</sup>

25. Preferred’s arguments are repetitive and untimely. One of Preferred’s principals, Guskey, raised substantially identical arguments that were rejected in the *800 MHz Second Memorandum Opinion and Order*.<sup>62</sup> We dismiss that portion of Preferred’s petition alleging that Sprint is not entitled to 1.9 GHz spectrum.

## 9. CTO’s Band Plan

26. CTO states that “The Plan provided by the TA which is adopted in this proceeding does not conform to the criteria specified by the Commission in the Background section [of the *Third Report and Order*].”<sup>63</sup> It urges the Commission instead to adopt the “Alternate Reconfiguration Plan for Puerto Rico and the Virgin Islands” that Preferred submitted in 2008 in response to the *Second Further Notice of Proposed Rulemaking*.<sup>64</sup>

27. CTO’s band plan would expand the ESMR band by 3.5 MHz and relegate all public safety licensees to the new NPSPAC band.<sup>65</sup> CTO’s petition is untimely. The decision not to expand the ESMR band in Puerto Rico was made in the *800 MHz Second Memorandum Opinion and Order* in 2007.<sup>66</sup> Thus, we are dismissing CTO’s petition. Were we to reach the petition on the merits, we would deny it. Although CTO asserts that the plan would accommodate existing and future public safety, SMR and Business/Industrial Land Transportation (B/ILT) licensees, CTO makes no effort to demonstrate that would be so, *i.e.*, it does not indicate, for example, where “high site” licensees from its expanded ESMR band would be relocated, or how future growth would be accommodated. More significantly, CTO does not justify reducing the public safety allocation from 7.75 MHz, in the plan adopted in the *Third Report and Order*,<sup>67</sup> to 6 MHz in its plan.

## IV. DECISION

28. Petitioners were on notice from the *Third Report and Order* that repetitious petitions seeking reconsideration of settled matters were impermissible,<sup>68</sup> yet proceeded to file pleadings that ignored that caveat with respect to the majority of issues raised in the petitions. We admonish petitioners for wasting the resources of the Commission and other parties forced to deal with petitioners’ repetitive

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<sup>61</sup> *Id.*

<sup>62</sup> *Second Memorandum Opinion and Order*, 22 FCC Rcd at 10486-10487 ¶ 53.

<sup>63</sup> CTO Petition at 1.

<sup>64</sup> *Id.* at 2, *citing* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 10179 (PSHSB 2008).

<sup>65</sup> CTO Petition at 4.

<sup>66</sup> *See supra* n. 39.

<sup>67</sup> The 7.75 MHz is made up of the 6 MHz in the NPSPAC band and the 1.75 MHz of public safety channels in the interleaved band (809-815 MHz./854-860 MHz).

<sup>68</sup> *Third Report and Order*, 25 FCC Rcd at 4448-4449 ¶15, *citing* *800 MHz Second Memorandum Opinion and Order*, 22 FCC Rcd at 10487 ¶54, *citing* Applications of Warren Price Communications, Inc. Bay Shore, New York *et al.*, for a Construction Permit for a new FM Station on Channel 276 at Bay Shore, New York, *Memorandum Opinion and Order*, 7 FCC Rcd 6850 (1992) *citing* VHF Drop-Ins, 3 Rad. Reg. 2d 1549, 1551 n.3 (1964).

filings and, as noted *supra*, dismiss those portions of petitioners' pleadings that raise already settled issues.

29. Petitioners' claims that were not repetitious we have considered on the merits and found that petitioners have failed to make a persuasive case that the rules adopted in the *Third Report and Order* are not in the public interest. Therefore, we are denying those claims.

#### **V. ORDERING CLAUSES**

30. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Smartcomm, L.L.C., Kenneth Fry and Preferred Spectrum Investments, LLC is DISMISSED IN PART AND DENIED IN PART as specified herein.

31. IT IS FURTHER ORDERED that the Joint Petition for Reconsideration filed by Preferred Communications Systems, Inc., its subsidiary Preferred Acquisitions Inc., and Charles D. Guskey (Guskey) is DISMISSED IN PART AND DENIED IN PART as specified herein.

32. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Concepts to Operations IS DISMISSED.

33. 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 Division  
Public Safety and Homeland Security Bureau