

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

In the Matter of	)	
	)	
State of Michigan	)	WT Docket 02-55
Request for Waiver to Use Former NPSPAC	)	
Mutual Aid Channels for Cross-Border	)	
Communications With Canada.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 8, 2011**

**Released: February 8, 2011**

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

1. In this *Memorandum Opinion and Order* we deny, without prejudice, the captioned waiver request (Request), filed January 28, 2010 by the State of Michigan (Michigan) seeking authorization to use the former 800 MHz Mutual Aid channels along the U.S./Canada border.

**I. INTRODUCTION**

2. Michigan has a statewide 800 MHz system, a portion of which operates in Canada Border Regions 3, 4 and 7.<sup>1</sup> With rebanding of its system, the five 800 MHz NPSPAC Mutual Aid channels, originally located in the 821-824 MHz/866-869 MHz band segment will be relocated 15 MHz lower in frequency to the 806-809 MHz/851-854 MHz band segment.<sup>2</sup> When reconfiguration of Michigan's system is complete, Sprint Nextel Corp. (Sprint) will occupy the 821-824 MHz/866-869 MHz band segment, subject to the restriction that the power flux density of its signals on the former United States NPSPAC Mutual Aid channels may not exceed a specified limit at the common border.<sup>3</sup>

3. Michigan asserts that there is a compelling need for 800 MHz system interoperability between the two countries and that many public safety users in Canada have the former United States NPSPAC Mutual Aid channels programmed into their radios. When band reconfiguration is complete, Michigan points out, there will no longer be interoperability between the United States and Canada Mutual Aid channels.<sup>4</sup>

4. To preserve interoperability on the Mutual Aid channels, Michigan requests a waiver to permit continued operation of Michigan's subscriber units (mobile and portable) on the former NPSPAC Mutual Aid channels in the immediate vicinity (approximately five miles) of the common border, and

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<sup>1</sup> Request for Waiver at 1 (Request).

<sup>2</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>3</sup> See Arrangement Between the Dept. of Communications of Canada and the FCC of the United States Concerning the Use Along the US-Canada Border of the Band 806-890 MHz (Jan. 1994, addendum, Dec. 1994) (Arrangement F). See also Arrangement Between the Dept. of Communications of Canada and the FCC of the United States Concerning the Use Along the US-Canada Border of the Bands 821-824 MHz and 866-869 MHz (Sep. 1990, addendum, Dec. 1994).

<sup>4</sup> Request at 2, 3.

only for cross-border interoperability.<sup>5</sup> These radios would be operated in the “direct” mode (*i.e.*, without intervening United States infrastructure) with their Canadian counterparts or, assuming permission by Canada, operated on Canadian infrastructure.<sup>6</sup>

5. Michigan submits that operation of mobile and portable units in the manner described would not cause interference to Sprint because “the waiver relief requested . . . can be expected to fall within the umbrella of that mandatory protected area,”<sup>7</sup> *i.e.*, the area in which Sprint’s operations will be curtailed in order to meet the power flux density limitations at the common border. Michigan undertakes to “coordinate and cooperate” with Sprint to establish “rules of the road” which, Michigan asserts, will allow public safety and Sprint’s iDEN network to coexist in the border region.<sup>8</sup>

6. Sprint opposes the requested waiver.<sup>9</sup> It contends that Michigan’s waiver request is, in substance, an untimely, and therefore procedurally deficient, petition for reconsideration of the Commission’s May, 2008 *800 MHz Second Report and Order* where the Commission relocated the NPSPAC channels to the lower portion of the 800 MHz band and required that frequencies corresponding to certain former NPSPAC Mutual Aid channels be protected, in Canada, against ESMR interference.<sup>10</sup> Sprint also contends that Michigan failed to consider alternatives to its waiver proposal. For example, Sprint states that Michigan could provide Canadian operators with access to Michigan’s system, and observes that it has a similar sharing arrangement with Canadian carrier Telus.<sup>11</sup> Sprint also suggests that Michigan could provide Canadian operators with radios that would operate according to the revised United States band plan, thereby providing Canadian operators with access to the new NPSPAC mutual aid channels.<sup>12</sup> Lastly, Sprint observes that interoperability could be obtained by using a “console patch” to interconnect United States and Canada 800 MHz infrastructure along the common border.<sup>13</sup>

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<sup>5</sup> Michigan recognizes that the proposed operation “might not comply precisely with the power and power flux density restrictions in the treaty governing this band” but observes that the same situation prevailed pre-reconfiguration when Canada public safety entities were permitted to use the former NPSPAC Mutual Aid channels - which fell on U.S. primary spectrum - for cross-border interoperability. Request at 7-8 n.6.

<sup>6</sup> Request at 7.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> Sprint Opposition to Request for Waiver, Feb. 12, 2010 (Opposition). Sprint notes that its opposition was due on Feb. 8, 2010, but that Washington, D.C. federal government offices were closed Feb. 8 through Feb. 11, 2010, due to snowfall. We therefore regard the Opposition as timely filed.

<sup>10</sup> Opposition at 7-11, *quoting* Improving Public Safety Communications in the 800 MHz Band, *Second Report and Order*, 23 FCC Rcd 7605, 7617 (2008). (“As proposed in the FNPRM, we establish new mutual aid channels with 25 kHz spacing in the new border area NPSPAC band plan to match the mutual aid channels in the non-border NPSPAC band plan. In addition, we will maintain the existing cross-border mutual aid channels in the former NPSPAC band that are situated on U.S. primary spectrum for continued mutual aid use on the Canadian side of the border. These channels will be designated as Canadian primary channels, so that Canadian public safety systems can continue using them on the Canadian side of the border for interoperability. We clarify, however, that Sprint may use these channels for ESMR operations in the U.S., so long as it protects Canadian primary use by not exceeding the applicable PFD limit (-107 dBw(W/m<sup>2</sup>) per 25 kHz) at or beyond the border.”)

<sup>11</sup> *Id.* at 13. (Telus Mobility, which provides service on a iDEN network compatible with Sprint’s, is a Canada counterpart to Sprint.)

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.*

7. Sprint also opposes Michigan's waiver request on interference grounds.<sup>14</sup> It denies that there will be a "buffer area" where Michigan could operate free of interference on the former NPSPAC Mutual Aid channels, because Sprint intends to make use of those channels as close to the common border as possible, consistent with maintaining the requisite interference protection to Canadian operators.<sup>15</sup> It contends, without documenting its contention, that Michigan's operations on the former NPSPAC Mutual Aid channels would render the channels unusable by Sprint "throughout the metro and suburban areas of Detroit, where it estimates it has as many as 1,800 sites that could be "impacted negatively"<sup>16</sup> by Michigan's proposal. Sprint faults Michigan for stating, "without any technical showing or analysis whatsoever" that its request is "limited" and "will not adversely affect Sprint Nextel's operations."<sup>17</sup> Sprint characterizes the waiver request as "unreasonably broad" and lacking in sufficient detail to support a public interest finding.<sup>18</sup>

8. In reply to Sprint's opposition, Michigan denies that its waiver request is, in fact, a petition for reconsideration and points out that the request neither seeks to overturn the 800 MHz *Second Report and Order* nor establish a rule of general applicability.<sup>19</sup> Michigan questions Sprint's claim that Sprint can successfully operate on the former NPSPAC Mutual Aid channels in close proximity to the common border and submits that "[f]urther discussion with Sprint Nextel and, if appropriate, with the FCC and Industry Canada ("IC") should clarify that point and . . . enable the parties to reach agreement on a mutually acceptable solution."<sup>20</sup> Michigan discounts Sprint's discussions of possible alternatives to the waiver grant because those alternatives would require cooperation by, and a commitment from, a variety of Canadian public safety entities and, possibly, approval by Industry Canada.<sup>21</sup>

## II. DISCUSSION

9. We agree with Michigan that its pleading is a legitimate request for waiver and not a petition for reconsideration in disguise.<sup>22</sup> Two years have elapsed since the 800 MHz *Second Report and Order* with a concomitant increase in recognition of the importance of cross-border interoperable communications.<sup>23</sup> Also, Michigan seeks relief only for itself and thus does not advocate changes to the rules adopted in the 800 MHz *Second Report and Order*.<sup>24</sup>

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<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 16 n.41.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> Reply to Opposition to Request for Waiver of the State of Michigan, Feb. 22, 2010 (Reply) at 2.

<sup>20</sup> Reply at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2.

<sup>23</sup> See, e.g., *Implementing Recommendations of the 9/11 Commission Act of 2007* (Pub. Law No. 110-53) and *Consolidated Security Disaster Assistance and Continuing Appropriation Act of 2009* (Pub. Law No. 110-329) (the Border Interoperability Demonstration Project, establishing three cross-border interoperability projects along the Canada U.S. border).

<sup>24</sup> The function of a waiver is not to change the general standard, a matter for which the opportunity for general comment is a prerequisite under the Administrative Procedure Act, but to justify an *ad hoc* exception to that standard in a particular case. *Storer Broadcasting Co.*, 14 RR 742, 746-7 (1956); *VHF Drop-In Proceeding*,

10. The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>25</sup>

11. On this record, it is not possible to ascertain whether the requested waiver would either serve or frustrate the rules established in the *800 MHz Second Report and Order*. The core purpose of 800 MHz rebanding is to relieve public safety users of interference from cellular-architecture carriers such as Sprint. Here, however, the parties have presented nothing other than unsupported assertions concerning interference or the lack thereof. Thus, Michigan has offered no technical showing that would support its belief that there would be a “buffer area”<sup>26</sup> in which it could operate on the former NPSPAC Mutual Aid channels without interference to Sprint, or itself. Similarly, Sprint has not even attempted to document its claim that interference to its operations could affect the entire Detroit metropolitan area.<sup>27</sup>

12. Given the lack of information on the interference environment that would be created by grant of the requested waiver, we are unable to determine whether its grant would be inequitable to, or unduly burdensome upon, Sprint. Moreover, Sprint’s assertion of interference and Michigan’s assertion to the contrary are inadequate for us to determine whether grant of the requested waiver would be in the public interest.

13. Michigan fails to show that it has no reasonable alternative to grant of the requested waiver. Its argument that the alternatives presented by Sprint would be costly and cumbersome<sup>28</sup> is unsupported and, in any event, unpersuasive given that many jurisdictions in the United States achieve interoperability using one or more of the methods to which Sprint refers.<sup>29</sup> Moreover, the relief requested by Michigan is, as Sprint observes, unduly broad.<sup>30</sup> Michigan has not established, for example, why a single former NPSPAC Mutual Aid channel would not suffice for its purposes, or why its requested relief should not be event-driven, *i.e.*, limited to declared emergencies.

### III. DECISION

14. The Commission acknowledges the need for effective cross-border public safety communications and looks favorably on any rule changes or waivers necessary to ensure that first responders in Canada and Mexico can communicate with their United States counterparts.<sup>31</sup> We are,

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*Memorandum Opinion and Order*, 90 FCC 2d 160, 166 (1982), *aff’d sub nom. Springfield Television of Utah, Inc. v. F.C.C.*, 710 (F.2d 620 (10th Cir.1983).

<sup>25</sup> 47 C.F.R. § 1.925(b)(3).

<sup>26</sup> Reply at 3.

<sup>27</sup> Opposition at 16 n.41 (asserting but not explaining how a 35 watt public safety mobile “would impact Sprint Nextel’s co-channel operations well outside the ‘buffer’ area, rendering these same channel (sic) unusable for Sprint Nextel well outside the metro and suburban areas of Detroit”).

<sup>28</sup> Reply at 4.

<sup>29</sup> See, e.g., *Guide to Radio Communications Interoperability Strategies and Product Report*, National Law Enforcement and Corrections Technology Center, National Institute of Justice, Rome, N.Y., April 1, 2003.

<sup>30</sup> Opposition at 16.

<sup>31</sup> See, e.g., *800 MHz, Report and Order*, 19 FCC Rcd at 15063.

however, denying Michigan's waiver request without prejudice for Michigan's failure to make a record sufficient to justify its requested relief. Should Michigan, or any other party, file a similar waiver request in the future, it should support its assertions with competent showings demonstrating, *inter alia*, that cross-border authorities endorse the relief sought, that the requested waiver will provide technically adequate cross-border communications, that the waiver proponent would neither cause objectionable interference to, nor receive objectionable interference from, other systems, and that there are no other technically feasible alternatives to the relief requested. If the waiver proponent deems technically feasible alternatives unacceptable on economic grounds, it should support its contentions in that regard with itemized data on the cost of alternatives.<sup>32</sup>

#### IV. ORDERING CLAUSE

15. Accordingly IT IS ORDERED that the State of Michigan Request for Waiver for Authority to Continue Using U.S. Primary "Old NPSPAC" Mutual Aid Channels on the U.S. Side of the U.S./Canadian Border, IS DENIED WITHOUT PREJUDICE.

16. 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

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<sup>32</sup> We note that there are two outstanding petitions for rule making seeking relief similar to that requested by Michigan. Those petitions will be addressed in a forthcoming Public Notice.