

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

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

FOURTH REPORT AND ORDER

Adopted: February 18, 2011

Released: February 18, 2011

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. By this Fourth Report and Order, the Federal Communications Commission’s Public Safety and Homeland Security Bureau (PSHSB or Bureau), on delegated authority, adopts a revised 800 MHz band plan for the U.S. Virgin Islands (USVI) in order to accomplish the Commission’s goals for 800 MHz band reconfiguration. The band plan is identical to that recently adopted for Puerto Rico.1 Herein, we direct the 800 MHz Transition Administrator, LLC (TA) to apportion spectrum in the ESMR portion of the band,2 and we establish a one year transition period for completion of rebanding in the USVI, commencing on March 21, 2011 and ending on March 20, 2012.

II. BACKGROUND

2. On April 26, 2010 we adopted the Third Report and Order and Third Further Notice of Proposed Rulemaking, which revised the 800 MHz band plan for Puerto Rico and sought comment on adopting an identical band plan for the USVI.3 In the Third Report and Order we adopted an 800 MHz band plan for the Puerto Rico NPSPAC Region (Region 47), including the “new” NPSPAC band at 851-854 MHz, an “interleaved” band allocation, and slightly modified Expansion Band and Guard Band allocations.4 The Third Report and Order also clarified how the TA would apportion spectrum in the 800 MHz “ESMR band” in Puerto Rico between 862-869 MHz to accommodate as many as three Economic Area licensees, i.e. North Sight Communications, Inc., Preferred Acquisitions Inc., (Preferred) and Sprint Nextel Corp.5 The Third Report and Order established an eighteen month transition period to complete 800 MHz band reconfiguration in the Puerto Rico NPSPAC Region, including a 90-day mandatory

1 Improving Public Safety Communications in the 800 MHz Band/New 800 MHz Band Plan for the U.S. Virgin Islands, WT Docket No. 02-55, Third Report and Order and Third Further Notice of Proposed Rulemaking, 25 FCC Rcd 4443 (PSHSB 2010) (Third Report and Order and Third FNPRM).

2 “ESMR” refers to “Enhanced Specialized Mobile Radio,” a term used to designate 800 MHz systems that employ cellular system architecture.

3 Third Report and Order, 25 FCC Rcd at 4451-52 ¶¶ 25.

4 Id. at 4444-45 ¶¶ 5-6.

5 Id. at 4449 ¶¶ 13-15. We note that EA licensee High Tech, which holds 20 EA channels in the USVI, has not elected to relocate to the ESMR band. Id.

negotiation period for remaining incumbents.⁶ In the *Third Further Notice of Proposed Rulemaking*, we sought comment on our tentative conclusion to adopt for the USVI the same band plan we adopted for Puerto Rico.⁷ We also sought comment on the appropriate rebanding timetable for the USVI, *e.g.*, should we implement an 18-month timetable similar to the Puerto Rico timetable, or would a different, possibly shorter, timetable be appropriate?⁸

3. Sprint Nextel Corp filed comments in support of immediate adoption of the proposed USVI band plan.⁹ Smartcomm, L.L.C., Kenneth Fry, and Preferred Spectrum Investments, L.L.C. (collectively, Smartcomm) filed joint comments in opposition claiming that “[t]he TA’s band plan for Puerto Rico is flawed and its application to the Virgin Islands would be flawed for similar reasons” and that the USVI band plan “should be rejected for the reasons noted in Smartcomm’s Petition for Reconsideration of the [Third Report and Order]”.¹⁰ In its Petition for Reconsideration of the Puerto Rico order, Smartcomm argued that (1) Puerto Rico should be treated in the same manner as the Commission treated the SouthernLINC Region in the Southeastern United States; (2) the Puerto Rico band plan improperly encumbers non-Sprint ESMR licensees and ESMR eligibles; (3) the reassignment of channels in Puerto Rico represents an inappropriate windfall to Sprint; and (4) the Bureau exceeded its delegated authority in adopting the Puerto Rico band plan.¹¹ No reply comments were filed.

III. DISCUSSION

4. As noted above, Smartcomm filed a petition for reconsideration of the *Third Report and Order*, which adopted the Puerto Rico band plan, and adopts the same arguments it made there into its instant comments.¹² The Bureau dismissed in part and denied in part Smartcomm’s petition for reconsideration of the Puerto Rico order on February 7, 2011.¹³ For the reasons explained in the *Memorandum Opinion and Order* disposing of Smartcomm’s petition for reconsideration of the Puerto Rico order, we find Smartcomm’s comments here, with respect to the USVI, unpersuasive. Applying the Puerto Rico band plan to the USVI does not pose an inequitable burden on Smartcomm because Smartcomm holds no spectrum in the USVI. Moreover, the USVI band plan equitably accommodates all ESMR-eligible licensees with replacement spectrum, including Preferred, should it relocate to the ESMR band. We see no need, or public interest benefit, to configure the 800 MHz band in the manner proposed by Smartcomm. The USVI band plan we adopt today is preferable to Smartcomm’s proposed band plan because it equitably accommodates ESMR-eligible licensees and benefits public safety. Although there currently are no 800 MHz public safety systems in the USVI, there are multiple public safety agencies eligible to operate on 800 MHz public safety spectrum that may require facilities in the future.

5. Accordingly, we are adopting our tentative conclusions in the *Third Further Notice of Proposed Rulemaking* in order to facilitate prompt completion of 800 MHz band reconfiguration in the USVI. We agree with the TA and Sprint “that because the Puerto Rico and U.S. Virgin Islands are contained within the same Economic Area for licensing purposes, it make sense to adopt the same band

⁶ *Id.* at 4451 ¶¶ 18, 20.

⁷ *Id.* 4451-52 ¶ 25.

⁸ *Id.*

⁹ Comments of Sprint Nextel Corporation at 2 (Sprint Comments).

¹⁰ Comments of Smartcomm, LLC at 1-2 (Smartcomm Comments).

¹¹ *Id.* at Attachment A, (copy of Smartcomm’s July 26, 2010 Petition for Reconsideration of the Puerto Rico Order).

¹² *Id.*

¹³ See Improving Public Safety Communications in the 800 MHz Band/New 800 MHz Band Plan for Puerto Rico and the U.S. Virgin Islands. WT Docket 02-55, *Memorandum Opinion and Order*, DA 11-197 (PSSB rel. Feb. 7, 2011).

plan in both NPSPAC Regions.”¹⁴ Further, there are a small number of “site-specific” licensees in the ESMR band that must be retuned to the lower portion of the 800 MHz band, just as in the Puerto Rico NPSPAC Region.¹⁵ Sprint notes that “the 800 MHz band reconfiguration process is already far along and near completion in [the USVI].”¹⁶ Sprint adds that “[t]he ‘new’ NPSPAC band has already been cleared of 1-120 channel incumbent site-specific licensees and the ‘old’ NPSPAC band has no 800 MHz incumbents to be retuned into the former 1-120 channel block.”¹⁷ Thus, Sprint submits that “800 MHz retuning of public safety licensees in the U.S. Virgin Islands is already complete.”¹⁸ We agree with Sprint that “[a]ll that remains in the U.S. Virgin Islands is the retuning of a small number of incumbents out of the ESMR band and consolidation of any [EA] licensees authorized to retune to the ESMR band.”¹⁹ Therefore we adopt the same band plan and procedures for the USVI as we did in Puerto Rico.²⁰

6. We also find that the transition period to complete reconfiguration for the remaining small number of 800 MHz licensees that must be retuned in the USVI should be harmonized with the transition period for Puerto Rico in order to avoid unnecessary delays and costs.²¹ Sprint favors “a shorter period for implementation of reconfiguration in the [USVI] to make its deadline consistent with the Puerto Rico deadline.”²² The TA also favors harmonizing the USVI and Puerto Rico timelines and has encouraged licensees in the USVI subject to rebanding “to develop cost estimates for the reconfiguration of their systems and to commence Frequency Reconfiguration Agreement (FRA) negotiations at the same time as Puerto Rico licensees.”²³ Indeed, on August 17, 2010, the TA sent replacement frequency proposals to the USVI licensees, and noted that the proposed replacement frequencies are contingent upon

¹⁴ The TA noted that “[b]ecause both Puerto Rico and the USVI are in the same EA, EA174, and have the same EA licenses, the USVI faces the same shortage of ESMR spectrum as in Puerto Rico.” See Proposal for Adoption of an Alternative 800 MHz Band Plan and Negotiation Timetable for Puerto Rico and the U.S. Virgin Islands Economic Area at 11 (TA Proposal). *Id.* Similarly, the TA added “there are also high-site incumbents in the USVI to be relocated from the ESMR Band.” *Id.* Accordingly, the TA determined “that the USVI is served best by the same alternative band plan as Puerto Rico.” *Id.* The TA concluded that “[u]sing the same alternative band plan for the entire EA will also permit frequency planning and future spectrum coordination to be performed more efficiently and will not cause any increase in the number of frequency reconfiguration agreements.” *Id.*; see also Sprint Comments at 2.

¹⁵ TA Proposal at 11.

¹⁶ Sprint Comments at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Third Report and Order*, 25 FCC Rcd at 4449 ¶ 13. In the USVI, we note that High Tech has 20 EA channels, North Sight holds 120 EA channels, Preferred has 125 channels and Sprint Nextel holds 165 EA channels. None of these licensees has any remaining site-specific channels in USVI and High Tech has not elected to relocate to the ESMR band in the USVI. Currently, Sprint, North Sight, and Preferred Acquisitions, Inc., collectively, hold 410 EA channels, whereas the reconfigured ESMR band will accommodate only 280 channels. To address this shortfall, we direct the TA to use the same procedures outlined in the *Third Report and Order*. *Id.* at 4449 ¶¶ 13-14.

²¹ Sprint Comments at 3. Sprint “suggests that the timetable for retuning incumbent licensees in U.S. Virgin Islands be consistent with the established timetable for retuning of incumbents in Puerto Rico.” *Id.* Sprint contends that “[d]elays in one NPSPAC Region cannot be permitted to result in a delay or additional costs in retuning for a single licensee authorized and required to relocate in both NPSPAC Regions.” *Id.*

²² *Id.* Sprint also supports a single 90-day mandatory negotiation period for remaining incumbents in U.S. Virgin Islands. Sprint Comments at n.6.

²³ Implementation Plan at 12.

the FCC's adoption of a final band plan for the USVI.²⁴ We similarly encouraged USVI licensees voluntarily to comply with the Puerto Rico timelines.²⁵ Thus, we believe that most, if not all, of the USVI licensees have already completed planning and negotiations and are well on their way to completing rebanding consistent with the Puerto Rico implementation schedule. Accordingly, we require all USVI high-site incumbents to clear the ESMR band by September 20, 2011 and that all USVI licensees complete reconfiguration by March 20 2012.

7. Although we believe that the USVI licensees have had ample opportunity to implement rebanding, to the extent that some licensees have not completed negotiations, we are providing a 90-day period to complete planning and negotiations followed, if necessary, by a 30-day-mediation period. This 120-day period will commence on March 21, 2011 and will expire on July 19, 2011. We believe that this approach reasonably balances the time needed for licensees and Sprint to negotiate FRAs and the Commission's goal of completing rebanding in a timely manner.²⁶

IV. PROCEDURAL MATTERS

8. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore it does not contain any new or modified "information burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 332, this *Fourth Report and Order* IS ADOPTED.

10. IT IS FURTHER ORDERED that the amendments of the Commission's Rules set forth in Appendix B and Appendix C ARE ADOPTED, effective upon the date of publication of this *Fourth Report and Order* in the Federal Register.

11. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Certification required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. § 604, and as set forth in Appendix A herein is ADOPTED.

²⁴ *Id.*

²⁵ See Public Safety and Homeland Security Bureau Announces that the 18-Month Transition Period for 800 MHz Reconfiguration in Puerto Rico (Region 47) Will Commence on September 20, 2010, WT Docket 02-55, *Public Notice*, 25 FCC Rcd 13110, 13114 (PSHSB 2010).

²⁶ In a companion Public Notice, we establish implementation plan and application freeze dates. See Public Safety and Homeland Security Bureau Announces that the 12-Month Transition Period for 800 MHz Band Reconfiguration in the United States Virgin Islands (Region 48) Will Commence on March 21, 2011, WT Docket 02-55, *Public Notice*, DA 11-316 (PSHSB rel. Feb. 18, 2011). This is consistent with the approach we adopted in Puerto Rico. *Supra* n.25.

12. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

James Arden Barnett, Jr.
Rear Admiral (Ret.)
Chief, Public Safety and Homeland Security Bureau

APPENDIX A

FINAL REGULATORY FLEXIBILITY CERTIFICATION

13. The Regulatory Flexibility Act of 1980 (RFA),²⁷ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”²⁸ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³¹ In sum, we certify that the rule changes and actions in this *Fourth Report and Order* will have no significant economic impact on a substantial number of small entities.

14. In this *Fourth Report and Order*, the Public Safety and Homeland Security Bureau, on delegated authority, establishes a revised 800 MHz band plan for the U.S. Virgin Islands (USVI) in order to accomplish the Commission’s goals for band reconfiguration. The band plan is identical to the band plan that the Commission first adopted in this proceeding with one exception—the USVI band plan includes a slightly larger Expansion Band and a slightly smaller Guard Band.³² The Expansion and Guard Bands we establish do not impact a significant number of small businesses, and our aim is to provide interference protection to eligible non-ESMR licensees. Furthermore, although ESMR licensees and ESMR-eligible licensees may be subject to a *pro rata* apportionment of spectrum, their operating capacity will not be significantly reduced, and hence the economic effect on their operations will not be significant.³³ Therefore, we certify that the requirements of this *Fourth Report and Order* will not have a significant economic impact on a substantial number of small entities.

15. The Commission will send a copy of the *Fourth Report and Order* including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the *Fourth Report and Order* and this

²⁷ The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²⁸ 5 U.S.C. § 605(b).

²⁹ 5 U.S.C. § 601(6).

³⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

³¹ Small Business Act, § 15 U.S.C. 632.

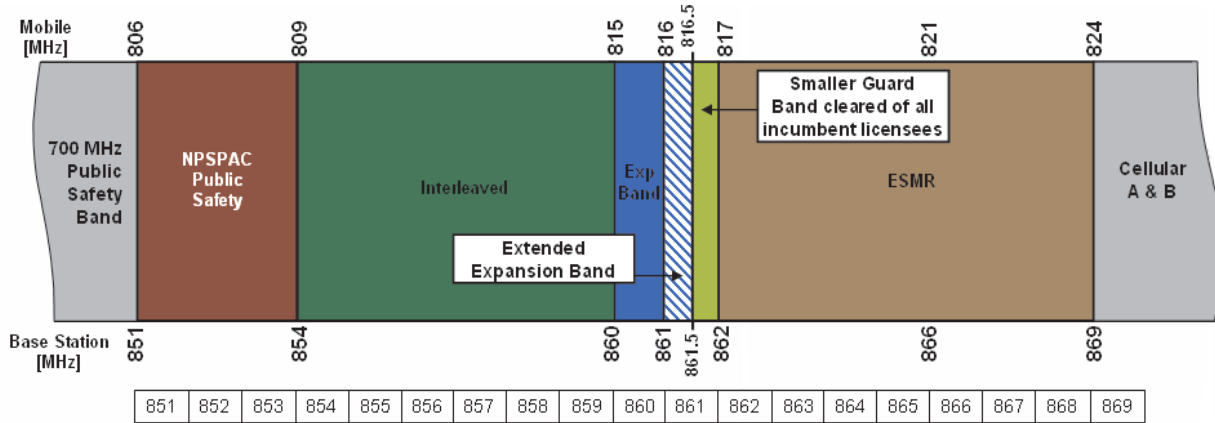
³² The USVI band plan, however, is identical to the band plan that the Public Safety and Homeland Security Bureau recently adopted for Puerto Rico.

³³ Sprint may lose significant amounts, or all, of its USVI spectrum if it becomes necessary to apportion ESMR spectrum to accommodate other licensees. See *800 MHz Second MO&O*, 22 FCC Rcd at 10479-80 ¶ 33. Sprint, however, which bears financial responsibility for 800 MHz band reconfiguration, received 10 MHz of spectrum at 1.9 GHz pursuant to the Commission’s 800 MHz orders. See generally *800 MHz Report and Order*.

certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

APPENDIX B

U.S. VIRGIN ISLANDS BAND PLAN



APPENDIX C

FINAL RULES

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

48. The authority citation for Part 90 continues to read as follows:

AUTHORITY: 4(i), 11, 303(g), 303(r), and 302(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

49. Paragraphs (1) and (2) of Section 90.617(k) are modified and new paragraphs (3) and (4) are added to Section 90.617(k). The introductory text in Section 90.617(k) is left unchanged.

§ 90.617 Frequencies in the 809.750-824/824.750-869 MHz, and 896-901/935-940 MHz bands available for trunked, conventional or cellular system use in non-border areas.

* * * * *

(k) ***

(1) Mobile units (except in Puerto Rico and the U.S. Virgin Islands):

(i) For channels 511 to 524—the minimum median desired signal levels specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) shall apply;

(ii) For channels 524 to 534—the minimum median desired signal level shall increase linearly from the values specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) to -70 dBm;

(iii) For channels 534 to 550—the minimum median desired signal level shall increase linearly from -70 dBm to -65 dBm.

(2) Portable units (except in Puerto Rico and the U.S. Virgin Islands):

(i) For channels 511 to 524—the minimum median desired signal levels specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) shall apply;

(ii) For channels 524 to 530—the minimum median desired signal level shall increase linearly from the values specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) to -80 dBm;

(iii) For channels 530 to 534—the minimum median desired signal level shall increase linearly from -80 dBm to -70 dBm;

(iv) For channels 534 to 550—the minimum median desired signal level shall increase linearly from -70 dBm to -65 dBm.

(3) Mobile units operating in Puerto Rico and the U.S. Virgin Islands:

(i) For channels 511 to 530—the minimum median desired signal levels specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) shall apply;

(ii) For channels 531 to 534—the minimum median desired signal level shall increase linearly from -80.2 dBm to -70 dBm;

(iii) For channels 534 to 550—the minimum median desired signal level shall increase linearly from -70 dBm to -65 dBm.

(2) Portable units operating in Puerto Rico and the U.S. Virgin Islands:

(i) For channels 511 to 530—the minimum median desired signal levels specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i) shall apply;

(ii) For channels 531 to 534—the minimum median desired signal level shall increase linearly from -80 dBm to -70 dBm;

(iv) For channels 534 to 550—the minimum median desired signal level shall increase linearly from -70 dBm to -65 dBm.

50. Sections 90.677(b) and (c) are amended.

§ 90.677 Reconfiguration of the 806-824/851-869 band in order to separate cellular systems from non-cellular systems

* * * * *

(b) *Voluntary negotiations.* Thirty days before the start date for each NPSPEC region other than Region 47 and Region 48, the Chief, Public Safety and Homeland Security Bureau will issue a public notice initiating a three-month voluntary negotiation period. During this voluntary negotiation period, Nextel and all incumbents may negotiate any mutually agreeable relocation agreement. Sprint Nextel and relocating incumbents may agree to conduct face-to-face negotiations or either party may elect to communicate with the other party through the Transition Administrator.

(c) *Mandatory negotiations.* If no agreement is reached by the end of the voluntary period, a three-month mandatory negotiation period will begin during which both Sprint Nextel and the incumbents must negotiate in “good faith.” In Region 47, a 90-day mandatory negotiation period will begin 60 days after the effective date of the *Third Report and Order and Third Further Notice of Proposed Rulemaking* in WT Docket 02-55. In Region 48, a 90-day mandatory negotiation period will begin on March 21, 2011. Sprint Nextel and relocating incumbents may agree to conduct face-to-face negotiations or either party may elect to communicate with the other party through the Transition Administrator. All parties are charged with the obligation of utmost “good faith” in the negotiation process. Among the factors relevant to a “good-faith” determination are:

(1) Whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities;

(2) The steps the parties have taken to determine the actual cost of relocation to comparable facilities; and

(3) Whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party. The Transition Administrator may schedule mandatory settlement negotiations and mediation sessions and the parties must conform to such schedules.

APPENDIX D

LIST OF COMMENTING PARTIES

COMMENTS

Smartcomm, L.L.C., Kenneth Fry, and Preferred Spectrum Investments, LLC.
Sprint Nextel Corporation