

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

In the Matter of

Liberty Communications, Inc.)	
)	PS Docket No. 02-55
and)	
)	Mediation No. TAM-50034
Sprint Nextel Corp.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2012

Released: September 21, 2012

By the Commission:

1. On July 30, 2010, Liberty Communications, Inc. (Liberty) filed an Application for Review of a July 16, 2010 *Memorandum Opinion and Order* issued by the Commission's Public Safety and Homeland Security Bureau.¹ For the reasons set out below, we deny the Application for Review.

I. BACKGROUND

2. The *Bureau Liberty Order* resolved a dispute between Liberty and Sprint Nextel Corporation (Sprint) concerning the rebanding of Liberty's 800 MHz Specialized Mobile Radio (SMR) system. Central to the dispute was whether Liberty had received "comparable facilities"² post-rebanding, an issue which was resolved in Sprint's favor. In its Application for Review, Liberty contests only one aspect of the *Bureau Liberty Order*, *i.e.*, the Bureau's determination that certain channels that Liberty received, post-rebanding, are comparable to its pre-rebanding channels.

3. Specifically, prior to rebanding, only one of Liberty's channels was separated by less than 100 kHz from other channels in Liberty's system whereas, after rebanding, there are three pairs of channels that are separated by 25 kHz, two pairs of channels separated by 50 kHz and one pair of channels separated by 75 kHz.³ Liberty contends that "basic generally accepted engineering principles" recommend "at least 100 kHz between adjacent receive channels on the same receive system."⁴ Because certain of its post-rebanding channels lack this 100 kHz minimum spacing, Liberty claims it faces

¹ Liberty Communications Inc. and Sprint Nextel Corp., *Memorandum Opinion and Order*, 25 FCC Rcd 9197 (PSHSB 2010)(*Bureau Liberty Order*). Sprint Nextel Corp. filed an Opposition to Application for Review on August 16, 2010 (Sprint Opposition). Liberty filed a Reply to Opposition to Application for Review on August 30, 2010 (Liberty Reply).

² The Commission has defined comparable facilities as those that 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." 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, 15077 ¶ 201 (2004) (*800 MHz Report and Order*).

³ *Bureau Liberty Order* 25 FCC Rcd at 9205 ¶ 24.

⁴ Application for Review at 3.

“difficulties . . . characterized by pervasive, actual and unavoidable interference.”⁵ Therefore, Liberty asserts that its post-rebanding channels are not comparable to its pre-rebanding channels,⁶ and contends that Sprint should be responsible for obtaining new channels for Liberty’s system or for replacing Liberty’s network equipment. In a single sentence in its Application for Review, Liberty requests that the Commission stay the effectiveness of the *Bureau Liberty Order* pursuant to section 1.102(b)(3) of the Commission’s rules.⁷

4. The *Bureau Liberty Order* held that the Commission’s rules do not protect licensees from interference originating from signals on adjacent channels. Thus, in its 2005 rebanding *Memorandum Opinion and Order* the Commission explicitly stated that “[a]s with the rules for applications for new licenses, the TA [Transition Administrator] need not consider adjacent channel stations when specifying a replacement channel.”⁸ The *Bureau Liberty Order* observed that, even if Liberty were afforded its preferred channel spacing, its system still could be susceptible to interference from the portable and mobile units of other licensees.⁹ In response to Liberty’s claim that its post-rebanding channel configuration was not comparable to its pre-rebanding channel configuration, the Bureau cited the Commission’s statement that “[o]ur rules do not . . . mandate identical channel configuration” for rebanding licensees.¹⁰

II. DISCUSSION

5. Under Section 1.115(b)(2) of the Commission’s rules, a party filing an Application for Review must demonstrate one of the following:

that the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; that the action involves a question of law or policy which has not previously been resolved by the Commission; that the action involves application of a precedent or policy which should be overturned or revised; an erroneous finding as to an important or material question of fact; or prejudicial procedural error.¹¹

In its Application for Review, Liberty asserts that the Bureau has made an erroneous finding of fact in concluding that Liberty’s post-reconfiguration channels give Liberty “comparable facilities.”¹²

6. The Commission has defined comparable facilities for purposes of 800 MHz rebanding in terms of (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs.¹³ Liberty claims that, with its post-

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2.

⁸ *Bureau Liberty Order* at 9205 ¶ 25 n.83 citing *Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order*, 20 FCC Rcd 16015, 16033 ¶ 40 n.85 (2005) (*800 MHz Memorandum Opinion and Order*); See also 47 C.F.R. § 90.621(b).

⁹ *Bureau Liberty Order* at 9205 ¶ 25. Liberty alleges that it is receiving interference from its own customers’ use of mobile and portable units on nearby channels. Liberty Reply at 2.

¹⁰ *Bureau Liberty Order* at 9205 citing *Upper 200 SMR Second Report and Order*, 12 FCC Rcd 19079, 19112-13 ¶ 2 (1997).

¹¹ 47 C.F.R. § 1.113(b)(2).

¹² Application for Review at 1.

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

rebanding frequencies, its “system will no longer trunk properly” and therefore has “inferior channel capacity, inferior signaling capability, baud rate and access time, inferior geographic coverage and higher operating costs.”¹⁴

7. Nothing in Liberty’s Application for Review leads us to conclude that the Bureau erred as to an important or material question of fact regarding Liberty’s channel assignments. Liberty claims that it has not received comparable facilities because its system is “fundamentally incapable of supporting viable operations.”¹⁵ Specifically, Liberty asserts that it experiences adjacent channel interference within Liberty’s own system because some of its replacement channels are spaced by less than 100 kHz.¹⁶ We find that the *Bureau Liberty Order* properly rejected these claims. In the *800 MHz Memorandum Opinion and Order*, the Commission, elaborating on the contours of the “comparable facilities” standard established in the *800 MHz Report and Order* that is applicable here, expressly held that the TA need not take channel adjacency into account when assigning replacement channels.¹⁷ As indicated in the *Bureau Liberty Order*, the Commission’s rules provide licensees no protection against adjacent channel interference, whether originating from its own or from another licensee’s channels.¹⁸ Thus, as the *Bureau Liberty Order* properly concluded, Liberty’s claims of interference are immaterial to whether it has received comparable facilities.¹⁹

8. Liberty also claims that the *Bureau Liberty Order* is “fatally flawed” because its discussion focuses on adjacent channel interference originating from other licensees, rather than Liberty, and because it found that Liberty failed to show any actual, rather than potential, interference.²⁰ These claims are not only immaterial for the reasons already given, but also inaccurate. As indicated above, the *Bureau Liberty Order* correctly held that Liberty had been provided “comparable facilities,” rejecting Liberty’s claims relating to adjacent channel interference. The fact that the *Bureau Liberty Order* discussed Liberty’s complaints of interference does not render them material to the *Order*’s conclusion that Liberty has been provided with “comparable facilities.” On the contrary, the Commission’s decisions make it clear that adjacent channel interference is immaterial to the “comparable facilities” calculus. The *Order* correctly makes no distinction whether such interference originates from a licensee’s or another entity’s adjacent channel or whether the alleged interference is actual or potential. Thus, the *Order* is not at all flawed, much less “fatally” so; the Bureau was merely disposing of Liberty’s claim. Nor was the *Order* erroneous in stating that Liberty failed to support its claims of actual, rather than merely potential, interference.²¹

¹⁴ Application for Review at 3-4.

¹⁵ Application for Review at 3.

¹⁶ Application for Review at 3-4.

¹⁷ *Bureau Liberty Order* 25 FCC Rcd at 9205-9206 ¶ 25, citing *800 MHz Memorandum Opinion and Order*, 20 FCC Rcd at 16033 n.85 (“[a]s with the rules for applications for new licenses, the TA need not consider adjacent channel stations when specifying a replacement channel”). See also 47 C.F.R. § 90.621(b).

¹⁸ *Id.*

¹⁹ *Id.* at ¶¶ 25-28.

²⁰ Application for Review at 3-4.

²¹ *Bureau Liberty Order*, 25 FCC Rcd at 9205-06 ¶ 26. Although Liberty claimed that the Bird Technologies report, *supra*, documented the existence of the interference that Liberty claims render its post-rebanding frequencies non-comparable, the Bureau’s examination of that report revealed that it “contains no instance of actual adjacent channel interference” to Liberty’s system.. The exhibit Liberty provided with its Application for Review also fails to do so; it shows only that some of Liberty’s replacement channels are spaced by less than 100 kHz – a fact not disputed in the *Bureau Liberty Order*. Moreover, nothing in the report or elsewhere in the record supports Liberty’s claim that its system does not “trunk properly” or is deficient in the other respects that Liberty claims. On March 31, 2011, (continued....)

9. In claiming that Sprint should pay for new network equipment for Liberty's system, Liberty cites the Commission's *800 MHz Second Report and Order*,²² in which the Commission required Sprint to compensate Canada border licensees that had to install more efficient transmitter combiners in order to accommodate decreased frequency separation. We find Liberty's reliance on the *800 MHz Second Report and Order*'s provisions respecting transmitter combiners unavailing and reject its claim. Absent more efficient transmitter combiners, some Canada border licensees affected by the *800 MHz Second Report and Order* would have encountered excessive combiner loss with close-spaced frequencies. The excess combiner loss would have caused a reduction in effective radiated power, hence depriving those licensees of "coextensive geographic coverage" – an element of "comparable facilities."²³ Liberty, however, has encountered no reduction in effective radiated power on its post-reconfiguration frequencies. Unlike the Canada border licensees, Liberty's post-reconfiguration effective radiated power is unaffected and its geographical coverage is thus coextensive with its pre-reconfiguration coverage. Accordingly, to the extent that Liberty believes that it will encounter adjacent channel interference in its system, it may implement the changes it believes necessary to abate that interference. The cost of such changes to Liberty's existing interference-susceptible equipment, however, is not Sprint's responsibility because the Commission's rules do not protect licensees against adjacent channel interference. As the *Bureau Liberty Order* properly found, "[r]equiring Sprint to pay for providing Liberty with a more interference resistant system post-reconfiguration would be an undeserved 'upgrade,' *i.e.*, it would not be consistent with the policy that licensees must reband at the minimum reasonable cost."²⁴

10. We dismiss Liberty's request for a stay of the *Bureau Order* as improperly filed. As noted above, Liberty requests a stay in a single sentence in its Application for Review. Section 1.44(e) of the Commission's rules²⁵ provides that stay requests must be filed as a separate pleading, and any request not filed as a separate pleading will not be considered by the Commission. In addition, Liberty makes no

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several months after close of the pleading cycle for Liberty's Application for Review, Bird Technologies filed a letter in this docket purporting to clarify that during its field investigation of Liberty's 800 MHz SMR system in Northern Florida, Bird detected actual interference into Liberty's operations as a result of close spacing of five of the rebanded channels, and that this interference was sufficient to preclude the effective operation of Liberty's system. Letter to Marlene H. Dortch, Secretary, FCC from Donald E. Huston, Motorola Strategic Account Manager, Bird Technologies Group (received March 31, 2011)(Bird Letter). Bird further asserts that these findings are discussed in its September 12, 2008 report (Bird Report) which was included in the record. The Bird Report alludes to a Liberty document discussing "[m]iscellaneous other intermittent and random problems" from April 1, 2007 through August 31, 2007. That Liberty document, however, is not in the record. The Bird Report itself discusses only potential interference based on the characteristics of Liberty's system. Thus, the *Bureau Liberty Order* accurately stated that the Bird Report only discusses potential interference and contains no instance of actual adjacent channel interference. *See Bureau Liberty Order*, 25 FCC Rcd 9197, 9205 ¶ 26. We reject the Bird Letter because, even assuming it is responsive to matters raised in an opposition to the Application for Review, it is untimely, having been filed seven months after the record closed on August 26, 2010 for Liberty's Application for Review and more than two years after the record closed on December 3, 2008 for the *Bureau Liberty Order*. *See* 47 C.F.R. § 1.115(d); *see also Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C.Cir. 1941)("We cannot allow a party to 'sit back' and hope that a decision will be in its favor, and when it isn't, to parry with an offer of more evidence"). As an alternative and independent basis for rejecting the Bird Letter, we conclude that Bird's assertions, even if they had been accurate, are immaterial to the Bureau's conclusion that Liberty is entitled to no relief from Sprint as a result of any adjacent channel interference, as indicated above.

²² Improving Public Safety Communications in the 800 MHz Band - Plan for U.S. Canada Border Regions, *Second Report and Order*, 23 FCC Rcd 7605, 7614 ¶ 19 (PSHSB 2008).

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

²⁴ *Bureau Liberty Order*, 25 FCC Rcd 9197, 9205 ¶ 27.

²⁵ 47 C.F.R. § 1.44(e).

attempt to show why it should be granted a stay.²⁶ In any event, because Liberty's request covers only the period while its Application for Review was pending, it is now moot.

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303 and Sections 1.44(e) and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.44(e), 1.115, that the Application for Review, filed July 30, 2010 by Liberty Communications, Inc., IS DENIED and its request for a stay is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ See, e.g., 47 C.F.R. § 1.3 (Commission may suspend its rules for "good cause shown").