

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

In the Matter of
Commonwealth of Massachusetts
and
Sprint Nextel Corporation
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WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2012

Released: September 20, 2012

By the Commission:

I. INTRODUCTION

1. On March 4, 2011, the Commonwealth of Massachusetts (the Commonwealth) filed an Application for Review of a February 3, 2011 Memorandum Opinion and Order (Massachusetts Order) issued by the Commission's Public Safety and Homeland Security Bureau (PSHSB or Bureau). For the reasons set forth below, we deny the application for review and affirm the Bureau's decision.

II. BACKGROUND

2. The 800 MHz Report and Order and subsequent orders in this docket require Sprint to negotiate a Frequency Reconfiguration Agreement (FRA) with each 800 MHz licensee that is subject to rebanding. The FRA must provide for relocation of the licensee's system to its new channel assignment(s) at Sprint's expense, including the expense of retuning or replacing the licensee's equipment, as required. If a licensee and Sprint are unable to negotiate a FRA, they enter mediation under the auspices of a Transition Administrator (TA) appointed mediator. If the parties do not reach agreement in mediation, the mediator forwards the mediation record and a recommended resolution to the PSHSB for de novo review.

3. The Massachusetts Order addressed a dispute between the Commonwealth and Sprint over

1 Application for Review, filed March 4, 2011 by the Commonwealth of Massachusetts (Massachusetts AFR).

2 Commonwealth of Massachusetts and Sprint Nextel, Memorandum Opinion and Order, 26 FCC Rcd 1068 (PSHSB 2011) (Massachusetts Order).

3 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, 15021-45, 15069 ¶¶ 88-141, 189 (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); and Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005).

4 The 800 MHz Report and Order originally provided for referral and de novo review of unresolved mediation issues by the Public Safety and Critical Infrastructure Division of the Commission's Wireless Telecommunications Bureau. 800 MHz Report and Order, 19 FCC Rcd at 15075 ¶ 201. However, the Commission has since delegated this authority to the Public Safety and Homeland Security Bureau. See Establishment of Public Safety and Homeland Security Bureau, Order, 21 FCC Rcd 10867 (2006).

whether the comparable facilities standard, and Section 90.699(d) of the Commission's rules,⁵ compelled Sprint to pay for the narrowbanding⁶ of 31 bi-directional amplifiers (BDAs) which the Commonwealth installed in vehicular tunnels prior to the commencement of commercial cellular service in the tunnels.⁷ The Bureau found that Sprint was not responsible for the cost of narrowbanding the BDAs.⁸

4. On March 4, 2011, the Commonwealth filed the instant application for review of the *Massachusetts Order*. In its application for review, the Commonwealth contends that the Bureau did not adequately perform a *de novo* review and misapplied the Commission's 800 MHz rebanding orders when it found that Sprint was not responsible for the cost of narrowbanding the BDAs.⁹ Specifically, the Commonwealth argues that the Bureau did not address "[the Commonwealth's] position why Sprint Nextel is responsible and why its technical analysis is credible and interference is real."¹⁰ In addition, the Commonwealth argues that the Bureau's decision "defeats the central objective of the Commission's work – to ensure public safety operations are not interfered with by commercial operations."¹¹

III. DISCUSSION

5. The obligation that is at issue here is Sprint's obligation to provide rebanding licensees with comparable facilities at minimum necessary cost.¹² The Commonwealth conflates that obligation with the obligation of Sprint and other carriers to abate unacceptable interference to 800 MHz public safety systems if that interference actually occurs¹³ in order to argue that Sprint is obligated to narrowband the Commonwealth's BDAs.

A. *De Novo* Review

6. The Commonwealth contends that, because the Bureau characterized two reports the Commonwealth submitted in the record as "irrelevant," the Bureau did not perform a *de novo* review of the record presented to it by the TA Mediator.¹⁴ We disagree with this assessment. From the text of the

⁵ The comparable facilities standard, states that licensees are only entitled to facilities that will provide the same level of service as the licensees' existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, this standard includes (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. *See 800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201. *See also*, 47 C.F.R. § 90.699(d).

⁶ Narrowbanding, as used herein, refers to the modification or replacement of bi-directional amplifiers so that they amplify only the public safety channels in the 800 MHz band.

⁷ *Massachusetts Order*, 26 FCC Rcd 1068 at ¶ 3. As presently configured, the BDAs operate on a "wideband" basis, *i.e.*, they receive, amplify, and retransmit all 800 MHz band signals.

⁸ *Id.* 26 FCC Rcd 1071-72 at ¶¶ 12-15.

⁹ *Massachusetts AFR* at 4-7.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 2.

¹² *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71 (2004) (the Minimum Cost Standard requires that costs associated with rebanding be reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use.")

¹³ 47 C.F.R. § 90.674.

¹⁴ *Massachusetts AFR* at 1-2. The reports in question are one provided by the Andrew Corporation – "Interference Analysis for Central Artery Tunnel Wireless Communications System." (Andrew Report) and the Commonwealth's in-house study – "800 MHz Rebanding -Metropolitan Highway System Tunnel RF Boosters" (White Paper). *Massachusetts Order*, 26 FCC Rcd 1070 at ¶ 7.

Massachusetts Order it is clear that the Bureau considered the two reports and agreed that wideband BDAs could potentially be susceptible to the interference conditions in the tunnels that the reports predicted would occur. The order, however, concluded (i) that the potential for interference existed before the Commonwealth's system was rebanded; and (ii) that rebanding actually reduced the potential for interference.¹⁵ Because the potential for interference pre-dated rebanding of the Commonwealth's 800 MHz system, the Bureau found that the reports submitted by the Commonwealth, while technically correct, were irrelevant from an evidentiary standpoint because they were not probative of the question of whether Sprint was responsible for the cost of narrowbanding the BDAs. We thus find that the Bureau satisfied its *de novo* review obligations and that its characterization of the studies as irrelevant is accurate.

B. The Comparable Facilities Standard

7. The *Massachusetts Order* points out that BDAs became potentially susceptible to interference when cellular service was initiated in the tunnels – an event that occurred prior to commencement of FRA negotiations. Thus, it was the inauguration of cellular service, not rebanding, that rendered the BDAs potentially susceptible to interference from cellular operations in the tunnels. Therefore, in performing the comparable facilities calculus, the Bureau first evaluated the status of the BDAs when rebanding began (when the BDAs were already potentially susceptible to interference); and, second, evaluated the status of the BDAs at the conclusion of rebanding (when the BDAs - which were not modified during the rebanding process - were still potentially susceptible to interference). The Bureau's evaluation showed that the pre-rebanding and post-rebanding status was identical and, therefore, that the Commonwealth had received comparable facilities.¹⁶

C. Adherence to Commission Directive

8. The Commonwealth contends that the Bureau failed to follow the legal and policy directives of the Commission's rebanding orders concerning interference. Specifically, the Commonwealth argues that the interference abatement procedures the Commission established in the *800 MHz Report and Order* required Sprint to modify or replace the BDAs once cellular commercial providers began operating in the tunnel system.¹⁷ For the following reasons, we find that the Bureau properly applied the Commission's policies and directive.:

9. First, the interference abatement procedures in the *800 MHz Report and Order*, codified in Section 90.674 of the Commission's rules,¹⁸ come into play only when unacceptable interference is actually encountered. Thus, if Sprint, or another carrier, causes actual unacceptable interference in the tunnels, that interference must promptly be abated. The Commonwealth, however, has not alleged that interference has occurred. The reports provided in the record show only that there is a *potential* for interference under certain circumstances if the Commonwealth's BDAs are not narrowbanded.

10. Second, if actual – rather than potential – interference were to occur, the interfering carrier's obligation to abate it would arise from Section 90.674 of the rules, not from application of the comparable facilities standard. Indeed, the obligations imposed by Section 90.674 of the rules survive rebanding and protect all 800 MHz public safety systems, whether or not they have been rebanded.

¹⁵ *Id.* at 1071-72, ¶¶12, 15.

¹⁶ The potential for interference to public safety was actually reduced as a consequence of rebanding, not because any changes were made to the BDAs, but because Sprint's operations were relocated to the Enhanced Specialized Mobile Radio band where they now have less potential for interference because they are spectrally separated from public safety frequencies.

¹⁷ Massachusetts AFR at 4-7.

¹⁸ 47 C.F.R. § 90.674.

11. In sum, we hold that the Bureau was correct in finding that narrowbanding of the Commonwealth's BDAs was not compelled by the comparable facilities standard and that Section 90.674 of the rules did not obligate Sprint to narrowband the Commonwealth's BDAs.¹⁹ Should actual unacceptable interference occur in the future, Section 90.674 will require the interfering carrier(s)²⁰ to promptly abate the interference.²¹

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that 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 Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review, filed March 4, 2011, by the Commonwealth of Massachusetts IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁹ In order for the Commonwealth to obtain relief under Section 90.674 of our rules it must first report that its system is receiving unacceptable interference. 47 C.F.R. §§ 90.674(a)(2)-(3). There is no record evidence of such a notification.

²⁰ To the extent that unacceptable interference results from the combination of signals from multiple licensees, Section 90.674 of the rules imposes joint and several liability for abating the interference. 47 C.F.R. § 90.674(b).

²¹ In the *800 MHz Report and Order*, the Commission made clear that in abating unacceptable interference, it is the *interfering* party that chooses the abatement method. *800 MHz Report and Order*, 19 FCC Rcd 14982-83 ¶ 20. Therefore, unacceptable interference, were it to occur, could be abated by means other than narrowbanding the Commonwealth's BDAs.