

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18

OPPOSITION OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint Nextel") hereby opposes two joint petitions for partial reconsideration filed in this proceeding by the City of Boston and other parties (the "Boston Group") and by Washoe County, Nevada, Chesapeake, Virginia, and the City of Overland Park, Kansas ("Washoe Group").¹ These petitioners challenge the

¹ City of Boston, *et al.* Petition for Partial Reconsideration (June 14, 2007) ("Boston Group Petition"); Petition for Partial Reconsideration of Washoe County, Nevada, the City of Chesapeake, Virginia, and the City of Overland Park, Kansas

Commission's decision in the *Second Memorandum Opinion and Order* confirming that 800 MHz incumbent licensees are responsible for funding their own post-mediation litigation activity.² The Commission should again uphold its decision. As it found in the *Second MO&O*, the Commission lacks statutory authority to require Sprint Nextel to cover these litigation costs. This policy is also consistent with the Commission's key early orders in this proceeding, and has greatly benefited 800 MHz reconfiguration by encouraging the resolution of disputes through mediation and limiting the amount of *de novo* review at the Commission. Accordingly, the Commission should reject the petitioners' recycled arguments and expeditiously deny their request.

I. THE COMMISSION SHOULD AFFIRM ITS DECISION IN THE *SECOND MO&O* THAT THE COSTS OF POST-MEDIATION LITIGATION ARE NOT RECOVERABLE FROM SPRINT NEXTEL

On December 30, 2005, the Wireless Telecommunications Bureau ("Bureau") issued a Public Notice regarding the negotiation and mediation obligations of "Wave 1" incumbent licensees in the 800 MHz reconfiguration process.³ Among other things, the Bureau in the *December 2005 Public Notice* reminded Wave 1 incumbents that "licensees who fail to reach a mediated agreement must bear their own costs associated [with] all further administrative or judicial appeals of band reconfiguration issues, including *de*

("Washoe Group") (Aug. 20, 2007) ("Washoe Group Petition"). (Unless otherwise indicated, all pleadings cited herein were filed in WT Docket No. 02-55.)

² *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Second Memorandum Opinion and Order, 22 FCC Rcd 10467 (2007) ("*Second Memorandum Opinion and Order*" or "*Second MO&O*").

³ Wireless Telecommunications Bureau Reminds 800 MHz "Wave One" Channel 1-120 Licensees of Band Reconfiguration Negotiation and Mediation Obligations, Public Notice, 20 FCC Rcd 20561 (WTB 2005) (DA 05-3355) ("December 2005 Public Notice").

novo review by PSCID and appeal of any such review before an ALJ.”⁴ Following this public notice, two parties sought reversal of the Bureau’s statement on parties’ litigation costs.⁵ On May 30, 2007, the Commission released the *Second MO&O*, in which it denied these parties’ requests and affirmed that incumbents’ post-mediation litigation costs are not recoverable from Sprint Nextel.⁶ Now, as described below, the same two lawyers (albeit with new clients) are back at the Commission essentially reiterating their previous unpersuasive arguments.

A. The Commission Lacks Statutory Authority to Require Sprint Nextel to Reimburse Incumbents for Their Post-Mediation Litigation Costs

In the *Second MO&O*, the Commission concluded that it lacks statutory authority to require Sprint Nextel to reimburse incumbent licensees for their post-mediation litigation costs.⁷ The Commission should affirm this finding on review. In particular, there is no validity to the Boston Group’s argument that a litigation funding obligation here would be equivalent to the Commission’s enforcement of a voluntary agreement between Sprint Nextel and the Commission.⁸ This legal theory is undermined by the fact that, as described further below, neither the *800 MHz R&O* nor the *Supplemental Order* required Sprint Nextel to cover incumbent licensees’ costs for post-mediation litigation.⁹

⁴ *December 2005 Public Notice* at 2.

⁵ See Request for Clarification, Communications & Industrial Electronics, Inc., North Sight Communications, Inc., and Ragan Communications (Jan. 27, 2006); Petition for Reconsideration, Schwaninger & Associates, P.C. (Jan. 24, 2006).

⁶ *Second MO&O* ¶¶ 43-50.

⁷ *Id.* ¶ 49.

⁸ Boston Group Petition at 11-14.

⁹ See *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Report and Order*, Fifth Report and Order, Fourth Memorandum Opinion and

Certainly, Sprint Nextel had no intention of committing and did not commit to fund incumbent licensees' post-mediation litigation efforts when it accepted the terms of the *800 MHz R&O* and the *Supplemental Order* in February 2005. The Commission's authority to enforce the terms of settlements or consent decrees is irrelevant to the instant issue. As noted in the *Second MO&O*, the Commission has found in Section 208 complaint proceedings that it lacks legal authority to require one party to fund another's litigation efforts, and the same analysis applies to post-mediation 800 MHz reconfiguration administrative litigation.¹⁰

B. The Boston Group's Other Legal Arguments Are Without Merit

In its petition, the Boston Group presents a number of other substantive and procedural legal objections to the Commission's decision that incumbent 800 MHz licensees must cover their own post-mediation litigation costs. None of these arguments has any merit, and the Commission should expeditiously reject these legal claims.¹¹

In search of support for its position, the Boston Group mischaracterizes the Commission's analysis in the *800 MHz R&O* and the *Supplemental Order*. Counter to its assertions, there is no inconsistency between those early orders and the Bureau's statement in the *December 2005 Public Notice* and the Commission's ruling in the *Second MO&O*. Neither the *800 MHz R&O* nor the *Supplemental Order* required Sprint Nextel to cover incumbents' post-mediation litigation costs. While the *800 MHz R&O*

Order, and Order, 19 FCC Rcd 14969 (2004) ("*800 MHz R&O*"); Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) ("*Supplemental Order*").

¹⁰ *Second MO&O* ¶ 49.

¹¹ In its brief petition, the Washoe Group focuses on its policy concerns, pointing to alleged harms that the non-recoverability of post-mediation litigation costs causes to incumbent licensees. The Washoe Group incorporates by reference the various legal arguments presented in the Boston Group Petition. Washoe Group Petition at 3.

calls on Sprint Nextel to pay “the full cost of relocation of all 800 MHz band . . . incumbents,”¹² the Commission in that order explicitly distinguished between mediation and post-mediation activities. The *800 MHz R&O* made clear that the costs of post-mediation arbitration would not be absorbed solely by Sprint Nextel, but would instead be shared by Sprint Nextel and participating incumbent licensees.¹³ The *800 MHz R&O* also warned incumbent licensees and Sprint Nextel regarding the substantial expense of litigation, plain indication that the Commission intended that incumbent licensees bear their own post-mediation litigation costs.¹⁴ This gives each party incentives to reach retuning agreements and avoid protracted, costly proceedings.

The Boston Group also misinterprets the *Supplemental Order*, erroneously relying on the Commission’s statement in that order regarding Sprint Nextel’s “sole responsibility for paying all band reconfiguration costs,” including those for “resolving any disputes.”¹⁵ As explained in the *Second MO&O*, this *Supplemental Order* language related only to parties’ private resolution of disputes through negotiation and mediation. The Commission made this statement in the specific context of licensees’ right to have relocation expenses paid in advance by Sprint Nextel, a reimbursement approach that does not assume any post-mediation litigation. As stated in the *Second MO&O*, the Commission “did not intend by this language to create an unlimited right to recovery of litigation costs.”¹⁶

¹² *800 MHz R&O* ¶ 11.

¹³ *Second MO&O* ¶ 47 (citing *800 MHz R&O* ¶ 194).

¹⁴ *800 MHz R&O* ¶ 194.

¹⁵ Boston Group Petition at 3-7; see *Supplemental Order* ¶ 15.

¹⁶ *Second MO&O* ¶ 48.

In the absence of a preexisting funding obligation for post-mediation litigation, the Boston Group is wrong that the Commission's rejection of this obligation constitutes the establishment of a new rule and therefore triggers various procedural requirements.¹⁷ The Bureau in the *December 2005 Public Notice* reasonably interpreted the Commission's analysis in the *800 MHz R&O* and the *Supplemental Order*, and the Commission in the *Second MO&O* upheld this interpretation. Thus, rather than impose any new obligation, the Bureau and the Commission simply affirmed the cost recovery limits from these earlier orders.¹⁸

C. The Commission's Decision on Post-Mediation Litigation Costs Is Sound Policy and Equitable to All Parties

In their petitions, both the Boston Group and Washoe Group argue that the Commission's decision on post-mediation litigation costs provides Sprint Nextel with an unfair advantage on disputed 800 MHz rebanding issues.¹⁹ As the Commission concluded in the *Second MO&O*, these claims are baseless.²⁰ In fact, by requiring incumbent licensees to cover their own post-mediation litigation costs, the Commission has achieved an appropriate balance between the competing interests in retuning efficiency and adequate procedural safeguards for incumbents. The Commission's

¹⁷ Boston Group Petition at 7-8.

¹⁸ Of course, had the Bureau and Commission instead effected a "substantive change in its existing rules constitut[ing] a new 'legislative rule'" (Boston Group Petition at 7), the Boston Group would be right that the Commission was obligated to meet the Administrative Procedure Act's notice and comment requirements as well as the requirements of the Regulatory Flexibility Act. *See* 5 U.S.C. § 553; 5 U.S.C. §§ 601-612. Since the Commission's decision on this issue did not fall into this category, however, these procedural claims have no merit.

¹⁹ Boston Group Petition at 21-25; Washoe Group Petition at 4-5.

²⁰ *Second MO&O* ¶ 50.

decision in the *Second MO&O* is sound policy and is equitable to all parties in the reconfiguration process.

The Commission's approach to post-mediation litigation costs has worked well to date. All parties have an incentive to reach a negotiated agreement through mediation, and only very few Stage I and Stage II relocation disputes have come before the Bureau for *de novo* review. The relief sought by the petitioners herein would reduce the likelihood of 800 MHz retunees reaching negotiated agreements through mediation, as they would be encouraged to seek review at the Commission. This would harm the public interest by directing funds from retuning activities to excessive litigation, delaying 800 MHz reconfiguration and making that process more costly.

II. CONCLUSION

Sprint Nextel urges the Commission to reject the parties' petitions for reconsideration and affirm that incumbent licensees' post-mediation litigation costs for 800 MHz reconfiguration are not recoverable from Sprint Nextel. The Commission's decision on incumbents' litigation costs is legally sound and constitutes effective and equitable policy.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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Certificate of Service

I, Claudia Del Casino, hereby certify that on this 16th day of October 2007, I caused true and correct copies of the foregoing Opposition of Sprint Nextel Corporation to be mailed by first-class mail to:

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