

SPECTRUM ACQUISITIONS, INC.

July 25, 2008

VIA ELECTRONIC FILING

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-A325
Washington, D.C. 20554

Re: WT Docket No. 02-55
Opposition to Sprint Nextel Waiver Request Channels 809-817/854-862 MHz

Dear Ms. Dortch:

On June 17, 2008, the Federal Communications Commission ("FCC" or "Commission") granted the waiver requests of over five hundred (500) NPSPAC licensees seeking additional time to complete retuning their respective systems.¹ In response to the FCC's grant of such waiver requests, Sprint Nextel Corp. ("Sprint Nextel") filed a Petition for Relief² ("Petition") with respect to its 800 MHz 1-120 Channels and 800 MHz Interleaved, Expansion Band, and Guard Band Channels (809-817/854-862 MHz), the latter of which the Commission previously had ordered it to vacate by June 26, 2008.³

Sprint Nextel's Petition requests that the Commission reverse its determination in the First Report and Order,⁴ Supplemental Order and Order on Reconsideration⁵ and Third

¹ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order* (released June 17, 2008).

² Sprint Nextel Corp. Petition for Relief, WT Docket No. 02-55, June 17, 2008 ("Petition").

³ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007)("800 MHz Third MO&O"), at ¶¶26, 28.

⁴ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order and Order*, 19 FCC Rcd 14969 (2004) as amended by Erratum, 19 FCC Rcd 19651 (2004); and Erratum, 19 FCC Rcd 21818 (2004)("800 MHz R&O"), at ¶¶ 11, 198.

⁵ Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004)("800 MHz Supplemental Order"), at ¶ 54.

Memorandum Opinion and Order⁶ and essentially allow Sprint Nextel to retain and operate its Interleaved, Expansion Band and Guard Band Channels during the reconfiguration process. Pursuant to Sprint Nextel's Petition, it would vacate its Interleaved Channels (Channels 231-470), Expansion Band (Channels 470-510) and Guard Band (Channels 511-550) according to a graduated schedule that is tied to the percentage of NPSPAC licensees that that relocated in a particular NPSPAC Region:

⁶ 800 MHz Third MO&O, at ¶ 28; *see* Nextel Communications, Inc., *Ex Parte* Presentation, WT Docket No. 02-55, September 16, 2004, at 1; and *Ex Parte* Presentation, WT Docket No. 02-55, September 21, 2004, "800 MHz Public Safety Report & Order Status Update—Operational Flexibility for All Incumbents", Slide 2. Interestingly enough, Sprint Nextel now is seeking at least a fourth "bite at the apple" by rearguing this issue after incorporating its September 2004 *ex parte* presentations in a (1) Petition for Clarification And/Or Reconsideration filed on December 22, 2004 (800 MHz R&O), (2) Petition for Reconsideration filed on January 27, 2006 (Supplemental Order—issue not raised) and then (3) following the release of the 800 MHz Third MO&O rearguing it before the D.C. Circuit Court of Appeals without raising it in a petition for reconsideration filed with the FCC.

Having challenged so many other interested parties in this proceeding on procedural grounds, it seems both curious and incongruous both for it to seek relief through the filing of a waiver when following the release of the Third MO&O it failed to file a timely objection to the Commission's requirement that it vacate the Interleaved, Expansion Band and Guard Band Channels by June 26, 2008, now extended to July 26, 2008, and for the FCC to reconsider such argument. *See, e.g.*, Sprint Nextel, Reply, WT Docket No. 02-55, June 11, 2008, at 1 (questioning Spectrum Acquisitions, Inc.'s standing to raise objections to Sprint Nextel's initial Waiver Request related to its Channels 1-120 filed on May 1, 2008); Nextel, Opposition and Comments Regarding Petitions for Reconsideration, WT Docket No. 02-55, April 21, 2005, at 3 & n. 5 ("The Commission should dismiss the Preferred Petition because it far exceeds the page limit set forth in the Commission's rules. The Preferred Petition rambles on for 53 single-spaced pages. Under 47 CFR Section 1.429(d), reconsideration petitions are limited to 25 double-spaced pages.")

As discussed below, little or nothing has changed since the Commission initially decided this issue more than four years ago in the 800 MHz R&O and Supplemental Order except Sprint Nextel's realization of the costs of its rebanding obligations without the doubling of its 800 MHz spectrum capacity through a technological "fix" in the form of a 6:1 cellular interconnect vocoder to be delivered by Motorola. *See* Nextel Communications, Inc., *Ex Parte* Presentation, December 19, 2003, at 9 (response to Question 18) and at 14 (response to Question 30).

**Percent of Relocated
NPSPAC Licensees**

**No. of Interleaved, Expansion
Band and Guard Band Channels
To Be Vacated by Sprint Nextel**

1. None
2. 25%
3. 50%
4. 75%
5. 90%
6. 100%

1. 20
2. Additional 40
3. Additional 60
4. Additional 80
5. Additional 80
6. Remaining Channels
including Guard Band within
sixty (60) days of Sprint
Nextel completing NPSPAC
relocation in a particular
NPSPAC Region

Pursuant to Sprint Nextel's Petition, NPSPAC rebanding would be considered completed in particular Stages described immediately above when Sprint Nextel has full use throughout a NPSPAC Region of the respective percentage (25%, 50%, 75%, 90% and 100%) of the 120 full 25 kHz channels vacated by the NPSPAC licensees at Channels 710-830 (821-824 MHz/866-869 MHz).⁷ According to Sprint Nextel's Petition it then would make the Interleaved Channels available to Public Safety licensees within sixty (60) days of notice that they are licensed and ready to commence service on the new channels.⁸

On June 19, 2008, the Association of Public Safety Communications Officers-International ("APCO"), International Association of Chiefs of Police ("IACP") and International Association of Fire Chiefs ("IAFC") filed a letter with the Commission in response to Sprint Nextel's Petition. In its response these Public Safety trade associations noted a "pent up" demand by Public Safety licensees for additional spectrum in the Interleaved Channels and proposed a firm date of July 1, 2009 by which Sprint Nextel must vacate its Interleaved Channels at least upon receiving written notice from a Public Safety licensee indicating that it is prepared to operate on such

⁷ *Id.*, and n. 9.

⁸ Sprint Nextel defined "ready" as (1) receipt of authorization from the FCC to operate on the channels at its proposed site; (2) construction of the base station(s) and related infrastructure necessary to operate on the new channel(s); (3) deployment of mobile units or handsets capable of operating on the new channels for the majority of its regular users; and (4) intention to commence regular operations on the new channels within sixty (60) days. *Id.*, at 5.

Channels.⁹ According to APCO, IACP and IAFC its proposed “firm date” was consistent with the Commission’s recent waivers of the rebanding completion date and preserves the goals of the 800 Third MO&O by preventing indefinite Sprint Nextel operations on its Interleaved Channels.¹⁰

On July 7, 2008, Sprint Nextel filed a letter with the FCC. In its letter Sprint Nextel contended that the APCO, IACP and IAFC position was “purely speculative” since it failed to demonstrate that the number of Interleaved Channels to be vacated under Sprint Nextel’s staged transition plan by July 1, 2009 would be insufficient to satisfy the demand for access to such Channels by Public Safety licensees then ready to commence operations.¹¹ In response to APCO, IACP and IAFC’s concerns, Sprint Nextel proposed a “safety valve” for accelerated channel transition on a case-by-case basis.

Sprint Nextel noted that under its staged transition approach that once NPSPAC relocation was 75% complete, Public Safety licensees would have access to up to two hundred (200) Channels of Interleaved spectrum within sixty (60) days notice that they were licensed for and ready to commence operations on the new Channels. It then proposed that once the 75% retuning threshold was achieved in a particular NPSPAC Region it would upon receipt of sixty (60) days notice vacate any of the remaining forty (40) Interleaved Channels in a particular NPSPAC Region for a Public safety licensee that is ready to commence operations on such Channels.¹²

Spectrum Acquisitions, Inc. (“SAI”) is a Delaware corporation formed to purchase, construct and operate 700 MHz band licenses. As a prospective purchaser and operator of such licenses, it has an interest in the FCC’s D Frequency Block re-auction rulemaking proceeding, WT Docket No. 06-150. On June 23, 2008, it filed a Comment in that proceeding in which it proposed that the Commission consider the following:

1. Sprint Nextel would return all of its 800 MHz licenses to the Commission who in turn would reissue them to the Public Safety Spectrum Trust (“PSST”);
2. Sprint Nextel would pay to the PSST the difference between \$2.5 billion and the amount it has expended to date with respect to 800 MHz rebanding;

⁹ APCO, IACP and IAFC, Letter, WT Docket No. 02-55, at 1.

¹⁰ *Id.*, at 2.

¹¹ Sprint Nextel, Letter, WT Docket No. 02-55, at 2.

¹² *Id.*, at 3. Sprint Nextel proposed that its threshold access requirements apply to its “safety valve,” and Public Safety licensees be required to demonstrate the unavailability of other Interleaved Channels in the particular NPSPAC Region or otherwise show that those Channels are unusable.

3. FCC would agree to permit Sprint Nextel to retain its 10 MHz nationwide license in the 1.9 GHz Band;
4. FCC would reorganize 800 MHz Private Land Mobile Radio Band (“PLMRB”) as follows:
 - 806-809 MHz/851-854 MHz: public safety;
 - 809-815 MHz/854-860 MHz: critical infrastructure, Business and Industrial/Land Transportation and site-licensed SMR;
 - 815-816 MHz/860-861 MHz: Expansion Band;
 - 816-819 MHz/861-864 MHz: Public Safety;
 - 819-820 MHz/864-865 MHz: Guard Band; and
 - 820-824 MHz/865-869 MHz: EA-licensed SMR;
5. Public safety would return 6 MHz of 700 MHz Band spectrum to the FCC who in turn would add it to the D Frequency Block as a single 16 MHz license;
6. FCC would auction D Frequency Block as a commercial license and use Cellular Market Areas as geographic market;
7. FCC would adopt rules reserving D Frequency Block for designated entities/new entrants only.¹³

Auction proceeds would be transferred by FCC to PSST for the development of a nationwide broadband public safety network.

SAI’s proposal is premised upon the surrender by Sprint Nextel of its 800 MHz band spectrum in exchange for (1) discontinuance of its 800 MHz rebanding financial obligations retaining its 1.9 GHz band nationwide license and (2) forgiveness of its otherwise continuing financial obligation to pay costs directly related to reconfiguration of the 800 MHz band. SAI therefore has a considerable and recognizable interest in both the Commission’s decision with respect to Sprint Nextel’s Petition and the 800 MHz rebanding proceeding.

1. Background of Sprint Nextel Petition

a. Original Agreement

On February 7, 2005, Nextel Communications, Inc. (“Nextel”) entered into an agreement with the Commission with respect to the reconfiguration of the 800 MHz Private Land Mobile Radio Band (“PLMRB”)(806-824 MHz/851-869 MHz). Pursuant to such agreement Nextel would vacate all of its Economic Area (“EA”) and site licenses

¹³ SAI, Comment, WT Docket No. 06-150, June 23, 2008, at 6-8.

below 817 MHz/862 MHz and pay all of the reasonable costs directly related to the reconfiguration of the PLMRB.¹⁴ In exchange therefor, the FCC allowed Nextel, Nextel Partners and the licensees who had executed purchase option or construction and management agreements with Nextel (collectively, the “Nextel Control Group”)¹⁵ to move their respective EA-licensed spectrum to the former NPSPAC Channels on a 1:1 clean and contiguous basis and convert their respective site-licensed spectrum to EA-licensed spectrum on a 1:1 clean and contiguous basis.¹⁶ Moreover, the Commission exclusively awarded Nextel a 10 MHz nationwide license in the 1.9 GHz band.¹⁷

According to Nextel, its Control Group held sufficient spectrum in Channels 121-150 and 151-440 to accommodate the relocation of Non-Nextel Control Group EA- and site-licensed Channels from Channels 1-120 and 441-600 and provide such relocated licensees with “comparable facilities.”¹⁸ In the *800 MHz Report and Order*, the FCC envisioned that reconfiguration of the PLMRB would occur as follows:

- “1) Nextel shuts down its General Category channels and relocates all non-Nextel General Category licensees. It temporarily shifts many of its operations to “green space” at 900 MHz.
- 2) NPSPAC licensees relocate to six megahertz of spectrum in the former General Category space at Nextel’s expense.
- 3) Nextel relocates its systems from the [900 MHz] green space and from the interleaved portion of the [PLMRB] into the vacated NPSPAC channels; surrendering its rights below 817 MHz/862 MHz spectrum in the process.

¹⁴ Letter from Tim Donahue, President and Chief Executive Officer, Nextel to Michael K. Powell, Chairman, FCC, WT Docket No. 02-55 (filed February 7, 2005). *See* 800 MHz Report and Order, ¶¶ 5 & nn. 14-16, 10-12, and 23. In the 800 MHz R&O, the FCC stated that it sought a “solution to the interference problem that achieves the following paramount goals: (1) a solution that abates “unacceptable interference” caused by ESMR and cellular systems to 800 MHz public safety systems; (2) a solution that is both equitable and imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and Business, Industrial and Land Transportation (B/ILT) systems; (3) a solution that results in responsible spectrum management; and (4) a solution that provides additional 800 MHz spectrum that can be quickly accessed by public safety agencies and rapidly integrated into their existing systems. *Id.*, at ¶ 2.

¹⁵ *See, e.g.*, Nextel Communications, Inc. Comment, Docket No. 02-55 (May 6, 2002), at 2 & n.4; Appendix A; Nextel Communications, Inc., Reply Comment, Docket No. 02-55 (August 7, 2002), at 9-10 & nn. 9-11; Appendix I.

¹⁶ *See* Consensus Parties, Supplemental Comment, Docket No. 02-55 (December 24, 2002), at 14.

¹⁷ 800 MHz Report and Order, ¶¶ 33-35.

¹⁸ *See* Nextel Communications, Inc., Opposition to Request for Stay, Docket No. WT 02-55, filed November 16, 2005.

- 4) Any remaining relocations necessary to effect complete reconfiguration of the [PLMRB] in that [NPSPAC] region are made at Nextel's expense, e.g., moving public safety systems out of the Expansion band."¹⁹

In the *800 MHz Report and Order*, the Commission explicitly recognized that at least temporarily Nextel would suffer a loss of 800 MHz spectrum capacity.²⁰ To ameliorate such loss, the FCC modified its 900 MHz rules to allow Nextel exclusively to file applications for "green space" site licenses and use the granted licenses on a BTA-wide during the 800 MHz PLMRB rebanding process.²¹ The Commission also allowed Nextel to increase its "credit" against its rebanding payment obligation by including funds spent to reconfigure its own systems.²²

Following the release of the 800 MHz R&O, Nextel sought several "clarifications" in meetings with Commission staff. One of these "clarifications" was that it be allowed to remain on its Interleaved, Expansion Band and Guard Band Channels during the reconfiguration process so as to minimize the disruption to its iDEN network's operations.²³ This "clarification" of the 800 MHz R&O was opposed by several commenters including Cinergy Services, Inc. and Consumers Energy Company and Entergy Corporation and Entergy Services, Inc.²⁴ The FCC agreed with such comments that together with a relaxed eighteen (18) month initial benchmark allowing Nextel to remain on such Channels throughout the rebanding process "might provide it with an incentive to delay rebanding as long as possible."²⁵

Although Nextel filed a Petition for Reconsideration of the 800 MHz Supplemental Order,²⁶ it did not challenge the FCC's determination that it would not be

¹⁹ See 800 MHz Report and Order at ¶¶ 6, 32 and n.71, 198, 301 and n. 712.

²⁰ *Id.* at ¶ 35 & n. 74.

²¹ *Id.* at ¶¶ 6 & n. 18 and 198. See 47 C.F.R. §90.621 (f) in Appendix C of the 800 MHz Report and Order.

²² *Id.* at ¶¶35 & n. 74 and 207; 800 MHz Supplemental Order, 19 FCC Rcd 25150, at ¶ 69; Third Memorandum Opinion and Order, 22 FCC Rcd 17209, at 17217 ¶ 24, 17219 & n. 61, ¶ 28 (2007)("800 MHz Third MO&O").

²³ See Nextel, *Ex Parte* Presentation, WT Docket No. 02-55, September 16, 2004, at 1; *Ex Parte* Presentation, September 21, 2004, "800 MHz Public safety Report & Order—Status Update", Slide 2.

²⁴ See Cinergy Services, Inc. and Consumers Energy Company, Comments, WT Docket No. 02-55, December 2, 2004, at 8-10; and Entergy Corporation and Entergy Services, Inc., Comments, WT Docket No. 02-55, December 2, 2004, at 5-7.

²⁵ 800 MHz Supplemental Order, 19 FCC Rcd 25150 ¶ 54.

²⁶ Sprint Nextel, Petition for Reconsideration, WT Docket No. 02-55, January 27, 2006.

allowed to remain on its Interleaved, Expansion Band and Guard Band Channels during the reconfiguration process.

b. Third Memorandum Opinion & Order

In the Third MO&O,²⁷ the Commission determined that Sprint Nextel had failed to meet its eighteen (18) month benchmark established in the 800 MHz Supplemental Order²⁸ of relocating all Non-Nextel and Non-SouthernLINC licensees from Channels 1-120 in the first twenty (20) NPSPAC Regions the Transition Administrator had scheduled for band reconfiguration.²⁹

As a result, the FCC determined to impose two new benchmarks upon Sprint Nextel:

1. After January 1, 2008, Sprint Nextel must relocate its Channels 1-120 within sixty (60) days of receiving a written request from a NPSPAC licensee to clear such spectrum for testing purposes or to commence operations.³⁰
2. Other than in Wave 4 border areas, Sprint Nextel must relocate its Channels 1-120 not later than June 26, 2008 regardless of whether NPSAPC licensees are prepared to relocate by that date.³¹

Sprint Nextel had challenged the Commission's determination to impose the above additional benchmarks on the grounds that they "would seriously harm public safety" and "squander scarce spectrum resources."³² Finding to the contrary, the FCC set forth four public policy objectives for its decision:

1. elimination of the risk that harmful interference would occur to relocating NPSPAC licensees from Sprint Nextel's sites otherwise continuing to operate in Channels 1-120;
2. simplification and expedition of the transition process since NPSPAC licensees no longer would need to coordinate their relocation with Sprint;
3. hasten the availability of Channels 1-120 for new public safety facilities; and
4. afford Sprint Nextel access to former NPSPAC Channels more quickly.³³

²⁷ 800 MHz Third MO&O, 22 FCC Rcd 17209 (2007).

²⁸ 800 MHz Supplemental Order, 19 FCC Rcd at 15130 ¶ 53.

²⁹ *Id.*

³⁰ 800 MHz Third Order, at 17217 ¶ 23.

³¹ *Id.*, at 17217-18, ¶ 25.

³² Sprint Nextel Ex Parte Letter, filed September 6, 2007, at 1-2.

³³ *Id.*, at 17218 ¶ 26.

However, the Commission noted that if a NPSPAC licensee were granted a waiver so that it may relocate to certain Channels 1-120 in a particular market after June 26, 2008, it would allow Sprint Nextel to file a petition to remain temporarily on the Channels 1-120 to which the NPSPAC licensee's channels would have been relocated.³⁴ In any such petition, the FCC required a showing by Sprint Nextel that

1. public safety would not be adversely affected;
2. it has no reasonable alternative; and
3. granting such petition otherwise would be in the public interest.³⁵

The FCC also affirmed that its Orders in the rebanding proceeding required Sprint Nextel to vacate all of its remaining Interleaved Channels by June 26, 2008, except in Wave 4 border areas, and Expansion Band and Guard Band Channels, except in the Southeast Region. Observing that the Channels to be vacated by Sprint Nextel would revert to the Commission for re-licensing and Public Safety licensees would have exclusive access to the vacated Interleaved Channels for three years following the completion of rebanding in a particular NPSPAC Region, the FCC found that Sprint Nextel's relinquishment of these Channels would accomplish important public policy objectives by (1) reducing the potential for interference and (2) increase the amount of spectrum available for public safety use. The Commission also noted that it had enabled Sprint Nextel to prepare for and mitigate anticipated spectrum shortfalls by providing it access to 900 MHz spectrum and crediting it for the cost of constructing additional cell sites to increase its network capacity.³⁶

Thirty days following the release of the 800 MHz Third MO&O, Sprint Nextel filed a Petition for Review in the D.C. Circuit Court of Appeals.³⁷ In its petition, Sprint Nextel maintained that the FCC's decision in the 800 MHz Third Order that it vacate its Channels 1-120 even if the NPSPAC licensees were not ready to relocate their respective channels was arbitrary and capricious under 5 U.S.C. § 706 (A).

³⁴ *Id.*, at 17218 ¶ 27.

³⁵ *Id.*

³⁶ *Id.*, at 17218 ¶ 28.

³⁷ *Sprint Nextel Corporation v. Federal Communications Commission*, 07-1458 (D.C. Cir. October 12, 2007).

c. D.C. Circuit Court of Appeals Decision

On May 2, 2008, the D.C. Circuit released its decision affirming that the Commission's orders set forth in the Third MO&O requiring Sprint Nextel to vacate its Channels 1-120 and Interleaved, Expansion Band and Guard Band Channels by a certain date regardless of the readiness of NPSPAC licensees to relocate were reasonable and therefore within its authority.³⁸

In determining this issue, the Court found a "regulatory decision balancing competing goals is valid if the agency can demonstrate that its resolution advances at least one of those objectives and that its decision-making process was regular."³⁹ Here the Court found that the Commission delineated four reasons why its decision advanced the public interest.⁴⁰

Moreover, the Court found the Commission had considered the possible harm that would occur to Nextel's network by requiring it to vacate its Channels 1-120 by June 26, 2008. However, it found the FCC's policy choice that "NPSPAC licensees take precedence" over Nextel's network was a "rational policy judgment" and therefore affirmed the Commission's challenged orders.⁴¹

d. Sprint Nextel Waiver Request

On May 1, 2008, Sprint Nextel filed a Waiver Request with the Commission. Sprint Nextel initially noted that the vast majority of NPSPAC licensees have filed applications for and been granted waiver requests to remain on their respective frequencies beyond the June 26, 2008 relocation deadline. Based upon the NPSPAC licensees' lack of readiness to relocate their frequencies and the disruption to Sprint Nextel's 800 MHz Band network, the company requested that it be allowed to remain on Channels 1-120 in a particular market until a NPSPAC licensee by written notice indicates that it is prepared to relocate its frequencies in that market. Once such written notice is received, Nextel committed to providing the NPSPAC licensee with replacement spectrum in Channels 1-120 within sixty days.

On June 19, 2008, the Commission's Public Safety and Homeland Security Bureau granted Sprint Nextel's Waiver Request subject to the following limitations:

³⁸ *Id.*

³⁹ *Id.* at 8 citing *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 234 (D.C. Cir. 2000).

⁴⁰ See text above discussing the 800 MHz Third Order and n. 35 *infra*.

⁴¹ *Sprint Nextel Corporation v. Federal Communications Commission*, at 10.

1. Sprint Nextel must relinquish any Channel 1-120 channel to the NPSPAC licensee with prospective rights to the channel on sixty days notice that it needs the channel for testing purposes of to commence operations;
2. To the extent a Channel 1-120 channel is not needed to relocate a NPSPAC licensee, Sprint Nextel must still vacate the channel if
 - a. the corresponding spectrum 15 MHz higher in the PLMRB is clear in that NPSPAC Region and is therefore available for use by Sprint; and
 - b. the channel is licensed for new post-banding NPSPAC facilities.⁴²

2. Discussion

a. Public Policy Considerations

As noted above, in the Third MO&O the Commission noted the following public policy considerations in reaffirming its previous determination that Sprint Nextel would be required to vacate its Interleaved, Expansion band and Guard Band Channels by the former June 26, 2008 deadline regardless of any other rebanding contingency:

1. reduction of the potential for interference; and
2. increase in amount of spectrum for Public Safety use.⁴³

b. Waiver Standards

Under the FCC's rules a party seeking a waiver must demonstrate either that

1. the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case; and that a grant of the waiver would be in the public interest; or
2. in view of the 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 if the applicant has no reasonable alternative.⁴⁴

⁴² In such cases, Sprint Nextel must vacate upon 60 days notice from the new NPSPAC licensee of readiness to use the channel.

⁴³ 800 MHz Third MO&O 17218, at ¶ 28.

⁴⁴ 47 CFR § 1.925(b)(3).

c. Sprint Nextel Petition

In its Petition Sprint Nextel initially noted that the vast majority of NPSPAC licensees had requested and been granted waivers by the FCC. It then maintained that by allowing it to vacate its Interleaved, Expansion Band and Guard Band Channels in stages on a NPSPAC region-by-NPSPAC region basis, it could support Public Safety's need for new channels while avoiding the disruption to its customers that it would result if required to vacate such Channels by a particular deadline.⁴⁵

According to its Petition there is no reasonable alternative to granting the relief requested. Relocating its 800 MHz band facilities to 900 MHz, constructing additional cell sites or only granting a waiver to allow it continued access to its Channels 1-120 were not viable alternatives to granting this waiver request. Sprint Nextel contended that the 900 MHz band lacked sufficient spectrum to make up its spectrum shortfall and delays would exist between vacating its Channels 1-120 and securing access to its ESMR band replacement channels.⁴⁶

Granting its requested relief thus would serve the public interest according to the Petition since it would reduce service disruptions to Sprint Nextel's iDEN network subscribers including Public Safety agencies.⁴⁷ Finally, Sprint Nextel contended that its proposed staged channel clearing process would provide additional new channels to Public Safety agencies ready to use them even before band reconfiguration is completed in non-border areas.⁴⁸

d. Analysis

In weighing the competing policy considerations, we believe that it is important to place them in an historical context. As noted above, this is the fourth occasion Sprint Nextel has sought to retain use of its Interleaved, Expansion band and Guard Band Channels during the reconfiguration process.

As noted above, Sprint Nextel and the Commission entered into an agreement that was memorialized by the 800 MHz Report and Order and the 800 MHz Supplemental Order. Such agreement was based upon certain written representations by Sprint Nextel:

⁴⁵ Sprint Nextel, Petition, June 17, 2008, at 2, 5.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

1. it had adequate 800 MHz spectrum holding to provide all relocating licensees with “comparable facilities;”
2. it could accommodate a temporary 800 MHz spectrum shortfall during the rebanding process through the use of new and improved iDEN technology to be developed by Motorola and changes in the FCC’s rules that would allow it exclusive access to 900 MHz “green space” and use of such site licenses on a BTA-wide basis;
3. it would pay all “reasonable” costs directly related to the rebanding process; and
4. it would meet certain rebanding schedules established by the FCC.

In exchange for such representations, the Commission provided Nextel and SouthernLINC the favorable treatment of both their EA- and site-licensed spectrum discussed above and Sprint Nextel an exclusive nationwide allocation of 10 MHz in the 1.9 GHz band.

Sprint Nextel now essentially maintains that for reasons beyond its control its representations that formed the basis of the Commission’s rebanding orders no longer are true and correct. Impliedly, it is maintaining that it should be allowed to amend its rebanding obligations while retaining its rebanding benefits.

Sprint Nextel’s Petition is a thinly disguised attempt to renegotiate the basic tenets of the Commission’s 800 MHz R&O and 800 MHz Supplemental Order. According to those Orders, initially non-Nextel Site Licensees would move from Channels 1-120 into the Interleaved or Expansion Band Channels to be vacated by Sprint Nextel. Second, Sprint Nextel would move its Channels 1-120 to 900 MHz spectrum so that the NPSPAC licensees could relocate to Channels 1-120.⁴⁹ Third, contemporaneously and not later than thirty-six (36) months from the commencement of the rebanding process, Sprint Nextel would vacate its Interleaved, Expansion Band and Guard Band Channels.⁵⁰

Following the initial step, under Sprint Nextel’s Petition the NPSPAC licensees by writing would individually indicate their readiness to relocate. Upon receipt of such notification, Sprint Nextel would vacate its Channels 1-120 that would correspond to the NPSPAC Channels held by such relocating NPSPAC licensee. Here Sprint Nextel substitutes a gradual synchronous channel swap approach for its previous extensive use of 900 MHz spectrum to facilitate relocation of NPSPAC licensees. As a further substitute for the extensive use of 900 MHz spectrum and the construction of numerous

⁴⁹ See Consensus Parties, Supplemental Comment, WT Docket No. 02-55, December 24, 2002, at 33-34.

⁵⁰ See nn. 4-5 *infra*.

additional base stations, Sprint Nextel extends its gradual synchronous swap approach to its Interleaved, Expansion Band and Guard Band Channels.

In the 800 MHz R&O, 800 MHz Supplemental Order and Third MO&O, the FCC determined that its paramount goals were to reduce the potential for harmful interference to Public Safety licensees and provide additional 800 MHz spectrum for such licensees within thirty-six (36) months of the commencement of the rebanding process.⁵¹ A secondary goal was to remove any conflict of interest by Sprint Nextel to retain its 800 MHz band spectrum at the expense of rebanding.⁵² Presented with alternative proposals, the Commission ultimately adopted the Consensus Parties' Proposal because unlike the Preferred Communication Systems, Inc. and Motorola, Inc. Proposals, it provided Public Safety licensees with 4.5 MHz of additional 800 MHz spectrum.⁵³

Sprint Nextel argues that its gradual synchronous swap approach not only minimizes disruption to its 800 MHz iDEN system but also does not delay the availability of Interleaved, Expansion Band and Guard Band Channels to Public Safety licensees who would be ready to use them.⁵⁴ However, as the FCC noted in its Brief recently filed with the D.C. Circuit Court of Appeals:

“Sprint claims that the Commission has tried to fix a problem that already has been solved because the [800 MHz Third MO&O] requires Sprint to vacate spectrum within 60 days of a request by a NPSPAC licensee that it is ready to move. This argument presumes, however, that the only problem is Sprint’s unwillingness to vacate spectrum. Sprint ignores the broader problem of ongoing interference caused by its operations and the shortage of new spectrum for public safety systems. The 60-day rule does not address those problems.”⁵⁵

As the FCC further noted in its Brief:

“Sprint shows a fundamental failure to understand the stakes involved here—and its own role in the matter. Alleviating interference to public safety systems has been the FCC’s paramount goal from the beginning of

⁵¹ See nn. 4-5 *infra*; see also, FCC Brief submitted to D.C. Circuit Court of Appeals in *Sprint Nextel Corp. v. FCC*, at 24-25 (“FCC Brief”).

⁵² See 800 MHz Supplemental Order, ¶ 54; 800 MHz Third MO&O, ¶¶28; and FCC Brief, at 25-26.

⁵³ See 800 MHz R&O, ¶¶ 18; 149.

⁵⁴ See *Sprint Nextel*, Petition, June 17, 2008, at 7.

⁵⁵ FCC Brief, at 20.

this proceeding. Yet the biggest single threat to these systems is Sprint itself. The Commission has a compelling interest in separating Sprint from public safety systems as soon as possible. In the interests of band reconfiguration, the agency allowed the situation to persist for three years, but the Commission has reasonably determined that the time for separation has come.”⁵⁶

Interestingly enough, Sprint Nextel does not claim that its gradual synchronous swap approach would reduce the potential for interference with Public Safety licensees. In the 800 MHz R&O the FCC noted that “eliminating the interleaving of Public Safety and commercial channels would reduce the number of “hard edges” between spectrum utilized by two different network architectures and thus reduce the risk of interference to Public Safety systems.”⁵⁷ Following the release of the 800 MHz R&O, Nextel persuaded the Commission to delay the imposition of the interference protection standards and mitigation tactics adopted therein.⁵⁸ As the FCC argued in its Brief filed with the D.C. Circuit Court of Appeals:

“Moving Sprint out of the General Category and Interleaved bands within 36 months is especially critical because the Commission waived some aspects of its newly enhanced interference rules ‘until band reconfiguration is complete in a particular NPSPAC Region.’ The Commission took that step, at Sprint’s request, in order to avoid ‘substantial operational restrictions’ on Sprint that the enhanced rules otherwise would impose. Public safety systems had opposed the move, worried about increased interference during the transition. Thus, because public safety licensees are at an especially high risk of interference in the absence of these rules, it is particularly important to separate Sprint’s system from public safety systems by the deadline.”⁵⁹

Rather than separating incompatible architecture systems and minimizing, if not eliminating, interference with Public Safety systems, Sprint Nextel’s graduated synchronous swap approach would result in both the new interleaving of such systems in Channels 1-120 and continued interleaving of such systems in the Interleaved Channels. Such approach conflicts with the FCC’s determination in the 800 MHz Supplemental Order that “[t]he initial phase of band reconfiguration, in which [Sprint] vacates its spectrum in the interleaved channels ... will provide immediate ...spectral

⁵⁶ *Id.*, at 21.

⁵⁷ 800 MHz R&O, ¶ 18.

⁵⁸ 800 MHz Supplemental Order, ¶ 38.

⁵⁹ FCC Brief at 23.

separation between incompatible technologies, thus providing some decrease in potential for interference.”⁶⁰

Providing additional spectrum for Public Safety licensees—the FCC’s second public policy interest objective—also is poorly served by Sprint Nextel’s graduated synchronous swap proposal. Contrary to its assertions in the Petition, such approach clearly delays the availability of Sprint Nextel’s Interleaved Channels to Public Safety licensees.⁶¹

Finally, Sprint Nextel’s graduated synchronous swap approach conflicts with the Commission’s secondary goal of eliminating any conflict of interest between Sprint Nextel’s desire to retain its Interleaved, Expansion Band and Guard Band Channels for as long as possible and its commitment and obligation to complete reconfiguration of the 800 MHz band as expeditiously as possible.⁶²

In the Third MO&O the Commission determined that Sprint Nextel could obtain a waiver of its thirty-six (36) month relocation deadline with respect to its licenses in Channels 1-120 under certain circumstances upon a showing that

1. public safety would not be adversely affected;
2. it has no reasonable alternative; and
3. granting such petition otherwise would be in the public interest.⁶³

As noted above, Sprint Nextel’s graduated synchronous swap approach increases rather than decreases the potential for interference with public safety systems. The FCC’s Rebanding Orders sought to minimize, if not eliminate, such interference by the spectral separation of incompatible architecture systems within a relatively brief period. Sprint Nextel’s approach strikes at the very heart of the Commission’s paramount goals in the Rebanding proceeding by increasing the interleaving of

⁶⁰ 800 MHz Supplemental Order, ¶ 44.

⁶¹ In the 800 MHz R&O the FCC observed that “time is of the essence” in restructuring the 800 MHz band and the public safety interference problem “will only increase in severity as private, public safety and commercial use of the 800 MHz band intensifies.” See 800 MHz R&O, ¶ 14.

⁶² See, e.g., 800 MHz Third MO&O, ¶ 22; FCC Brief at 26; see also AT&T, Letter, WT Docket No. 02-55, April 19, 2007, at 10-11.

⁶³ 800 MHz Third MO&O, at 17218 ¶ 27.

incompatible architecture systems, its potential conflict of interest and, arguably, the length of the rebanding process.⁶⁴

Sprint Nextel argues that it has no reasonable alternative to the FCC's adoption of the company's graduated synchronous swap approach since it would be too time consuming and costly to construct additional base stations and acquire additional 900 MHz spectrum.⁶⁵ Sprint Nextel necessarily bases such argument upon the unforeseeability of the amount of its spectrum shortfall if required to comply with the Commission's firm deadline to vacate its Interleaved, Expansion Band and Guard Band Channels.⁶⁶

However, both the Consensus Parties Proposal and the FCC's Rebanding Orders clearly envisioned that Sprint Nextel would lose access to considerable 800 MHz spectrum during the rebanding process.⁶⁷ Prior to the FCC's adoption of the 800 MHz R&O, Nextel represented that it would make up for such spectrum shortfall through the widespread deployment of a 6:1 cellular voice interconnect vocoder to be provided by Motorola.⁶⁸ According to Motorola and Nextel press releases during 2002-2004, considerable progress was achieved in developing such vocoder.⁶⁹

⁶⁴ FCC Brief, at 25-26.

⁶⁵ See Sprint Nextel Form 10-K (December 31, 2007), at 40; Sprint Nextel Form 10-Q (September 30, 2007), at 34.

⁶⁶ See, e.g., Sprint Nextel Petition, at 2.

⁶⁷ See 800 MHz R&O, at ¶¶ 6 & n. 18; 32 & n. 71; 198; 301 & n. 712; SAI, Opposition, WT Docket No. 02-55, at 2-3; Consensus Parties, Supplemental Comment, WT Docket No. 02-55, at 33; Nextel, Letter, WT Docket No. 02-55, at 9 (further explanation of comment 18) and 14 (further explanation of comment 30).

⁶⁸ See Nextel 2003 Letter, at 9, 18.

⁶⁹ See, e.g., *Motorola Successfully Completes New Software Test of New Vocoder for Nextel's iDEN-R-Network*, Motorola Press Release, April 16, 2002; *Nextel, Motorola test new voice coder*, RCR Wireless News, April 16, 2002; *Nextel's Technology Waiting Game*, RCR Wireless News, June 10, 2002, at 1-2; *How Nextel Beat the Heat Only to Face the Inferno*, Telephony Online, May 1, 2003, at 5; *Double or Nothing*, Wireless Week, July 15, 2002; *Nextel and Motorola Showcase Enhancements to iDEN Technology; Nextel Confirms 2002 Guidance – Demonstration of Nextel's Nationwide Direct Connect and 6:1 Vocoder*, Motorola Press Release, December 17, 2002; *Nextel demos vocoder, reiterates guidance*, RCR Wireless News, December 17, 2002; *Enhancements Extend iDEN Lifespan*, Wireless Week, January 15, 2003; *Tim Donahue, Nextel Communications*, Telephony Online, June 2, 2003; *Nextel Reduces Churn, Debt*, Wireless Week, July 17, 2003; *Nextel adds some pizzazz to new handset lineup*, RCR Wireless News, September 15, 2003; and *Nextel to invest in Florida network enhancements*, RCR Wireless News, February 28, 2005.

According to press releases and articles, Nextel conducted a major field test of this vocoder in North Texas, Florida and Baltimore and Washington, D.C. in early 2005.⁷⁰ Although we cannot locate any press release or article discussing the results of such field test, articles in 2007-2008 indicate that while such vocoder provided increased system capacity the voice quality was unacceptable.⁷¹

Based upon these press releases and articles, it appears that Sprint Nextel knew as early as March 2005 that its technological solution to its 800 MHz spectrum shortfall was problematic at best. Instead of responding by constructing additional base stations and purchasing considerable additional 900 MHz spectrum, together with Motorola Sprint Nextel continued to rely upon developing the 6:1 vocoder.

3. Conclusion

Having relied upon a technological fix that did not work, Sprint Nextel now is seeking to renegotiate its 800 rebanding commitments and obligations. Its argument essentially boils down to this—it is in the public interest to grant such relief because Sprint Nextel now simply cannot afford to vacate its Interleaved, Expansion Band and Guard Band Channels on July 26, 2008 or on July 1, 2009. In essence, what Sprint Nextel is saying is that without the technological fix of the 6:1 vocoder, it cannot fulfill its 800 MHz rebanding obligations.

If Sprint Nextel is renegotiating its 800 MHz rebanding obligations, we believe that the FCC should be free to do the same with Sprint Nextel's benefits. If Sprint Nextel truly is unprepared to vacate its Interleaved, Expansion Band and Guard Band Channels and could not withstand the disruption to its 800 MHz iDEN network, we recommend that the Commission grant Sprint Nextel a six-month extension of its

⁷⁰ Nextel apparently was dissatisfied with the voice quality produced by the 6:1 vocoder as early as late 2003 or early 2004. *See* Nextel hits bump for network upgrade, CNet News.com, February 19, 2004.

⁷¹ *See Rebanding Still Behind Schedule*, Mobile Radio Technology, January 1, 2007; *Sprint Nextel Suffers More iDEN Losses*, Mobile Radio Technology, June 1, 2007; *Sprint Nextel to launch 'Come Back' campaign*, FierceWireless, January 14, 2008; *Rough Waters*, Mobile Radio Technology, February 1, 2008, at 2 (Chris Hackett, vice president of public sector sales programs for Sprint: "Network quality suffered throughout much of 2006 and 2007 because Sprint tried to deal with a capacity crunch by using a 6:1 vocoder, which used compression technology to pack more and more users on the network but resulted in poor voice quality that often sounded garbled on the other end." John Byrne, a director for Technology Business Research: The assumptions about the iDEN network in general were wrong. They thought they could scale back on [capital expenditures] before the merger by implementing a new vocoder. But overall, the limitations of the technology are being revealed.")

deadline and revise the conditions attached to the grant of the 1.9 GHz spectrum such that Sprint Nextel gains rights to the spectrum on a NPSPAC Region-by-NPSPAC Region basis only after it successfully completes 800 MHz rebanding in the particular Region.⁷²

If you any questions regarding this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/

Alejandro A. Calderon,
Chief Executive Officer

cc: The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Chief Derek Poarch

⁷² See AT&T, Letter, WT Docket No. 02-55, filed April 19, 2007, at 4, 12 & n. 71.