Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 02-55
Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion and Guard Bands	)	

OPPOSITION OF SMARTCOMM, L.L.C. TO SPRINT NEXTEL CORPORATION'S REQUEST FOR WAIVER OF ITS OBLIGATION TO RELINQUISH CHANNELS IN THE 800 MHZ INTERLEAVED, EXPANSION AND GUARD BANDS

Smartcomm, L.L.C. ("Smartcomm") opposes Sprint Nextel Corporation's ("Sprint") request for waiver of its obligation to vacate all its non-border area 800 MHz Interleaved Band spectrum under 815/860 MHz, regardless of the state of reconfiguration completion.[1] Granting Sprint such an open-ended and uncertain extension of its rebanding obligations would expose public safety to harmful interference, delay the commercial availability of that spectrum, and derail the 800 MHz transition indefinitely.

Sprint was not given a gift, and should not be permitted to make it into one. Its $4.86 billion worth of spectrum in the 1.9 GHz band came with public interest strings attached to it.[2]

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[1] *See* Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55, at 1 (Jan. 27, 2010) ("2010 Waiver Request").

[2] 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*, FCC 04-168 ¶ 297 (rel. Aug. 6, 2004) ("*800 MHz Band Order*"). This 2004 estimate likely has increased substantially over the past six years given the shortage of spectrum.

But the *quid pro quo* is at risk of becoming a spectrum "give-away." Sprint has taken the benefits but so far has failed to fulfill the responsibilities that were their price; indeed, it is now trying to postpone fulfilling them for a third time. If Sprint had bought a car or a house, they would likely have been repossessed. What is more, Sprint's last extension came with a warning. As the Commission itself said, no matter what happens with NPSPAC licensee rebanding, Sprint must evacuate the Interleaved, Expansion, and Guard Band spectrum (all channels between 809-817 MHz/854-862 MHz) upon certain clearing benchmarks. The problem, of course, is that satisfaction of these benchmarks is largely in Sprint's hands and requires concerted effort on its part. Sprint, however, has no incentive to make that effort – indeed its logical incentive may be to do exactly the opposite. For that reason, the FCC also has imposed a hard (albeit already twice extended) March 31, 2010 deadline. By that date Sprint must evacuate the interleaved portion of that spectrum (the band below 815/860 MHz), regardless of its progress or lack thereof in clearing the former NPSPAC channels (821-824 MHz/866-869 MHz).

Sprint is now asking the Commission to disregard this deadline and suspend its effect. This means that, if the FCC were to issue yet another extension to Sprint and impose yet another "hard" deadline, the deadline could be viewed as a "soft" one: on the evidence, Sprint would be quite justified in thinking that this latest deadline, too, could be extended like the previous one. This is not to question Sprint's good faith or the motivation behind its conduct to date. Smartcomm takes no position on such matters. But the absence of satisfactory results means that the Commission cannot afford to create misaligned incentives.

Smartcomm requests that the Commission take steps to resolve the languishing 800 MHz public safety interference problem, create some moral hazard for Sprint (a hazard that, after all, is no more than the risk that Sprint will be held to its obligations) and open up the Interleaved

Band to use by public safety and Critical Infrastructure Industries ("CII") providers, and eventually CMRS providers. To that end, the Commission should either deny the extension request or impose conditions with real teeth. The FCC should also initiate a rulemaking to establish licensing and service rules to govern the Interleaved Band spectrum. Smartcomm, L.L.C. has some recommendations about these rules and plans to file a petition for rulemaking in that regard.

I. INTEREST OF SMARTCOMM

Smartcomm is an entity interested in applying for commercial radio licenses in the 800 MHz Expansion Band and Guard Band and (either by itself or through affiliates) purchasing commercial and Business and Industrial/Land Transportation ("B/ILT") licenses in the 800 MHz Expansion Band and commercial licenses and B/ILT licenses in the 812.5-815 MHz/857.5-860 MHz band.[3]

As a potential licensee, Smartcomm has an interest in avoiding interference and in competing with Sprint in the CMRS markets – interests that give it standing to participate in this proceeding. Interference and competition-related considerations are the paradigmatic bases of standing under the Communications Act.[4]

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[3] Smartcomm was founded in 2007 by Ms. Carole Downs and Mr. Pendleton Waugh. Among other things, Smartcomm is interested in obtaining licenses to use the 800 MHz spectrum. For purposes of full disclosure, Smartcomm notes that the Commission has raised certain character-related questions regarding the qualifications of Mr. Waugh, questions that Mr. Waugh is anxious to answer at the appropriate time.

[4] *See FCC v. Sanders Brothers*, 309 U.S. 470, 477 (1940) (finding that Congress wanted a competitor or potential competitor to have standing because such a competitor "would be the only person have a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission"); *FCC v. National Broadcasting Company*, 319 U.S. 239, 247 (1943) (holding that a party has standing to intervene when an FCC "action would cause electrical interference" to its operations).

At the very least, as the Commission has previously done in this proceeding, these comments can be treated as an informal objection, providing the Commission with an important opportunity to develop a full record.[5] The proposals contained herein are properly before the FCC in this proceeding because they address the reconfiguration of the 800 MHz band on a going-forward basis.

II. THE 800 MHZ BAND

Public safety licensees have long suffered interference from high density ESMR and cellular telephone systems in the 800 MHz bands – especially from Sprint. In 2002, the Commission concluded that the ever-increasing interference to public safety represented "a sufficiently serious problem that a solution must be found.[6]

A. The 800 MHz Proceeding

In 2004, the Commission addressed this public safety interference problem by giving Sprint a spectrum assignment worth many billions of dollars – the 1.9 GHz band (1910-1915 and 1990-1995 MHz).[7] In exchange, Sprint's predecessor, the primary commercial SMR licensee in the 800 MHz band, agreed to undertake the responsibility of relocating licensees and rebanding that spectrum.[8] Sprint is thus required to relocate its own SMR operations to the 817-824 MHz/862-869 MHz band, and must vacate all channels it used in the 806-817 MHz/851-862

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[5] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, DA 08-1444, ¶ 9 (rel. June 19, 2008) (allowing an opposition to be considered as an informal objection despite a lack of standing).

[6] Improving Public Safety Communications in the 800 MHz Band, *Notice of Proposed Rulemaking*, 17 FCC Rcd. 4873, 4482 ¶ 16 (2002).

[7] *800 MHz Order* ¶ 12.

[8] *Id.* ¶ 11.

MHz band segment.[9] Public safety licensees, and later CII agencies, will gain exclusive access to all channels vacated by Sprint in the interleaved portion of the band below 815 MHz/860 MHz for a limited-year period of time, after which eligible CMRS applicants could apply to use the spectrum.[10]

Following the reconfiguration, the 806-817 MHz spectrum will be configured as follows:

- NPSPAC (Public Safety): Only NPSPAC systems will be eligible to operate in the 806-809 MHz/851-854 MHz band segment (Channels 1-230, 25 kHz channels spaced every 12.5 kHz).

- Interleaved Band: The interleaved portion of the band at 809-815 MHz/854-860 MHz (Channels 231-470 spaced every 25 kHz) will consist of public safety, B/ILT and SMR channels interleaved. Public safety and CII agencies will have exclusive access to the 809-809.75 MHz/854-854.75 MHz band segment (Channels 231-260 spaced every 25 kHz) and the channels vacated by Sprint below 815 MHz/860 MHz for five years, after which eligible CMRS providers may apply to use the spectrum.

- Expansion Band: The Expansion Band at 815-816 MHz/860-861 MHz (Channels 471-510 spaced every 25 kHz) will consist of B/ILT and SMR channels interleaved. The Expansion Band may also be used to house non-Sprint ESMR systems.

- Guard Band: The Guard Band at 816-817 MHz/861-862 MHz (Channels 511-550 spaced every 25 kHz) will consist of forty channels available to any 800 MHz licensee. Any licensee operating below 817 MHz/862 MHz may elect to relocate to the Guard Band. The Guard Band may also be used to house non-Sprint ESMR systems.[11]

B. Sprint's Request to Further Delay the 800 MHz Transition

After Sprint failed to meet the Commission's initial benchmarks established in the *800 MHz Supplemental Order*,[12] the FCC imposed a June 26, 2008 deadline on Sprint to relocate

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[9] *Id.* ¶ 23.

[10] *Id.* ¶ 11 & n.56.

[11] *Id.* ¶ 151.

[12] Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd. 2513, 2515 ¶ 53 (2005) ("*Supplemental Order*").

from the Interleaved Band regardless of "*any* other rebanding contingency."[13] Sprint made little progress by that deadline and asked the Commission to eliminate that deadline and tie its relinquishment of the Interleaved Band to NPSPAC rebanding.[14] Recognizing the importance of certainty as to when the spectrum would become available, the Commission rejected Sprint's request but extended the deadline for it to vacate the Interleaved Band until March 31, 2010.[15] Now, because it has not completed the rebanding process, Sprint is once again asking the Commission to eliminate that hard deadline.[16]

III. SPRINT'S FURTHER DELAY WOULD UNDERMINE THE 800 MHZ TRANSITION, INCREASE INTERFERENCE POTENTIAL, AND STYMIE PUBLIC SPECTRUM NEEDS

The FCC has always assumed Sprint may have to temporarily shift some of the operations from the 800 MHz band to the 900 MHz band frequencies to provide "green space" for public safety licensees and to effect reconfiguration of the 800 MHz band.[17] The Commission did not establish the March 31, 2010 deadline because it believed the 800 MHz rebanding process would be complete by that date. It created the deadline because it believed the

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[13] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Third Memorandum Opinion and Order*, FCC 07-167 ¶ 28 (rel. Sept, 12, 2007) ("*Third Order*") (emphasis added).

[14] *See* Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55, at 1 (June 17, 2008) ("2008 Waiver Request").

[15] Improving Public Safety Communications in the 800 MHz Band – relinquishment By Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, WT Docket No. 02-55, *Order*, FCC 08-253, ¶ 15 (rel. Oct. 20, 2008) ("*Vacated Spectrum Order*").

[16] 2010 Waiver Request at 1.

[17] *800 MHz Order* ¶ 6 (recognizing that Sprint would "have to shift some of its operations from the 800 MHz band to 900 MHz band frequencies in order to provide the 'green space' necessary to effect reconfiguration of the 800 MHz band.").

public safety community needed "certainty regarding when such spectrum will become available to meet public safety demand."[18]

Sprint's request would, if granted, further disrupt the orderly process the FCC envisioned and delay the transition indefinitely. The request removes any certainty that a deadline creates, leaves potential applicants in a state of indefinite limbo, retains the current interference issues, and prevents the full development of the 800 MHz band spectrum. Notably, the transition delay will be indefinite even if the current deadline is replaced with another one. The extension will mean, *ipso facto*, that the next deadline, too, can be extended.

Public safety licensees need the 800 MHz spectrum. Public safety entities have been completing the reconfiguration process and are ready to use it. Public safety agencies have few viable alternatives to the 800 MHz spectrum.[19] Public safety demand for the 800 MHz band spectrum is increasing as few interleaved channels have been released in and near major metropolitan areas.[20] When these channels have been released, they are quickly assigned to public safety applicants.[21] The Commission should not delay the transition any further because a few public safety licensees have not fully completed reconfiguration. It has a responsibility to help those public safety entities that are ready to use the spectrum. It should also provide an

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[18] *Vacated Spectrum Order* ¶ 15 ("…it is appropriate to set an eventual deadline for Sprint to vacate the Interleaved Band regardless of NPSPAC rebanding progress. This will provide public safety with certainty regarding when such spectrum will become available to meet public safety demand, and will increase the spectral separation between Sprint and public safety.").

[19] Letter from Robert Gurss, APCO International, *et al.*, to Marlene Dortch, FCC, WT Docket No. 02-55, at 2 (Feb. 3, 2010) ("Public Safety Letter"); Letter from John Johnson, NPSPAC Region 39 Review Committee, to Marlene Dortch, FCC, WT Docket No. 02-55, at 1-2 (Feb. 4, 2010).

[20] Public Safety Letter at 2.

[21] *Id.*

incentive to Sprint to complete the process. If retuning delays can justify further delay in evacuating the spectrum, it may be little wonder if delays continue to occur.

Far from being harmless, Sprint's continued presence in the 800 MHz band below 817/862 MHz perpetuates the "ongoing and growing problem of interference to public safety communications" that the FCC has sought to address since the *800 MHz Report and Order* was adopted in 2004.[22] Only moving Sprint off the band will provide the separation needed to protect *existing* public safety licensees.

The attempted perpetuation of Sprint's rights to the spectrum it was supposed to evacuate years ago also has a domino effect. It delays the three-year exclusive use by public safety licensees. It delays the subsequent two-year period of use by public safety licensees and CII licensees. And it delays the eventual availability of the spectrum for commercial mobile radio services – services that may compete with Sprint's own.

IV. SPRINT'S REQUEST IS PROCEDURALLY IMPROPER

Even without these substantive infirmities, Sprint's request must still be rejected as procedurally improper because it is really an untimely reconsideration petition and it fails to meet the FCC's waiver standard.

A. Sprint Has Lodged an Improper Reconsideration Request

Effectively, Sprint's request is not for a waiver of a Commission rule or a request for an extension of time to meet its obligation but a request for reconsideration of the FCC's decision to impose a hard deadline on Sprint's obligation to vacate the Interleaved Band. In essence, Sprint's request is not to waive a requirement but to eliminate it altogether. This is a substantive change to the Commission's prior decision and not a waiver of the decision's instant

[22] *Id.*

applicability. In substance, therefore, Sprint is once again making a reconsideration request under the guise of something else.[23] And a reconsideration request is procedurally defective because it is untimely.[24]

B. Sprint Fails to Meet the FCC's Waiver Standard

Even assuming that Sprint properly requested a waiver of its obligation, it has not met the waiver standard. Sprint properly notes that a waiver may be granted if the underlying purpose of the rule would not be served or if the application of the rules would be unduly burdensome but has not met the burden. The purpose of the deadline is to provide "certainty regarding when such spectrum will become available to meet public safety demand."[25] Eliminating the deadline extends the time frame for making the spectrum available indefinitely. In addition, the deadline is meant to create a moral hazard for Sprint and provide it with an incentive to complete the process.[26] It is a "retune or lose" warning. This warning is unmistakable unless, of course, it is negated.

In addition, there is no undue burden on Sprint. Sprint has known since 2004 that it may need to transition its customers, at least temporarily, to the 900 MHz spectrum.[27] At this late

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[23] *See Third Order* ¶ 9 (rejecting Sprint's "request for clarification" as an untimely request for consideration).

[24] The *Vacated Spectrum Order* became final on October 30, 2008. Therefore, petitions for reconsideration were time-barred after November 29, 2008. *See* 47 U.S.C. § 405(a) ("petition for reconsideration must be filed within 30 days from the date upon which public notice is given of the order … complained of").

[25] *Vacated Spectrum Order* ¶ 15.

[26] *800 MHz Order* ¶ 23 (detailing potential consequences for failure to meet its rebanding obligations, including forfeitures and potential license revocation).

[27] *800 MHz Order* ¶ 6.

date, making the necessary arrangements to transition a few of Sprint's customers cannot be described as a burden that is undue, but rather as one that is overdue.

V. IF THE COMMISSION GRANTS AN EXTENSION, IT MUST IMPOSE CONDITIONS THAT PROVIDE SPRINT WITH A TRUE INCENTIVE AND PROPERLY PENALIZE FURTHER DELAYS

As noted throughout, Sprint's request should simply be denied. Sprint has failed to live up to its obligations and it is time for Sprint's failures to be met with consequence. If the Commission decides, however, to not hold Sprint accountable this time, it should make sure to avoid a permanent waiver of accountability.

If the Commission, for the third time, is inclined to grant Sprint any relief whatsoever, substituting yet another "retune or lose" deadline will be a woefully unsuitable condition. Sprint's continuing practice of filing waiver requests to postpone fulfilling its 800 MHz rebanding obligations threatens to make a mockery of such deadlines. Thus, if it does not deny Sprint's request, the Commission should grant only a brief extension that is, moreover, subject to conditions with real teeth. Smartcomm believes that, not later than six months from the Commission's ruling upon Sprint's third and hopefully final waiver request, Sprint should be required to vacate all of its channels within the Interleaved, Expansion and Guard Bands regardless of its progress or lack thereof in completing the retuning of public safety licensees within the former NPSPAC channels. Moreover, the Commission should consider imposing a condition affecting Sprint's entitlement to the 1.9 GHz spectrum – the other part of the *quid pro quo* struck with Sprint. If Sprint has not vacated those 800 MHz bands, then for every MHz/Pop it still is using within a particular NPSPAC Region, Sprint should forfeit an identical MHz/pop of its 1.9 GHz spectrum assignment in that particular NPSPAC Region. That spectrum should, in turn, be assigned to a new spectrum manager willing and financially capable of completing the rebanding process in that NPSPAC Region. In exchange for the assignment of the 1.9 GHz

spectrum, the spectrum manager would undertake to complete the 800 MHz spectrum relocation left incomplete by Sprint. These types of conditions, if carried out, would help ensure completion of the 800 MHz band transition.

CONCLUSION

The waiver requested by Sprint would disserve the public interest by eliminating any certainty public safety licensees have in the 800 MHz transition and perpetuating the interference risks these essential service providers face. Sprint's request is also procedurally infirm. It should be rejected or, in the alternative, only granted subject to strict conditions that will be unwaveringly enforced.

Respectfully submitted,

/s/

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March 26, 2010

DECLARATION OF CAROLE DOWNS

I declare under penalty of perjury under the laws of the United States of America that the allegations of fact in the foregoing are true and correct to the best of my information, knowledge and belief. Executed on March 26, 2010.

Carole Downs
President
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CERTIFICATE OF SERVICE

I, Christopher Bjornson, hereby certify that on this 26th day of March, 2010, I caused the foregoing to be served by electronic mail, upon the following:

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