

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Improving Public Safety)	WT Docket No. 02-55
Communications in the 800 MHz Band)	
)	
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 yet another waiver of its obligation to vacate all its 800 MHz Interleaved Band spectrum under 815/860 MHz, regardless of the state of reconfiguration completion.¹ The Commission should deny the waiver request altogether. Alternatively, the Commission should give Sprint a short extension of up to four months and either state that this new deadline will not be further extended under any circumstance, or articulate a truly exacting standard that would need to be met by Sprint for a further extension not to exceed two weeks as well as conditions that would be imposed on such a further extension. Granting Sprint yet another one-year extension of its rebanding obligations without taking these precautions would merely continue to expose public safety to harmful interference, delay the commercial availability of that spectrum,

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 2 (dated Feb. 11, 2011) (“2011 Waiver Request”). The latest waiver request extends to nine out of 21 National Public Safety Planning Advisor Committee (“NPSAC”) regions covered by Sprint’s previous waivers.

cause Sprint to believe it can flout the Commission’s directives in the reconfiguration process, and derail the 800 MHz transition even further.

In evaluating Sprint’s request to extend this deadline for the fourth time, the Commission should scrutinize more closely than in past extension decisions both Sprint’s progress on reconfiguring these bands and the effect that prior extensions have had on that progress by diluting Sprint’s moral hazard. Last year, the Commission declined to eliminate the deadline because it wanted to give Sprint “an incentive to fully cooperate with relocating licensees in the completion of rebanding.”² That incentive did not appear to be effective for Sprint, at least for the nine NPSPAC regions in question here, as Sprint is before the Commission for the fourth time. Sprint must not be allowed to expect a perpetual grant of new extensions, with each new deadline set to be waived based on what has now become a routine, “business as usual” new waiver request filed shortly before the deadline is set to expire.

The problem with this state of affairs is at least threefold. First of all, the “incentive” to complete the band’s reconfiguration, which the Commission has correctly tried to preserve by still holding Sprint to a deadline, becomes totally hollow if the deadlines prove soft and liable to routine further extension. Second, a regime of successive extensions is not really tantamount to a waiver. Rather it is tantamount to a “back-door” reconsideration of the *Spectrum Vacation Order*.³ In that decision, the Commission denied Sprint’s petition for reconsideration to be

² 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*, DA 10-576, ¶ 13 (rel. Mar. 31, 2010) (“*Third Extension Spectrum Order*”).

³ 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*”).

relieved of its band-clearing obligations. It should not permit Sprint to resort to self-help and achieve the same change to the rule through another device.

Finally, third, Sprint's request fails to meet the FCC's 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 Sprint 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 demands."⁴ As discussed above, extending 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.⁵ 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.⁶ At this late 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.

As Smartcomm has already had occasion to discuss in response to one of Sprint's previous waiver requests,⁷ 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

⁴ *Vacated Spectrum Order* ¶ 15.

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

⁶ *800 MHz Order* ¶ 6.

⁷ 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, WT Docket No. 02-55 (Mar. 26, 2010) ("Smartcomm Opposition").

strings attached to it.⁸ Sprint has taken the benefits but still has failed to fulfill the responsibilities that were their price; indeed, it is now trying to postpone fulfilling them for a fourth time. If Sprint had bought a car or a house, they would likely have been repossessed a long time ago. What is more, Sprint's last extension came with the clear warning that Sprint must vacate the Interleaved Band by March 31, 2011. The problem, of course, is that satisfaction of the relocation benchmarks that have not been met is largely in Sprint's hands and requires concerted effort on its part. Sprint, however, has no incentive to make that effort if it is fairly confident that its deadline for evacuating the spectrum will be extended. To the contrary, it may well have the reverse incentive – to refrain from progress, cite to the lack of it, and obtain another extension.. The Commission understood the need to align Sprint's incentives with the public interest, and it was to that end that it imposed a hard (albeit already thrice extended) March 31, 2011 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.

When Sprint made its 2010 Waiver Request⁹ last year, Smartcomm warned the Commission that:

if [it] 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.¹⁰

⁸ 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.

⁹ See Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55, at 2 (Jan. 27, 2010) (“2010 Waiver Request”).

¹⁰ Smartcomm Opposition at 2.

Sprint's most recent waiver request validates that assertion. The absence of satisfactory results means that the Commission cannot afford to create misaligned incentives. Sprint will continue to discount deadlines, unless the Commission acts upon the ones it sets.

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. In addition to denying Sprint's extension request or heavily conditioning a further extension, the FCC should also initiate a rulemaking to establish licensing and service rules to govern the Interleaved Band spectrum so that interested parties like Smartcomm¹¹ can provide input to the Commission.

As a potential licensee for the band, 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.¹² At the very least, these comments can be

¹¹ 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. 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.

¹² 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).

treated as an informal objection, providing the Commission with an important opportunity to develop a full record.¹³ 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.

CONCLUSION

Sprint's waiver request to unreasonably extend its deadline for a remarkable fourth time 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. It should be rejected or, in the alternative, only granted subject to an exacting standard and to strict conditions that will be unwaveringly enforced.

Respectfully submitted,

/s/

Pantelis Michalopoulos
Christopher R. Bjornson
Steptoe & Johnson LLP
1330 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Smartcomm, L.L.C.

February 22, 2011

¹³ 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).

CERTIFICATE OF SERVICE

I, Latoya Brisbane, hereby certify that on this 22nd day of February, 2011, I caused the foregoing to be served by electronic mail, upon the following:

Lawrence R. Krevor
James B. Goldstein
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, Virginia 20191
Lawrence.Krevor@sprint.com
James.Goldstein@sprint.com

_____/s/
Latoya Brisbane