

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

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

**REPLY TO OPPOSITIONS
TO SPRINT NEXTEL CORPORATION'S REQUEST FOR WAIVER**

SPRINT NEXTEL CORPORATION

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March 1, 2011

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SUMMARY

Sprint Nextel Corporation (“Sprint Nextel”) hereby responds to Oppositions by Smartcomm, LLC (“Smartcomm”) and Preferred Spectrum Investments, LLC (“PSI”) to Sprint Nextel’s February 11, 2011 Request for Waiver (“Sprint Nextel Waiver”) of the March 31, 2011, Interleaved Band spectrum relinquishment requirements in nine NPSPAC Regions.

Both Oppositions must be summarily rejected on procedural grounds. PSI’s Opposition was never served on Sprint Nextel and both PSI and Smartcomm lack standing. Considered on their merits, these Oppositions fail to demonstrate how granting Sprint Nextel a narrowly defined and limited waiver, which would be consistent with past Bureau action in this proceeding, would be contrary to the public interest.

Sprint Nextel also addresses an *ex parte* letter jointly filed by the Association of Public-Safety Communications Officials – International, Inc., the International Association of Chiefs of Police and the International Association of Fire Chiefs expressing concern – which Sprint Nextel shares -- with the pace of 800 MHz band reconfiguration and the availability of Interleaved Band spectrum for relicensing to public safety. Sprint Nextel points out that it stands ready to retune every remaining public safety agency as soon as they are ready to do so, that interleaved channels are available in most regions, that some interleaved channels are available for reassignment even in the nine regions covered by the instant waiver request, and that more interleaved channels will be available for relicensing as public safety agencies retune to their new channel assignments.

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Pursuant to Section 1.45 of the Federal Communications Commission’s (“Commission”) rules, Sprint Nextel Corporation (“Sprint Nextel”) hereby responds to Oppositions by Smartcomm, LLC (“Smartcomm”)¹ and Preferred Spectrum Investments, LLC (“PSI”)² to Sprint Nextel’s February 11, 2011 Request for Waiver (“Sprint Nextel Waiver”). Smartcomm and PSI argue that Sprint Nextel should be required to relinquish 800 MHz Interleaved Band (809-815 MHz/854-860 MHz) channels in nine NPSPAC Regions as of March 31, 2012 and not as further progress is made in these Regions. Both Oppositions must be summarily rejected on procedural grounds. However, if considered on their merits, the Oppositions fail to demonstrate how granting Sprint Nextel a narrowly defined and limited waiver, which would be consistent with past Bureau actions in this proceeding, would be contrary to the public interest.

¹ See Smartcomm Opposition, dated February 22, 2011, filed in WT Docket 02-55 (“Smartcomm Opposition”).

² See Preferred Spectrum Investments, LLC Opposition dated February 22, 2011, filed in WT Docket 02-55 (“PSI Opposition”).

The Association of Public-Safety Communications Officials – International, Inc. (“APCO”), the International Association of Chiefs of Police (“IACP”) and the International Association of Fire Chiefs (“IAFC”) (collectively “Public Safety”) also filed a letter commenting on Sprint Nextel’s Waiver.³ The Public Safety Letter does not oppose the Sprint Nextel Waiver, but expresses concern with the ongoing pace of 800 MHz band reconfiguration and the possibility of obtaining early access to Interleaved Band spectrum. Sprint Nextel shares that concern and believes the Commission’s rules and policies already provide for early public safety access to Interleaved Band channels in special situations, as discussed further below.

I. PSI’s Opposition Must Be Dismissed for Failing to Serve its Opposition on Sprint Nextel

PSI electronically filed its Opposition in the 800 MHz band reconfiguration WT Docket 02-55 on February 22, 2011, the due date for a timely opposition to Sprint Nextel’s Waiver. The PSI Opposition, however, was not served on Sprint Nextel by any means (electronic, overnight delivery, mail nor by hand) and therefore the PSI Opposition must be dismissed pursuant to Section 1.47 of the Commission’s Rules.⁴

II. Both Oppositions Should Be Dismissed for Lack of Standing

Setting aside the other procedural infirmities of the Oppositions, the Bureau should dismiss both Oppositions for lack of standing. Both Smartcomm and PSI

³ See Letter from Association of Public-Safety Communications Officials – International, Inc. (“APCO”), the International Association of Chiefs of Police (“IACP”) and the International Association of Fire Chiefs (“IAFC”) dated February 25, 2011, filed in WT Docket 02-55 (“Public Safety Letter”).

⁴ See 47 C.F.R. § 1.47. See Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, *Order*, DA 10-576 (PSHSB March 31, 2010) (“21 NPSPAC Region Waiver”) (Dismissing letter without consideration which was late-filed and was not served on Sprint Nextel).

recognize the standing issue as significant, and each cites *FCC v. Sanders Bros.*, 309 U.S. 470, 477 (1940) for the proposition that “potential competitors” have standing to object to applications and waivers due to their economic interests. This claim, however, overstates the holding of *Sanders Bros.* In *Sanders Bros.*, the Court determined that an *existing* licensee had standing to challenge the Commission’s grant of a license to an actual competitor. The Court reasoned that Congress may have intended to grant standing to a *competing licensee* in such a case, because Congress “may have been of the opinion that one likely to be financially injured by the issuance of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.”⁵ *Sanders Bros.* therefore contemplated a significantly different set of facts from this waiver circumstance, where Smartcomm⁶ and PSI⁷ allege standing solely on the basis that they *may one day* apply for licenses that will give them a future possible *opportunity* to compete with Sprint Nextel.

To demonstrate standing, a party must show “(1) a personal injury ‘in fact’; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, not

⁵ *FCC v. Sanders Bros.*, 309 U.S. 470, 477 (1940).

⁶ Smartcomm appears to recognize that its basis for standing may be questionable, as it requests that its comments be treated as an informal objection. (Smartcomm Opposition at pages 5-6).

⁷ PSI states that “it is poised to apply” for 800 MHz spectrum once band reconfiguration is completed and the subsequent five-year exclusive licensing period for Public Safety and Critical Infrastructure eligibles expires. (PSI Opposition at page 3). PSI also indicates it “intends” to purchase other 800 MHz spectrum. (PSI Opposition at page 4.) All of these statements evidence a lack of standing today to protest Sprint Nextel’s Waiver Request.

merely speculative, that the requested relief will redress the injury.”⁸ As a general matter, standing requires a showing of reasonably proximate harm, not a mere allegation of a speculative injury.⁹ Standing is thus not “an ingenious academic exercise in the conceivable,” but requires a “factual showing of perceptible harm.”¹⁰ To grant standing, an “injury must consist of an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical,” and the more speculative the injury, the less likely it is that standing will be found.¹¹

Under this standard, courts, as well as the FCC itself, have distinguished *Sanders Bros.* in cases where a party alleges a speculative, potential injury. For example, the D.C. Circuit has stated that *Sanders Bros.* was “premised on the petitioner’s status as a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged governmental action.”¹² The Bureau itself recently dismissed a petition for declaratory ruling for lack of standing where the “Petitioners have suffered no injury in fact,”

⁸ Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, DA 11-337, ¶ 8 (PSHSB rel. Feb. 24, 2011) (“*New Jersey Transit Order*”).

⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992).

¹⁰ *Id.*, citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, (1973).

¹¹ *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004), citing *Lujan*.

¹² *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002) (emphasis in original). The *New World Radio* court found that a Washington, D.C. AM radio station licensee lacked standing to challenge the renewal of a Pocomoke City, Maryland AM station because the “competitive injury” alleged would occur, if at all, only if the Maryland station subsequently sought and secured relocation of its license to the Washington, D.C. area. The Washington station did not have standing where an agency action was, “at most, the first step in the direction of future competition,” and the court rejected as “too remote to confer standing” a claim of a “chain of events” injury.

concluding that the injury Petitioners alleged was “too remote and speculative to confer standing.”¹³ Similarly, the Commission dismissed a petition to deny for lack of standing where the petitioner’s stations, which the petitioner claimed would be the subject of a competitive injury, were not constructed and the petitioner presented no evidence that it was a direct and current competitor.¹⁴

For these same reasons, Smartcomm’s citation of *FCC v. National Broadcasting Co.*, 319 U.S. 239, 247 (1943) to support standing to challenge the Waiver is unavailing. While the Court found standing where an FCC action would create interference, it in no way altered the requirement that an actual injury be demonstrated as a precondition to finding a party has standing. An alleged injury, whether economic or interference related, is far too speculative and distant in the case of the pending Sprint Nextel Waiver to confer standing on either Smartcomm or PSI.

PSI is not an 800 MHz licensee; it appears to be an *investor* in Preferred Communications Systems, Inc. (“Prteferred”) – an FCC licensee.¹⁵ Although individual investors¹⁶ in PSI may hold or previously held some single-channel 800 MHz licenses, PSI does not have standing to object to Sprint Nextel’s Waiver. PSI’s own website states

¹³ *New Jersey Transit Order* at ¶ 8. *See also* Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, DA 11-382, (PSHSB rel. Feb. 28, 2011) (“*Ottawa County Order*”).

¹⁴ Wireless Properties of Virginia, Inc., Assignor and Nextel Spectrum Acquisition Corp., Assignee, *Memorandum Opinion and Order*, 23 FCC Rcd 7474, ¶ 9 (WTB 2008), citing *New World Radio*.

¹⁵ *See* <http://preferredspectrum.com/aboutus.html> Preferred, as Sprint Nextel has indicated previously, is an entity with unconstructed 800 MHz licenses in Puerto Rico and a handful of markets in the continental United States.

¹⁶ *See* Exhibit A and Exhibit B to the PSI Opposition.

that its business plan is to “acquire specific 800 MHz licenses in the near *future* with the *intent of leasing the licenses* to a major wireless carrier for a significant profit.”¹⁷ To the extent PSI is referring to Interleaved Band channels for which Sprint Nextel has requested a limited waiver, the Bureau should note that PSI is not eligible to apply for the Interleaved Band channels Sprint Nextel is returning to the Commission for relicensing in the 800 MHz Reconfiguration Proceeding, as the Commission’s rules make those channels solely available to Public Safety eligibles (and Critical Infrastructure eligibles) for at least five years from the completion of band reconfiguration in a given public safety area. Even if, *five years from now*, PSI were able to acquire any of the Interleaved Band, Expansion Band or Guard Band spectrum Sprint Nextel returns, PSI would still not be a true “competitor” to Sprint Nextel by dint of obtaining limited spectrum in the non-cellularized portion of the 800 MHz band.¹⁸

Smartcomm presents no better case for standing.¹⁹ It is unknown whether Smartcomm is even operational or providing service to customers or where it is actually

¹⁷ “Preferred Spectrum Investments offers accredited investors opportunities to enjoy a considerable return on investment.” “Its two main goals: 1. Acquire specific 800 MHz licenses in the near *future* with *the intent of leasing* the licenses to a major wireless carrier for a significant profit. 2) Provide Preferred certain debt financing.” See <http://preferredspectrum.com/opportunity.html>. (Emphasis added) The Commission should note that PSI’s website lists Carole Downs as Company Secretary; she is also the CEO and co-founder of Smartcomm. PSI’s address, suite number and even fax number are identical to that of Smartcomm’s, calling into question whether PSI is even the real party in interest in its Opposition.

¹⁸ Stated differently, PSI’s possibility of obtaining some Interleaved Band channels five years from now does not now make it a “competitor” for purpose of conferring standing to oppose Sprint Nextel’s instant waiver request.

¹⁹ It is ironic that Smartcomm chose to challenge Sprint Nextel’s request for waiver relief based on an unspecified “moral hazard” argument when Smartcomm’s President and co-founder, Mr. Pendelton Waugh (“Mr. Waugh”), is a convicted felon. See Preferred Communication Systems, Inc., *Order to Show Cause and Notice of Opportunity*

doing so. Even if it were, Smartcomm is not a cellularized provider and thus, cannot be deemed a “competitor” of Sprint Nextel.

III. Smartcomm and PSI Broadly and Unfairly Attempt to Blame Sprint Nextel for Non-Completion of 800 MHz Band Reconfiguration

As the Bureau is well aware, Sprint Nextel neither performs public safety retunes nor controls the timing of a public safety licensee’s 800 MHz retuning activity. Sprint Nextel cannot compel a public safety licensee to perform its planning work more quickly, negotiate agreements with Sprint Nextel or its vendors without delay, or perform the series of tasks necessary to complete each individual 800 MHz retune.²⁰ To the extent that PSI and Smartcomm are dissatisfied with the overall pace of 800 MHz band reconfiguration and the highly attenuated impact these delays may have on their extremely speculative business plans, their frustration should be redirected to the 800 MHz incumbent licensees who have yet to complete their retuning projects.

As Sprint Nextel has stated repeatedly throughout the 800 MHz band reconfiguration process, Sprint Nextel has no incentive to delay 800 MHz band reconfiguration and would retune every remaining incumbent licensee today were they ready to do so.²¹ The facts provided in Sprint Nextel’s Waiver demonstrate

for Hearing, 22 FCC Rcd 13363 (2007) ¶¶ 2-5. See also Notice of Disbarment from the Securities and Exchange Commission, June 24, 1997 at <http://www.sec.gov/litigation/admin/3438761.txt> outlining basis for conviction and multiple disbarments of Mr. Waugh.

²⁰ As the Bureau is well aware, until a public safety incumbent completes its planning, and provides a complete cost estimate, Sprint Nextel has no ability to even negotiate an FRA or initiate 800 MHz retuning. Even at this late date in the 800 MHz band reconfiguration process, public safety licensees in some of the nine NPSPAC Regions still have not completed their planning activities.

²¹ Sprint Nextel Waiver at page 5.

overwhelmingly that hundreds of licensees have responded to the Commission's requirement to complete 800 MHz band reconfiguration and have done so, while hundreds more are hard at work on implementing or completing their individual projects.²² Sprint Nextel's Waiver also shows, unfortunately, that licensees in at least nine NPSPAC Regions where Sprint Nextel has subsequently requested relief, are for their own individual reasons, well behind schedule.²³ Until public safety incumbents achieve more progress in this limited number of NPSPAC Regions, it is not in the public interest to require that Sprint Nextel make the interleaved channels available for 800 MHz public safety system expansion and/or new systems in these nine regions where public safety has vacated few, if any, of Sprint Nextel's FCC-mandated replacement channels.²⁴ Sprint Nextel's Waiver is narrowly tailored based on the circumstances that exist in these NPSPAC Regions today, where ongoing delays by other licensees who

²² Sprint Nextel Waiver at pages 2-3.

²³ Sprint Nextel Waiver at pages 3-4

²⁴ *21 NPSPAC Region Waiver* at ¶ 11. In 2008, the Commission agreed that enforcing its previous directive that Sprint Nextel make all of its spectrum below 862 MHz available prior to the end of band reconfiguration would do harm to Sprint Nextel. *See Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, Order, DA 08-253, ¶ 13 (October 30, 2008) ("Phased Transition Order")* ("Given these circumstances, we do not believe the public interest would be served by requiring Sprint to immediately vacate the entire Mid-Band, which would cause serious disruption to Sprint's network and customers."). Similarly, the Bureau has recognized the need to balance the pace of band reconfiguration with Sprint Nextel's access to channels during the reconfiguration transition period granting Sprint Nextel a waiver to permit it continued access to Channels 1-120 where the Bureau has granted corresponding waivers to give NPSPAC licensees more time to relocate to the new NPSPAC band. *See Improving Public Safety Communications in the 800 MHz Band; Sprint Nextel Request for Waiver of June 26, 2008 Rebanding Deadline with Respect to Channels 1-120, Order, WT Docket No. 02-55, DA 08-1444, at ¶ 13 (PSHSB rel. June 19, 2008)* ("... grant of the waiver to Sprint will help it to avoid unnecessary disruption to its network and customer service. . .")

Sprint Nextel does not control or cannot compel to complete retuning simply must be acknowledged and limited relief granted. In addition, Sprint Nextel's Waiver Request recognizes that the Bureau has granted public safety licensees repeated waivers and extensions of time to vacate Sprint's replacement channels and complete their retuning obligations.²⁵

IV. The Joint Public Safety Filing Echoes Sprint Nextel's Desire for Rapid Completion of 800 MHz Band Reconfiguration

On February 25, 2011, APCO, the IACP and the IAFC filed a joint letter commenting on Sprint Nextel's Waiver.²⁶ Public Safety expresses concern with the "delay in clearing spectrum in the remaining nine regions" and notes that these regions have "pent-up demand" for additional public safety spectrum. It does not, however, *per se* oppose grant of the waiver request.²⁷

Sprint Nextel shares the concerns expressed by Public Safety about the pace of 800 MHz band reconfiguration in these nine NPSPAC Regions and beyond. Sprint Nextel continues to do everything within its control to facilitate 800 MHz reconfiguration so that public safety systems move to their new channel assignments, thus freeing up the former NPSPAC channels for Sprint Nextel to occupy.

²⁵ *Improving Public Safety Communications in the 800 MHz Band; Supplemental Requests for Waiver of the June 26, 2008 Rebanding Deadline*, WT Docket No. 02-55, Order, DA 10- 2431 (PSSB rel. December 30, 2010).

²⁶ See Public Safety Letter at page 1. The Public Safety Letter was filed three days after the applicable filing deadline and may be dismissed pursuant to Section 1.45 of the Commission's Rules. Notwithstanding the procedural point, Sprint Nextel has chosen to treat the filing as an *ex parte* letter and respond on the merits.

²⁷ *Id.*

For example, Sprint Nextel will make available after March 2011 for Commission reassignment all of its Interleaved Band channels in 12 NPSPAC Regions -- in addition to the 25 NPSPAC Regions in which it has already made all of its Interleaved Band channels available for Commission reassignment to public safety communications operators.²⁸ Sprint Nextel is making additional interleaved spectrum available even though the pace of 800 MHz band reconfiguration progress in these 12 Regions is also generally slower than in other Regions.²⁹ Even in the nine NPSPAC Regions at issue herein, Sprint Nextel has already made Interleaved Band channels available to the Commission for reassignment,³⁰ and anticipates making additional channels available soon in Dallas and the New York Metro region in accordance with the Commission's progress benchmark requirements.³¹ If incumbent public safety agencies in the nine NPSPAC Regions complete reconfiguration faster than projected, Sprint Nextel will be pleased to make additional Interleaved Band spectrum available in those Regions. Sprint Nextel has been responsive and will continue to be responsive to Public Safety as has been demonstrated in the Waiver Request itself.

²⁸ 21 NPSPAC Region Waiver at ¶ 12.

²⁹ Sprint Nextel Waiver at page 6.

³⁰ Pursuant to the 2008 *Phased Transition Order*, in early 2009 Sprint Nextel made as many as 20 800 MHz channels available in every non-border market between 854.0-854.5 MHz as part of the Stage 1 initial "give-back" of spectrum. See Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures For Channels Relinquished by Sprint Nextel Corporation in the 809-809.5/854-854.5 MHz Band, *Public Notice*, DA 08-2810 (December 28, 2008). Pursuant to this process public safety licensees in and near major cities, such as New York City, Houston, Chicago, Baltimore, Boston, and San Francisco have all applied for and received grants of new 800 MHz spectrum to expand their systems.

³¹ Sprint Nextel Waiver at page 4.

Beyond expressing general concern about the pace of reconfiguration, Public Safety also suggests if the waiver is granted, that the Commission allow public safety applicants early access to Interleaved Band channels in the nine NPSAPC Regions in question if a public safety agency demonstrates an immediate need for early access. The Commission's Orders already provide flexibility for public safety licensees to seek waiver of the Commission's applicable benchmarks,³² and Sprint Nextel has and will continue to cooperate with individual public safety agencies in such circumstances as they arise and are warranted. Accordingly, no new standards, processes or procedures are necessary if the Bureau grants Sprint Nextel's Waiver request.

³² *Phased Transition Order* at ¶ 15.

V. Conclusion

Despite extensive 800 MHz reconfiguration progress across the country, many of the 800 MHz public safety incumbents in the nine NPSPAC Regions have made limited progress towards commencing or completing their individual reconfigurations. As a result, they will not be retuning to their new channel assignments anytime soon, thus warranting granting Sprint Nextel the limited waiver relief it seeks. Sprint Nextel has and will continue to meet its 800 MHz reconfiguration responsibilities and appreciates all opportunities to work cooperatively with the Commission, the Transition Administrator, and the Public Safety community to advance the reconfiguration transition and to complete both individual reconfigurations, and this overall project as soon as possible.

PSI and Smartcomm's Oppositions should be dismissed for lack of standing or alternatively denied on the merits and Sprint Nextel's Waiver Request should be granted.

Respectfully submitted,

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March 1, 2011

CERTIFICATE OF SERVICE

I, James B. Goldstein, hereby certify that on this March 1, 2011, I caused the foregoing Reply to Oppositions to Sprint Nextel's Request for Waiver to be served by U.S. Mail or electronic mail, as indicated, upon the following:

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