

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

In the Matter of	)	
	)	
County of Genesee, New York	)	WT Docket No. 02-55
	)	Mediation No. TAM-43102
and	)	
	)	
Sprint Nextel Corporation	)	

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Nextel Communications, Inc. (“Nextel”), a wholly owned subsidiary of Sprint Nextel Corporation, hereby files this Opposition to the Oakland County, Michigan (“Oakland or County”) Petition for Reconsideration filed on October 11, 2011 by Oakland County, Michigan (the “Petition”). Nextel opposes this Petition on the merits and on procedural grounds.<sup>1</sup> The Petition is procedurally defective because Oakland County’s Petition for Reconsideration is of another licensee’s Order on *de novo* review of a Recommended Resolution.<sup>2</sup> In similar cases the Bureau has determined unrelated 800 MHz licensees, even if they have general issues in common, do not have standing to seek reconsideration of the outcome of another licensee’s mediation process.<sup>3</sup>

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<sup>1</sup> Nextel’s Opposition to Oakland County’s Motion for Leave to Intervene is filed concurrently with this Opposition.

<sup>2</sup> County of Genesee, New York and Sprint Nextel Corp., *Memorandum Opinion and Order*, WT Docket No. 02-55, DA 11-1521 (PSHSB Sept. 9, 2011) (“*Bureau Order*”).

<sup>3</sup> See City of Boston, Massachusetts and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 2361, ¶ 2 (PSHSB 2007) (“We dismiss the petition for reconsideration for lack of

On the merits, Oakland's Petition is nothing more than a "me-too" argument that the Bureau Order misapplied existing Commission requirements to the County of Genesee's replacement frequency challenge. However, the Petition's arguments supporting these assertions and seeking Bureau reconsideration are fatally flawed and should not disturb the Bureau's determinations on reconsideration. On review, the Bureau should affirm its prior determination that the *Bureau Order* disposing of Genesee's arguments is sound and is consistent with every right Genesee has and every obligation Nextel has under the 800 MHz Orders to provide comparable post-reconfiguration frequencies to an incumbent licensee. Oakland has no greater rights in this regard than any other U.S. – Canadian border area licensee.

**I. THE PETITION MISCHARACTERIZES THE APPLICATION OF 800 MHZ ORDERS TO ITS SITUATION.**

The County's radio system is located in the U.S. – Canadian border area in Region 3. Like Genesee, Oakland faces the reality that the revised and ultimately adopted post-rebanding 800 MHz band plan for the U.S. – Canadian border reflects the reality that cross border sharing of spectrum by federal jurisdictions means that there is simply less of it to be assigned on a primary basis to individual operators either in Canada or in the United States. When confronting this reality in adopting a revised 800 MHz band plan for the U.S. – Canadian border, the Commission correctly determined that Expansion Band and Guard Band assignments would not be workable for any of the U.S. – Canadian border regions. This decision was entirely consistent with the determination for some non-border areas in the United States, as there are areas within the U.S. where there was not sufficient spectrum available for a Guard Band, such as in Atlanta,

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(Continued)

standing because the *Boston Order* is limited to the facts presented in the record of that proceeding and does not adversely affect Petitioners.”)

Georgia.<sup>4</sup>

The *Bureau Order* is therefore entirely consistent with the Commission's May 2008 *Second Report and Order*, which specifically considered and rejected the use of a 800 MHz Guard Band.<sup>5</sup> However, rather than accept the Bureau's determination that even in this circumstance, incumbent licensee replacement spectrum would be deemed comparable, the County seeks special treatment on the theory that the Bureau has deprived it of some non-existent guarantee made by the Commission. The County asserts specifically that the *Bureau Order* erroneously holds that "Canadian Border public safety licensees are not entitled to proactive interference protection."<sup>6</sup> The essential scope of this supposedly critical "proactive" protection is the use of Guard Band spectral separation; however, the Commission affirmatively found such Guard Bands to be unnecessary for comparability to exist in the context of Canadian Border regions, around Atlanta, Georgia, and in some other areas. Thus, the County cannot succeed in showing that the Bureau failed to apply the Commission's determination in this case. The Bureau acted consistently with the Commission's 800 MHz Orders and Oakland completely failed to demonstrate otherwise.

The County maintains the erroneous view that it can reject post-rebanding replacement frequencies because they are "too close" to other licensees. The County of course, does not determine or set license assignment rules; the Commission does. The Commission has specified that there need not be a Guard Band in any U.S. – Canadian border region and that channel

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<sup>4</sup> See Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015, ¶¶ 46-49 (2005).

<sup>5</sup> See Improving Public Safety Communications in the 800 MHz Band, *Second Report and Order*, 23 FCC Rcd 7605 (2008) ("*Second Report and Order*").

<sup>6</sup> Petition at 2.

assignments can be made in the manner the TA proposed because the County has the guarantee, post-rebanding, of “absolute interference protection.” The quarrel the County has, apparently, is that it views “absolute” as inferior to what it describes as “proactive” interference protection. But since the Commission plainly determined there was insufficient spectrum in some areas of the country to allow the use of Guard Bands, the County has no right to expect them to be created now for its individual benefit.<sup>7</sup>

The Bureau also properly discounted the County’s overheated rhetoric about the “technical toolbox” being insufficient to address interference, because “it ignores the fact that Sprint must avoid use of the interfering frequency.”<sup>8</sup> Because the Bureau applied the Commission’s directions to the channel assignment circumstances Genesee presented, there is no basis whatsoever for the Bureau to reverse course on reconsideration.

The Bureau specifically reviewed each of Genesee’s contentions as to why the replacement frequencies offered would not be comparable. The Bureau found each to be erroneous. As the *Bureau Order* states: “the replacement channels offered by Sprint for Genesee’s FRED operations are comparable to its existing FRED channels. On these replacement channels, Genesee may operate its FRED technology, as before, without the need to

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<sup>7</sup> As the *Bureau Order* observes, the institution of a Guard Band, or buffer in Region 2 was “impossible because of the limited number of channels primary to the U.S. in the Canada border region” but that Sprint nevertheless has a strict responsibility to avoid objectionable interference, which conceivably might include instituting a *de facto* buffer. *Bureau Order* at ¶31. This, the Bureau maintained, was preferable to creating unnecessary and inefficient spectrum use in border areas to accommodate the County’s preference.

<sup>8</sup> *Id.*

conform to the more restrictive NPSPAC emission mask...”<sup>9</sup>

On the specific issue of the replacement channels being within 1 MHz of a possible Nextel frequency, the Bureau similarly took issue with Genesee’s reading of the scope of its replacement spectrum rights:

We disagree with Genesee that retuning its FRED-enabled channels to within 1 MHz of the ESMR band is contrary to Commission rules or would somehow fail to constitute comparable facilities. When establishing channel plans for the Canada border, the Bureau stated “[b]ecause of the limited amount of U.S. primary spectrum available in the Canadian border regions, we do not create an Expansion Band or Guard Band in Regions 1-6. In declining to establish an Expansion Band or Guard Band, however, the Bureau noted that ‘licensees operating in the non-ESMR portion of the band . . . will be entitled to full interference protection from Sprint’s ESMR operations. . . . Further, the Bureau observed that the band plans adopted in the regions along the Canada border ensure ‘that all relocating licensees will receive comparable facilities.’ It is therefore clear from the *800 MHz Second Report and Order* that the Bureau contemplated that the TA could provide non-ESMR licensees with replacement channels within 1 MHz of the ESMR band and that those licensees would receive comparable facilities by virtue of the absolute rules prohibiting Sprint from causing objectionable interference to the relocated licensees. (cites and footnotes omitted).<sup>10</sup>

Thus, the Bureau affirmed that “full” or “absolute” interference protection is provided without any specific rule-based spectral buffer in the U.S. - Canadian border region and is still the full interference protection that the Commission has deemed to be comparable.

As the *Bureau Order* correctly observed, to the extent that any border area licensee believed that its rights were undermined by the band plan that has been applied to its operations,

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<sup>9</sup> *Bureau Order* at ¶ 27. The framing of the replacement spectrum issue as one of comparable facilities makes its case of reconsideration even more inane: prior to rebanding, the region had no Guard Band and following rebanding the same conditions apply. For the County to be in any position to credibly object to its General Category channel assignments far more would be required than a generalized expression of concern that it is “too close” to possible Nextel operations.

<sup>10</sup> *Id.* at ¶¶ 27-28.

the time to have complained about that was during the Canadian band plan rulemaking. To seek reconsideration of a frequency assignment decision that so plainly is consistent with the band plan and that the Bureau quite appropriately determined was comparable given the circumstances of limited spectrum availability in the border areas is an inappropriate waste of resources. The Petition's strained counter to this point is that its reconsideration is only "requesting the proper application of that Order's parameters in that it be able to operate at least 1 MHz distant from these cellular operations."<sup>11</sup> However, since the *Bureau Order* correctly states that Genesee is wrong as a factual matter in asserting a right to 1 MHz of spectral separation, there is nothing Oakland has shown to demonstrate that the Bureau improperly applied the Commission's 800 MHz Orders to its circumstances. Any fair reading of the Commission's *Second Report and Order* adopting the U.S. – Canadian band plan demonstrates that the 1 MHz separation requirement was not absolute in every frequency assignment or reassignment. The only absolute was the requirement on Nextel to provide strict interference protection post-rebanding.

The Commission specifically addressed and determined the extent of required separation of ESMR and non-ESMR (high site B/ILT and traditional SMR), which is the portion of the band where Genesee's replacement frequencies are located. Indeed, the Commission directed the TA to separate types of operations based on regional differences in channel usage, and since the number of channels occupied by B/ILT and high site SMR licensees will vary by region, the dividing line between EMSR and non-ESMR will also vary by region. As the Commission stated:

upon completion of rebanding in each border region, licensees operating in the non-ESMR portion of the band (as determined by the TA) will be entitled to full

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<sup>11</sup> Petition at 2-3.

interference protection from Sprint's ESMR operations under the same post-rebanding interference standard that applies outside the border regions. . . We recognize that assigning replacement channels to non-ESMR licensees in the manner described will reduce the potential separation between upper and lower bounds of available frequencies in the non-ESMR pool... .<sup>12</sup>

The County proves nothing by spending pages of its Petition citing comments Nextel and other commenters made in the course of the underlying 800 MHz rulemaking concerning what would be workable or desirable outcomes vis-à-vis spectral separation particularly in the spectrum-constrained U.S. – Canadian border areas. The fact is that the Commission adopted its own band plan, detailed technical rules and policies to effectuate 800 MHz rebanding. This means that the Commission's rules, and not individual or joint comments in a rulemaking about what the Commission might or should adopt as its final rules, are what governs. It is the Commission that plainly has stated that at the border, strict interference protection constitutes comparable frequency assignments. The County's opportunity to argue the merits of that point as to its operations in the context of any 800 MHz rulemaking has come and gone.

**II. THE COUNTY HAS MISCONSTRUED THE RULE TABLES OF ASSIGNMENT TO MAKE AN UNSUPPORTABLE ARGUMENT.**

Perhaps because the County recognizes the futility of its comparable facilities argument, the County has, for the first time, attempted to articulate yet a new problem with its replacement frequencies in its Petition. According to the County, Section 90.619(c)(7) of the Commission's rules may mean that the County's designated replacement channels are "entirely encompassed within the block where High Density Cellular operations (whether by an SMR operator or any Part 90 eligible licensee) are permitted."<sup>13</sup> Because this assertion is plainly incorrect, there

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<sup>12</sup> *Second Report and Order* at ¶¶ 18-19.

<sup>13</sup> Petition at 7.

should be no need to respond as a substantive matter. However, operation in the General Category portion of the band as shown in Section 90.619(c)(7) and operation in the ESMR portion are subject to differing rules and requirements. The County ignores that critical point as well as the plain fact that the *Second Report and Order* directed the TA to determine, for each Canadian border region, where the non-ESMR and ESMR portions of the band start and stop.<sup>14</sup> The *Bureau Order* was plain that Genesee and other similarly situated licensees have the benefit of full interference protection once the region is fully reconfigured from Nextel's operations in the ESMR band in U.S. – Canadian border areas and in every other circumstance as well. To the extent that the County has a complaint, then the County yet again has a complaint with the Commission's determinations in the *Second Report and Order*, and not a quarrel with the Bureau in applying these determinations to Genesee's situation. Regardless of the County's overheated rhetoric, Nextel is required to provide full interference protection even on these channels post-rebanding, leading, as the Commission recognized, in some cases potentially to creation of spectrum buffers if necessary. The Commission's rules were deliberately fashioned to provide the County with adequate interference protection, even in circumstances that the County plainly views as less than ideal.

### **III. CONCLUSION**

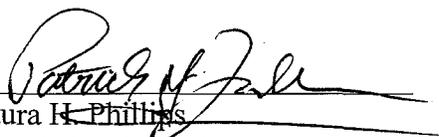
Oakland County has an obligation to reband its 800 MHz operations under the Commission's rules and the band plan that applies in its respective border region. While the County may not like the results of the application of the band plan to its operations, it was

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<sup>14</sup> The Petition states that the County lacks "final" information from the TA concerning Nextel's General Category assignments but speculates that they could be less than .5 MHz away from it. However, because the County has full interference protection, the actual assignments are not relevant for upholding the Bureau's application of the Commission's rules.

directed to either accept the frequencies or make a filing with the Bureau in August, both of which it has failed to do. The County has no basis to make unsupported allegations that it will not enjoy both comparable facilities and full interference protection post-rebanding. The Petition should be denied.

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October 21, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of October, 2011, a true copy of the foregoing Opposition to Petition for Reconsideration was served electronically upon:

**PSHSB800@fcc.gov**

**Alan Tilles**  
**atilles@shulmanrodgers.com**

A handwritten signature in cursive script, appearing to read "Laura H. Phillips", is written over a solid horizontal line.

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