Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18

ORDER

Adopted: January 27, 2006 **Released: January 30, 2006**

By the Chief, Public Safety and Critical Infrastructure Division:

I. INTRODUCTION

1. We have before us a Request for Stay filed by Preferred Communications, Inc. (Preferred)[1], a Specialized Mobile Radio (SMR) Economic Area (EA) licensee in the 800 MHz band, seeking a stay of the Commission's rules and regulations governing 800 MHz rebanding, as adopted in the *800 MHz Report and Order* and subsequent orders in this docket.[2] For the reasons discussed below, we

[1] Preferred Communications Systems, Inc., Request for Stay (filed Nov. 9, 2005) (Stay Request).

[2] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 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, DA 04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459, 19 FCC Rcd 21818 (2004) (*800 MHz Report and Order*); Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*) and (continued….)

conclude that Preferred has not met the legal standard for a stay.

II. BACKGROUND

2. In the *800 MHz Report and Order*, the Commission adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.[3] Specifically, the Commission ordered the expeditious reconfiguration of the 800 MHz band to separate public safety, critical infrastructure industry (CII), and other non-cellular systems from Enhanced Specialized Mobile Radio (ESMR)[4] systems characterized by the use of high-density cellular architecture.[5] The new 800 MHz band plan requires public safety, CII, and other non-cellular licensees to operate in the lower portion of the 800 MHz band, and ESMR carriers that utilize high-density cellular architecture to operate in the upper portion of the 800 MHz band.[6] To the extent necessary to effectuate band reconfiguration, licensees who require relocation to new frequencies must be afforded "comparable facilities,"[7] and their relocation expenses will be paid for by Sprint Nextel Corporation (Sprint Nextel), which has guaranteed the availability of the necessary funds.[8]

3. Of particular relevance to Preferred, the Commission provided certain relocation options to 800 MHz EA licensees in the interleaved portion of the 800 MHz band who sought to operate ESMR systems under the new band plan. In the *800 MHz Report and Order*, the Commission gave EA licensees already operating ESMR systems the option of relocating to the ESMR portion of the 800 MHz band.[9] In the *800 MHz Supplemental Order*, the Commission extended to non-ESMR EA licensees, including EA licensees that had not constructed facilities, the option to relocate to comparable spectrum in the ESMR band contingent on their using cellular technology.[10] However, non-ESMR licensees exercising this option would not receive unencumbered EAs but would instead receive spectrum in the ESMR band equivalent to the unencumbered "white space" that they held at the time the *800 MHz Report and Order* was published in the Federal Register.[11]

(Continued from previous page)
Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, WT Docket 02-55, 20 FCC Rcd 16015 (2005) as amended by Erratum, DA 05-3061 rel. Nov. 25, 2005 (*800 MHz MO&O*) (collectively, *800 MHz Rebanding Orders*).

[3] *800 MHz Report and Order* at 15021-45 ¶¶ 88-141.

[4] For a definition of ESMR, *see id*. at 15060-61 ¶¶ 172-173.

[5] For an explanation of a high-density cellular architecture system, *see id*. at 15060-61 ¶¶ 172-74.

[6] Public safety, CII, and other non-cellular licensees will operate below 817/862 MHz and ESMR systems will operate on spectrum above 817/862 MHz. *Id.*at 14977 ¶ 11.

[7] Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities with transition to the new facilities as transparent as possible to the end user. *800 MHz Report and Order* at 15077 ¶ 201.

[8] In exchange for Sprint Nextel's spectral and financial contributions to 800 MHz band reconfiguration the Commission will modify Sprint Nextel's license to reflect ten megahertz of spectrum in the 1.9 GHz band. *Id*. at 14974-75 ¶ 5. Sprint Nextel has secured its $2.5 billion commitment to fund band reconfiguration through multiple letters of credit. *Id.* at 14987 ¶ 30. *See also Supplemental Order* 19 FCC Rcd 25130 ¶ 20.

[9] *800 MHz Report and Order* at 15056-57 ¶ 162

[10] *800 MHz Supplemental Order* at 25154-56 ¶¶ 78-81. In such cases, Nextel is required to pay the transactional costs of identifying comparable spectrum, but the EA must build the new cellular facilities at its own expense.

[11] *Id.* at 25155 ¶ 79.

III. PREFERRED'S CLAIMS

4. Preferred is a non-ESMR licensee with both EA and site-based 800 MHz authorizations.[12] With regard to its EA authorizations, Preferred argues that certain Commission-imposed conditions restrict Preferred's right to deploy a high density "cellular architecture system by which it could offer commercial push-to-talk and cellular voice service on a competitive basis with [Sprint Nextel]."[13] Preferred specifically argues that by limiting non-ESMR EA licensees to their white space if they elect to move to the ESMR band, the Commission unreasonably discriminated against Preferred and "retroactively" deprived it of EA license rights it acquired at auction – in particular, the right to recover spectrum within the EA if a site-based incumbent in the EA ceases operations.[14] Preferred also claims that it will suffer economic harm as a result of the rebanding process because insufficient spectrum exists to relocate all relocating EA and site-based licensees[15] and because the Commission's records do not contain sufficient information for Preferred to determine if it is receiving comparable spectrum.[16] As an attachment to its stay motion, Preferred submits a study prepared by Concepts To Operations, Inc. (CTO) purporting to support its allegations of insufficient spectrum.[17]

5. On November 16, 2005, the Association of Public Safety Communications Officials-International, the International Association of Chiefs of Police, the International Association of Fire Chiefs, Inc., the Major Cities Chiefs Association, the Major County Sheriffs' Association and the National Sheriffs' Association filed in opposition to the Stay Request.[18] These parties argue that the requested relief would undermine the underlying purpose of this proceeding: preventing interference to communications systems used to protect the safety of life and property. Sprint Nextel also filed an opposition to the Stay Request, contending that Preferred "offers nothing more than recycled arguments previously rejected by the Commission" and that the CTO study is "fraught with methodological errors and erroneous conclusions."[19]

IV. DISCUSSION

6. The Commission evaluates petitions for stay under well-settled precedent. To warrant a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.[20]

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[12] Stay Request at 2. Preferred indicates that it is a non-ESMR licensee, but does not state whether it has constructed facilities or is providing service to the public with its EA authorizations. *See* Opposition to Motion to Stay filed Nov. 16, 2005 by Sprint Nextel Corporation (Sprint Nextel Opposition) at 2.

[13] Stay Request at i-ii.

[14] *Id.* at 13.

[15] *Id.* at 4-5

[16] *Id.* at 7-8.

[17] Analysis of the Impact of 800 MHz Rebanding, prepared Oct. 10, 2005 (rev. Nov. 04, 2005).

[18] Opposition to Request for Stay, filed Nov. 16, 2005 by Association of Public Safety Communications Officials-International, International Association of Chiefs of Police, International Association of Fire Chiefs, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association and the National Sheriffs' Association.

[19] Sprint Nextel Opposition at 1.

[20] *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); *see also Wash. Metro. Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977).

A. Preferred Has Not Shown It Would Prevail On The Merits

7. Preferred fails to show that it would likely prevail on judicial review of the *Rebanding Orders*. The actions the Commission has taken to abate interference to public safety and CII licensees—for the reasons stated in these orders—are fully within the Commission's authority and are amply supported by a comprehensive record. Preferred participated in the rulemaking proceeding that led to the *Rebanding Orders* and its arguments, many of which are repeated in its stay request, were fully considered but rejected as inconsistent with the Commission's interference abatement goals.

8. First, Preferred substantially overstates the effect that band reconfiguration would have on its plans. As an initial matter, nothing in the *Rebanding Orders* would preclude Preferred from deploying a low site and low power cellular architecture system to offer commercial push-to-talk and cellular voice service on a competitive basis with Sprint Nextel. Moreover, although Preferred cites Section 90.685(b) of the Commission's rules as depriving EA licensees of rights "previously granted them under the rules for their licenses in effect at the time that Preferred bid in the Commission's auction for the EA licenses,"[21] the rule in question neither increases nor diminishes any of Preferred's rights. It merely requires Preferred to provide a given level of service to the population of its EA-based service area within a given period of time.[22]

9. Preferred also objects to what it refers to as a "Cellular Deployment Test," an apparent reference to the Commission's decision that EA licensees with constructed ESMR systems who elect to relocate to the ESMR band would receive unencumbered spectrum while EA licensees who elect to relocate but have not constructed ESMR systems would only receive their white space. This differing treatment, however, derives from one of the fundamental premises of the *Rebanding Orders*: the separation of incompatible technologies. Under the *Rebanding Orders,* incumbent ESMR operators have the right to relocate to the ESMR band or to remain in the non-ESMR band, albeit on a strict non-interference basis.[23] The Commission offered unencumbered spectrum as an incentive for ESMR incumbents to relocate in order to reduce the potential for interference to public safety.[24] On the other hand, because non-ESMR incumbents do not pose a similar risk of interference to public safety, the Commission did not seek to create an incentive for these incumbents to relocate. Moreover, the Commission treated ESMRs and non-ESMRs differently because rebanding will reduce the amount of spectrum in which ESMR technology can be deployed from thirty megahertz to fourteen megahertz.[25] Given the limited amount of spectrum that will be available for ESMR use post-rebanding, it is entirely reasonable for the Commission to provide greater access to this spectrum for entities that are currently using the ESMR technology to serve consumers in preference to entities that may do so in the future. This is consistent with the Commission's underlying goal of ensuring that no area or person will lose service as a result of the rebanding process.

10. We also reject Preferred's contention that the Commission's actions with respect to EA licensees constitute retroactive rulemaking. A retroactive rule forbidden by the Administrative Procedure

[21] *See* Stay Request at 13.

[22] *See* 47 C.F.R. § 90.685(b). It is worth noting that the *Rebanding Orders* did not change the substance of this rule. *Compare* 47 C.F.R. § 90.685(b) (2004) with 47 C.F.R. § 90.685(b) (2005).

[23] *See 800 MHz Report and Order* at 15056-57 ¶ 162.

[24] *800 MHz Supplemental Order* at 25154 ¶ 77.

[25] Prior to the *Rebanding Orders*, licensees could deploy ESMR technology anywhere in the 806-821MHz/851-866 MHz bands. Subsequent to the effective date of the *800 MHz Report and Order*, new ESMR systems can only be deployed in the 817-824 MHz/862-869 MHz bands.

Act (APA) is one that alters the past legal consequences of past actions[26] not one that upsets expectations based on prior law.[27] The differential treatment of ESMRs and non-ESMRs is not a retroactive construction requirement, as Preferred claims, because it does not affect Preferred's past license rights but only its future rights. Depending on its election, Preferred can either retain the ability to deploy ESMR technology or it can retain the ability to reclaim "white space" in its geographic area. Many agency rulemakings affect expectations based on prior law, but such an effect does not, by itself, render a rule invalid.[28] Commission licensees, in particular, have no vested right to an unchanged regulatory framework throughout their license term.[29]

11. In expanding on the "prevailing on the merits" prong of the *Virginia Petroleum* test, courts have focused on the requisite "strong showing" burden imposed on a party seeking a stay. Thus, even when a court may believe that a party would eventually prevail on the merits, it requires more, *i.e.*, "that the record before us is of such order of probability as to mandate the stay."[30] Preferred's unsupported arguments on the merits fail to meet this standard.

B. Preferred Will Not Suffer Irreparable Harm

12. Preferred fails to show that it will suffer irreparable injury if a stay is not granted. The standards for demonstrating irreparable injury are clear: "A party moving for a stay is required to demonstrate that the injury claimed is 'both certain and great.'"[31] As is the case with injunctive relief, a stay "will not be granted against something merely feared as liable to occur at some indefinite time"; rather, the party seeking a stay must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm."[32] Bare allegations of

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[26] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988) (Scalia, J. concurring) (rules are retroactive if they "alter the past legal consequences of past actions" or "change what the law was in the past," not simply because they "affect" past transactions (emphasis in original)).

[27] *See DirectTV, Inc. v. FCC,* 110 F.3d 816, 826 (D.C. Cir. 1997) quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499 (1994) (*Landgraf*). "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property…" *Id.* quoting *Landgraf*, 511 U.S. at 270 n.24.

[28] *See, e.g.*, *Chem. Manufacturers Ass'n v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.").

[29] *See FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding prospective regulations limiting multi-media ownership under the FCC's general rulemaking powers, including requirement for divestiture as a condition for license renewal); *Comm. for Effective Cellular Rules v. FCC,* 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking); *WBEN, Inc. v. United States*, 396 F.2d 601, *cert. denied*, 393 U.S. 914 (1968) (upholding license modifications that limited predawn AM broadcasting rights of "daytimer" licensees that previously had some of the more ample privileges granted to "fulltimer" licensees).

[30] *N. Atl. Westbound Freight Ass'n v. Fed. Mar.Comm'n,* 397 F.2d 683, 685 (D.C. Cir. 1968).

[31] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (A party attempting to show irreparable harm must show that the alleged harm is "both certain and great; ... actual and not theoretical….Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur."). *Id*.

[32] *Id*., citing *Conn. v. Mass.*, 282 U.S. 660, 674 (1931) and *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd* 548 F.2d 977 (D.C. Cir. 1976.)

what is likely to occur are of no value since the court must decide whether the harm will in fact occur."[33]

13. Preferred claims it will suffer irreparable injury because band reconfiguration will cause its spectrum to have less value. In the first instance, we reject this claim because economic loss in and of itself cannot support a claim of irreparable harm.[34] Moreover, Preferred offers no evidence in support of its claim of economic loss. Preferred offers no financial or valuation information in its petition other than stating the fact that it paid $32 million for its spectrum at auction. In addition, Preferred has failed to explain how its current EA spectrum rights are more valuable than those spectrum rights it will have after it makes its election. We therefore hold that Preferred's conjectural arguments regarding future lost spectrum value are inadequate to sustain an irreparable injury claim.

14. Preferred further claims that it will suffer irreparable injury because the Commission's records lack sufficient data for it to accurately determine the "comparable spectrum" it is entitled to. Preferred argues that in order to determine what its spectrum holdings are it must be able to determine the service contours of the incumbent licensees it must protect. Preferred contends that while the information necessary to determine such contours is contained in the Commission's Universal Licensing System database, that database only contains information from 2000 and many incumbent licensees were licensed prior to that year.[35] Preferred also contends that the data the Commission provided in response to a Freedom of Information Act request does not contain sufficient information to allow Preferred to accurately determine its licensing rights.[36] However, Preferred has not submitted any evidence demonstrating that it has sought or exhausted potential alternative sources of the information it needs (*e.g.,* including Nextel, the TA, or Commission-certified frequency coordinators),[37] nor has it provided information on the number of licensees whose service contours it is unable to ascertain.[38] Thus, we find that Preferred's arguments with regard to "comparable spectrum" will not sustain an irreparable injury claim.

15. Finally, we reject Preferred's claim that it will suffer irreparable injury because insufficient spectrum exists to accommodate all relocating licensees. As an initial matter we note that the CTO study filed by Preferred in support of this allegation is not timely filed.[39] As Sprint Nextel correctly notes, Preferred waited more than fifteen months after the release of the *800 MHz Report and Order* to file the instant stay request.[40] It is well established that a party may not sit back in a proceeding and then

[33] *Id*.

[34] *See Wisconsin Gas Co.,* 758 F.2d at 674 (stating that "economic loss does not, in and of itself, constitute irreparable harm").

[35] Stay Request at 7-8.

[36] *Id.* at 8.

[37] A list of frequency coordinators can be found on the Commission's website. *See* http://wireless.fcc.gov/services/ind& bus/licensing/freqcoordinators.html and http://wireless.fcc.gov/publicsafety/coord.html.

[38] We note that pre-2000 licensing data are a matter of public record even though not electronically available on the Universal Licensing System, and that such records are conventionally used by Commission-certified frequency coordinators.

[39] Analysis of the Impact of 800 MHz Rebanding, prepared Oct. 10, 2005 (rev. Nov. 04, 2005).

[40] Sprint Nextel Opposition at 1.

proffer new evidence only after an adverse ruling is rendered. [41]

16. Moreover, we find that the CTO study contains significant defects. Nextel's analysis of the study convincingly shows that CTO has overcounted the number of channels that must be relocated into the 809 MHz-816 MHz band segment.[42] For example, CTO contends that there are 120 non-Sprint Nextel licensees operating on channels 401-600 in Boston, Massachusetts that must be relocated to the 809 MHz-816 MHz segment of the band.[43] However, as Sprint Nextel asserts, the Commission's records show that there are no non-Sprint Nextel licensees operating on channels 401-600 in Boston.[44] Thus, sufficient channels exist in the 809 MHz-816 MHz segment of the band in Boston to accommodate all incumbents which must relocate to this portion of the band.[45] Additionally, we note that the Transition Administrator has identified relocation channels for all relocating licensees in Wave 1 and Wave 2.[46] If, as Preferred claims, insufficient spectrum exists to accommodate relocating licensees, identifying these replacement channel assignments would not have been possible.

C. A Stay Would Injure Other Parties and is Contrary to the Public Interest

17. In the instant matter, the final two prongs of the *Virginia Petroleum* test are so interrelated as to merit treating them together. We find that grant of a stay would both harm other parties and be contrary to the public interest because it would prevent the Commission from achieving its core goal of abating interference to public safety and CII communications. The record in this proceeding overwhelmingly demonstrates that the interference problem is real, growing, and a threat, not only to the safety of first responders, but also to the citizens whose lives and property they are charged to protect. Were a stay granted, there would be palpable—even life-threatening—harm to both public safety agencies and to the public as a whole resulting from continued and unabated interference to public safety and CII systems.

18. We further note that although Preferred states that public safety agencies have asked for a halt to the rebanding process, it offers no support for this premise. In fact, the Association of Public Safety Communications Officials-International, the International Association of Chiefs of Police, the International Association of Fire Chiefs, Inc., the Major Cities Chiefs Association, the Major County

[41] *See Springfield Television Broad. Corp. v. FCC*, 328 F. 2d 186 (1964), *Colo. Radio Corp. v. FCC*, 118 F. 2d 24 (1941), and *KXYZ Television, Inc.*, FCC 67R-294, 8 FCC 2d 937, 953 (1967).

[42] Sprint Nextel Opposition at 6.

[43] CTO Study, Appendix A.

[44] *See* Sprint Nextel Opposition at 6.

[45] Sprint Nextel attributes this error to discrepancies contained in the Commission's ULS database. Specifically, Sprint Nextel notes that several Sprint Nextel licenses contain information pertinent to the entity that held the license prior to the Sprint Nextel acquisition of the license. Sprint Nextel contends that the CTO study apparently attributed to non-Sprint Nextel entities any license containing such discrepancies, even though the database clearly indicates that Sprint Nextel (or a subsidiary) is the actual licensee. *See* Sprint Nextel Opposition at n.15.

[46] On March 11, 2005, the Bureau approved the TA's basic 800 MHz band reconfiguration schedule, i.e., the grouping of the nation's NPSPAC regions into four waves (Waves 1-4) and starting the reconfiguration process in each wave on the dates recommended by the TA. *See* Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, *Public Notice*, 20 FCC Rcd 5159, (WTB 2005).

Sheriffs' Association and the National Sheriffs' Association have opposed Preferred's stay request.[47]

V. CONCLUSION

19. For the reasons explained above, we find that Preferred has provided no sustainable reason for reversing the Commission's public interest findings. We believe granting a stay would only operate to delay the public interest benefits the Commission articulated in the *Rebanding Orders*, contravene the Commission's goals in this proceeding and undermine the Commission's accomplishment of its mandate to promote safety of life, health and property through radio communications under the Communications Act, as amended.[48] Accordingly, as precedent dictates, we conclude that Preferred has failed the *Virginia Petroleum* test for grant of a stay and deny its Request for Stay.

VI. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 1.41 and 1.43 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43 that the Request for Stay submitted by Preferred Communications Systems, Inc., in the above-captioned proceeding on November 9, 2005, IS DENIED.

21. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau

[47] *See* Opposition to Request for Stay, filed Nov. 16, 2005 by Association of Public Safety Communications Officials-International, International Association of Chiefs of Police, International Association of Fire Chiefs, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association and the National Sheriffs' Association.

[48] *See* 47 U.S.C. § 151.