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

In the Matter of Improving Public Safety Communications in the 800 MHz Band – Petition for Declaratory Ruling by Comunicaciones Digitales del Norte, S.A. de C.V., Radio Sistemas de Tamaulipas, S.A. de C.V., Troncatel, S.A. de C.V., and Union Agricola Regional del Norte de Tamaulipas.	)))))))))	WT Docket No. 02-55

ORDER

Adopted: October 27, 2016 **Released: October 27, 2016**

By the Chief, Public Safety and Homeland Security Bureau and the Chief, International Bureau:

I. INTRODUCTION

1. On July 29, 2016, four Mexican radio licensees operating 800 MHz trunked mobile systems, Comunicaciones Digitales del Norte, S.A. de C.V., Radio Sistemas de Tamaulipas, S.A. de C.V., Troncatel, S.A. de C.V., and Union Agricola Regional del Norte de Tamaulipas (collectively, Petitioners), jointly filed a Petition for Declaratory Ruling (Petition) with the Commission.[1] For the reasons set out below, we dismiss the Petition.

II. BACKGROUND

2. Petitioners operate 800 MHz trunked mobile systems in Mexico in the vicinity of the U.S.-Mexico border. Pursuant to the June 8, 2012, agreement between the United States and Mexico modifying the international allocation of 800 MHz spectrum in the U.S.-Mexico border region (Amended Protocol),[2] Petitioners and certain other Mexican 800 MHz licensees in the U.S.-Mexico "Sharing Zone" must change their operating frequencies to conform to a revised border area band plan contained within the Amended Protocol.[3] To implement the Amended Protocol, the Instituto Federal de Telecomunicaciones (IFT), the Mexico telecommunications regulator, has ordered Petitioners to vacate their 800 MHz operating frequencies and move to the 400 MHz band.[4]

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[1] Comunicaciones Digitales del Norte, S.A. de C.V., Radio Sistemas de Tamaulipas, S.A. de C.V., Troncatel, S.A. de C.V., and Union Agricola Regional del Norte de Tamaulipas, Petition for Declaratory Ruling, filed July 29, 2016.

[2] *See* Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the Allotment, Assignment and Use of the 806-824/851-869 MHz and 896-901/935-940 MHz Bands for Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border (June 8, 2012) (Amended Protocol).

[3] The Sharing Zone is a region extending 110 kilometers from the border into each country. *See Improving Public Safety Communications in the 800 MHz Band,* Fifth Report and Order, 28 FCC Rcd 4085, 4086 para. 2 (PSHSB 2013).

[4] *See, Troncatel, S.A. de C.V. v. Plenary of the Federal Telecommunications Institute (IFT),* Case 35/2016, Office of Common Correspondence of the District Courts and Collegial Courts in Specialized Administrative Matters in Economic, Broadcasting, and Telecommunications Competition and Auxiliary Center of the First Region (in

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3. The Amended Protocol provides for Mexican incumbent operators that are required to relocate to be compensated for their "reasonable costs" to transition to replacement channels.[5] It states that the U.S. and Mexican agencies implementing the Amended Protocol "shall insure that operators or related corporate entities operating in the co-primary allotment[6] cover all such reasonable costs of incumbent operators in Mexico that are associated with the transition to comparable facilities on the replacement channels."[7] If the Mexican incumbents are relocated outside the 800 MHz band – as IFT has directed in Petitioners' case – the Amended Protocol provides for compensation "only up to an amount comparable to the reasonable cost of a transition inside the 806-824/851-869 MHz band."[8]

4. In their Petition, Petitioners seek a declaratory ruling from the Commission that Sprint Corporation (Sprint) and/or AT&T, Inc. (AT&T) be obligated to compensate Petitioners for their "reasonable costs" to reband or relocate their operations "as may be required by IFT."[9] Petitioners also request that the U.S.-Mexico Task Force, established by the Commission and IFT to implement the Amended Protocol, "engage in dialogue with Petitioners, IFT, Sprint Corporation, AT&T Mexico and any other party that the Task Force deems responsible for compensating and assisting implementation of the necessary transition actions of the Mexican licensees."[10]

5. In support of their request, Petitioners state that, on July 27, 2011, Sprint entered into an agreement with NII Holdings, Inc. (NII), pursuant to which NII's subsidiary, Nextel Mexico, would "facilitate negotiations" with licensees operating on the Mexican side of the Sharing Zone and would pay up to $18 million in costs and expenses associated with rebanding or relocation by such licensees. (Sprint-NII Agreement).[11] Petitioners recite that under the Sprint-NII agreement, Sprint agreed to reimburse Nextel Mexico if the cumulative cost of relocating Mexican licensees in the Sharing Zone exceeded $18 million.[12] Petitioners allege that, in 2014, Sprint "held various discussions with the Petitioners culminating in a meeting on October 5, 2014" in Dallas, Texas, at which Sprint orally "committed to compensate the Petitioners for their planned vacating of operations in the 800 MHz Spectrum" and "Petitioners agreed to the settlement amount that was communicated orally by Sprint."[13]

6. Petitioners also allege that following an announcement in January 2015 that AT&T was acquiring Nextel Mexico, Sprint "abandoned" discussions with Petitioners and "distanc[ed] itself" from its alleged oral compensation commitment, contending that Petitioners should seek compensation from AT&T as the acquirer of Nextel Mexico.[14] Petitioners claim, however, that AT&T "has denied its

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Spanish)(*Troncatel Order*). (In its decision, the court acknowledged IFT's order for Troncatel to relocate to the 400 MHz band and stayed the IFT order on procedural grounds.)

[5] Amended Protocol, Article V.

[6] The Amended Protocol defines the co-primary allotment as the 818.5-824 MHz / 863.5-869 MHz segment of the band, in which the U.S. and Mexico may license "counterpart operators" to use the entire band segment, subject to signal strength limits at the border. Amended Protocol, Article II, paras. 4-5.

[7] Amended Protocol, Article V.

[8] *Id.*

[9] Petition at 2.

[10] *Id.* The Amended Protocol calls for establishment of a bi-national Task Force to coordinate the transition of U.S. and Mexico licensees to their replacement frequencies. Amended Protocol, Article V. The Task Force consists of staff from the FCC, State Department, and IFT.

[11] Petition at 6.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 6-7

assumptions of the obligation of Nextel-Mexico for compensation to the Mexican concessionaires."[15] Petitioners state that in March 2016, they filed in the Mexican courts for an injunction to prevent IFT from relocating them to the 400 MHz band "because there had not been any payment as required under the Amended Protocol, and under Sprint's oral contract with Petitioners, as well as IFT's failure to comply with other procedural requirements."[16] Petitioners contend that they "continue to have [the] right to operate within the 800 MHz Spectrum on the Mexican side of the Sharing Zone and therefore, there will be continued delays and disputes in implementing the Amended Protocol unless the Commission clarifies Sprint's obligations under the Amended Protocol as requested herein."[17]

III. DISCUSSION

7. Under Section 1.2(a) of the rules, the Commission "may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."[18] A declaratory ruling therefore is typically used to "clarify, interpret, or determine the appropriate application of a provision of the Communications Act (or other statute within its jurisdiction), the Commission's rules or prior Commission orders."[19]

8. Here, however, Petitioners fail to identify any controversy or uncertainty relating to the Communications Act, other statutes within the Commission's jurisdiction, or the Commission's rules or prior orders. Instead, Petitioners' core contention is that they have not received the compensation they claim to be entitled to under the Amended Protocol.[20] To the extent that Petitioners seek redress under the Amended Protocol, however, their remedy lies in Mexico, not the United States. As Petitioners acknowledge, IFT is responsible for implementing the Amended Protocol in Mexico.[21] Indeed, Petitioners state that they have sought redress against IFT in the Mexican courts,[22] and since the Petition was filed, one Petitioner has obtained a Mexican court injunction against IFT.[23] In short, implementation of the Amended Protocol as it applies to Mexican licensees such as Petitioners is a Mexican regulatory matter, over which the Commission has no more authority than Mexico has over implementation of the Amended Protocol in the United States. We therefore decline to involve the Commission in a dispute between Petitioners and IFT that is being heard by the Mexican court. In so doing, we note that Section 544(a)(4) of the Administrative Procedure Act states that adjudication of the kind requested by the Petitioners need not be undertaken when "there is involved . . . the conduct of military or foreign affairs functions."[24]

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[15] *Id.* at 7. Petitioners cite no evidence of AT&T's alleged denial of Nextel Mexico's obligations. We note that Nextel Mexico, now AT&T Mexico, remains subject to IFT's regulatory authority and the terms of the Amended Protocol as a "counterpart operator."

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

[17] *Id.* at 8.

[18] 47 C.F.R. § 1.2(a). *See also* 5 U.S.C. § 554(e); *Harry S. Goodman*, Memorandum Opinion and Order, 12 FCC 678, 678 (1948) (noting that the APA "makes the issuance of [declaratory rulings] discretionary").

[19] *Commnet Wireless, LLC, Petition for Declaratory Ruling*, Order, 27 FCC Rcd 4324, 4325 (WTB 2012).

[20] Petition at 4, para. 6 ("Full transition on the Mexican side has been delayed because of a dispute concerning the costs associated with implementing the Amended Protocol requirements").

[21] *Id.* at 3, para. 3.

[22] *Id.* at 7-8, paras. 23-24.

[23] *See Troncatel Order, supra* note 4.

[24] 5 U.S.C. § 554(a)(4). The APA's legislative history suggests that the purpose of the foreign affairs exception was "to allow more cautious and sensitive consideration of those matters which 'so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.'" *American Ass'n of Exporters and Importers-Textile and Apparel Group v. U.S.*, 751 F.2d 1239,

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9. Petitioners also argue that the Commission should clarify the obligations of Sprint and/or AT&T to compensate Petitioners, citing the Sprint-NII Agreement and the alleged oral commitment by Sprint to compensate Petitioners.[25] We decline to do so. As noted above, Petitioners' rights to compensation under the Amended Protocol are a matter for the Mexican regulatory authority. To the extent that Petitioners claim that separate and apart from the Amended Protocol, either the Sprint-NII Agreement or the alleged oral commitment by Sprint entitles Petitioners to compensation, such claims are private and contractual in nature and do not raise regulatory issues that require Commission resolution. The Commission has a longstanding policy of declining to adjudicate contract law questions for which a forum exists elsewhere.[26] That policy is appropriately applied here where Petitioners have judicial fora available to pursue their contract claims.

10. The Commission has broad discretion whether or not to issue a declaratory ruling.[27] Here, we conclude that this discretion should be exercised by dismissing the Petition. In so doing, we emphasize that we remain committed to working with and assisting IFT to implement the requirements of the Amended Protocol so that the 800 MHz rebanding can proceed expeditiously in the Sharing Zone.

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1249 (Fed. Cir. 1985); *see also Rajah v. Mukasey*, 544 F.2d 427, 437 (2d Cir. 2008) (finding that the Section 544(a)(4) exception would apply when, for example, agency action could impair relations with other countries); *International Broth. of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (affirming reliance on foreign affairs exception of the APA in rejecting challenge to a rule issued by the U.S. Department of Transportation without notice and comment that arose from a Memorandum of Understanding with that agency's Mexican counterpart).

[25] Petition at 9.

[26] *See*, *e.g., Listeners' Guild, Inc. v. FCC,* 813 F.2d 465, 469 (D.C. Cir. 1987), *citing, e.g., Agreements Between Broadcast Licensees and the Public,* Report and Order, 57 FCC 2d 42 (1975); *Carnegie Broadcasting Co.,* Memorandum Opinion and Order, 5 FCC 2d 882, 884 (1966); *Transcontinent Television Corp.,* 44 FCC 2451, 2461 (1961).

[27] *See*, *e.g., Yale B'cstg Co. v. FCC,* 478 F.2d 594, 602 (D.C. Cir. 1973); *Motions for Declaratory Rulings Regarding Commission Rules and Policies,* Memorandum Opinion and Order, 14 FCC Rcd 12752, 12758 (1999); *Improving Public Safety Communications in the 800 MHz Band*, Order, 26 FCC Rcd 2035, 2039 (PSHSB 2011); *see also, Inquiry Concerning Political Broadcast Requirements,* Letter, 40 FCC 295, 295 (1958)("Agencies are not required to issue [declaratory rulings] merely because a request is made therefor.").

IV. ORDERING CLAUSE

11. ACCORDINGLY IT IS ORDERED, that the Petition for a Declaratory Ruling, filed July 29, 2016, by Comunicaciones Digitales del Norte, S.A. de C.V., Radio Sistemas de Tamaulipas, S.A. de C.V., Troncatel, S.A. de C.V., and Union Agricola Regional del Norte de Tamaulipas IS DISMISSED.

12. This action is taken under delegated authority pursuant to Sections 0.51, 0.191, 0.261 and 0.392 of the Commission's rules, 47 CFR §§ 0.51, 0.191, 0.261, 0.392; Section 1.2(a) of the Commission's rules, 47 CFR § 1.2(a); and Section 554 of the Administrative Procedure Act, 5 U.S.C.§ 554.

FEDERAL COMMUNICATIONS COMMISSION

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