

**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: February 28, 2006

Released: March 3, 2006

By the Commission:

I. INTRODUCTION

1. By this Order we grant a Request for Waiver filed by the Sprint Nextel Communications, Inc. (Sprint Nextel).¹ Sprint Nextel requests relief from the requirement that it provide a letter from Nextel International, now NII Holdings, Inc. (NII), the operator of certain 800 MHz facilities in Mexico, committing NII to cooperate to the extent "necessary or desirable in the completion of reconfiguration of the 800 MHz band."² Specifically, Sprint Nextel asserts that it lacks control over NII and that it

¹ See Letter dated November 10, 2005, from James B. Goldstein, Director-Spectrum Reconfiguration Projects, Sprint Nextel Corporation to Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau (Waiver Request).

² *Id.* at 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 (continued....)

therefore cannot compel NII to produce such a letter.³ For the reasons discussed below, we grant Sprint Nextel's waiver request.

II. BACKGROUND

2. On July 8, 2004, the Commission adopted the *800 MHz R&O*, which implemented technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.⁴ Under the terms of the *800 MHz R&O*, the Commission provided for 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)⁵ systems characterized by the use of high-density cellular architecture.⁶ In addition, the Commission imposed certain obligations on Nextel (which were subsequently assumed by Sprint Nextel as a result of the merger) to ensure the success of band reconfiguration, including the requirement that it "provide a letter or letters, in content satisfactory to the Commission, from any and all parties having a financial or equitable interest in any existing or proposed 800 MHz system, whether in the United States, Mexico or Canada, and connected in any way to Nextel by way of being a subsidiary, partner, or otherwise; to the effect that such parties are bound to perform the obligations imposed on Nextel herein to the extent such obligations are necessary or desirable in the completion of reconfiguration of the 800 MHz band."⁷ The Commission identified this as one of several conditions precedent to Nextel being authorized to operate in the 10 megahertz of spectrum in the 1.9 GHz band that was awarded to Nextel by the order.⁸

3. On December 22, 2004, the Commission released the *800 MHz Supplemental Order*, which clarified and modified certain provisions of the *800 MHz R&O*.⁹ Of particular relevance to Sprint Nextel's waiver request, the *800 MHz Supplemental Order* narrowed the group of entities from which Nextel was required to obtain letters of commitment. Specifically, the Commission stated that it only "desired Nextel or its successors or assigns to provide the Commission with letters demonstrating commitments from its corporate partners, subsidiaries, or affiliates (including any 800 MHz system operators in which Nextel has an ownership interest)."¹⁰ In a footnote referenced in the quoted sentence, the Commission specifically listed Nextel Partners and Nextel International as two entities from which letters were required.¹¹

4. On March 7, 2005, Nextel submitted a letter to the Wireless Telecommunications Bureau, attaching the required letter of commitment from Nextel Partners, but stating that it lacked the ability to

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amended by Erratum, DA 04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459, 19 FCC Rcd 21818 (2004) (*800 MHz R&O*).

³ Waiver Request at 2.

⁴ See *800 R&O*, 19 FCC Rcd at 15021-15045 ¶¶ 88-141.

⁵ For a definition of ESMR, see *id.* at 15060-15061 ¶¶ 172-173.

⁶ For a definition of a high-density cellular architecture system, see *id.* at 15060-15061 ¶¶ 172-174.

⁷ *Id.* at 15129-30 ¶ 344.

⁸ *Id.*

⁹ 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*).

¹⁰ *Id.* at 19 FCC Rcd 25133 ¶ 27.

¹¹ *Id.* at n. 61.

control or influence Nextel International to provide a similar letter.¹² In support of its position, Sprint Nextel argued that it only owned a twenty percent ownership interest in NII and that it could not be deemed to be in control of NII under the Financial Accounting Standards Board rules.¹³ Specifically, Sprint Nextel argued, *inter alia*, that it lacked minority shareholder protective or participating rights in NII, no preference in liquidation above other NII shareholders, a lack of representation on NII's Board of Directors.¹⁴ Nextel contended that under these circumstances, Nextel International should not be deemed an "affiliate" and that the Commission's orders should not be construed to require Nextel to provide a commitment letter from Nextel International.¹⁵

5. On November 10, 2005, Sprint Nextel submitted a letter to the Wireless Bureau in which it stated that its prior 20 percent ownership share in Nextel International (now NII) had declined to 9.8 percent.¹⁶ Sprint Nextel attached the March 7 letter and reiterated its contention that because of its limited ownership interest and lack of ability to control NII, the Commission's orders did not require Sprint Nextel to provide a letter from NII. In the alternative, Sprint Nextel requested a waiver of the commitment letter requirement to the extent it requires providing a letter from NII.¹⁷

III. DISCUSSION

6. As a threshold matter, we reject Sprint Nextel's contention that the Commission's 800 MHz orders can be construed not to require it to provide a letter of commitment from NII. As noted above, the *800 MHz Supplemental Order* specifically named NII's predecessor, Nextel International, as one of the entities from which a letter was required.¹⁸ However, for the reasons stated below, we grant Sprint Nextel's request to waive the requirement in this instance.

7. The Commission evaluates requests for waiver in wireless proceedings pursuant to guidelines set out in section 1.925(b) of its rules.¹⁹ The party seeking waiver must show that application of the rule in question either would not serve "[t]he underlying purpose of the rule(s)," "would be inequitable, unduly burdensome or contrary to the public interest," or "the applicant has no alternative."²⁰

8. In support of its waiver request, Sprint Nextel emphasizes that NII is an independent, publicly traded company in which Sprint Nextel currently has only a 9.8 percent ownership interest.²¹ Sprint Nextel further contends that its relationship with NII is such that it lacks *de jure* or *de facto* control over NII or the ability to exert significant influence over the company.²² Sprint Nextel argues that under these

¹² Letter dated March 7, 2005, from James B. Goldstein, Senior Attorney—Government Affairs, Nextel Communications, to John Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (March 7 Letter), attaching Letter dated March 7, 2005, from Donald J. Manning, Vice President and General Counsel, Nextel Partners, to Marlene H. Dortch, Secretary, Federal Communications Commission.

¹³ *Id.* at 2.

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 3.

¹⁶ Waiver Request at 2.

¹⁷ *Id.*

¹⁸ See note 11 *supra*.

¹⁹ 47 C.F.R. § 1.925(b).

²⁰ *Id.*

²¹ Waiver Request at 2.

²² *Id.* See also March 7 Letter at 2-3.

circumstances, waiver of the Commission's requirement to obtain a letter of cooperation from NII would not violate the underlying purpose of the requirement—to ensure that subsidiaries of Sprint Nextel could not disclaim responsibility for retuning its system to implement band reconfiguration.²³ Sprint Nextel also argues that its lack of control over NII would make requiring it to obtain a letter of cooperation from NII inequitable, unduly burdensome and contrary to the public interest.²⁴

9. We conclude that strict enforcement of the commitment letter requirement in this instance would not serve its underlying purpose. As stated in the *800 MHz Supplemental Order*, the purpose of requiring Sprint Nextel to provide letters was to ensure that Sprint Nextel's "corporate partners, subsidiaries, or affiliates" in the 800 MHz band would not disclaim responsibility for implementing band reconfiguration.²⁵ Thus, this requirement was properly applied in the case of Nextel Partners, in which Nextel had a substantial ownership interest, and which has provided a commitment letter. Although the Commission further stated that the requirement should extend to "any 800 MHz system operator[] in which Sprint Nextel has an ownership interest,"²⁶ we do not believe it is necessary to apply it to NII. In contrast to Nextel Partners, NII operates exclusively outside the United States, Sprint Nextel's ownership interest in NII is small, and Sprint Nextel lacks the ability to control or significantly influence NII's corporate decisions.²⁷ Waiving the requirement that Sprint Nextel provide a letter from NII will not enable Sprint Nextel to avoid rebanding obligations through the non-cooperation of a corporate partner, subsidiary, or affiliate. Our decision is also consistent with the Commission's decision in the *800 MHz Supplemental Order* not to require Sprint Nextel to provide commitment letters from "independent" companies even if they have business relationships with Sprint Nextel such as roaming agreements.²⁸

10. We also find that it would be impractical and inequitable to impose the commitment letter requirement on Sprint Nextel in this instance, and that it has no reasonable alternative to a waiver. Although Nextel International was a subsidiary of Nextel prior to 2002,²⁹ Sprint Nextel's ownership interest in NII has declined significantly in recent years to the point that as a practical matter, Sprint Nextel is not in a position to compel NII to provide a commitment letter. However, while we waive the requirement, we note that obtaining the cooperation of NII along the US-Mexico border is important to the goal of abating interference to 800 MHz public safety systems in the border area. Therefore, we direct Sprint Nextel to undertake its best efforts to work with NII to resolve border issues affecting band reconfiguration.

11. As noted above, the requirement to provide commitment letters is one of several conditions precedent that the Commission imposed in the *800 MHz R&O* on Sprint Nextel's right to

²³ Waiver Request at 2. .

²⁴ *Id.*

²⁵ *800 MHz Supplemental Order* at 25133 ¶ 27.

²⁶ *Id.*

²⁷ Waiver Request at 2; March 7 Letter at 2-3. *See also* Nextel Communications Inc. 424(b)(3) Prospectus, filed on July 25, 2003 with the Securities and Exchange Commission.

²⁸ *See 800 MHz Supplemental Order* at 25133 ¶ 27.

²⁹ In May 2002, Nextel International was renamed NII and filed for Chapter 11 bankruptcy protection. When NII emerged from bankruptcy protection in November 2002, Nextel's ownership interest declined to thirty-six percent. *See* NII Holdings, Inc. November 12, 2002 8K Filing, filed on November 15, 2002 with the Securities and Exchange Commission and Nextel Communications Inc. 424(b)(3) Prospectus, filed on July 25, 2003 with the Securities and Exchange Commission.

operate in the 1.9 GHz band.³⁰ With grant of this waiver and the prior submission of the Nextel Partners commitment letter, we find that Sprint Nextel has met this condition. Sprint Nextel has also previously satisfied the other conditions precedent specified in the *800 MHz R&O* pertaining to provision of a letter of credit and an opinion letter on bankruptcy issues.³¹ Accordingly, we find that Sprint Nextel has met all of the conditions precedent to its right to operate in the 1.9 GHz band, and we direct the Wireless Bureau to take such further steps as are necessary to reflect this in our licensing database. We note that Sprint Nextel's authorization to operate in the 1.9 GHz band remains subject to the condition that it timely meet its rebanding obligations as provided in the *800 MHz R&O* and subsequent orders.³²

IV. ORDERING CLAUSES

12. 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 1.925 of the Commission's Rules, 47 C.F.R. § 1.925 that the Request for Waiver submitted by Sprint Nextel Corporation Communications Systems, Inc., in the above-captioned proceeding on November 10, 2005, IS GRANTED.

13. IT IS FURTHERED ORDERED that the Wireless Telecommunications Bureau SHALL TAKE such steps as are necessary to allow Sprint Nextel to commence operations on its assigned spectrum in the 1.9 GHz band.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission

³⁰ See *800 MHz R&O* 19 FCC Rcd 15129-30 ¶ 344.

³¹ See Letter, dated June 13, 2005, from Lawrence R. Krevor, Vice-President Government Affairs, Nextel Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission.

³² See *800 MHz R&O* 19 FCC Rcd 15130 ¶ 347, *Supplemental Order* 19 FCC Rcd 25143 ¶ 53.