

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

In the Matter of)
Improving Public Safety Communications in the) WT Docket 02-55
800 MHz Band)
County of Chester, Pennsylvania)
and Sprint Nextel Corporation)
City of Chesapeake, Virginia)
and Sprint Nextel Corporation)

FOURTH MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2008

Released: December 23, 2008

By the Commission:

Table with 2 columns: Section Name and Para. Includes I. INTRODUCTION, II. DISCUSSION, III. PROCEDURAL MATTERS, IV. ORDERING CLAUSES, and APPENDIX: FINAL REGULATORY FLEXIBILITY CERTIFICATION.

I. INTRODUCTION

1. In this order, we address the June 25, 2008 request by Sprint Nextel Corporation (Sprint) to defer the 800 MHz rebanding financial "true-up" process until after rebanding is completed.

2. We then address several pending petitions for reconsideration or review of prior rebanding orders and public notices. First, we deny two petitions that seek reconsideration of our decision in the Second Memorandum Opinion and Order in this proceeding requiring parties to bear their own costs in rebanding-related litigation before the Commission.

1 Letter from Lawrence R. Krevor, Vice President - Spectrum, Sprint Nextel Corporation, to David Furth, Associate Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission, filed June 25, 2008 (Sprint Request).

2 See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, Second Memorandum Opinion and Order, 22 FCC Rcd 10467 (2007) (800 MHz Second MO&O).

treat two pending petitions for *de novo* review filed by Sprint against Chesapeake, Virginia, and Chester County, Pennsylvania, as applications for review for purposes of resolving questions of law, and we allow the parties to file oppositions and replies as provided under our application for review procedures. Third, we deny a petition for reconsideration that alleges that our *Public Notice* released on September 12, 2007 to expedite the rebanding process³ imposed unreasonable new regulatory burdens on 800 MHz licensees.

3. Finally, we delegate authority to the Public Safety and Homeland Security Bureau (PSHSB or Bureau) to develop a rebanding plan for the U.S. Virgin Islands based on a proposal submitted by the TA.

II. DISCUSSION

A. Financial True Up

4. Background. In the *800 MHz Report and Order*, the Commission ordered rebanding of the 800 MHz band to resolve interference between commercial and public safety systems in the band.⁴ The Commission required that band reconfiguration in non-border regions be completed in 36 months.⁵ The Commission further ordered the TA to perform a financial reconciliation or “true-up” six months after the 36-month transition period ended, *i.e.*, 42 months after the start of rebanding.⁶ The purpose of the true-up is to assess Sprint’s total creditable rebanding costs for both 800 MHz rebanding and relocating of Broadcast Auxiliary Service (BAS) licensees in the 1.9 GHz band, and to compare these costs to the value of the 1.9 GHz spectrum that the Commission awarded to Sprint. If the value of the 1.9 GHz spectrum exceeds Sprint’s creditable costs, Sprint must pay the difference to the U.S. Treasury as an “anti-windfall” payment.⁷

5. The 36-month rebanding period established by the *800 MHz Report and Order* expired on June 26, 2008.⁸ Accordingly, under the currently applicable timetable, the true-up must occur no later than six months after that date, or by December 26, 2008.

6. On June 25, 2008, Sprint filed a letter requesting that the true-up be postponed indefinitely until both 800 MHz rebanding and BAS relocation are complete.⁹ Noting that both rebanding projects have been subject to unforeseen complexity and delay, Sprint contends that conducting the true-up as scheduled would be premature and would fail to account for significant rebanding costs that Sprint has yet to incur.¹⁰ Sprint notes that BAS relocation has taken longer than

³ See FCC Announces Procedures and Provides Guidance for Completion of 800 MHz Rebanding, WT Docket 02-55, *Public Notice*, 22 FCC Rcd 17227 (2007) (*Rebanding Guidance Notice*).

⁴ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order*, 19 FCC Rcd 14969 (2004) (*800 MHz Report and Order*).

⁵ *Id.* at 14977 ¶ 11.

⁶ *Id.* at 15124 ¶ 330.

⁷ *Id.*

⁸ The 36-month period commenced on June 27, 2005. See Wireless Telecommunications Bureau Announces that 800 MHz Band Reconfiguration Will Commence June 27, 2005, in the NPSPAC Regions Assigned to Wave 1 and Specifies 800 MHz Reconfiguration Benchmark Compliance Dates, WT Docket 02-55, *Public Notice*, 20 FCC Rcd 9961 (WTB 2005).

⁹ Sprint Request at 2.

¹⁰ *Id.* at 7.

originally anticipated, and that the Commission has extended the original 30-month BAS relocation deadline until March 5, 2009.¹¹ Sprint also notes that more than 60 percent of Phase II public safety licensees have sought waivers of the 36-month deadline for 800 MHz rebanding, and that PSHSB has granted waivers to many of these licensees through July 1, 2009.¹² Sprint further asserts that if the true-up were to occur in December 2008, the parties would be required to engage in an intensive accounting process that would divert resources from the rebanding process itself.¹³ As a result, Sprint argues, the true-up date should be adjusted to the new realities of the rebanding timeline.¹⁴ Sprint therefore requests that we waive our rules and orders to the extent necessary and postpone the true-up date until the completion of 800 MHz and BAS reconfiguration.¹⁵

7. In addition to requesting postponement of the true-up date, Sprint also requests that we adopt a new schedule for completing 800 MHz Phase II rebanding. Sprint also proposes that while this schedule is in development, we should “make clear that the procedures, cut-off dates, and other corresponding incidents triggered by the June 26, 2008 completion deadline are held in abeyance pending the Commission adopting a revised timetable.”¹⁶

8. Discussion. We agree with Sprint that circumstances have changed since the Commission established the initial true-up schedule, and that neither 800 MHz rebanding nor BAS relocation has progressed sufficiently to justify conducting the true-up as originally scheduled. The Commission originally determined that the true-up would occur 42 months after the start of the rebanding process because it was assumed that all rebanding work (both 800 MHz and BAS) would be completed within 36 months and that Sprint would therefore have incurred all relevant rebanding expenses within that period. The six-month window following the 36-month transition would then provide time for Sprint to collect and provide cost information to the TA and for the TA to perform the necessary accounting and reconciliation.

9. While substantial progress in rebanding has been made, the assumptions that led to the current true-up deadline are no longer applicable. Because of unanticipated delays in the BAS relocation process, the Commission has extended the original September 7, 2007 deadline for BAS relocation by 18 months until March 5, 2009.¹⁷ Similarly, 800 MHz rebanding has taken longer than anticipated. PSHSB has granted numerous waivers of the June 26, 2008 deadline to public safety licensees for periods of up to a year (*i.e.*, through July 1, 2009), with licensees having the ability to request additional time if necessary.¹⁸ In addition, reconfiguration of border areas (the cost of which is also an element of the true-

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 5.

¹⁷ Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 4393 ¶ 29 (2008).

¹⁸ See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Order*, 23 FCC Rcd 9421 (PSHSB 2008); *Order*, 23 FCC Rcd 9430 (PSHSB 2008); *Order*, 23 FCC Rcd 9443 (PSHSB 2008); *Order*, 23 FCC Rcd 9454 (PSHSB 2008); *Order*, 23 FCC Rcd 9464 (PSHSB 2008); *Order*, 23 FCC Rcd 9476 (PSHSB 2008); *Order*, 23 FCC Rcd 9485 (PSHSB 2008); *Order*, 23 FCC Rcd 9491 (PSHSB 2008).

up) is not subject to the 36-month timetable.¹⁹ As a result, reconfiguring the 800 MHz band will extend well past the 36-month deadline.

10. The extended timetable for rebanding has also extended the period during which Sprint will incur costs that need to be accounted for in the true-up. The Commission has made clear that Sprint remains responsible for funding all rebanding costs until rebanding is complete, including costs incurred after the initial deadlines.²⁰ As Sprint points out, this means that the rebanding costs it has incurred during the initial 36 month period represent only a portion of its eventual cost obligation.²¹ Sprint notes that based on the extended BAS relocation timetable, over 90 percent of BAS licensees will relocate after June 26, 2008, so that Sprint will incur a large portion of its BAS costs after that date. Similarly, because of the large number of waivers granted to 800 MHz public safety licensees, Sprint will incur a large portion of its 800 MHz rebanding costs after June 26, 2008.²²

11. In light of these changed circumstances, we conclude that the December 26, 2008 true-up date should be postponed. However, we decline to postpone the true-up process until the conclusion of rebanding as Sprint proposes. Because the final completion date for rebanding remains uncertain, Sprint's proposal would create similar uncertainty with respect to the timing of the true-up process. In addition, while we believe that initiating the true up as originally scheduled would be premature, it may be appropriate to conduct the true-up before rebanding is complete. As noted above, the purpose of the true-up is to determine whether Sprint must pay an anti-windfall payment to the U.S. Treasury. In this regard, Sprint states that based on its current cost projections to complete rebanding, "it is very unlikely" that it will owe an anti-windfall payment.²³ Thus, it is possible that Sprint could incur sufficient rebanding costs before rebanding is complete to eliminate the possibility of a windfall payment, in which case there would presumably be no need to wait until rebanding completion to conduct the true-up.

12. Based on these considerations, we take the following actions with respect to the true-up. First, we extend the true-up deadline from December 26, 2008 until July 1, 2009. Second, we direct the TA to file a report with the PSHSB by May 1, 2009 with its recommendation (1) whether rebanding has made sufficient progress that conducting the true-up on July 1, 2009 would be appropriate, or (2) whether the true-up deadline should be extended for an additional period. Finally, we delegate authority to the PSHSB to consider and grant further extensions of the true-up deadline based on the TA's recommendation.

13. We emphasize that our action with respect to the true-up date is intended to have no impact on any other aspect of either the 800 MHz or BAS rebanding timetable. Therefore, we deny Sprint's request to adopt a new timetable for completion of 800 MHz Phase II rebanding. As noted above, we have already granted waivers of the June 26, 2008 deadline to licensees requiring more time to complete rebanding, and we have established a procedure for licensees to request additional extensions if necessary. We believe the waiver process currently in place is sufficient to address concerns regarding the rebanding timetable, and that Sprint's proposal to establish an entirely new timetable is therefore unnecessary.²⁴ We also dismiss Sprint's request to "hold in abeyance" other 800 MHz obligations

¹⁹ *800 MHz Report and Order*, 19 FCC Rcd at 15063 ¶ 176.

²⁰ *Rebanding Guidance Notice*, 22 FCC Rcd at 17232.

²¹ Sprint Request at 8.

²² *Id.* at 7.

²³ *Id.*

²⁴ Sprint also requests that the TA conduct initial regional rebanding implementation planning sessions (IPS) in all non-border area NPSAC regions, which have been successful in developing a common understanding of all issues (continued....)

triggered by the June 26, 2008 rebanding deadline.²⁵ We clarify, however, that our dismissal of this aspect of Sprint's request is without prejudice to the right of Sprint or any other party to raise issues separately relating to the June 26, 2008 deadline as it applies to other rebanding obligations.²⁶

B. Post-Mediation Litigation Costs

14. Background. In the *800 MHz Second MO&O*, we addressed two petitions for reconsideration challenging a determination by the Wireless Telecommunications Bureau that Sprint's obligation to pay licensee rebanding costs does not require it to pay licensees' post-mediation litigation costs when rebanding disputes are brought before the Commission.²⁷ We denied the reconsideration petitions on both statutory and policy grounds. First, we found that in the absence of specific statutory authorization, we lacked the authority to require one party to pay another party's costs in litigation before us.²⁸ Second, we found that even if we possessed such authority, requiring Sprint to pay post-mediation litigation costs "would only increase the likelihood of litigation and add cost and delay to the rebanding process."²⁹

15. Two groups of 800 MHz licensees have sought reconsideration of our holding in the *800 MHz Second MO&O* on this issue. One group, led by the City of Boston (Boston Petitioners), argues that our decision is unsupported by the *800 MHz Report and Order* and *800 MHz Supplemental Order*.³⁰ These petitioners also contend that our decision created a new "legislative rule" that shifted, without notice, the cost burden onto licensees for bringing post-mediation appeals to the Commission, and therefore that our decision contravenes the Administrative Procedures Act (APA),³¹ the Unfunded Mandates Act,³² and the Regulatory Flexibility Act.³³ These petitioners further argue that the

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and scheduling needs among all stakeholders. Sprint Request at 5-6. As stated in the *Rebanding Guidance Notice*, we approve TA-conducted initial and follow-up regional IPS to ensure licensees, vendors, and consultants develop comprehensive implementation schedules and identify interoperability issues, risks and interdependencies. *Rebanding Guidance Notice*, 22 FCC Rcd at 17230-231.

²⁵ See Sprint Request at 5.

²⁶ In particular, we make no ruling today on Sprint's request to "harmonize" references in the 800 MHz R&O to June 26, 2008, relating to the Mobile Satellite Service (MSS) licensee reimbursement of Sprint Nextel for the costs of relocating BAS licensees with the postponed true-up. Sprint Request at 8. See also Letter from Lawrence R. Krevor, Vice President - Spectrum, Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed October 8, 2008, at 13, citing *Sprint Nextel Corp. v. New ICO Satellite Services G.P., et al.*, No. 1:08cv651 (E.D. Va. Aug. 29, 2008) (order referring claims to FCC under the doctrine of primary jurisdiction).

²⁷ *Second MO&O*, 22 FCC Rcd at 10483-86 ¶¶ 47-50.

²⁸ *Id.* at 10485-86 ¶¶ 49-50.

²⁹ *Id.* at 10485-86 ¶ 50.

³⁰ Petition for Partial Reconsideration of City of Boston, *et al.*, filed June 14, 2007 (Boston Petition). Sprint filed an opposition to Boston's Petition. Opposition of Sprint Nextel Corp. (Oct. 16, 2007) (Sprint Opposition). The Boston Petitioners filed a Motion to Strike Sprint's Opposition, arguing that it was untimely filed under 47 C.F.R. § 1.45(b) of our rules. See Motion to Strike of the City of Boston (Oct. 30, 2007). Sprint opposed the Motion. See Opposition to Motion to Strike of Sprint Nextel Corp. (Nov. 9, 2007). On November 14, 2007, Petitioners sought to withdraw their Motion to Strike. See Reply to Opposition to Petition for Reconsideration and Opposition to Motion to Strike of City of Boston, *et al.*, at 2 n.1 (Nov. 14, 2007). We grant petitioners' request and dismiss the Motion to Strike as moot.

³¹ Boston Petition at 7, citing 5 U.S.C. § 553.

³² Boston Petition at 6 n.4, citing 2 U.S.C. §§ 1531, 1533, 1534.

Commission has the authority to require Sprint to pay post-mediation litigation costs because Sprint allegedly “agreed” to pay those costs.³⁴ They argue that the Commission arbitrarily and capriciously drew a line between mediation and post-mediation costs that did not exist previously and that this line fails to recognize incumbents’ need for legal representation throughout the rebanding process, including *de novo* review proceedings.³⁵

16. A second group of licensees led by Washoe County, Nevada (Washoe Petitioners) filed a separate petition for reconsideration that incorporates by reference the legal arguments raised in the Boston Petition.³⁶ The Washoe Petitioners also allege that the non-recoverability of post-mediation litigation costs will cause harm to public safety licensees.³⁷

17. Sprint opposes both petitions for the reasons stated in the *800 MHz Second MO&O*.³⁸ Specifically Sprint argues that we lack the statutory authority to require Sprint to cover these costs.³⁹ Sprint also argues that this policy is consistent with the Commission’s earlier orders in this proceeding and that this policy has greatly encouraged the resolution of disputes through mediation and limiting the amount of *de novo* review.⁴⁰

18. Discussion. We deny the Boston and Washoe Petitions and affirm the *800 MHz Second MO&O*. First, the arguments presented in both petitions are largely repetitive of the reconsideration arguments that the Commission previously considered and rejected in the *800 MHz Second MO&O*.⁴¹ To the extent that petitioners raise new arguments, their petitions are untimely because they have failed to show that their arguments could not have been raised previously. Nevertheless, we address petitioners’ new arguments as informal objections.

19. We reject the Boston Petitioners’ claim that our litigation cost holding in the *800 MHz Second MO&O* constituted a legislative rule requiring notice and comment under the APA.⁴² In the *800 MHz Second MO&O*, we found that the Wireless Telecommunications Bureau correctly interpreted our prior rebanding orders as not requiring Sprint to pay other licensees’ post-mediation litigation costs.⁴³ Thus, our holding in the *800 MHz Second MO&O* did not represent a change from prior decisions, and therefore cannot be considered a new legislative rule. To the extent that our holding could be construed as a “rule” at all, it is at most an interpretive rule, which does not require notice and comment.⁴⁴ For the

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³³ Boston Petition at 10, *citing* 5 U.S.C. § 604.

³⁴ Boston Petition at 11-17.

³⁵ *Id.* at 18-26.

³⁶ Petition for Partial Reconsideration of Washoe County, Nevada; City of Chesapeake, Virginia; Overland Park, Kansas, filed August 30, 2007 (Washoe Petition).

³⁷ Washoe Petition at 3.

³⁸ Sprint Opposition at 2-7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 47 C.F.R. § 1.429(h)(i).

⁴² Boston Petition at 7.

⁴³ *800 MHz Second MO&O*, 22 FCC Rcd at 10483 ¶ 47.

⁴⁴ *Central Texas Telephone Cooperative v. FCC*, 402 F.3d 205 (D.C. Cir. 2005); *Air Transport Ass’n of America, Inc. v. FCC*, 291 F.3d 49 (D.C. Cir. 2002); *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 976 F.2d 227, 237 (D.C. Cir. 1992).

same reason, it does not violate the Unfunded Mandates Act or the Regulatory Flexibility Act, which do not apply to interpretive rules.

20. We also reject the Boston Petitioners' argument that we have the authority to require Sprint to pay post-mediation litigation costs because Sprint allegedly agreed to do so by consenting to the rebanding conditions imposed on it in the *800 MHz Report and Order* and the *800 MHz Supplemental Order*.⁴⁵ Petitioners argue that the litigation cost issue is analogous to situations addressed by the Commission's "greenmail" rule, which under certain circumstances allows an applicant before the Commission to negotiate the withdrawal of a petition to deny or other objection to the application by agreeing to pay the opposing party's cost of filing and prosecuting the petition or objection.⁴⁶ As we previously discussed in the *800 MHz Second MO&O*, however, neither the *800 MHz Report and Order* nor the *800 MHz Supplemental Order* contained a condition requiring Sprint to pay its opponents' litigation costs in matters before the Commission, and Sprint therefore never agreed to such a condition.⁴⁷ Thus, the issue is not whether the Commission has the statutory authority to enforce a voluntary agreement by one party to pay another's litigation costs, but whether the Commission has the statutory authority to require one party to pay another's costs involuntarily. As we concluded in the *800 MHz Second MO&O*, the Commission lacks the latter authority.⁴⁸

21. Both the Boston Petitioners and the Washoe Petitioners express concern that if 800 MHz licensees are required to bear their own post-mediation litigation costs, Sprint could force licensees into costly evidentiary hearings before the Commission in order to pressure them into agreeing to less favorable terms in their rebanding agreements than they obtained in mediation or an initial decision by PSHSB.⁴⁹ Even if we had statutory authority, we do not believe this concern justifies requiring Sprint to pay all costs of post-mediation litigation as petitioners propose. In fact, very few rebanding cases have been referred from TA-sponsored mediation to the Bureau, and fewer still have been the subject of requests for evidentiary hearing by Sprint. Moreover, we retain ample authority to ensure that Sprint does not exploit the post-mediation process to saddle incumbents with unnecessary costs. Indeed, we have cautioned all parties involved in rebanding that "filing rebanding appeals for the purpose of delay, driving up litigation costs, or forcing concessions from another party is an abuse of the Commission's processes and will not be tolerated."⁵⁰ In that connection, we reserve the authority to impose penalties against any party that acts in bad faith or otherwise abuses the Commission's processes.

C. Pending Petitions for *De Novo* Review

22. **Background.** Sprint has filed petitions for *de novo* review before an Administrative Law Judge (ALJ) of two decisions issued by the PSHSB that addressed rebanding disputes between Sprint and individual 800 MHz licensees. In the first petition, Sprint seeks review of a Bureau order resolving a dispute between Sprint and Chester County, Pennsylvania (Chester County).⁵¹ The second petition seeks

⁴⁵ Boston Petition at 13-18.

⁴⁶ *Id.*, citing 47 C.F.R. § 1.935.

⁴⁷ *800 MHz Second MO&O*, 22 FCC Rcd at 10484-85 ¶¶ 47-48.

⁴⁸ *Id.* at ¶ 49.

⁴⁹ Boston Petition at 22-25; Washoe Petition at 3.

⁵⁰ Washoe County, Nevada, et al., WT Docket No. 02-55, *Memorandum Opinion and Order*, 23 FCC Rcd 11695, 11701 ¶ 23 (2008) (*Washoe County AFR Order*).

⁵¹ Petition for De Novo Review filed by Nextel Communications, Inc., filed July 30, 2007, seeking review of County of Chester and Sprint Nextel, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 13146 (PSHSB 2007).

rehearing of a Bureau order resolving a dispute between Sprint and the City of Chesapeake, Virginia (Chesapeake).⁵²

23. Discussion. Although Sprint is entitled under Section 90.677(d)(2) of our rules to seek a *de novo* evidentiary rehearing before an ALJ of any Bureau rebanding decision,⁵³ we pointed out in our recent *Washoe County AFR Order* that the *de novo* rehearing procedure does not supplant the application for review procedure set forth in Part 1 of the Commission's rules.⁵⁴ We also stated that in cases where party's petition for *de novo* review raises question of law, the Commission may treat the petition as an application for review for purposes of resolving those questions in order to "expedite the evidentiary *de novo* review process by limiting the ALJ hearing to questions of fact and eliminating the possibility that any decisional legal conclusions that the judge would otherwise have rendered would conflict with and necessitate reversal by the Commission."⁵⁵

24. We believe that the Chester County and Chesapeake petitions should be treated as applications for review for purposes of resolving questions of law raised in both petitions. Prior to acting on the petitions, however, we afford the parties the opportunity to file oppositions and replies as provided under our application for review procedures.⁵⁶ Accordingly, we allow Chester County and Chesapeake to file oppositions to Sprint's respective petitions within 15 days of release of this order. We also allow Sprint to file a reply within 10 days of the filing of any opposition filed by Chester County or Chesapeake.⁵⁷

D. September 12, 2007 Public Notice

25. Background. On September 12, 2007, we issued the *Rebanding Guidance Notice*, which set forth procedures and guidelines to expedite the rebanding process for NPSAC licensees. In particular, the *Notice* (1) established timetables and deadlines for licensees to complete rebanding planning activities;⁵⁸ (2) revised timelines for negotiation and mediation of Frequency Reconfiguration Agreements (FRAs);⁵⁹ (3) provided guidance to licensees regarding how to use the change notice process to address unanticipated changes in cost, scope, or schedule that occur during rebanding implementation;⁶⁰ and (4) encouraged licensees to undertake certain rebanding activities prior to reaching their FRAs with Sprint.⁶¹ The *Rebanding Guidance Notice* also provided guidance to Sprint and the TA "to help expedite cost review and approval, and ultimately to ensure that rebanding is accomplished in a

⁵² Petition for De Novo Review filed by Nextel Communications, Inc., filed July 30, 2007, seeking review of City of Chesapeake, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 13156 (PSHSB 2007).

⁵³ 47 C.F.R. § 90.677(d)(2).

⁵⁴ *Washoe County AFR Order*, 23 FCC Rcd at 11697 ¶ 7.

⁵⁵ *Id.*

⁵⁶ *See id.* at ¶ 7 n.23 (Commission will "provide the requisite opportunities for opposition and reply" when treating a petition for *de novo* review as an application for review). Section 1.115(d) of the Commission's rules provides 15 days for filing an opposition to an application for review and 10 days for filing a reply following the filing of an opposition.

⁵⁷ Sprint may only file a reply in either case if an opposition is filed.

⁵⁸ *Rebanding Guidance Notice*, 22 FCC Rcd at 17227.

⁵⁹ *Id.* at 17228.

⁶⁰ *Id.* at 17229.

⁶¹ *Id.* at 17231.

reasonable, prudent, and timely manner.”⁶²

26. The State of Indiana and several other 800 MHz licensees (Indiana Petitioners) jointly filed a petition for reconsideration of the *Rebanding Guidance Notice*.⁶³ The Indiana Petitioners claim that the *Notice* unlawfully created substantive rules without notice and comment, in violation of Section 553 of the Administrative Procedures Act.⁶⁴ The Indiana Petitioners also contend that the Commission acted arbitrarily imposed additional obligations on public safety licensees that petitioners claim ignore the challenges faced by public safety in implementing 800 MHz rebanding.⁶⁵

27. Discussion. We deny the Indiana Petition. First, the parties have erred in their underlying assertion that the *Rebanding Guidance Notice* created new substantive rules. The purpose of the *Notice* was to provide “supplemental procedures and provide guidance for completion of 800 MHz rebanding” by NPSPAC licensees.⁶⁶ Thus, the *Notice* is procedural in nature and does not require prior notice and comment.

28. We also reject the contention that the *Rebanding Guidance Notice* arbitrarily imposed additional burdens on public safety or ignored the challenges faced by public safety in completing rebanding. We briefly address each of the objections to the *Notice* raised by the Indiana Petition.

29. *Completion of Planning.* The *Rebanding Guidance Notice* set deadlines for completing planning activities and provided guidance to facilitate completion of planning within those time limits. The Indiana Petitioners contend that the planning deadlines established in the *Notice* fail to take into account planning delays caused by limited third party vendor resources or by state and local law.⁶⁷ However, the *Notice* explicitly allowed licensees to request extensions if they required additional planning time.⁶⁸ Moreover, subsequent to the *Notice*, the Commission implemented waiver procedures enabling licensees still in planning to seek waivers of the June 26, 2008 rebanding deadline.⁶⁹ Pursuant to those procedures, the PSHSB granted waivers to numerous licensees to extend their planning periods, including Indiana and several other parties to the Indiana Petition.⁷⁰

30. *FRA Negotiations.* In the *Rebanding Guidance Notice*, we stated that in the event FRA negotiations between NPSPAC licensees and Sprint are not completed within thirty days, the parties

⁶² *Id.*

⁶³ Petition for Reconsideration of State of Indiana, *et al.*, filed Oct. 15, 2007 (Indiana Petition).

⁶⁴ Indiana Petition at 2, *citing* 5 U.S.C. § 553.

⁶⁵ Indiana Petition at 2-4.

⁶⁶ *Rebanding Guidance Notice*, 22 FCC Rcd at 17227.

⁶⁷ Indiana Petition at 3-7.

⁶⁸ *Rebanding Guidance Notice*, 22 FCC Rcd at 17228.

⁶⁹ Federal Communications Commission Provides Guidance For Submission Of Requests For Waiver Of June 26, 2008 Deadline For Completion Of 800 MHz Rebanding, *Public Notice*, 23 FCC Rcd 664 (2008) (*Waiver Procedures Notice*).

⁷⁰ For example, the State of Indiana, the Massachusetts Department of Corrections, and the Illinois Public Safety Agency Network requested interim extensions to submit a rebanding timetable, which we granted. *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Order*, 23 FCC Rcd 9421 (PSHSB 2008) (*Wave 1 Interim Waiver Order*). Presently these licensees have supplemental extension requests pending before PSHSB.

would be afforded a twenty day mediation period.⁷¹ Indiana Petitioners' contend that the thirty-day deadline for conclusion of FRA negotiations is unsupported by the record given the myriad of potential issues and layers of review that may arise before completion of FRA negotiations.⁷² We believe that the thirty day period established for FRA negotiations is reasonable. The *Rebanding Guidance Notice* provides that the negotiation period does not begin until the licensee has completed planning and submitted its cost estimate to Sprint,⁷³ so that a factual predicate exists for meaningful negotiations to occur. Our experience with rebanding also indicates that upon completion of planning, many licensees have been able to complete or substantially complete their negotiations with Sprint within the negotiation and mediation timeframes established in the *Notice*.⁷⁴ Moreover, in those instances where parties have required more time for negotiation due to the complexity of the issues or the need to obtain regulatory approval to execute the FRA, we have granted PSHSB discretion to grant parties additional time to complete the FRA process.⁷⁵

31. *Change Notice Process.* In the *Rebanding Guidance Notice*, we stated that licensees may not use the change notice process to recover "costs that were reasonably foreseeable during planning or FRA negotiations but were not raised in negotiations, or that were considered or rejected."⁷⁶ The Indiana Petitioners argue that this language is inconsistent with our prior rebanding orders and that it could prevent licensees from fully recovering their costs.⁷⁷ We disagree with this contention. The guidance we provided in the *Notice* regarding change notices was a clarification of the standard articulated in prior orders that licensees are entitled to recover all "reasonable and prudent" rebanding costs.⁷⁸ In the *Notice*, we affirmed that this standard entitles licensees to recover costs that are the result of "unanticipated changes in cost, scope, or schedule that occur during implementation or in the case of an emergency."⁷⁹ On the other hand, we clarified that it is not reasonable for licensees to use the change notice process to attempt to re-negotiate their agreements after the fact based on issues that should have been or actually were raised earlier. This distinction is fully consistent with our prior orders regarding recoverable costs.

32. *Rebanding Implementation.* In the *Rebanding Guidance Notice*, we encouraged licensees to undertake certain rebanding activities (e.g., deployment of subscriber equipment) prior to

⁷¹ *Rebanding Guidance Notice*, 22 FCC Rcd at 17228.

⁷² Indiana Petition at 7-10

⁷³ *Rebanding Guidance Notice*, 22 FCC Rcd at 17228

⁷⁴ The *Rebanding Guidance Notice* called for Stage 2 NPSPAC licensees to complete planning between October and December 2007, depending on their transition wave, and to negotiate their FRAs thereafter in accordance with the 30/20 day negotiation/mediation timetables in the *Notice*. In the fourth quarter of 2007 (the first full quarter after release of the *Notice*), 81 Stage 2 licensees completed their FRA negotiations. 800 MHz Transition Administrator Quarterly Progress Report for the Quarter Ended December 31, 2007 (filed February 29, 2008), at 15. In the first quarter of 2008, an additional 70 licensees completed FRA negotiations. 800 MHz Transition Administrator Quarterly Progress Report for the Quarter Ended March 31, 2008 (filed June 6, 2008), at 14.

⁷⁵ *Waiver Procedures Notice*, 23 FCC Rcd at 664.

⁷⁶ *Rebanding Guidance Notice*, 22 FCC Rcd at 17229.

⁷⁷ Indiana Petition at 10-12.

⁷⁸ See Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd at 9818, 9820 ¶ 8 (2007).

⁷⁹ *Rebanding Guidance Notice*, 22 FCC Rcd at 17229.

execution of their FRAs with Sprint.⁸⁰ Indiana Petitioners argue that this element of the *Notice* puts licensees at risk of not recovering rebanding costs incurred prior to completing their FRAs.⁸¹ Petitioners' claim is unavailing. In fact, the *Notice* did not require licensees to begin rebanding activity prior to executing their FRAs, but merely "encouraged" them to do so. The notice also directed licensees to resources developed by the TA that help licensees prepare for and expedite the reconfiguration process and provide for recovery of associated costs. Finally, the notice expressly reaffirmed that Sprint is required to pay all licensee rebanding expenses that are reasonable, prudent, and necessary, regardless of when such costs are incurred.⁸²

E. U.S. Virgin Islands

33. In the *800 MHz Second MO&O*, we determined that an alternative rebanding plan was appropriate for Puerto Rico due to the unique nature of 800 MHz incumbency in the Puerto Rico market compared to other markets.⁸³ We directed the TA to propose an alternative band plan and negotiation timetable for Puerto Rico, and delegated authority to PSHSB to implement the band plan and timetable.⁸⁴ The TA submitted its proposal as directed, but also recommended extending the Puerto Rico band plan to the U.S. Virgin Islands (USVI).⁸⁵ The TA noted that the USVI and Puerto Rico face many rebanding issues in common. For example, because the USVI is in the same Economic Area (EA) as Puerto Rico, it has the same EA licensees relocating to the ESMR Band and faces a similar shortage of ESMR spectrum to accommodate rebanding licensees that are ESMR-eligible.⁸⁶ The TA also noted that the USVI, like Puerto Rico, has site-licensed systems that will need to be relocated out of the ESMR Band.⁸⁷ For these reasons, the TA proposed modifying the USVI band plan to match the band plan for Puerto Rico.⁸⁸

34. In the *800 MHz Second MO&O*, we delegated authority to PSHSB to establish a band plan for Puerto Rico, but we did not delegate similar authority with respect to the USVI.⁸⁹ In light of the TA's recommendation to adopt the same band plan for the USVI as for Puerto Rico, we now delegate authority to PSHSB to seek comment on the USVI portion of the TA Proposal and to establish a rebanding plan for the USVI.

III. PROCEDURAL MATTERS

35. **Report to Congress.** The Commission will send a copy of this *Fourth Memorandum*

⁸⁰ *Id.* at 17231.

⁸¹ Indiana Petition at 12-13.

⁸² *Rebanding Guidance Notice*, 22 FCC Rcd at 17232.

⁸³ *800 MHz Second MO&O*, 22 FCC Rcd at 10479 ¶ 32.

⁸⁴ *Id.* at 10479-80 ¶ 33. We delegated authority to PSHSB to approve or modify the proposed band plan and timetable, and suspended the rebanding timetable for Puerto Rico until a new band plan is adopted. *Id.* PSHSB has since released a Notice of Proposed Rulemaking seeking comment on the Puerto Rico proposal. *See Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 10179 (PSHSB 2008).

⁸⁵ Proposal for Adoption of an Alternative 800 MHz Band Plan and Negotiation Timetable for the Puerto Rico and U.S. Virgin Islands Economic Area, WT Docket 02-55, filed October 19, 2007 (TA Proposal) at 11.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See 800 MHz Second MO&O*, 22 FCC Rcd at n.72.

Opinion and Order and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁹⁰

36. **Paperwork Reduction Act Analysis.** This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, it does not contain any new or modified “information burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.⁹¹

IV. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(f), 332, 337 and 405, this Fourth Memorandum Opinion and Order and Order on Reconsideration IS HEREBY ADOPTED.

38. IT IS FURTHER ORDERED that the Informal Request filed by Sprint Nextel Corporation on June 25, 2008 IS GRANTED to the extent described herein.

39. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration of the Second Memorandum Opinion and Order, filed by the City of Boston, et. al., on June 14, 2007 IS DENIED to the extent described herein.

40. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Second Memorandum Opinion and Order, filed by the Washoe County, Nevada; City of Chesapeake, Virginia; Overland Park, Kansas on August 30, 2007 IS DENIED to the extent described herein.

41. IT IS FURTHER ORDERED that the Petition for Reconsideration of the *Public Notice*, filed by the State of Indiana, et. al., on October 15, 2007 IS DENIED to the extent described herein.

42. IT IS FURTHER ORDERED that the Motion to Strike, filed by the City of Boston, et. al., on October 30, 2007 IS DISMISSED to the extent described herein.

43. IT IS FURTHER ORDERED that pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Chesapeake, Virginia and the County of Chester, Pennsylvania may file oppositions within 15 days of release this Order to the respective Petitions for De Novo Review filed July 17, 2007, by Sprint Nextel Corporation, and that Sprint Nextel may file a reply in each matter within 10 days of the filing of any opposition.

44. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Certification required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. § 604, and as set forth in Appendix A herein IS ADOPTED.

⁹⁰ See 5 U.S.C. § 801(a)(1)(A).

⁹¹ See 44 U.S.C. 3506(c)(4).

45. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Fourth Memorandum Opinion and Order and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

APPENDIX

Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),¹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵ Consistent with what we describe below, we certify that the actions in this *Fourth Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities.

2. *Financial True Up.* In the *800 MHz Report and Order*, the Commission required that 800 MHz band reconfiguration in non-border regions be completed in 36 months. The Commission required the Transition Administrator (TA) to perform a financial reconciliation or “true-up” six months after the 36-month transition period ended, *i.e.*, by December 26, 2008. In this *Fourth Memorandum Opinion and Order*, we address Sprint’s request that we postpone the true-up process until after rebanding of the 800 MHz and 1.9 GHz bands is completed. We partially grant Sprint’s request and postpone the true-up date from December 26, 2008 to July 1, 2009, because both rebanding projects have been subject to unforeseen complexities and delay. In addition, we direct the TA to file a report and recommendation on whether the true-up process should be conducted by July 1, 2009 or postponed to a later date. Because our decision is limited to reporting requirements applicable to Sprint and the TA and affects no other entity, and because our decision concerning Sprint merely extends the status quo, we certify that our decision will not have a significant economic impact on a substantial number of small entities.

3. All other issues do not raise regulatory flexibility issues because our actions deny petitions for reconsideration, defer action on certain petitions for de novo review and afford certain parties an opportunity to file oppositions and replies as provided under our application for review procedures, or internally delegate authority, and therefore do not raise any regulatory flexibility issues. The Commission will send a copy of the *Fourth Memorandum Opinion and Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review

¹ The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² 5 U.S.C. § 605(b).

³ 5 U.S.C. § 601(6).

⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁵ 15 U.S.C. § 632.

Act.⁶ In addition, the *Fourth Memorandum Opinion and Order* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.⁷

⁶ See 5 U.S.C. § 801(a)(1)(A).

⁷ See 5 U.S.C. § 605(b).