



for vacated Interleaved Band (809-825/854-860 MHz) channels.<sup>4</sup> These conditions and restrictions, adopted without notice or comment from impacted licensees, are not supported by the FCC rules and policies governing the Rebanding Process and establish a presumption disfavoring these PS Incumbents without consideration of the specific facts of their particular rebanding activities.

**I A "PRESUMPTION" TO DISALLOW REBANDING-RELATED COSTS FOR A CERTAIN CATEGORY OF PS INCUMBENTS IS INCONSISTENT WITH THE RULES AND POLICIES GOVERNING THE REBANDING PROCESS**

The fundamental bargain struck to effectuate the band clearing process known as 800 MHz rebanding,<sup>5</sup> and thereby address ongoing interference problems in the band and provide Sprint with replacement spectrum in the 800 MHz and 1.9 GHz bands, was that Sprint would pay the "reasonable, prudent and minimum necessary costs" to relocate 800 MHz incumbents to comparable facilities.<sup>6</sup> The determination as to whether a relocating incumbent's costs satisfy that standard is made following a defined process: first, in the negotiation of a rebanding plan and associated costs between the licensee and Sprint; second, through approval of those negotiated costs by the Transition Administrator ("TA") appointed by the FCC to oversee the Rebanding Process; and, finally, if the incumbent and Sprint are not able to reach agreement, through FCC *de novo* review of the TA-appointed mediator's Recommended Resolution ("RR") regarding the disputed cost matters. The sole exception to this process is one carved out by the FCC in the 800 MHz rebanding proceeding itself wherein the Commission determined that incumbents would be responsible for their own costs of filing and prosecuting requests for *de*

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<sup>4</sup> *Id.* at ¶ 9. This spectrum is also addressed in a companion order issued by the FCC: Improving Public Safety Communications in the 800 MHz Band, Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, WT Docket No. 02-55, *Order*, DA 10-576 ("*Relinquishment Order*").

<sup>5</sup> Representing a variety of licensees, the undersigned law firms were part of the negotiations team which led to the creation of the Consensus Plan, upon which the Commission's original Rebanding Order was predicated.

<sup>6</sup> *See, e.g.*, 800 MHz Order at ¶ 198; *see also*, Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818 (2007).

*novus* review of disputed issues, as well as the costs of pursuing subsequent administrative or judicial review of the FCC's decision.<sup>7</sup>

It is clear that the Commission considers the cost of preparing and filing the reports required in the Order as presumptively recoverable by incumbents subject to 800 MHz rebanding,<sup>8</sup> as it has the other reporting costs imposed on such licensees, since it felt the need to identify these costs as **presumptively non-recoverable** only for a particular class of PS Incumbents – those that have not yet submitted their cost estimates to Sprint.<sup>9</sup> Notably, this conclusion, which appears only in a footnote in the Order, is not supported by citation to any FCC rule or Order in this lengthy and well-documented proceeding or even by an explanation for the Commission's position. It can only be assumed, therefore, that the FCC has made a blanket determination that all PS Incumbents in this category have been dilatory in fulfilling their rebanding responsibilities and, thus, their reporting costs presumptively fail to satisfy the reasonable, prudent and necessary standard.

This conclusion is inconsistent with the process established by the Commission for considering rebanding-related costs, a process that is intended to be predicated on a fact-driven consideration of a specific rebanding project. It pre-judges the behavior of individual PS Incumbents in individual rebanding matters without reference to the histories of those matters. It

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<sup>7</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 at ¶ 44 (2007).

<sup>8</sup> Indeed, the Firms have for years been recovering costs for the multiple reports to the Transition Administrator, as well as the last set of Extension Waivers required by the Commission. *See* Improving Public Safety Communications in the 800 MHz Band, Supplemental Requests for Waiver of June 26, 2008 Rebanding Deadline, WT Docket No. 02-55, *Order*, DA 09-1297 (rel. June 9, 2009).

<sup>9</sup> The Firms understand that this presumption is intended to apply only to PS Incumbents that have not yet submitted their cost estimates to Sprint, although the language in the footnote could be read to apply more broadly.

presumes, first, that blame must apply if the cost estimate has not yet been submitted and, second, that the fault lies with the incumbent and not with Sprint.<sup>10</sup>

There is no basis for this conclusion. While the Firms share the Commission's desire to see 800 MHz rebanding completed as promptly as can reasonably be accomplished, they do not agree that delays in submitting cost estimates necessarily are caused by PS Incumbents. Any number of factors can influence the time needed to complete planning, finalize a rebanding plan and develop the associated cost estimates, not the least of which are the delays encountered when a Change Order is needed before planning can be concluded.<sup>11</sup> Other elements are the complexity of the system, interdependencies between a system and others in its area, and the limitations on incumbent resources in a time of fiscal devastation for many municipalities and substantial reductions in personnel. Many of these factors are entirely beyond the control of the PS Incumbents. Some are within the control of Sprint such as the matter involving the City of Billings, Montana. In that case, Sprint refused to negotiate with the City, claiming that Sprint was not required to reband the City's system. The Commission recently determined otherwise, found in favor of the City and directed that negotiations commence.<sup>12</sup> Yet, under the Order, Billings would be required to fund the costs of preparing and filing an extension request that is necessary because of Sprint's refusal to negotiate with the City. This cannot have been the Commission's intention and confirms that there is no single, one-size-fits-all conclusion that properly can be applied to a group of individual licensees.

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<sup>10</sup> Conversely, in the *Relinquishment Order*, the Commission extended the time allowed for Sprint to vacate the Interleaved Spectrum and specifically noted that "[i]n taking these actions, we make no finding regarding the degree to which Sprint's inability to vacate channels by prior deadlines is due to factors within or beyond Sprint's control, and defer consideration of such issues to a later date." *Relinquishment Order* at ¶ 15.

<sup>11</sup> Some Change Orders result in negotiations lasting up to a year, or ultimately require Commission resolution.

<sup>12</sup> City of Billings, Montana and Sprint Nextel Corporation, WT Docket No. 02-55, *Memorandum Opinion and Order*, DA 10-504 (rel. Mar. 26, 2010).

The Firms cannot speak to the specifics of each rebanding matter in this category, but those details are essential in any finding that rebanding-related costs are not reimbursable. It is for this reason that the Commission properly adopted the Rebanding Process described above, one that undertakes a fact-specific determination of whether costs for which reimbursement is requested are, indeed, reasonable, prudent and necessary. To presumptively conclude that a class of PS Incumbents is not entitled to reimbursement for rebanding-related costs stands on its head the fundamental predicate of the Commission's 800 MHz rebanding decision, deprives those PS Incumbents of the right to demonstrate that their costs satisfy the FCC's standard for cost recovery, is unsupported by any previous Commission decision in this proceeding and serves no public interest purpose.<sup>13</sup> The Firms urge the FCC to reconsider and reverse this decision.

## **II THERE IS NO LEGAL OR POLICY BASIS FOR PROHIBITING OTHERWISE QUALIFIED PARTIES FROM APPLYING FOR VACATED SPRINT SPECTRUM SIMPLY BECAUSE THEY DO NOT HAVE EXECUTED FRAS**

One element of the Commission's 800 MHz rebanding decision was to reserve spectrum vacated by Sprint in the Interleaved Band for licensing by public safety entities for the first three years of its availability.<sup>14</sup> The Commission did so because it recognized a pressing need for additional capacity for public safety licensees in this band.<sup>15</sup> The FCC made the first groups of vacated spectrum available to the public safety community generally and this spectrum has been used to meet important communications requirements.<sup>16</sup>

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<sup>13</sup> It may be that the FCC believes its position will act as an inducement to the affected licensees to accelerate their rebanding efforts, assuming, as the FCC appears to, that the delay is due to conditions entirely within their control. The Firms not only disagree with the Commission's presumption, but query why it would have that effect since the costs under consideration cannot be avoided by these PS Incumbents irrespective of their future actions.

<sup>14</sup> 800 MHz Order at ¶ 152.

<sup>15</sup> Improving Public Safety Communications in the 800 MHz Band, Supplemental Requests for Waiver of June 26, 2008 Rebanding Deadline, WT Docket No. 02-55, *Order*, FCC 08-253 (rel. October 30, 2008) at para. 10.

<sup>16</sup> Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Establish New 800 MHz Vacated Channel Search Engine For Identifying Vacated Channels in the 800 MHz Interleaved Band That Will Be

The Order now has imposed a condition on public safety eligibility for this spectrum. Without going through a notice and comment proceeding to consider whether the restriction adopted is reasonable, necessary and in the public interest, the Commission has announced that it will limit eligibility to: (1) public safety licensees that have fully executed FRAs at the time they apply for interleaved channels; and (2) public safety licensees that are either not required to reband or have completed the rebanding process.<sup>17</sup> The justification offered is the Commission's belief that PS Incumbents "who have not submitted cost estimates or completed FRA negotiations at this late date should focus their resources on completing the FRA process and initiating rebanding of their systems as soon as possible."<sup>18</sup>

In critical respects, this action is even more punitive vis-à-vis PS Incumbents than the presumption that certain rebanding costs should not be recoverable. It assumes, contrary to fact, that the failure to complete the negotiation of an FRA is necessarily the responsibility of or even within the control of the PS Incumbent. The FCC is well aware of the oftentimes contentious nature of the FRA negotiation process. There is an inherent tension between the interests of PS Incumbents that have the responsibility for ensuring that their communications systems are not unnecessarily disrupted during the complex work of rebanding them and that their post-rebanding systems are in all respects comparable and Sprint which invariably argues that the work can be completed more quickly and inexpensively. The larger and more complicated the public safety system is, the more likely the parties are to encounter areas of dispute that can require detailed technical and operational discussions to resolve. And when the parties are unable to reach agreement, even following good faith negotiations, the Rebanding Process

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Available for Licensing to Public Safety and Critical Infrastructure Industry Entities, *Public Notice*, DA 08-2464 (rel. Nov. 6, 2008).

<sup>17</sup> *Order* at ¶ 9.

<sup>18</sup> *Id.*

requires the submission of Proposed Resolution Memoranda by the parties, the drafting of an RR by the mediator and *de novo* Commission review of the record before rendering a decision. It is far from uncommon for this process to take a year or more to complete, with much of that time needed for the FCC review process, while the PS Incumbent's rebanding work is on hold.

This FCC position not only unjustifiably penalizes PS Incumbents for matters that are not necessarily within their control, but provides Sprint with additional leverage in the FRA negotiation process. If a PS Incumbent needs additional 800 MHz capacity, capacity that realistically is only available from the Interleaved Band, then it may be forced to choose between compromising its reasonable, prudent and necessary rebanding requirements just so that it is not precluded from applying for this spectrum. That is not a choice that PS Incumbents should be forced to make.

PS Incumbents have to manage myriad communications-related matters simultaneously. Rebanding is a federal mandate that they must fulfill, as is the upcoming narrowband conversion, but they do not have the luxury of ignoring other critical issues such as capacity requirements while they undertake these other tasks. The condition imposed in this Order is an unjustified and fundamentally inequitable measure that handicaps certain public safety licensees for matters that are outside their control. It will not accelerate the 800 MHz Rebanding Process, unless by short-changing PS Incumbents in the scenario described above, and should be eliminated before the Commission issues a Public Notice releasing the next group of vacated spectrum.

For the reasons detailed herein, the Firms respectfully request that the Commission reconsider and reverse the two decisions addressed above.

Respectfully submitted,

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April 22, 2010