

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of)	
)	
Washoe County, Nevada)	
and Sprint Nextel)	
)	
Mediation No. TAM-12342)	
)	
and)	WT Docket No. 02-55
)	
City of Sparks, Nevada)	
and Sprint Nextel)	
)	
Call Signs WPPRX309,)	
WPUF364, and WPEV464)	

**To: The Secretary
Federal Communications Commission
Washington, DC 20554**

APPLICATION FOR REVIEW

Nextel Communications, Inc. (“Nextel”), a wholly-owned subsidiary of Sprint Nextel Corporation, hereby applies for review of the July 3, 2007 *Memorandum Opinion and Order* (“*Order*”) of the Public Safety and Homeland Security Bureau (the “Bureau”)¹ pursuant to Section 1.115 of the Federal Communications Commission’s (“Commission’s”) rules.² The Bureau’s decision requiring Nextel to reimburse Washoe County, Nevada and City of Sparks, Nevada (together “Washoe”) for the costs identified in the *Order* was arbitrary and capricious.

¹ *Washoe County, Nevada, and Sprint Nextel, Mediation No. TAM-12342, and City of Sparks, Nevada, and Sprint Nextel, Mediation No. TAM-12307, WT Docket No. 02-55, Memorandum Opinion and Order, DA 07-2955 (PSHSB rel. July 3, 2007) (“Order”).*

² 47 C.F.R. § 1.115; *see also Wireless Telecommunications Bureau Announces Procedures for De Novo Review in the 800 MHz Public Safety Proceeding, Public Notice, 21 FCC Rcd 758, DA 06-224 at 3, ¶ 11 (WTB 2006) (“Bureau Public Notice”).*

In rejecting most of the mediator's findings and recommendations, the Bureau abandoned the Commission's standard for determining what costs are reasonable, prudent, and the minimum necessary for achieving 800 MHz reconfiguration. Rather than apply the Commission's established cost standard, the Bureau wrongly deferred to the incumbent's subjective judgment regarding rebanding costs and shifted the burden of proof on these issues to Nextel. In addition, the Bureau disregarded the voluminous record evidence showing that many of Washoe's proposed costs are duplicative and excessive. For these reasons, the Commission should expeditiously overturn the *Order*.

I. THE BUREAU ARBITRARILY AND CAPRICIOUSLY APPLIED THE COMMISSION'S COST REIMBURSEMENT STANDARD FOR 800 MHz RECONFIGURATION

On March 22, 2007, the mediator in this proceeding issued his Recommended Resolution on disputed cost issues between Washoe and Nextel.³ On a number of issues, the mediator ruled in favor of Nextel and found that the costs in question are duplicative and excessive, eliminating any right to reimbursement. Most significantly, in the case of Washoe's proposed use of MCM software ("MCM") for inventory management and tracking of end-user radio equipment, the mediator found that Washoe is not entitled to cost reimbursement.⁴ Citing the Bureau's December 2006 decision in *City of Boston*, the mediator found that MCM is not operationally necessary for rebanding and is therefore not a recoverable expense.⁵ In addition, the mediator also found that Washoe did not seriously consider any alternatives to MCM when it prepared its

³ *Washoe County, Nevada, and Nextel Communications, Inc., Mediation No. TAM-12342, and City of Sparks, Nevada, and Nextel Communications, Inc., Mediation No. TAM-12307, Recommended Resolution, 800 MHz Transition Administrator, LLC (Mar. 22, 2007) ("Recommended Resolution").*

⁴ Recommended Resolution at 9-11.

⁵ *Id.* at 9-10; *City of Boston, Massachusetts and Sprint Nextel, Memorandum Opinion and Order, 21 FCC Rcd 14661 (PSHSB 2006) ("City of Boston").*

cost proposal.⁶ The mediator also ruled in favor of Nextel on various disputed cost issues relating to “project management” activities, finding that Washoe did not successfully rebut Nextel’s well-documented objections or otherwise show that the proposed costs are reasonable, prudent, and the minimum necessary.⁷ The mediator agreed as well with Nextel that Washoe did not provide sufficient justification for reimbursement of the costs associated with extensive network drive testing.⁸

In the *Order*, the Bureau rejected the mediator’s well-grounded recommendations without legitimate basis and approved the majority of Washoe’s cost claims. The Bureau abdicated its responsibilities by deferring uncritically to Washoe’s cost judgments, thereby effectively shifting the burden of proof on rebanding costs to Nextel, and failed to account for the vast weight of the record evidence. Accordingly, the *Order* was arbitrary and capricious and inconsistent with the Commission’s rules and policies for 800 MHz reconfiguration, and the Commission should reverse this decision on review.

A. The Bureau Arbitrarily and Capriciously Shifted the Burden of Proof on 800 MHz Rebanding Costs to Nextel

Throughout the *Order*, the Bureau arbitrarily and capriciously applied the Commission’s standard for what constitutes a reasonable, prudent, and minimum necessary cost during the 800 MHz reconfiguration process. As the Bureau formally acknowledges but then ignores in the *Order*, Washoe has “the burden of proving that the funding it has requested is reasonable, prudent, and the minimum necessary to provide facilities comparable to those presently in use.”⁹ The Commission requires that an incumbent licensee’s cost estimate submitted to the Transition

⁶ Recommended Resolution at 10.

⁷ *Id.* at 16-17, 19.

⁸ *Id.* at 24-25.

⁹ *Order* ¶ 4.

Administrator (“TA”) “contain the licensee’s certification that the funds requested are the minimum necessary to provide facilities comparable to those presently in use.”¹⁰ Moreover, the TA can only approve Planning Funding Agreements and Frequency Reconfiguration Agreements if incumbent licensees are requesting reimbursement of the *minimum necessary* costs for comparable facilities. Even after the Commission’s recent clarification of this cost standard, this “minimum necessary” requirement is a key foundation of the 800 MHz reconfiguration framework.¹¹ Were incumbent licensees to have the right to more than minimum cost recovery, it would be virtually impossible to contain the cost of 800 MHz reconfiguration.

In the *Order*, the Bureau effectively abandoned the Commission’s cost standard. In place of this standard, the Bureau arbitrarily and capriciously applied the principle that an incumbent licensee’s subjective judgment regarding its rebanding costs should not be questioned, and effectively shifted the burden on these cost issues to Nextel. As described below, in the case of one cost estimate, the Bureau stated that “[w]e find that this task is prudent and will not substitute our judgment for that of the licensee in this matter.”¹² This absolute deference to the subjective views of incumbent licensees renders the mediation process irrelevant, and flouts the

¹⁰ *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 198 (2004), *aff’d sub nom. Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006).

¹¹ In a May 18, 2007 order, the Commission clarified that the term “minimum necessary” cost does not mean the absolute lowest cost under any circumstances, but the “minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner.” *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 22 FCC Rcd 9818, ¶ 6 (2007) (FCC 07-92). This standard accounts not only for cost, but also for all of the objectives of the 800 MHz proceeding, including timely and efficient completion of the rebanding process, minimizing the burden rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety’s ability to operate during the transition. *Id.* ¶ 8.

¹² *Order* ¶ 39.

Bureau's fundamental obligation to exercise its own judgment regarding what constitutes a reasonable and prudent expenditure for reconfiguring the 800 MHz band.

Applying this deferential approach, the Bureau determined that Washoe should be reimbursed for costs that far exceed the minimum necessary for 800 MHz rebanding. Perhaps most egregiously, the Bureau found that Washoe is entitled to reimbursement for MCM's exorbitantly priced, unnecessary software that provides substantial benefits entirely unrelated to rebanding.¹³ This decision conflicts not only with the Commission's general cost standard, but also with the Bureau's own well-reasoned holding seven months ago in *City of Boston*, where, as indicated above, it determined that the purchase of MCM did not satisfy the Commission's minimum necessary cost standard.¹⁴ In addition, as discussed further below, the Bureau blithely accepted Washoe's claim that it had carefully evaluated the full range of potential software alternatives before making its decision to purchase MCM. The Bureau failed to mention that it was Nextel that identified the available software options and provided this information to Washoe. The Bureau ignored the fact that Washoe bore the burden of proof on this issue, yet Washoe failed to offer evidence that it had actually undertaken a systematic comparison of these products.

On other cost issues, the Bureau similarly accepted Washoe's subjective cost judgments and shifted the burden of proof to Nextel. Consequently, the Bureau rejected the mediator's findings that Washoe failed to meet its burden of proof on numerous disputed project management costs, including the costs for site and end-user equipment inventory analysis, statewide coordination, identifying training and personnel, and development of a radio programming schedule. The Bureau also disagreed with the mediator's (and Nextel's)

¹³ *Order* ¶¶ 22-24.

¹⁴ *City of Boston* ¶¶ 2, 15-30.

conclusions regarding the proposed costs for testing of each type and model of end-user radio with the new frequencies and software installed. While the mediator and Nextel believed that this task is unnecessary for rebanding, the Bureau, as referenced above, stated that it would “not substitute our judgment for that of the licensee in this matter.”¹⁵ Thus, despite Nextel’s showing that these and other disputed costs were duplicative and excessive, the Bureau arbitrarily and capriciously found a right to reimbursement for these costs.

B. The Bureau Ignored the Record Evidence Establishing That There Are Reasonable, Less Costly Alternatives to MCM Software and That Washoe’s Other Proposed Costs Are Duplicative and Excessive

In the *Order*, the Bureau arbitrarily disregarded the record evidence accumulated during the mediation between Washoe and Nextel. This evidence strongly supports Nextel’s position that MCM is not necessary for the reconfiguration of Washoe’s 800 MHz systems, and confirms that Washoe’s other proposed costs are duplicative and excessive.

First, the Bureau ignored the evidence that Nextel introduced regarding Washoe’s proposed use of MCM, including substantial evidence showing that effective but far less expensive software options were available to Washoe.¹⁶ In particular, the Bureau largely disregarded the overwhelming record evidence demonstrating that Microsoft Excel is a reasonable, cost-effective alternative to MCM. Nextel submitted into the record numerous Excel spreadsheets, diagrams, and manual excerpts demonstrating that Microsoft Excel is a feature-rich and more affordable software option. In the face of this evidence, the Bureau instead relied upon Washoe’s unsupported claim that MCM provides greater reliability and accuracy than Excel. Nextel has refuted this claim, demonstrating that Excel is no more vulnerable than MCM to

¹⁵ *Order* ¶ 39.

¹⁶ *Id.* ¶¶ 22-24.

problems resulting from incorrect data entry and other operator errors.¹⁷ In fact, as Nextel has shown, MCM's usefulness and accuracy is actually dependent on the accuracy of *Excel* data, since MCM relies on data imported from Excel spreadsheets.¹⁸ This is another crucial fact ignored by the Bureau.

The Bureau in the *Order* also summarily claimed, without citing any evidence, that Washoe had rejected potential alternatives to MCM only after engaging in a reasoned analysis of those options.¹⁹ This characterization distorts the facts in this proceeding. The mediation record clearly shows that Nextel evaluated and repeatedly presented Washoe with less costly, non-disruptive software alternatives, and that Washoe essentially failed to respond to these contacts.²⁰

¹⁷ Nextel submitted into the record a demonstration Excel spreadsheet showing how Excel can easily perform data rejection functions, a feature cited by Washoe as a reason for preferring MCM software over Excel.

¹⁸ See *Nextel Communications, Inc. and Washoe County, Nevada*, Mediation No. TAM-12342, Proposed Resolution Memorandum of Nextel Communications, Inc., at 5-6 (Mar. 2, 2007), stating:

MCM software is not necessary for Washoe's reconfiguration. Identification of all radio units is a project management task that, by admission of Washoe and representatives of MCM Technology, can and will be performed without the use of MCM software. As explained by representatives of MCM Technology, use of MCM software requires, as a threshold step before the software can be used, that the licensee conduct an inventory on its own and import the collected inventory data into the MCM database. This inventory data is often submitted in electronic form (typically Microsoft Excel) to MCM Technology, although it also can be submitted in non-electronic formats. This inventory effort is independent of and is conducted without any assistance from MCM software; licensees must conduct their own inventories and collect data in their own worksheets. Thus, MCM Software is not helpful – much less necessary – for the “[i]dentification of all radio units.”

¹⁹ *Order* ¶ 24.

²⁰ It appears that the only other option Washoe took any time to consider was Microsoft Excel.

Unlike the mediator – who had direct access to the parties during mediation – the Bureau did not recognize Washoe’s failure to meet its burden of proof on this cost issue.

The Bureau’s discussion of *City of Boston* further illustrates the Bureau’s distortion of the record and mischaracterization of key facts. The Bureau claims that Washoe’s system is more complex than Boston’s and that the majority of Washoe’s sites “are on difficult-to-reach mountaintops.”²¹ The record clearly reflects, however, that Washoe proposes to use MCM solely to track radios, and does not intend to use this software for infrastructure inventory, such as base station sites. Thus, the mountaintop locations of certain Washoe base station sites are irrelevant to its use of MCM software for tracking mobile and portable end user units; the Bureau’s reliance on this fact is misplaced and reflective of the disconnect between the record developed in mediation and the Bureau’s findings.

The Bureau’s findings on other cost issues are similarly unsupported by the record. The Bureau repeatedly neglected to examine evidence presented by Nextel, and ignored the fact that Washoe failed to satisfy its burden of proof on these issues. With respect to Washoe’s proposed project management costs, the record shows that Nextel supplied a detailed spreadsheet analyzing these costs, responding to each line item cost proposed by Washoe. While Nextel approved many of those costs, in other cases it found that the costs were duplicative of other reimbursable expenses. Washoe provided *no evidence* in response, and the mediator in his Recommended Resolution concluded that Washoe failed to rebut Nextel’s objections to these duplicative costs.²² The Bureau nevertheless rejected Nextel’s arguments and approved the majority of Washoe’s project management costs, *doing so without any analysis and without requiring that Washoe meet its burden of proof*. The Bureau’s repeated disregard for the

²¹ Order ¶ 22.

²² Recommended Resolution at 19.

evidence in this proceeding represents arbitrary and capricious decision making that must be overturned on Commission review.

On the specific issue of drive testing, the Bureau's treatment of the record also threatens to undermine the Commission's mediation processes for 800 MHz reconfiguration. Washoe failed to address drive testing before or during mediation or in any of its Proposed Resolution Memoranda; Washoe's only explanation of its cost estimate for this activity was in its initial Statement of Position (SOP) filed with the Bureau following the mediator's Recommended Resolution.²³ Instead of dismissing this submission as untimely, the Bureau determined that Washoe would be entitled to "reasonable costs" for drive testing if it could justify its proposed costs within seven days of the *Order*.²⁴ This *ad hoc* procedural approach enables incumbent licensees to ignore their negotiation and mediation obligations, thereby threatening the integrity of the 800 MHz mediation program.²⁵

²³ *Washoe County, Nevada, and Nextel Communications, Inc., PSHSB File No. 12342, and City of Sparks, Nevada, and Nextel Communications, Inc., PSHSB File No. 12307, Statement of Position, Washoe County, Nevada, at 14-15 (Apr. 5, 2007).*

²⁴ *Order* ¶ 29.

²⁵ With this action, the Bureau also ignored its own requirements prohibiting the introduction of new evidence in parties' SOPs and deprived Nextel of any opportunity for timely review or comment. *See Bureau Public Notice, DA 06-224 at 2 ¶ 4, providing:*

Statements must be strictly limited to issues raised in the course of mediation and facts contained in the record. Parties may not introduce facts not contained in the record or introduce arguments on issues that were not presented to the mediator for consideration during mediation. Any material not conforming to the foregoing restrictions will be stricken.

II. CONCLUSION

Based on the Bureau's abandonment of the Commission's standard for reviewing incumbent licensees' proposed costs and its disregard for the record evidence in this proceeding, Nextel urges the Commission to reverse the Bureau's arbitrary and capricious decision requiring Nextel to reimburse Washoe for the costs identified in the *Order*.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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Certificate of Service

I, Ruth E. Holder, hereby certify that on this 2nd day of August, 2007, I caused a true and correct copy of the foregoing Application for Review to be mailed by electronic mail and by first class United States mail, postage prepaid, to:

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