

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

In the Matter of)	
)	
Washoe County, Nevada)	
Mediation No. TAM-12342)	
)	
and)	WT Docket No. 02-55
)	
City Of Sparks, Nevada)	
)	
Mediation No. TAM-12307)	
)	
Call Signs WPRX309)	
WPUF364 and WPEV464)	

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

OPPOSITION TO APPLICATION FOR REVIEW

Washoe County, Nevada (“Washoe”), through counsel and pursuant to Section 1.115(d) of the Commission’s Rules,¹ hereby respectfully submits this Opposition to the Application for Review filed by Nextel Communications, Inc. (“Nextel”) in response to the *Memorandum Opinion and Order* (“Order”) of the Public Safety and Homeland Security Bureau dated July 3, 2007.²

INTRODUCTION

This matter clearly highlights exactly how flawed the whole rebanding process has become. On July 3, 2007, the Bureau issued an Order in this matter. Nextel, in

¹ 47 C.F.R. § 1.115(d). *See also* Wireless Telecommunications Bureau Announces Procedures for *De Novo* Review in the 800 MHz Public Safety Proceeding, *Public Notice*, DA 06-224 (WTB 2006).

² 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 07-2966 (PSHSB rel. July 3, 2007) (“Bureau Order”)

response to that Order, elected to file both a Petition for De Novo Review and an Application for Review. This put Washoe in the untenable position of having to both file an Opposition to the Application for Review in this proceeding and begin preparation for the Administrative Hearing. As a result, multiple hours were expended on the part of Washoe, Galena Group and counsel preparing and filing this Opposition.³ Since Washoe was placed in this predicament duplicative filing of appeals, it is Washoe's position that the costs associated with the preparation and filing of this Opposition should be recoverable on the part of Washoe.

Moreover, the Commission should dismiss outright Nextel's Application for Review as duplicative. Nextel has already filed a Petition for De Novo Review. By simultaneously filing an Application for Review, Nextel is seeking to take "two bites of the regulatory appeal apple" – and consequently, artificially inflating the costs for the Licensee to defend against such apparent chicanery. Indeed, the Commission should take this opportunity to provide guidance, not just in the Washoe matter, but for the plethora of cases that are surely to follow, that such behavior will not be tolerated. The Commission has determined that Licensees are to bear the costs of appeals. Permitting Nextel to file multiple appeals simply permits them to artificially inflate the costs to the Licensee in the hopes that the Licensee will simply settle in order to avoid these excessive and obviously duplicative costs.

Clearly, this is not a case where a licensee is engaging in frivolous litigation. Rather, it was Nextel that filed the relevant appeals, thus causing Washoe to incur litigation expenses (which the Commission has currently deemed as unrecoverable) in a process that was supposed to be at no cost to the licensee. In this regard, it is impossible

³ Likewise, even more hours will be spent in preparation for the Administrative Hearing.

for the Commission to justify why Washoe should be forced to litigate, but have its significant costs for such litigation a non-recoverable expense. Such a position is so fundamentally at odds with the Commission's central tenet in this proceeding (no cost to the licensee), that it cannot be justified on any grounds.

BACKGROUND

As demonstrated in the underlying record, Washoe and Nextel remained far apart during these negotiations with regard to numerous issues. It was Washoe's position that Nextel's proposed cuts were not based upon any rationale reasoning. In fact, the only reasoning provided by Nextel with regard to any issue was the blanket statement that Nextel believed that the requested hours were either too much or duplicative. To date Nextel has failed to provide Washoe, or the Commission for that matter, with any information with regard to how it decided that any of Washoe's proposed hours were either reasonable or unreasonable. In its Recommended Resolution ("RR"), the TA Mediator agreed, in large part, with Nextel's position stating that many of the requested hours were duplicative and not a recoverable expense. Upon review, however, the Bureau rejected the TA Mediator's RR and held that Washoe was entitled to the compensation it should for user training, site inspection and inventory tracking software, but sought further documentation on drive testing. Moreover, the Commission also approved the majority of Washoe's proposed costs for internal staff and consulting fees.⁴

⁴ Bureau Order at 1.

DISCUSSION

A. Legal Standard – Burden of Proof

In its Application for Review, Nextel argues that the Bureau improperly shifted the burden of proof on rebanding costs from Washoe to Nextel.⁵ According to Nextel, the Bureau arbitrarily and capriciously ignored the Commission’s policies and rules with regard to 800 MHz reconfiguration by abandoning the Commission’s cost standard.⁶ Nextel maintains that, by deferring to Washoe’s costs judgments, the Bureau flouted its fundamental obligation to exercise proper judgment regarding what constitutes a reasonable and prudent expenditure, thus necessitating Commission review of the Bureau’s actions. To further bolster this position, Nextel maintains that the “minimum necessary” standard applies to all proposed reimbursable costs – notwithstanding the Commission’s recent clarification of the cost standard.⁷ Nextel’s primary claim seems to be that Washoe has not met its burden of proof as to the proposed inventory tracking software.⁸ According to Nextel, the evidence previously submitted by Washoe (and contained in the underlying record) is insufficient to meeting its burden of proof.

Nextel misunderstands the legal standard. Washoe concurs that it (Washoe) bears the burden of proof to demonstrate that the proposed costs requested are reasonable and prudent to accomplish the various rebanding tasks. Nextel, however, fails to recognize exactly what the level of Washoe’s burden of proof is. In this instance, the burden is a preponderance of the evidence.

⁵ Nextel Application for Review at 3.

⁶ *Id.* at 3-4.

⁷ *Id.* at 4. *See also*, Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, FCC 07-92 (2007).

⁸ Nextel also takes exception to the approval of the project management costs relating to both Washoe itself and Galena Group.

In this instance, Washoe has presented detailed worksheets, the project Gantt chart and a comprehensive description of the tasks to be performed and the hours associated with each task.⁹ Nextel, on the other hand, provides nothing in support of its contention that the requested hours are excessive and duplicative other than its bald assertion. Washoe acknowledges that the Licensee has the burden to produce evidence to prove his/her case. Should there be empirical evidence supporting the Licensee's position, it must be presented to the finder of fact (in this case, the Commission).¹⁰

The Commission will then make a determination as to whether or not the evidence presented is persuasive and that the burden of proof has been met.¹¹ That is exactly what happened herein. The Bureau assessed and evaluated the weight to be assigned to the evidence presented and decided its effect. Washoe presented detailed worksheets and descriptions of the hours to be spent and the tasks associated with those hours. No evidence to the contrary was presented. Instead, Nextel relied merely on rhetoric to support its position. Given that, the Bureau correctly found that Washoe had met its burden of proof. The Bureau was neither arbitrary nor capricious, but instead diligently carried out its oversight duties. Appealing that decision simply because one does not like the outcome is simply not permitted and Nextel's Application for Review should be dismissed accordingly.

⁹ See Washoe PRM and Reply PRM as well as the data exchanged during negotiations, all contained in the underlying record herein.

¹⁰ See Owens-Illinois v. Armstrong, 591 A.2d 544, 552 (Md. App. 1991), judgment aff'd in part and rev'd in part, 591 A.2d 544 (Md. 1991); cert. denied, Armstrong v. Owen-Illinois, Inc., 506 U.S. 871, 113 S.Ct. 204 (1992).

¹¹ See generally, Mayer v. North Arundel Hospital Ass., Inc., 802 A.2d 483, 493 (Md. App. 202), cert. denied, 806 A.2d 680 (Md. Sept. 12, 2002).

B. MCM Software

As discussed at length in the underlying record, Washoe does not have a methodology to track its radios or the time of its personnel working on rebanding, nor does it have the staff to assemble time sheets, compile hours worked, track the status of mobile units rebanded or schedule radios for reprogramming. Instead, Washoe, after reviewing several options, elected to propose using software created by MCM Technology LLC (“MCM”). MCM’s package is capable of performing all of the above-referenced tasks.

The Bureau, in its Order, determined that the proposed use of MCM software by Washoe was a recoverable expense. In particular, the Bureau noted that the facts herein were readily distinguishable from the *City of Boston* matter in that Washoe’s system was larger and more complex than that of Boston.¹² Moreover, according to the Bureau, the version of the MCM software that Washoe is proposing to use is less costly and directly tailored to rebanding than that proposed by Boston. Finally, the Bureau held that Washoe had indeed considered less costly alternatives to MCM and had, after considering and rejecting several alternative software packages, purchased an earlier version of MCM.¹³

Nextel, in its Application for Review, strenuously objects to the use of the MCM software. Nextel argues that Washoe did not genuinely consider potential alternative service providers.¹⁴ Likewise, Nextel contends that the Bureau completely disregarded evidence demonstrating that Microsoft Excel is a reasonable, cost-effective alternative to

¹² City of Boston, Massachusetts and Sprint Nextel, Mediation No. TAM- 11155, *Memorandum Opinion and Order*, DA 06-2556 (PSHSB, rel. December 20, 2006)(hereinafter “*City of Boston*”).

¹³ See Bureau Order at ¶¶ 22-24.

¹⁴ Nextel Application for Review at 6.

MCM.¹⁵ Instead, according to Nextel, the Bureau relied exclusively upon Washoe's unsupported claim that MCM was a superior product to Excel and incorrectly determined that the purchase of the MCM software was a recoverable expense.

The Commission should dismiss this claim as it is wholly without merit. It has become apparent during the course of this proceeding that Nextel will not genuinely consider MCM software as an alternative for use by any Licensee. Rather, Nextel obviously has a personal issue with respect to MCM. Whether that distaste is for the software itself or merely the former management of MCM, Washoe cannot tell. Washoe can only note that Nextel's intense dislike of MCM clearly has clouded its perception as to whether or not the use of this software is reasonable, prudent or necessary.

For example, during the course of this proceeding, Nextel would argue that there are several asset management software programs that could meet the stated functionality needs of Washoe at a much lower cost than that of MCM. Finally, in its final attempt to undermine use of the MCM software, Nextel engaged in an elaborate discussion of how over the course of several hours two of its staff created an Excel spreadsheet that would match the capabilities of MCM. Washoe did conduct a brief analysis of the software packages proposed and rejected them as unsuitable for use by public safety users, and Washoe submitted documentation as to the results of its review. When Washoe provided an extensive discussion of why Excel would not work, elaborating by using its past disastrous experience with Excel, Nextel refused to modify its position in the slightest.

The Bureau reviewed the record and correctly determined that Washoe had presented sufficient evidence to demonstrate that (i) it had reviewed and analyzed several software packages when purchasing its own earlier version of MCM; (ii) that the

¹⁵ *Id.*

purchase of the MCM software is reasonable and necessary to effectuate Washoe's rebanding; and (iii) that the size and complexity of Washoe's system does, in fact, fall squarely within the Commission's guidelines as laid out in the *City of Boston* matter. The Commission should uphold the Bureau's decision herein.¹⁶

C. Recoverable Costs

Washoe, Galena Group and counsel have expended considerable hours reviewing the Application for Review and drafting this Opposition. All of these hours were expended as a direct result of Nextel's filing both a Petition for De Novo Review and an Application for Review. Both of these filings were made as a direct result of Nextel's distress over the Bureau's approval of the purchase of the MCM software for use by Washoe County. As clearly demonstrated above, the Bureau did not exceed its authority in any way – but instead, based its decision squarely upon the record submitted in this matter. It is absolutely unacceptable and absurd that Washoe's costs are artificially driven up simply because Nextel did not agree with the Bureau's decision.. While some might argue that Nextel should not be forced to bear the costs of an Incumbent's frivolous appeal, that should only apply if the Incumbent is not compelled to protect its rights. Hence, it is Washoe's position that all of the costs associated with the filing of this Opposition are recoverable costs.

¹⁶ Nextel further asserts that, on the issue of drive testing, the Bureau's treatment of the record threatens to undermine the mediation process. In particular, Nextel maintains that Washoe failed to address drive testing before or during the mediation process, but instead waited until its Statement of Position to raise the issue. Given that, Nextel argues that consideration of drive test by the Bureau, rather than outright dismissal of the matter as untimely presented, allows Licensees to ignore their negotiation and mediation obligations and threatens the integrity of the process. Nextel Application for Review at 9. This is clear example of failure on the part of Nextel to thoroughly review the record. The costs associated with drive testing were initially presented to Nextel as part of the Statement of Work, which was attached to Washoe's PRM and constitutes part of the record herein. More importantly, however, on page 30 of Washoe's Reply PRM, Washoe directly addresses the issue of drive testing. Thus, the Bureau was entirely correct in addressing drive testing in its Order.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Commission act in accordance with the views presented herein and summarily dismiss the Application for Review filed by Nextel Communications, Inc.

Respectfully submitted,

WASHOE COUNTY, NEVADA

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Date: August 17, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2007, a true copy of the foregoing Opposition was served by electronic mail upon:

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