

**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)	

REPLY OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), a wholly-owned subsidiary of Sprint Nextel Corporation, hereby replies to the Opposition filed by Washoe County, Nevada (“Washoe”) in response to Nextel’s Application for Review in the above-captioned proceeding.¹ In its filing, Nextel urged the Commission to overturn the Public Safety and Homeland Security Bureau’s (the “Bureau’s”) July 3, 2007 *Memorandum Opinion and Order* (“Order”),² based on the Bureau’s arbitrary and capricious decision to require reimbursement to Washoe for numerous unjustified 800 MHz rebanding costs. The Bureau failed to follow the Commission’s standard for reviewing incumbents’ proposed 800 MHz rebanding costs, and disregarded the record evidence in this proceeding. Washoe’s Opposition fails to rebut Nextel’s analysis and presents no legitimate reason why the Commission should uphold the *Order*.

¹ Opposition to Application for Review of Washoe County (Aug. 17, 2007) (“Opposition”); Application for Review of Nextel (Aug. 2, 2007) (“Application for Review”). (Unless otherwise indicated, all pleadings cited herein were filed in WT Docket No. 02-55.)

² *Washoe County, Nevada, and Sprint Nextel, Mediation No. TAM-12342, and City of Sparks, Nevada, and Sprint Nextel, Mediation No. TAM-12307, Memorandum Opinion and Order*, 22 FCC Rcd 11860, DA 07-2955 (PSHSB 2007) (“Order”).

Washoe's Opposition begins and ends not with a defense of the Bureau's flawed decision making, but by addressing the recoverability of licensees' legal costs from post-mediation litigation. The instant proceeding, however, is not the appropriate forum for addressing this policy issue. The Commission ruled on this issue earlier this year in its Second Memorandum Opinion and Order, affirming on both statutory and policy grounds that Nextel is not required to pay licensees' post-mediation litigation costs.³ Washoe has recently petitioned for reconsideration of this Commission decision, and its advocacy concerning post-mediation litigation cost recovery should be confined to that rulemaking.⁴ Nextel's application for review concerns the Bureau's failure to follow the Commission's standards for review of the mediator's Recommended Resolution, not the Commission's post-mediation litigation cost recovery policy.⁵

Related to this issue, Washoe alleges that Nextel's legal response to the Bureau's defective *Order* is "chicanery" designed to artificially inflate Washoe's costs. This overheated claim is without basis. A party to a Commission proceeding has the right to seek Commission review of actions taken under delegated authority. In the 800 MHz reconfiguration context, a party may also seek hearing before an Administrative Law Judge if the party believes that the Bureau did not act in accordance with applicable law, rules or policies. Washoe has availed itself of comparable procedural rights in seeking reconsideration of the Commission's recent post-mediation cost

³ *Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 22 FCC Rcd 10467, FCC 07-102, ¶¶ 47-50 (2007).

⁴ See Petition for Partial Reconsideration of Washoe County, *et al.* (Aug. 20, 2007).

⁵ Nextel supports the Commission's May 2007 decision on post-mediation litigation costs and opposes any ruling that would enable incumbent 800 MHz licensees to recover these costs from Nextel. As Nextel has argued previously, all parties should bear their own costs during any *de novo* review at the Commission. Opposition of Sprint Nextel Corporation at 6-7 (Mar. 23, 2006). Sprint Nextel already has the disproportionate burden of funding the legal costs of licensees during mediation regardless of the outcome. If Nextel were required to fund ongoing appeals, that action would eliminate a key incentive for licensees to come to an agreement during the mediation period, an effect that could impede 800 MHz reconfiguration.

reimbursement decision; it cannot seriously believe that review should be available only when it “loses,” but not for any other party when it “wins.”

Under the Bureau’s procedures, a party disputing a Bureau decision is free to seek a hearing before an Administrative Law Judge, to file an Application for Review with the Commission, or to do both.⁶ These alternatives are not mutually exclusive, and, as is its right, Nextel is pursuing both of these options in this case. The Commission should flatly reject Washoe’s disingenuous and self-serving position that “such behavior [should] not be tolerated.”⁷

Once Washoe finally addresses the merits of the *Order*, its defense is undermined by a blatant mischaracterization of the Commission’s 800 MHz band reconfiguration cost standard. First, while Washoe recognizes that its proposed costs must be reasonable and prudent, it ignores the requirement that these costs also be the “minimum necessary” to achieve 800 MHz rebanding, as clarified by the Commission’s May 2007 cost standard order.⁸ Second, while Washoe acknowledges that it bears the burden of proof on the cost standard, it understates the requirements for this showing. According to Washoe, a licensee must merely provide a “preponderance of the evidence” on a particular cost proposal; in Washoe’s view, this apparently means no more than offering brief descriptions and time estimates for its proposed tasks.⁹

⁶ See *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”).

⁷ Opposition at 2. While Washoe criticizes Nextel’s filing of “multiple appeals” (*id.*), it is Washoe and two other licensees – all represented by the same outside counsel – that are seeking further review of the Commission’s post-mediation litigation cost decision despite the Commission’s unambiguous finding that it has no statutory authority to require Nextel to reimburse such costs.

⁸ Opposition at 4. See *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 22 FCC Rcd 9818, FCC 07-92, ¶ 6 (2007). In this order, the Commission clarified that the term “minimum necessary cost” does not mean the absolute lowest cost under any circumstances, but rather the “minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner.”

⁹ Opposition at 5.

Contrary to Washoe's claims, this raw information is not enough. *Rather, incumbent licensees can only meet their burden of proof by explaining how each of their proposed costs is reasonable, prudent, and the minimum necessary to achieve 800 MHz band reconfiguration.* As Nextel has consistently argued and as the mediator found in his Recommended Resolution, Washoe has never provided sufficient explanation for a variety of its proposed rebanding costs. The Bureau nonetheless deferred to Washoe's subjective cost judgments and disregarded the voluminous evidence showing that many of these proposed costs are duplicative and excessive. In doing so, the Bureau effectively shifted the burden of proof on these cost issues to Nextel and engaged in arbitrary and capricious decision making.

As Nextel explained in its Application for Review, perhaps the Bureau's most unsupported finding was that Washoe is entitled to reimbursement for MCM's exorbitantly priced, unnecessary software that provides substantial benefits entirely unrelated to 800 MHz reconfiguration.¹⁰ In response, Washoe makes the bizarre claim that Nextel "obviously has a personal issue with respect to MCM" and suggests that Nextel may have a "distaste" for the "former management of MCM."¹¹

Nextel's perception of MCM software is not "clouded" by such factors. Rather, it is Washoe's justification of its decision to use MCM software that is clouded by faulty facts. Washoe claims that it conducted a "brief analysis" of other software products and rejected them as unsuitable for public safety use. The mediation record clearly shows, however, that Nextel evaluated and repeatedly presented Washoe with less costly, non-disruptive software alternatives, and that Washoe essentially failed to respond to these contacts. With respect to Microsoft Excel ("Excel"), Nextel has refuted Washoe's claim that Excel "would not work" and has demonstrated

¹⁰ Application for Review at 5-6.

¹¹ Opposition at 7.

with overwhelming evidence that Excel is a reasonable, cost-effective alternative that is no more vulnerable than MCM software to incorrect data entry and other operator errors. Washoe has never met its burden of proof on this software issue, and has similarly failed to do so with respect to many other proposed 800 MHz rebanding costs.

In any case, the evidence in the record demonstrates that MCM software is not a reasonable, prudent, and minimum necessary rebanding cost for Washoe to carry out 800 MHz reconfiguration. The Bureau's decision to the contrary is arbitrary and inconsistent with its decisions in other retuning proceedings.¹²

Accordingly, for the foregoing reasons, Nextel again urges the Commission to reverse the Bureau's arbitrary and capricious decision requiring Nextel to reimburse Washoe for the disputed costs identified in the *Order*.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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¹² See, e.g., *City of Boston, Massachusetts and Sprint Nextel*, Memorandum Opinion and Order, 21 FCC Rcd 14661 (PSHSB 2006).

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 27th day of August, 2007, I caused a true and correct copy of the foregoing Reply to Opposition to be mailed by electronic mail and by first class United States mail, postage prepaid, to:

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