

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
County of Charles, Maryland)	WT Docket No. 02-55
And Sprint Nextel Corporation)	
)	
Mediation No. TAM-12003)	

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO THE PETITION FOR RECONSIDERATION
OF THE STATE OF CONNECTICUT**

**Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)**

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Summary

The Public Safety and Homeland Security Bureau (“Bureau”) should promptly dismiss the State of Connecticut’s Petition for Reconsideration of the Bureau’s *Charles Order*. First and foremost, Connecticut lacks standing to seek reconsideration of the Bureau’s order. The Bureau’s orders on *de novo* review of 800 MHz reconfiguration mediations are confined to the specific record presented by the parties to those proceedings, and each case must stand on its own facts. Connecticut can point to nothing in the *Charles Order* that precludes Connecticut, or any other public safety incumbent licensee, from demonstrating that its proposed reconfiguration costs are properly reimbursable under the Commission’s orders if those costs are reasonable, prudent and the minimum necessary to provide the licensee with comparable facilities following reconfiguration. The Bureau has dismissed petitions similar to Connecticut’s for lack of standing, and should do so here as well.

Second, Connecticut’s specific objections to the Bureau’s use of Cost Metrics, assembled and published by the 800 MHz Transition Administrator (“TA”), lack merit. The Cost Metrics are simply data – they do not represent any improper delegation of authority to the TA and could not logically be the subject of any sort of rulemaking proceeding. Connecticut’s contention that it is prejudiced by any reference to or application of these Cost Metrics disregards the fact that it and every other retuning incumbent licensee has a full opportunity to present and explain its particular system facts and costs in a negotiation (and often a mediation) with Nextel.

The fact is that through this process more than 80 percent of non-border area public safety incumbents have already reached retuning cost agreements with Nextel. They include incumbents across the nation using virtually every type of public safety technology with systems large and complex, small and simple, and nearly every variant in between. To suggest that

Connecticut is uniquely complex and somehow deserves special treatment or exemption from any TA Cost Metric review because of its purported complexity ignores the facts and demeans the sincere efforts of hundreds of complex public safety systems that have completed or are well along in their own reconfiguration projects. The TA Cost Metrics directly reflect the collective retuning cost experience of nearly 800 public safety communications systems and thus provide experience relevant to evaluating the remaining retuning proposals.

Finally, use of the Cost Metrics aggregated and published by the TA represents sound public policy. The Bureau concluded over two years ago that the availability of this information could only speed the process of reconfiguration by providing guidance regarding a reasonable range of costs based on the concrete experience of public safety agencies which have already successfully concluded negotiations with Nextel concerning the terms of their reconfiguration projects. As time goes on and more cost agreements are added to the TA Cost Metric data, the Bureau should remain committed to fact-based decision-making, which logically includes, among other things, reviewing available data concerning the costs of other similar public safety system reconfigurations.

Simply stated, the Bureau's consideration of the TA Cost Metric data in the Charles County decision, as part of its *de novo* review of all of the information in the record, does not constitute reversible error. Connecticut's Petition should be dismissed.

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Pursuant to Section 1.106(g) of the Commission’s rules,¹ Nextel Communications, Inc. (“Nextel”), a wholly owned subsidiary of Sprint Nextel Corporation, by its attorneys, submits this Opposition to the Petition for Reconsideration (“Petition”) submitted by the State of Connecticut (“Connecticut” or the “State”) with respect to the Public Safety and Homeland Security Bureau’s Order on *de novo* review of the Charles County, Maryland mediation.² Connecticut lacks standing to file for reconsideration in this matter, as under Commission precedent it has not been adversely affected, and cannot be adversely affected by the *Charles Order*. Ignoring for a moment this obvious and fatal procedural infirmity of the Petition, Connecticut’s assertions regarding the Bureau’s use of aggregate cost information published by

¹ 47 C.F.R. § 1.106(g).

² See County of Charles, Maryland and Sprint Nextel, *Memorandum Opinion and Order*, WT Docket No. 02-55, DA 09-2252, (PSHSB Oct. 19, 2009) (“*Charles Order*”).

the Transition Administrator simply are wrong as a matter of law and policy. The Bureau should promptly dismiss the Petition.

I. CONNECTICUT LACKS STANDING TO SEEK RECONSIDERATION OF THE CHARLES ORDER.

Section 1.106(b) of the Commission’s rules provides that only parties to the proceeding, or parties whose interests are adversely affected by the decision, may petition for reconsideration of a Commission order.³ Furthermore, a person filing a petition for reconsideration who is not a party to a proceeding must state with particularity the manner in which the person’s interests are adversely affected by the action taken, and must show good reason why it was not possible to participate in earlier stages of the proceeding.⁴ Connecticut is not a party to the Charles County proceeding and thus has no standing to file a petition for reconsideration of the *Charles Order*. The Bureau should dismiss the Petition for lack of standing, consistent with its general rule and with its prior orders on this exact point in other 800 MHz mediation orders.

Connecticut claims that its interests were adversely affected by the *Charles Order* because “the Bureau’s decision precludes Connecticut from receiving comparable facilities as required under the Commission’s rules.”⁵ This is an amazing statement that is easily debunked by reference to the Bureau’s well reasoned action dismissing the petitions of other licensees who were not parties to an underlying mediation. The Bureau has established that its review of every 800 MHz reconfiguration mediation forwarded to it for *de novo* review is confined to the record presented in that particular proceeding. In dismissing a petition for reconsideration of an earlier

³ 47 C.F.R. § 1.106(b)(1).

⁴ *Id.*

⁵ Petition for Reconsideration of the State of Connecticut, WT Docket No. 02-55, 1-2 (Nov. 17, 2009) (“Petition”).

Bureau order filed by petitioners unrelated to the licensee in the underlying case, the Bureau concluded that the order was “limited to the facts presented in the record of that proceeding and does not adversely affect [unrelated] Petitioners.”⁶ Similarly, the *Charles Order* is limited to the record developed in that proceeding, and, as such, it cannot “adversely affect” Connecticut. Applying this direct precedent, Connecticut again has no standing to seek reconsideration of the *Charles Order*, and the Bureau should dismiss the Petition on this basis alone.

Even putting aside the Bureau’s statements concerning the standing of non-participant licensees to seek review, there is nothing in the *Charles Order* that discusses Connecticut’s reconfiguration project at all, or in any way limits Connecticut’s ability, when its time comes, to meet its burden of proof to demonstrate that its own particular proposed costs for reconfiguration are reasonable, prudent and the minimum necessary to ensure that it receives comparable facilities following reconfiguration in accordance with the Commission’s orders.

Connecticut singles out the following statement in the Bureau’s *Charles Order* as the source of its concern:

We further emphasize that at this late stage in the rebanding process, and in light of the substantial cost data that underlie the TA Metrics, we intend to rely increasingly on the TA Metrics as a baseline for determining the reasonability of costs. Licensees claiming costs significantly in excess of the metrics for comparable systems face a high burden of justification.⁷

Contrary to Connecticut’s claim, this passage in no way precludes Connecticut from receiving comparable facilities following reconfiguration. Rather, the *Charles Order* simply provides clarity regarding the Bureau’s longstanding policy of using the TA’s Cost Metrics to evaluate the reasonableness of a licensee’s proposed costs where those costs fall far outside a reasonable

⁶ City of Boston, Massachusetts and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 2361, ¶ 2 (PSHSB 2007).

⁷ Petition at 3.

range broadly bounded by available data. This articulation of an established policy is not adverse to Connecticut nor will it prevent Connecticut from making the case that its particular reconfiguration project presents an instance where extraordinarily high costs are justified. In fact, the policy is meant to encourage licensees with particularly high costs or unusual complexities to come to negotiations with Nextel prepared to demonstrate objectively what their specific circumstances are, and thus facilitate the overall negotiation process that Nextel and nearly 800 public safety licensees already have navigated successfully.

Even if Connecticut could somehow demonstrate that its interests are adversely affected by the *Charles Order*, which it cannot, it is noteworthy that there is nothing new about the Bureau's intention to use the TA's Cost Metrics as one means of evaluating the reasonableness of proposed reconfiguration costs – that has been a part of this process for several years and that aspect of the *Charles Order* reflects the longstanding practice of both the Commission and the Bureau.

Well over two years ago, the Commission itself endorsed the use of the TA's Cost Metrics, noting that these Metrics would provide “an important set of benchmarks for assessing the reasonability of costs in ongoing and future negotiations.”⁸ The Bureau first applied the TA Cost Metrics in evaluating a licensee's proposed costs more than two and a half years ago, and stated that it would subject proposed reconfiguration costs falling far outside the Metrics to

⁸ Improving Public Safety in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, ¶ 12 (May 18, 2007) (“Similarly, Sprint and other licensees may consider cost metrics that have been derived from the TA from aggregated PFA and FRA data. At this point in the process, Sprint has entered into numerous PFAs and FRAs with 800 MHz licensees. These agreements have been reached through vigorous arms-length negotiations and (in many cases) mediation, and have been approved by the TA as meeting the Commission's cost standards. As a result, the cost data from these agreements provides an important set of benchmarks for assessing the reasonability of costs in ongoing and future negotiations.”)

greater scrutiny.⁹ The Bureau initially directed the TA to assemble and publish information regarding median costs for PFAs and FRAs nearly *three* years ago, specifically describing its intent “[t]o provide further guidance to public safety licensees in upcoming negotiations...”¹⁰

Connecticut states that it satisfies the requirements of Section 1.106(b) of the Commission’s rules with respect to persons who are not parties to a proceeding seeking reconsideration of an action in that proceeding because “Connecticut was unable to participate in this restricted proceeding because there is no notice of disputes between Sprint Nextel and public safety licensees.”¹¹ It is true that Connecticut was not on notice of this particular *de novo* review of another licensee’s mediation. However, the substantive policy to which Connecticut objects has been in place for *years*. Thus, if Connecticut believed itself aggrieved by the policy of using the Cost Metrics as one benchmark to evaluate the reasonableness of costs, it could have sought reconsideration of the Bureau’s initial order, released in January 2007, directing the TA to compile and publish aggregated cost information to provide guidance as to the reasonableness of costs and to “provide a baseline for all cost negotiations and thereby help to speed resolution of

⁹ *City of Manassas, Virginia and Sprint Nextel*, 22 FCC Rcd 8526, ¶¶ 6-7 (PSHSB 2007) (“Our review of costs is influenced by our experience in reviewing costs incurred by similarly situated 800 MHz licensees in the planning process. In this regard, we have the benefit of data from the TA that can provide us with cost metrics for approved planning funding agreements [for] systems of varying size and complexity ... Manassas requests almost three times the median amount of funding and over twice as much as the 75th percentile compared to licensees of similarly sized systems. Such a large deviation warrants careful scrutiny of these disputed costs”) (emphasis added) (“Manassas Order”). See also *City of Irving, Texas and Sprint Nextel, Memorandum Opinion and Order*, 22 FCC Rcd 16708, ¶ 47 (PSHSB 2007) (“As previously determined, the TA planning statistics are relevant to the mediation process as well as our *de novo* review.”)

¹⁰ *Improving Public Safety Communications in the 800 MHz Band*, Order, 22 FCC Rcd 172, ¶ 9 (PSHSB 2007) (“*Non-Disclosure Order*”).

¹¹ Petition at 2.

cost issues.”¹² That decision was not confined to the record of a particular proceeding, and Connecticut would have had standing to seek reconsideration of that order. That time, however, has passed. For Connecticut now to attack the Bureau’s longstanding policy of using TA Cost Metrics as one reasonableness benchmark is procedurally deficient under the Commission’s rules and precedent. Connecticut’s arguments are also substantively unavailing, as detailed below.

II. CONNECTICUT’S ARGUMENTS REGARDING THE USE OF COST METRICS LACK MERIT.

Connecticut asserts that it “objects to any use of the Transition Administrator metrics as it departs from the full Commission’s *August 2004* Order ensuring public safety agencies of comparable facilities.”¹³ It further argues that the TA’s Cost Metrics represent an improper delegation of authority to the TA, that the TA’s Cost Metrics are not the product of a rulemaking proceeding, and that the Metrics are unfairly skewed in that they do not contain data on “complex systems” such as Connecticut’s. None of these claims holds any water.

First, the Bureau’s and the Commission’s longstanding practice of using available facts, including the TA’s Cost Metrics, to evaluate proposed reconfiguration costs is entirely consistent with the Commission’s orders requiring that public safety agencies receive comparable facilities following reconfiguration. The whole idea of assembling aggregate data on what it costs to perform reconfigurations was meant to assist later-in-time licensees, so they could be informed generally of what vendors charged for various reconfiguration tasks. This data does not preclude a licensee from making its case that its particular costs are reasonable. Rather, the data provides important general information to all parties.

¹² *Non-Disclosure Order* at ¶ 9.

¹³ *Id.* at 3.

In any event, there is no basis for the assertion that the *Charles Order* in any way limits or changes the Commission's standard of comparable facilities. The Commission's reconfiguration orders establish that public safety licensees are to be provided with comparable facilities following reconfiguration at the reasonable, prudent and minimum necessary cost.¹⁴ It is for this purpose – to assist in determining whether a licensee's costs comply with the Commission's standards for reimbursement – that the Commission and Bureau directed the use of the TA's Cost Metrics as a factor in the *de novo* review process.

Second, the contention that the use of the TA's Cost Metrics represents an improper delegation of authority “to a private entity” of a “decision that the law reserves to [the Commission] alone” reflects a misunderstanding of what the Cost Metrics are and the nature of the TA's role in assembling them. The Bureau simply directed the TA – which reviews and approves every Frequency Reconfiguration Agreement (“FRA”) reached between Nextel and a public safety licensee for 800 MHz reconfiguration and thus has access to the data – to publish aggregate information concerning that data. This represents no delegation of Commission decision-making authority; 800 MHz reconfiguration mediations are subject to *de novo* review by both the Bureau and, if desired, the Commission itself, which retains the authority to review the record developed during mediation as well as available data such as the TA's Cost Metrics in order to reach its decision. The TA's role in compiling the Metrics is purely ministerial.

¹⁴ See *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) as amended by *Erratum*, 19 FCC Rcd 19651, (2004) and *Erratum*, 19 FCC Rcd 21818 (2004) (“800 MHz Report and Order”), *aff'd sub nom. Mobile Relay Associates et al. v. FCC et al.*, 457 F.3d 1 (D.C. Cir. 2006).

Third, Connecticut's objection that the TA's Cost Metrics "have not been subject to the rulemaking process" is perplexing.¹⁵ As noted above, the TA simply compiles and publishes the data. This data is not subject to dispute or comment – the numbers are what they are. It is not apparent how a rulemaking on the TA's Cost Metrics could even proceed. Would every FRA that makes up the relevant data be subject to notice and comment? How would Connecticut propose that public safety agencies keep sensitive information concerning their systems confidential? Is Connecticut proposing that the TA's arithmetic be subject to rulemaking?

The TA's Cost Metrics consist solely of objective and impartial data which the Commission may ultimately use as a tool to assist in evaluating a licensee's proposed costs for reconfiguration. Licensees remain free to present evidence justifying their proposed costs, and the Commission retains the ability to consider and weigh that evidence in determining whether a departure from the costs experienced by other licensees may be warranted in a particular case. There is no basis to subject raw data on vendor pricing and individual licensee internal costs to a rulemaking proceeding.

Fourth, the contention that the TA's Cost Metrics are "skewed enormously" against "complex systems" such as Connecticut's ignores that substantial work has been done in reconfiguration projects throughout the country by numerous public safety licensees operating large, complex systems. Many state public safety communications systems larger than Connecticut's have already completed 800 MHz reconfiguration.¹⁶ Indeed, a representative of

¹⁵ Petition at 3.

¹⁶ Overall, 406 non-border area public safety licensees have completed retuning to their new channel assignments, representing over a 40 percent completion rate across the country. *See* Letter from Lawrence R. Krevor, Vice President – Spectrum, Sprint Nextel Corporation, to David Furth, Deputy Bureau Chief, Public Safety and Homeland Security Bureau, WT Docket No. 02-55, 1 (Oct. 1, 2009).

the TA publicly has confirmed that, “considering that the majority of licensees, including the majority of licensees with complex large systems have FRAs, the cost metrics do not reflect only smaller systems that entered into FRAs earlier on in the program.”¹⁷ The most recently published TA Cost Metrics are based on data gathered from 779 FRAs for Stage 2 public safety licensees.¹⁸ In the system size range applicable to Connecticut, which includes public safety systems with between 4,001 and 10,000 units, there are 56 approved FRAs, hardly a small sample size. An additional 20 FRAs have been reached with public safety agencies with more than 10,000 subscriber units.

In Nextel’s experience, *reconfiguration of any public safety agency with several thousand subscriber units is always complex*. Connecticut is not uniquely situated in this regard, and it unfairly diminishes and demeans the tremendous work that both the public safety community and Nextel have put into reaching hundreds of agreements for the reconfiguration of complex systems to suggest that this work was easy or that all of the systems that came before it were simple.

III. USE OF THE TA’S COST METRICS REPRESENTS SOUND PUBLIC POLICY.

The Commission ordered 800 MHz reconfiguration to alleviate the potential for interference with mission critical public safety voice communications in the band. The Commission has “made it abundantly clear that we expect band reconfiguration to move forward expeditiously.”¹⁹ Use of the TA’s Cost Metrics, both by public safety agencies as an available

¹⁷ See Mission Critical Communications, *TA Addresses Cost Metrics Questions*, available at: <http://mccmag.com/onlyonline.cfm?OnlyOnlineID=88> (April 29, 2009).

¹⁸ 800 MHz Transition Administrator, LLC, *Cost Metrics for Frequency Reconfiguration Agreements* (v. 5, Nov. 10, 2009) (“TA Cost Metrics”).

¹⁹ *Improving Public Safety Communications in the 800 MHz Band, Third Memorandum Opinion and Order*, 22 FCC Rcd 17209, ¶ 47 (2007); see also *Improving Public Safety Communications* (continued...)

guideline to assist in developing their cost estimates, by the TA Mediators, and ultimately the Commission as a factor in evaluating proposed costs in cases that are presented for Commission review, can only help to speed this critical work.

The logic of generating and applying the Metrics is that, with a sufficient pool of data as to what different public safety systems paid vendors for reconfiguration, and agreed to as compensation for their internal costs, individual differences between licensees will be “smoothed out.” Connecticut’s argument that “there is no indication as to how [the] metrics were compiled or that they even relate to Connecticut’s circumstances”²⁰ misapprehends the underlying logic of the TA’s Cost Metrics and the Bureau’s purpose in directing the TA to assemble them. The inclusion of more and more data from additional licensees over time means that the TA’s Cost Metrics include more “unusual” licensees – that is, more licensees with different circumstances that reflect different levels of complexity.²¹ As the Commission and Bureau have recognized, the public availability of the TA’s Cost Metrics can both help inform the preparation of a licensee’s cost estimate and speed the evaluation of that cost estimate, and thus assisting the

(..continued)

in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, ¶ 8 (“one of the most critical of these goals is timely and efficient completion of the rebanding process, to ensure that the interference problem that threatens 800 MHz public safety systems is resolved as quickly and as comprehensively as possible”); *id.*, Joint Statement of Chairman Kevin J. Martin and Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate and Robert M. McDowell (“More important is that rebanding proceed as quickly and effectively as possible. After all, expeditiously eliminating interference between commercial and public safety users is the goal that motivates all of us. And we sincerely hope that all parties will keep their eyes on that prize even as they work through the details of this complex process.”)

²⁰ *Id.* at 30.

²¹ See *Charles Order* ¶ 5 (PSHSB Oct. 19, 2009) (“the TA Metrics provide a useful measure of cost reasonableness, because they are based on increasingly large amounts of historical information regarding the cost of rebanding public safety systems”).

public safety community, Nextel and the Commission in achieving the rapid completion of 800 MHz reconfiguration.

Nextel continues to recognize the importance of judging each licensee's system individually and on its own merits, and Nextel remains fully committed to being open to demonstrations by individual incumbent licensees of unique or special circumstances that they believe may warrant extraordinary deviation from the Metrics. Generalized assertions of complexity at this point in the process, however, are not compelling and should not serve as some sort of excuse to exempt a particular licensee from its obligation to present and justify its proposed reconfiguration costs.

It should be beyond dispute that it behooves all parties, including public safety agencies, Nextel and the Commission, to use as one benchmark the available data concerning the experience of those licensees that have already reached agreement on the terms of their reconfigurations. The fact that the Bureau chose to emphasize this already well established point in its *Charles Order* should not give rise to any Petition for Reconsideration by Connecticut. The Bureau did not modify its pre-existing policy, which was adopted in 2007; that policy has since been endorsed by the full Commission, and has been applied by the Bureau numerous times since then. Any Petition now seeking reconsideration of the Bureau's direction to the TA to assemble Cost Metrics for the information of all parties in this process, if not otherwise barred for lack of standing, is woefully tardy and therefore deficient on an independent basis.

IV. CONCLUSION

Connecticut has no standing to challenge the Bureau's order in this matter, as the Bureau has ruled that a non-party to a *de novo* review, such as Connecticut, cannot have interests that are adversely affected by a *de novo* review order – each case stands on its own particular facts. As a practical matter, Connecticut has no legitimate complaint, as it remains free to demonstrate that

its proposed costs comply with the Commission's standards. The Commission has a firmly established and longstanding practice of using available factual information, in this case the TA's Cost Metrics, to assist in the evaluation of the reasonableness of a licensee's proposed costs in accordance with those standards. This represents sound public policy and can only serve to speed the completion of 800 MHz reconfiguration. Connecticut's Petition should be dismissed.

For the foregoing reasons, Nextel respectfully requests that the Bureau promptly dismiss the Petition.

Respectfully Submitted,

NEXTEL COMMUNICATIONS, INC.

A handwritten signature in cursive script that reads "Laura Phillips". The signature is written in black ink and is positioned above a horizontal line.

Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)

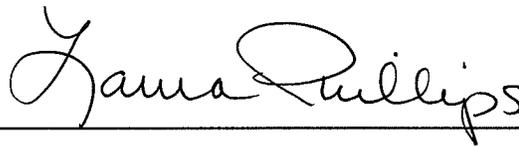
November 24, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2009, a true copy of the foregoing Opposition was served electronically upon:

The State of Connecticut
c/o Special Counsel to the State of Connecticut
John E. Logan
johnelogan@msn.com

Charles County, Maryland
c/o James R. Hobson
jhobson@millervaneaton.com



Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)