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

In the Matter of	)	
	)	
State of Indiana	)	
	)	WT 02-55
and	)	
	)	
Nextel Communications, Inc.	)	

To: The Commissioners

STATE OF INDIANA
APPLICATION FOR REVIEW

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May 4, 2011

Summary

The State of Indiana, by and through counsel, and in accord with Section 1.115 of the Commission's Rules hereby requests review of the *Memorandum Opinion and Order on Reconsideration* adopted by the Public Safety and Homeland Security Bureau in the above captioned matter, released on April 4, 2011, to correct obvious errors of law and misapplication of material facts which underlie an incorrect decision of the Bureau, which decision denies the State of Indiana reasonable compensation for certain tasks taken and to be taken in accord with the State's duties under the Commission's rebanding Orders and in accord with the terms and conditions of the parties' Frequency Reconfiguration Agreement.

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The State of Indiana, by and through counsel, and in accord with Section 1.115 of the Commission's Rules hereby requests review of the *Memorandum Opinion and Order on Reconsideration* adopted by the Public Safety and Homeland Security Bureau in the above captioned matter, released on April 4, 2011 (*Reconsideration Order*) and states the following:

I. Background

This matter arises out of Indiana's negotiation and entrance into a Frequency Reconfiguration Agreement with Nextel Communications, Inc. in accord with the Commission's Orders within the referenced Docket. During those negotiations, the State acted in good faith to resolve all issues related to the proposed costs of rebanding. The immediate matters arose while the parties were negotiating an amendment to the original FRA that was intended to reflect only the costs of the first touch of the subscriber units, leaving the costs of the second touch and the costs of the infrastructure to be negotiated pursuant to an amendment. A copy of the FRA that was executed by the parties was entered into the record in this proceeding.

The FRA recognized that the State's rebanding would involve over 1000 local government agencies that operate subscriber units upon the relevant 800 MHz radio network. Accordingly, there exists no central control over the actions of those local agencies by the State other than the "bully pulpit". In fact, the inventory upon which the parties' relied to create the estimates within the FRA was deemed to be only 80% accurate due to the problem of gathering information from myriad agencies. The problems were further exacerbated by the fact that subscriber units were being loaded onto the new system in abundance, causing the network to increase the number of subscriber units by the tens of thousands over the last few years.

During the parties' original negotiation of the FRA the parties agreed that the subscriber retune would not commence until after the parties' entrance into the FRA. As the Commission is aware, an incumbent licensee is not compelled to commence any activity related to rebanding without a signed agreement that would provide compensation for the costs of engaging in any such activity, as all such activity would, therefore, be at the risk of the licensee. Indiana determined and Nextel agreed that the State would not commence any such activity until following the parties' entrance into the FRA. Specifically, the parties agreed that the loading of replacement channels into new subscriber units would not commence until following the parties' entrance into the FRA.

The relevant facts that were before the Bureau are as follows: (a) at Section 28 of the FRA the parties agreed to a merger clause, making void all statements, writings, etc. that were not contained within and under the FRA; (b) the FRA did not contain a Schedule B, identifying the replacement channels and the locations where each such channel would be constructed, a material omission since the State could not know what replacement channels would be offered for expansion band channels subject to rebanding; (c) the Schedule C milestones clearly show that the loading of

replacement channels into the subscriber units would not commence until a date estimated to be 30 days beyond the date that the FRA was executed by the parties. All of the aforementioned facts were before the Bureau prior to its initial decision[1] and pursuant to the petitions filed during the reconsideration phase.

In addition, the negotiation of the amendment to the FRA created another issue in dispute related to the State's proposed costs for performing FCC application and licensing services. The State's vendor is EMR Consulting, Inc. which has performed such services for numerous rebanding licensees and always at the same rate, $650 per application. Nextel has agreed to this rate in each previous rebanding negotiation when EMR was the vendor of such services and other rebanding deals since the instant matter arose. However, for this rebanding, Nextel sought a volume rate from EMR equal to a 50% discount or $325 per application and EMR, with the State's support, understandably resisted.

In support of its position Nextel requested, without the State's participation or knowledge, a competing quote from another vendor, Enterprise Wireless Alliance (EWA). That request resulted in a quote for $51,590 to file 154 applications ($335 per application) with the Commission, which applications would simultaneously add the replacement channels and remove the replaced channel by a single application per call sign. EWA's quote did not include preparing any applications for permanent licensing to replace the 63 Special Temporary Authority grants under which a material portion of the State's system operates, which action has to be taken as a matter of law. Indiana stated that the EWA quote was irrelevant to this matter, did not represent the services of a vendor chosen

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[1] State of Indiana and Sprint Nextel Corp., *Memorandum Opinion and Order*, 26 FCC Rcd 1023 (PSHSB 2011), DA 11-191, released February 2, 2011.

(by right) by Indiana, did not include the full scope of the services which the State required, and could not, therefore, be employed to judge the reasonableness of EMR's quote for the complete services required. That EWA's quote was not equal to the scope of State's proposed and necessary services was fully admitted by EWA in a petition it filed within the reconsideration proceeding. Yet, despite the fact that the EWA quote was found to represent only a portion of the services required, the Bureau ruled that the $51,590 was sufficient compensation for all licensing services.

Despite the sometimes bizarre logic having been employed by Nextel in negotiating and litigating this matter and the Bureau in its previous decisions, it is significant to note that prior to this matter being reduced to Proposed Resolution Memoranda, EMR and the State decided to compromise on the matter and accept Nextel's original offer, of $325 per application. However, Nextel declared that offer to be off the table and insisted on the amount shown in the EWA quote as its position.

II. Issue One: Whether the Bureau erred in determining that the State was not entitled to compensation for the first touch of subscriber units immediately following the parties' entrance into the FRA.

The State avers that the Bureau erred by failing to properly apply legal precedent and authority to this issue[2] and concurrently caused an erroneous finding as to important and material facts.[3] Specifically, despite the State's repeated requests, the Bureau failed to apply even the basic tenets of contract law and, instead, repeatedly claimed that the Commission was not bound to apply

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[2] *See*, 47 C.F.R. §1.115(b)(2)(i)

[3] *See*, 47 C.F.R. §1.115(b)(2)(iv)

any aspect of contract law. Accordingly, the Bureau's claim is, in essence, that an FRA, in whole or in part, is not binding upon the parties if the Bureau deems that it should not be so. This is, of course, outside of the Bureau's authority and, indeed, the Commission's authority. The Commission is not empowered to sweep away the contractual obligations of private parties. However, when the Bureau stated in its *Reconsideration Order* that its ruling was intended to correct terms that the Bureau deemed to "violate the Commission's Rules and policies"[4] the true nature of the Bureau's error was finally made clear. The contract language as it exists does not violate the Commission's Rules and policies.

The Commission's Orders within this Docket provide that the Commission will assure, with the assistance of the Transition Administrator, that Sprint Nextel Corporation will only receive credit against its debt to the United States Treasury for payment of reasonable and prudent costs provided to incumbent licensees engaged in rebanding. Those same Orders do not prohibit Sprint Nextel Corporation and licensees from entering into any agreement that private parties might wish to enter into. Nor do those Orders direct the Bureau or the Transition Administrator to do more than disallow any credit going to Sprint Nextel for costs that are later deemed to be unnecessary. Accordingly, the contract should not be deemed unlawful or contrary to Commission policy, for it is not and could not be for the reasons put forth by the Bureau. What may be found to be unlawful is any allowance of credit applied to Sprint Nextel's debt to the Treasury for the payment of those costs, however, there is nothing unlawful about the State's demand that Nextel be bound by the terms of the FRA. Stated directly, Sprint Nextel is free to pay any amount for any goods or services related to rebanding and such agreement would not violate the Commission's Rules and policies, provided that, Sprint

[4] *Reconsideration Order* at ¶ 25.

Nextel was not allowed credit for paying any amount that the Commission deemed unreasonable or outside the scope of rebanding. Therefore, the Bureau is incorrect in its application of law since the Commission does not possess the authority to set aside contract terms that neither violate law nor its rules or policies.

A plain reading of the FRA demonstrates that Nextel has agreed to pay the subject amount and the merger clause at Section 28, combined with the milestones on the Schedule C, demonstrate that both parties are bound by the terms that would provide compensation to the State for the work performed at the time it was performed. No previous statements or claims made are subject to Nextel's use to modify or interpret the terms within the FRA, as such use violates the terms at Section 28. The Bureau's finding to the contrary is patently incorrect. The Bureau applied the issue of foreseeability to this matter and then ignored entirely the contents of the FRA, particularly the milestones on Schedule C. Had the Bureau properly applied the milestone evidence from the Schedule C, the Bureau would have determined that the State, as it consistently stated, foresaw the extreme difficulty in commencing the subject activity on the date that the FRA was signed by both parties, an uncertain date that was unknown at the time the FRA was being drafted. The State further foresaw the difficulty in getting multiple service shops and affected State and local entities to commence that activity. Therefore, the 30-day period was incorporated directly within the terms of the agreement. Accordingly, the Bureau's misplaces its application of the foreseeability issue by punishing the State for having both foreseen the problem and having dealt with it within the Schedule C milestones.

When that record evidence was again pointed out to the Bureau upon reconsideration, the Bureau did not even treat that material fact. It is entirely material to this matter that Nextel agreed

that the subject work would not begin until 30 days following the parties' entrance into the FRA. That is exactly what Schedule C says in a wholly unambiguous manner. That the Bureau chose to ignore this fact entirely undermines completely the Bureau's conclusion. Accordingly, if the Commission, upon review, combines the facts that (a) the State was not compelled to take any action related to rebanding prior to its entrance into the FRA (a fact not disputed by Nextel); (b) the parties mutually agreed that the subject work would not start until 30 days following the parties entrance into the FRA as shown on the Schedule C; and (c) that the State's entrance into that agreement with those terms was fully lawful under any circumstances, the Commission must conclude on review that the Bureau's decision is in error and should be reversed.

III. Issue Two: Whether the Bureau erred in its decision that the entire cost to Nextel of the State's preparation of necessary applications associated with rebanding should be limited to the EWA quote amount of $51,590.

The Commission's review of the record will show the necessary inconsistency with facts and logic to support a reversal of the Bureau's decision because the Bureau clearly made erroneous findings as to material facts.[5] Between permanently licensed stations and STAs, the State's system consists of 154 different call signs. To perform its rebanding in a lawful manner, the State will need to first add the replacement channels to each call sign to enable each facility to lawfully transmit on the replacement channels. Then, following the rebanding of the fixed network equipment, the State will need to remove the previous channels from its system, necessitating another application for each call sign. If the licensing work is not performed in this manner, the State will be operating without

[5] *See*, 47 C.F.R. §1.115(b)(2)(iv)

authority at some stage of the rebanding effort. Accordingly, the total number of applications that will be required to be filed, regardless of engineering issues or whether the call sign represents an STA, is 308.

The State originally and reasonably believed that the Bureau would know that two applications per call sign are required to meet the lawful and logistical needs of rebanding in all but few cases, with no such unusual case present here. Certainly the State was entitled to reasonably assume that the Bureau would know that a single-application methodology ("a drop and swap") would not be possible or lawful for facilities that are authorized under Special Temporary Authority. Yet, the Bureau's decision is supported by its wholly incorrect theory that the licensing work that is required will include the filing of 154 applications and no more.[6] This error in the Bureau's reasoning was not apparent to the State until it read the Bureau's initial decision, since the State reasonably assumed that the Bureau which was handling all such application matters would have known that nearly every rebanding incumbent licensee must file two applications per call sign during the rebanding process.

With this clear fact in mind, the EWA quote that would only file 154 applications and none for new, permanent authorizations to accommodate the STAs, is not a quote for the minimum number of services required by the State's rebanding. Certainly, it's short by at least half a job, a fact that the Bureau should have known, but somehow did not[7]. And a fact that the State reasonably

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[6] Sprint Nextel has never claimed that the work can be done with only 154 applications and has, instead, skillfully skirted this issue in its statements.

[7] The Bureau even failed to grasp the significance of this fact after reading EWA petition filed in this proceeding that admitted that EWA was not purporting to perform all tasks required by the State and was, rather, simply responding to a verbal inquiry by Nextel.

assumed the Bureau would recognize. Therefore, the State was shocked to discover that the Bureau did not know how the licensing process works for rebanding or simply ignored the correct procedure in its initial decision *MO&O*. This obvious process and procedure is not new evidence or argument introduced on reconsideration. It is an understandable reaction to the Bureau's failure to apply logic and procedure and what it should have known to its decision. Therefore, the State's insistence that the Bureau apply knowledge that is generally known to the entire rebanding populace should not be viewed with contempt by the Bureau.

The State of Indiana is entitled to assume that the Bureau represents the expert agency in matters related to licensing processes, including rebanding. However, the Bureau's decision does not reflect any such expertise. Rather, it represents ignorance in the original decision and recalcitrance in its response to the State's Petition For Reconsideration.

IV: Issue Three: Whether the Bureau erred in its repeated assertions that the State's Petition For Reconsideration was procedurally flawed.

The Bureau's claim that the State was not entitled or erroneously brought its Petition For Reconsideration is contrary to Commission policy[8] and involves erroneous findings of material facts.[9] The overarching policy that the Commission has provided repeatedly within its Orders within the subject Docket is that rebanding should result in a cost neutral outcome for public safety licensees. That is all that the State of Indiana has sought in this proceeding and nothing more. The facts, ignored by the Bureau, are that the licensing services will cost more than the amount decided

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[8] *See*, 47 C.F.R. §1.115(b)(2)(i)

[9] *See*, 47 C.F.R. §1.115(b)(2)(iv)

by the Bureau and the subscriber unit rebanding will cost more than allowed by the Bureau. Standing alone, these facts undermine the Bureau's decision and fully justify the State's bringing of its Petition For Reconsideration, the Bureau's statements to the contrary.

The plain truth is that the Bureau's initial decision was woefully wrong. The Bureau failed to read the entire FRA, failed to properly apply contract law, failed to apply any expertise in the method of licensing required during rebanding, failed often to get the series of events in correct order,[10] and failed to arrive at a decision that is supportable by even the most obvious of facts. Whether the Bureau is offended that the State was compelled to point out these obvious and repeated errors by the Bureau should be of no matter. However, the tone and choice of words within the *Reconsideration Order* demonstrate pique, rather than reasoned decision making. It also seems to present a warning to all other incumbent licensees that the Bureau does not wish to be bothered in the future by any Petitions For Reconsideration regarding such matters. It is, therefore, clearly calculated to chill the exercise of licensees' due process rights. If that is the Bureau's intent, that is most unfortunate. However, the Commission is positioned to dissuade licensees from being under the pall of the *Reconsideration Order* by simply reversing the Bureau's decision.

Trimming away much of the rhetoric lofted by both parties to this controversy and thereby reducing this matter to its essence, the facts are clear and unheeded by the Bureau. The FRA included Schedule C milestones that contradict every claim made by Nextel and every decision by the Bureau; and the contract does not represent a violation of Commission Rule or policy. Second,

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[10] At paragraph 19 of the *Reconsideration Order*, the Bureau again misconstrues when the TA Mediator reversed his opinion. The TA Mediator was fully aware of the EWA quote before TA Mediator wrote that the EMR quote was reasonable. The reversal came later, while drafting the Recommended Resolution.

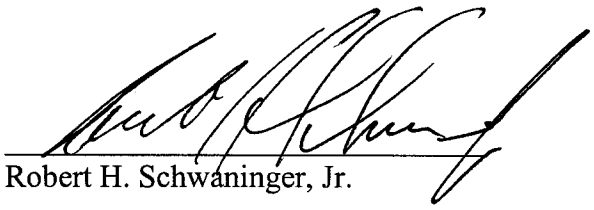
to perform the licensing services will require 308 applications to be filed. The Bureau budgeted for 154. Pointing this out to the Bureau in contradiction of the initial decision is not procedurally wrong or an imposition upon the Bureau's resources. It's why such petitions and due process exist in the first instance. It is also in furtherance of the Commission's policies of equity, fairness and rationality in its decisions. When the Bureau gets it wrong for obvious reasons, the Commission is available to correct those mistakes. That is due process and justice, and that is what the State of Indiana seeks herein.

V. Conclusion

The State of Indiana hereby respectfully requests that upon review, the Commission reverse the Bureau's decision and direct Nextel to compensate the State for the cost of preparation of 308 applications at a cost of $335 per application, i.e. $103,180 (double the EWA quote); to find that it was pursuant to the plain terms of the FRA and was entirely reasonable for the State to commence the subscriber effort no sooner than 30 days following the parties entrance into the FRA, in accord with the mutually agreed to milestones upon the Schedule C; and that there exists no procedural bar to the State requesting this relief as an aggrieved person by action taken under delegated authority.

Respectfully submitted,

STATE OF INDIANA



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May 4, 2011

Certificate of Service

I, Robert H. Schwaninger, Jr., certify that on the Fourth Day of May, 2011, the foregoing Application For Review was sent electronically to the following person.

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