

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

In the Matter of)	
)	
Sprint Nextel)	
12502 Sunrise Valley Drive)	
Reston, VA 20191-3438)	WT Docket 02-55
)	
)	Mediation No. TAM-12389
and)	
)	
Illinois Public Safety Agency Network)	
c/o Robert Schwaninger, Esquire)	
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)	
To: The Commission)	

OPPOSITION TO APPLICATION FOR REVIEW

Nextel Communications, Inc. (“Nextel”), a wholly owned subsidiary of Sprint Nextel Corporation, hereby files this Opposition to the Illinois Public Safety Agency Network (“IPSAN”) *Application for Review* of the Order issued on July 29, 2011 by the Public Safety and Homeland Security Bureau.¹ IPSAN, through counsel, asserts entitlement to payment of an unspecified amount of costs it claims were associated with the post-mediation review process before the Bureau. The *Application* asserts that the Bureau “erred in denying IPSAN’s ability to recover the costs incurred by IPSAN in mediation following the release of the Bureau’s earlier

¹ *Illinois Public Safety Agency Network*, Order, WT Docket 02-55, Mediation No. TAM-12389 (PSHSB July 29, 2011) (“*Second IPSAN Order*”); *Illinois Public Safety Agency Network*, Application for Review, WT Docket 02-55, TAM-12389 (Aug. 29, 2011) (“*Application*”).

Memorandum Opinion and Order.”² The *Application*’s reasoning in favor of any obligation on Nextel’s part to reimburse IPSAN for its costs is fatally flawed. On review, the Commission should reject IPSAN’s plea for unjustified payments.

I. IPSAN FAILED TO FOLLOW THE BUREAU’S DIRECT INSTRUCTIONS.

IPSAN is an 800 MHz incumbent licensee required to reconfigure its radio system pursuant to Commission rules. IPSAN provided Nextel with a reconfiguration cost estimate, which it then negotiated with Nextel. Because the parties could not come to a full agreement on costs and terms of IPSAN’s reconfiguration within the time specified, the TA commenced a mediation. During mediation, the parties failed to agree on the question of whether IPSAN’s request for a second touch of its data radios was required to provide IPSAN with comparable facilities after its reconfiguration was complete. Thus, the matter was briefed and the resulting TA Mediator’s Recommended Resolution concluded that IPSAN had not demonstrated its claimed loss of comparable facilities without a second touch. IPSAN requested *de novo* review of the mediation record, and the Bureau subsequently issued its initial order adopting the conclusions of the Recommended Resolution. The Bureau directed the TA Mediator, as its agent, to reconvene the parties promptly to conclude a Frequency Reconfiguration Agreement (“FRA”) that removed the cost of the second touch of IPSAN’s data radios from the scope of the reconfiguration project.

As the Bureau’s *Second IPSAN Order* recites, rather than cooperating to remove the rejected costs and to work towards prompt execution of an FRA reflecting the Bureau’s determinations, IPSAN instead declared on the initial post-Order call with Nextel that its

² *Application* at 1, citing to *Illinois Public Safety Agency Network*, Order, WT Docket 02-55, Mediation No. TAM-12389 (PSHSB March 23, 2011) (“*First IPSAN Order*”).

Motorola Statement of Work was stale. Several days afterwards IPSAN announced its intention to locate a substitute vendor, perhaps one who could perform both sets of radio touches for the same price as Motorola had quoted for a single touch. IPSAN simply announced its decision to change vendors, it did not ask the Bureau for additional time to complete its new process under the *First IPSAN Order*. It effectively granted itself several weeks to investigate its options, and then ceased to be in routine contact with the TA Mediator or Nextel on its progress.

Nextel had grave concerns about IPSAN's post-Order behavior. In Nextel's view, it had spent literally years negotiating and mediating IPSAN's reconfiguration using IPSAN's chosen vendor's Statement of Work. While IPSAN had the right to seek *de novo* review of the Recommended Resolution, once it received the Bureau's disposition, IPSAN either had to follow the instructions provided to conclude an FRA or it needed to file an appeal or reconsideration of the *First IPSAN Order*. Instead, IPSAN erroneously assumed that it was free to reevaluate its options, change vendors, and start the reconfiguration cost review process all over again. IPSAN also apparently assumed that Nextel would be required to negotiate this new vendor estimate and possibly go back through a mediation process. Nextel objected to IPSAN's approach, and the TA Mediator issued a Show Cause Order to elicit from IPSAN any reasonable explanation it might have for having created for itself a path that on its face failed to comply with the *First IPSAN Order*. IPSAN's justifications for its behavior were, as the Bureau accurately characterized them:

sophistry. The only rational construction of the Bureau's order is that IPSAN was to meet with Sprint and timely conclude an FRA by deleting from the Motorola-based cost estimate, the cost of providing a second touch to IPSAN's mobile data radios. That was an exercise in arithmetic which did not include "updating" the cost estimate, attempting to get a second touch for the same estimated cost as a first touch, soliciting a new vendor, or IPSAN's other machinations since the *Bureau*

Order was released on March 31, 2011.³

IPSAN's *Application* takes particular issue with the Bureau's determination in the *Second IPSAN Order* that IPSAN is not entitled to further additional cost reimbursement from Nextel beginning from the time the *First IPSAN Order* was issued. Without acknowledging the Bureau's conclusion that IPSAN failed to follow the Bureau's express directions, IPSAN asserts it was justified in taking all the steps that it took.

Critically, IPSAN does not deny that it failed to cooperate with the plain intent of the Bureau's direction that the TA Mediator "convene a meeting of the Parties, no later than 10 business days from the release of the [Order] to conclude a [FRA] consistent herewith."⁴ Instead, IPSAN makes several excuses for its unilateral decision not to comply with the direction. Whatever one can make of IPSAN's assertion of its entitlement to throw out Motorola and to start negotiations with an entirely new vendor and to prolong what should have been a straightforward process for several more months, it cannot be debated that IPSAN did not do what the Bureau directed it to do. It did something else entirely. The Bureau was plainly in a position to determine that IPSAN failed to comply with its Order, and the Bureau had every reason to reach that conclusion. The excuses offered by IPSAN for its behavior are not remotely compelling as reasons for the Bureau or the Commission not to determine that IPSAN flouted the Bureau's directions and should be responsible for whatever costs it caused itself from its own erroneous decisions.

³ *Second IPSAN Order* 7 ¶ 21.

⁴ *First IPSAN Order* 12 ¶ 33.

II. THE COMMISSION ALREADY ADDRESSED REIMBURSEMENT FOR POST-MEDIATION LITIGATION EXPENSES AND CONCLUDED THEY ARE NOT APPROPRIATE OR LAWFUL.

IPSAN claims that its *Application* is intended to point out “plain Bureau error” and that IPSAN “deems the issue to be novel.” However, the issue of a Commission licensee suffering the consequences of a failure to follow the directions of a Bureau order is not novel at all.⁵ Here, the Bureau determined that IPSAN’s costs, including those:

incurred by IPSAN in mediation following release of the *Bureau Order*, including, without limitation, costs of pleadings responsive to the TA Mediator’s show cause order, and costs associated with any pleadings filed subsequent to the release of the instant *Order*, and directed to the instant *Order*, are not reimbursable. To hold otherwise would be to award IPSAN for its failure to adhere to the directives of the Bureau Order.⁶

Aside from being consistent with the Bureau’s general regulatory authority over a licensee, the result is also consistent with the Commission’s determinations that 800 MHz incumbent licensees should not be reimbursed by Nextel for their post-mediation litigation costs.

⁵ Licensees that fail to follow or respond to Bureau orders and directives can be held liable for forfeiture penalties: “Under Section 503(b) of the Act and Section 1.80 of the Rules, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for forfeiture of penalty.” *Shenzhen Ruidian Communication Co. Ltd.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd. 18976 (EB 2005) (“*Shenzhen*”) (citations omitted), citing to 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a). See also *RSDC of Michigan LLC*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 6858 (EB 2007); and *General Growth Properties*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 6562 (EB 2007). In *Shenzhen*, the licensee failed to timely respond to two Enforcement Bureau letters of inquiry. In the Notice of Apparent Liability for Forfeiture, the Enforcement Bureau stated: “Misconduct of this type exhibits a disregard for the Commission’s authority and cannot be tolerated, and, more importantly, threatens to compromise the Commission’s ability to adequately investigate violations of its rules.” *Shenzhen* at 18978, ¶ 8.

⁶ *Second IPSAN Order* at ¶25.

In the 800 MHz Second Memorandum Opinion and Order,⁷ the Commission considered a Petition for Reconsideration, filed by IPSAN's counsel, as well as a separate Petition for Clarification, concerning aspects of procedures for mediation and the *de novo* review of disputed issues by the Commission.⁸ IPSAN's counsel claimed that under the terms of the 800 MHz Order, Nextel should be required "to pay all licensees' costs including those incurred in the course of any administrative or judicial action related to the 800 MHz rebanding disputes."⁹

The Commission rejected the Petition for Reconsideration, and declined to require Nextel to pay any licensee's post-mediation litigation costs for two separate reasons: first because the Commission lacks statutory authority to require one party to pay another party's litigation costs; and second, on public policy grounds.¹⁰ The Commission clarified that the language in the 800 MHz Order that states that "incumbents should incur no costs for band reconfiguration"¹¹ was not intended to create an unlimited right to recovery of litigation costs.¹²

No one required IPSAN to seek *de novo* review of the Recommended Resolution. While it has the right to seek *de novo* review, once it takes that step, its additional costs after that point

⁷ *Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 42 FCC Rcd 10467 at ¶¶ 43-50 (May 20, 2007) ("Second 800 MHz Order").

⁸ Second 800 MHz Order at ¶ 43.

⁹ Second 800 MHz Order at ¶ 45, footnote omitted. The Commission specifically cites to IPSAN's counsel's Petition.

¹⁰ Second 800 MHz Order at ¶ 47.

¹¹ *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120, at 25129 ¶ 15 (Dec. 22, 2004).

¹² Second 800 MHz Order at ¶ 48. Indeed, two other licensees represented by IPSAN's counsel would go even further and seek review in the D.C. Circuit before eventually withdrawing their appeal. See *City of Aurora, Illinois and City of Naperville, Illinois v. FCC*, Case No. 09-1061, Order (May 19, 2009).

are not reimbursed by Nextel. IPSAN's counsel plainly was aware of this. To the extent IPSAN has incurred costs associated with its actions and decisions after the Recommended Resolution was issued, these costs are not properly presented to Nextel.

III. NEXTEL IS NOT REQUIRED TO PAY IPSAN'S "SHOW CAUSE" COSTS.

IPSAN attempts to argue that during the Order to Show Cause proceeding it was "required to defend itself" as "[t]he matter arose out of mediation," and therefore Nextel is required to cover the associated costs.¹³ However, the entire Show Cause process was undertaken by the TA Mediator precisely because, in his view, IPSAN was failing to comply with the Bureau's order to promptly conclude an FRA. The TA Mediator was attempting to either have IPSAN begin to comply or to provide some reasonable explanation for its failure. This was not the normal formal mediation commenced when the parties fail to voluntarily agree on a rebanding plan and to an FRA after a mandatory negotiation period; it was the TA Mediator acting as the Bureau's "Special Master" to elicit information regarding the reasons for IPSAN's non-compliance with the *First IPSAN Order*. IPSAN's ridiculous assertion that "Nextel created an issue in dispute in mediation which IPSAN is entitled to challenge, the costs of which are fully reimbursable"¹⁴ ignores that IPSAN failed to comply with the *First IPSAN Order*. In contrast, Nextel was prepared to do exactly what the Bureau instructed, but it needed a willing participant in IPSAN to complete an FRA.

IPSAN claims that Nextel should be required to cover these costs as "[t]o find otherwise would act as a deterrent to persons who seek to exercise their due process rights in accord with

¹³ *Application* at 6.

¹⁴ *Id.*

the Commission’s published decisions.”¹⁵ Of course, IPSAN’s due process opportunities in this case were either to follow the terms of the *First IPSAN Order* – promptly complete an FRA – or to appeal or seek reconsideration of the *First IPSAN Order*. IPSAN did neither of these things. It was not only appropriate for the TA Mediator to issue his Order to Show Cause, as the Bureau’s *Second IPSAN Order* affirms, but it was also appropriate for the Bureau to determine IPSAN’s time and effort making baseless arguments that it complied with the *First Bureau Order* simply by attending an initial phone conference would be to reward “IPSAN for its failure to adhere to the directives of the Bureau Order.”¹⁶ IPSAN has demonstrated no due process or other harm to its rights.

IV. IPSAN WAS NOT “PUNISHED.”

The *Application* also claims that because the *Second IPSAN Order* did not find that IPSAN engaged in bad faith that a determination of no reimbursement for post-mediation litigation costs results in IPSAN suffering from a form of “economic punishment.”¹⁷ IPSAN was found by the Bureau not to have followed plain instructions, and the consequence, both as an 800 MHz programmatic policy matter and as a matter of Commission authority over its licensees, is not at all unusual. IPSAN’s counsel is well aware of the Commission’s ability to make decisions that “harm” a particular licensee’s perceived interests. The Bureau and Commission, rather than IPSAN, are the entities who must take the public interest of having parties comply with Bureau orders into account when the agency makes its decisions. The Bureau is simply using its authority in this case to make a determination that it is critical to the reconfiguration program

¹⁵ *Id.*

¹⁶ *Second IPSAN Order* at ¶ 25.

¹⁷ *Application* at 6-7.

that licensees do what the Bureau directs. This is not punishment or a penalty because IPSAN never had any reasonable expectation of payment from Nextel in the first instance. IPSAN must accept the consequences that flow from its chosen behavior.

Moreover, if IPSAN had been found to have been acting in bad faith, which certainly would have been possible given the record here, the costs of its entire reconfiguration could well have been its financial responsibility. The Bureau merely gave IPSAN a temporary reprieve from a full finding of bad faith so that it had one last clear chance to comply before bad faith was found. That is hardly a reason to conclude that IPSAN deserves reimbursement for its plain violation of a Bureau order that was short of a full finding of bad faith.

V. IPSAN IS ULTIMATELY RESPONSIBLE FOR ITS CHOICES AND DECISIONS.

Finally, IPSAN argues that because the Bureau stated that because it is permitted under program rules to select its desired reconfiguration vendor that IPSAN was also permitted to take the steps that it did. IPSAN thus attempts to leverage its right to vendor selection at the point of soliciting vendors to provide a reconfiguration cost estimate as a justification for having taken the step of firing Motorola and restarting the cost estimate process after the Bureau issued the *First IPSAN Order*.

Nextel does not disagree that an incumbent licensee is entitled to select its own vendor at the beginning of the process of putting together a cost estimate. But that right of vendor selection should not be viewed as unconditional and as having some sort of higher moral authority than following the Bureau's plain direction. Plainly, the appropriate time to have solicited new cost estimates was well behind IPSAN at the point where it has taken Motorola's Statement of Work and methodology all the way through mediation, Recommended Resolution, and the *de novo* review process before the Bureau. As the Bureau saw this issue, while IPSAN may be entitled to its choice of vendor, it is not entitled to another full negotiation/mediation

process with Nextel. Rather, the process up to the point of the *First IPSAN Order* yielded a cost cap on Nextel's reimbursement obligations.¹⁸

Further, as the Bureau also noted, IPSAN merely asserted, and never came close to credibly proving that the change of vendors was "necessary" such that it might have been a valid excuse for IPSAN's refusal to obey the instructions set forth in the First IPSAN Order. Certainly, if IPSAN thought it had such a case, that case should have been made, and it was not.

VI. CONCLUSION

IPSAN's Application for Review should be denied. Under the current Commission rules governing 800 MHz reconfiguration, Nextel is not required to pay another party's post-mediation litigation costs. The Bureau had every reason to find that IPSAN failed to follow its directives and that its costs should not be reimbursed. IPSAN, and only IPSAN, made the choices that resulted in the circumstances in which IPSAN finds itself. The undersigned attests that the statements and representations made in this Statement of Position are true and accurate to the best of his or her knowledge.

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September 13, 2011

¹⁸ See *Second IPSAN Order* at ¶ 19: "The cost of rebanding, as reflected in the FRA, shall not exceed the overall cost of rebanding IPSAN's system, as contained in the Motorola-based April 19, 2011 cost estimate."

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2011, a true copy of the foregoing Statement of Position was served electronically upon:

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