

LAWLER, METZGER, MILKMAN & KEENEY, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

REGINA M. KEENEY

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

April 20, 2007

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 02-55
Ex Parte Presentation

Dear Ms. Dortch:

On Thursday, April 19, 2007, Lawrence Krevor, Vice President, Government Affairs – Spectrum, Sprint Nextel Corporation (“Sprint Nextel”), James Goldstein, Director – Spectrum Reconfiguration Projects, Sprint Nextel, and I met with Michelle Carey, Senior Legal Advisor to Chairman Kevin Martin, to discuss the progress of 800 MHz reconfiguration. As a result of discussions with Commission staff about possible ways to refine the reconfiguration process, we provided the attached document with three interrelated recommendations. We recommend that the Commission (1) revise its 800 MHz retuning cost standard to permit more negotiating flexibility; (2) replace the current 180 days of voluntary and mandatory negotiations with a single 90-day mandatory negotiation period that begins when an incumbent provides its retuning cost estimates and statement of work; and (3) begin the retuning planning process proposed by public safety representatives and Sprint Nextel in their February 15, 2007 letter to the Commission.

Pursuant to section 1.1206(b)(2) of the Commission’s rules, 47 C.F.R. § 1.1206(b)(2), this letter and this attachment are being filed electronically for inclusion in the public record of this proceeding.

Sincerely,

/s/ Regina M. Keeney
Regina M. Keeney

cc: Michelle Carey
David Furth

Attachment

Sprint Nextel's Proposal to Streamline 800 MHz Band Reconfiguration

Executive Summary

Sprint Nextel recommends three interrelated essential Commission actions to improve, simplify and facilitate 800 MHz reconfiguration:

1. Give Sprint Nextel flexibility in negotiating incumbent retuning costs and protection from federal criminal liability by modifying the Commission's "minimum cost" standard and anti-windfall payment obligations as described below;
2. Replace the 180 days of voluntary and mandatory negotiations with a single 90-day mandatory negotiation period commencing when an incumbent provides its retuning cost estimates and Statement of Work; and
3. Commence the comprehensive wide-area planning process recommended by the public safety community and Sprint Nextel in their February 15, 2007 letter to the Commission to provide a blueprint for retuning individual public safety communications systems and assuring continuing retuning progress.

The Proposal

I. Revise the 800 MHz Retuning Cost Standard

- The Commission should clarify the 800 MHz *Report and Order's* reimbursable costs standard. *See Report and Order* at paragraph 198 "The submission to the Transition Administrator shall contain the licensee's certification that the funds requested are the minimum necessary to provide facilities comparable to those presently in use."
- This "minimum necessary" cost standard has been interpreted for 21 months of this process to essentially mean the "absolute lowest cost." As a result, Sprint Nextel spends a significant amount of time in negotiation and mediation requesting justification for proposed expenditures to ensure that the costs will be as low as possible. Sprint Nextel is in the position of having to challenge virtually every dollar spent on band reconfiguration to assure compliance with "minimum cost."
- The Commission should give Sprint Nextel greater flexibility in its review and acceptance of cost proposals that may not be the lowest cost, but that are "reasonable and prudent" and that are consistent with the Commission's objectives in the overall band reconfiguration initiative. (For example, assuming the Commission agrees, Sprint Nextel is willing to replace rather than retune M/A-Com's Master II repeater to save money on negotiating, mediating and litigating over what is required.
- Because of various Federal false claims statutes and the "anti-windfall" payment requirement, Sprint Nextel is legally required to document that a licensee's costs are the minimum necessary for a particular task. As a party to every contract and to every cost reimbursement claim, Sprint Nextel is uniquely at risk to federal oversight and criminal

Sprint Nextel's Proposal to Streamline 800 MHz Band Reconfiguration

penalties if it agrees to compensate licensees for costs that are later found to be excessive, unreasonable, or otherwise inconsistent with the Commission's minimum cost standard.

- Given the anti-windfall payment obligation and potential criminal liability, Sprint Nextel requires unambiguous Commission guidance and permission to spend more dollars than it may think is absolutely necessary in order to move retuning forward and achieve the overall goals of 800 MHz reconfiguration.
- Accordingly, modification of the cost standard must be a Commission decision. The anti-windfall payment obligation and the creation of the TA as a watchdog over "goldplating" and expenditures were all integral parts of the Commission's *Report and Order*. Sprint Nextel cannot rely upon non-binding dicta in a *de novo* review of a Recommended Resolution, a Bureau Public Notice announcing a revised cost standard, or a Bureau decision on delegated authority. The Commission has been very clear over the past year that fundamental aspects of the *Report and Order* must be addressed by the full Commission; *e.g.*, a mere three-month extension of Wave 1, Phase II mandatory negotiations required a Commission Order. A modification or clarification of the "minimum cost standard" would certainly fall within this category.
- This does not mean that all public safety proposed costs should be "rubber stamped" by Sprint Nextel or the TA. Sprint Nextel and the TA should still have an obligation to question expenditures that appear to be outside the norm based on precedent developed over the first 20 months of the band reconfiguration. In addition, public safety should still have the burden of demonstrating that requested funds are reasonable, prudent and necessary.

11. Negotiations Should Commence When an Incumbent Provides Sprint Nextel its Cost Estimates and Statement of Work

- Even if Sprint Nextel is given additional flexibility to accept a licensee's proposed cost estimates, Sprint Nextel is being deprived of any meaningful opportunity to review and negotiate the cost estimates because the estimates are not being provided until the parties "default" into mediation.
- The Commission's 800 MHz reconfiguration orders provide for Sprint Nextel and incumbents to negotiate retuning agreements over a three-month voluntary and three-month mandatory negotiating period, with only unresolved issues going to mandatory mediation. The process is working well for non-public safety (Phase I) incumbents.
- The majority of public safety incumbents (Phase II), however, are not providing their retuning cost estimates and statements of work (SOW) during the six month negotiating period; accordingly, this time is typically wasted without any meaningful retuning negotiations. In most cases, the cost estimates and SOWs are being provided at the end of the negotiating period or after the parties "default" into mandatory mediation.

Sprint Nextel's Proposal to Streamline 800 MHz Band Reconfiguration

- Negotiations would be much more productive, streamlined and effective if they did not begin until the public safety licensee provides its complete cost estimate, SOW and proposed retuning methodology. This change would have benefits for all of the remaining Waves and for incumbents that have not yet negotiated retuning agreements.
- Sprint Nextel proposes that starting the negotiating period only after incumbents provide a complete cost estimate and SOW would allow the Commission to reduce the current 180 days for voluntary and mandatory negotiations by half to a single 90 day mandatory negotiation period. If the Commission revises its "minimum cost standard" and Sprint Nextel receives greater flexibility in agreeing to public safety cost estimates, *and* if Sprint Nextel is provided cost estimates up front, Sprint Nextel would sacrifice the current six months of negotiation time (3 months voluntary, followed by 3 months mandatory) to one consolidated 90 day period.
- Sprint Nextel believes that with real negotiations, and with increased flexibility to agree to reasonable and prudent costs, Sprint Nextel and public safety incumbents will reach agreement on many retuning agreements (and planning agreements) without the need for mediation. This approach should at a minimum narrow substantially the number of issues requiring mediator assistance and possible referral to the Commission – as the Commission's order originally contemplated.
- **Require mediations to be completed within 30 days.** Under the current process, mediations routinely take longer than 30 days with numerous extensions. This is mainly due to the fact that TA mediation is not being used as it was intended -- to narrow contested issues and refer unresolved disputes to the Bureau -- but instead is being used to collect cost estimates and serve as the forum for *de facto* negotiation.
- If the cost standard is revised and if Sprint Nextel is provided cost estimates with sufficient opportunity to negotiate, there should be far fewer disputes requiring mediation.
 - 30 days should be enough time for a mediator to reach a negotiated settlement or develop a list of issues that can be forwarded to the Bureau for a *de novo* review.
 - TA mediators should not be issuing "Recommended Resolutions ("RRs") on disputed matters of telecommunications law and policy. TA mediators are not experts in telecommunications law; they should forward such matters to the Commission.
 - TA mediators should issue recommended resolutions only as to issues of contested fact, such as the cost of necessary equipment or labor, or the number of hours necessary to complete retuning tasks, based on the record before them and the precedent established by prior RRs and prior Bureau/Commission decisions on the same or substantially similar issues.

Sprint Nextel's Proposal to Streamline 800 MHz Band Reconfiguration

- **Require Bureau De Novo Review within 60 days.** The Commission should direct the Public Safety and Homeland Security Bureau to decide disputes referred to it from mediation, as well as requests for guidance on broader issues of telecommunications law and policy, within 60 days. Many common issues are impacting numerous negotiations but the lack of decisions and clear guidance creates continued uncertainty and increases the costs of multiple ongoing mediations.

III. Commence the Phase II Implementation Planning Requested by Public Safety and Sprint Nextel.

- Even if costs estimates are provided prior to negotiations, and even if the cost standard is revised, FRAs will not be complete without the wide-area planning necessary to schedule individual licensee retune commencement dates in conjunction with other area licensees and Sprint Nextel.
- Phase II retuning without prior comprehensive planning is like building a skyscraper without a blueprint – planning provides the blueprint and must be completed to give public safety incumbents, vendors, contractors, consultants and Sprint Nextel the certainty needed to provide essential manpower, equipment and spectrum resources for individual licensee retuning *with* minimal disruption to incumbents and *without* resurgent interference.
- **If the wide-area planning process for the physical retuning of Phase II systems is not started soon and completed over the next six months, it will be nearly impossible for any Phase II retunes to commence, much less be Completed, in 2007.**
- Most public safety licensees are signing retuning agreements which provide for the start of subscriber unit replacements/reflashing upon signature of the agreement, with the scheduling of the channel retune itself to be determined upon completion of the overall area-wide retuning “blueprint.” These agreements contemplate the blueprints being completed in July 2007 – this works needs to start now! Not doing so will frustrate public safety’s expectations.
- Many incumbents do not understand that the Commission’s rebanding scheme is based on coordinated channel swaps between individual public safety agencies and Sprint Nextel; it is not a “retune on demand” process. Where public safety licensees have interoperability or mutual assistance agreements, retuning requires coordination among *each of them and Sprint Nextel*, as well as careful frequency coordination to prevent a resurgence of interference. Creating area-wide blueprints to guide individual retunes is essential to keep retuning moving with minimal disruption to all incumbents, and for Sprint Nextel to maintain reliable service to its subscribers, including public safety licensees.
- For all of these reasons, the Commission should direct the TA, public safety, vendors and Sprint Nextel to undertake Phase II implementation planning as requested in the February 15 letter.