

reconsideration on procedural grounds on May 4, 2015.⁷

4. Following dismissal of APS' petition for reconsideration, APS and Sprint undertook to negotiate an "upgrade" of APS' system pursuant to which amounts to be paid by Sprint in accordance with the *MO&O* would be applied to obtain new equipment, rather than used to retune existing equipment. When the effort to negotiate an upgrade proved unsuccessful, Sprint provided APS with an FRA consistent with the *MO&O*, *i.e.*, an FRA contemplating the timely retuning of APS' existing system at a cost consistent with the *MO&O*. APS has refused to execute the FRA provided by Sprint, contending that it should not be required to commence the retuning of subscriber equipment until notified that all of its replacement frequencies are or soon will be "clear," *i.e.*, free of frequency conflicts with other U.S. stations and stations in Mexico.

III. DISCUSSION

5. APS has had over three and one-half months to conclude an FRA with Sprint as directed in the *MO&O*. Instead of following that directive, APS and Sprint pursued the negotiation of an upgrade. Both the *Fifth Report and Order*⁸ and the TA's upgrade policy require, *inter alia*, that upgrade proposals must be made early in the negotiation process and, in any event, not after the TA Mediator has issued a Recommended Resolution and the Bureau has issued, as it did here, its order disposing of issues raised in the Recommended Resolution. When the TA advised APS that the TA could not consider a waiver of the upgrade policy absent additional information from APS, APS indicated that it was unwilling to proceed with either an upgrade or the retuning of its existing system until notified that its replacement frequencies were clear or soon would be clear, something that could result in APS being one of the last licensees in the Mexico border region to complete rebanding. APS thus introduced substantial delay in implementing the *MO&O*'s directive that an FRA consistent with the *MO&O* be executed by the parties. The FRA that Sprint supplied to APS estimates that rebanding will commence 61 days after execution of the FRA and that it be completed 77 days thereafter. APS has contended that it requires additional time to contract with a rebanding vendor and that it does not desire or intend to have its radios programmed with both its old and new frequencies for an extended period of time. Given the passage of time since the release of the *MO&O*, we see no reason why the schedule contemplated by the draft FRA cannot be met. Accordingly we cannot but conclude that APS, for reasons of its own, seeks to delay the overall rebanding program by refusing to conform to the *MO&O*'s directive that it conclude an FRA consistent with the *MO&O*.

6. The *800 MHz Report and Order* places a strict obligation on all parties to rebanding, *i.e.*, they must at all times act in utmost good faith.⁹ Failure to do so can result in a licensee's facilities being relegated to secondary status, whereby they must not interfere with other licensees and must accept interference from other licensees without recourse. A licensee that does not operate in good faith can also be required to pay its own reconfiguration costs.

IV. DECISION

7. Because of APS' failure, after three and one-half months, to conclude an FRA consistent with the *MO&O*, we are requiring APS to show cause, within 5 business days of the date of this order why it should not be deemed to have failed to exhibit utmost good faith in its dealings with Sprint and the TA. In the alternative, APS may, within 5 business days of the date of this order, agree in principle to an FRA consistent with the *MO&O*. To that end, the parties shall continue to negotiate each business day until they reach agreement in principle.

⁷ Arizona Public Service Co. and Sprint Nextel Corp. *Order on Reconsideration*, DA 15-531(May 4, 2015), ___ FCC Rcd ___ (PSSB 2015).

⁸ Improving Public Safety Communications in the 800 MHz Band, New 800 MHz Band Plan for U.S. -- Mexico Sharing Zone, WT Docket No. 02-55, *Fifth Report and Order*, 28 FCC Rcd 4085, 4105 ¶ 63 (2013).

⁹ 47 C.F.R. § 90.677(c). *See* License Acquisitions, LLC and Nextel Communications, Inc., *Order*, 29 FCC Rcd 5761, 5762 (PSSB 2014).

V. ORDERING CLAUSES

8. Accordingly IT IS ORDERED that the Arizona Public Service Co. SHALL SHOW CAUSE, within 5 business days of the date hereof, why it should not be deemed to have failed to act in utmost good faith in concluding a Frequency Reconfiguration Agreement as directed by the Public Safety and Homeland Security Bureau on March 10, 2015.

9. IT IS FURTHER ORDERED that Sprint Corporation and the Arizona Public Service Co. SHALL MEET each business day from the date hereof to conclude a Frequency Reconfiguration Agreement consistent with the Public Safety and Homeland Security Bureau's *Memorandum Opinion and Order* released March 10, 2015, said meeting to be attended by persons authorized to bind their principals and to continue, from day to day, until the parties reach agreement in principle.

10. This action is taken under delegated authority pursuant to Sections 0.191(a) and 0.392 of the Commission's Rules, 47 C.F.R. §§ 0.191(a), 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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