

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
County of Flagler, Florida
and Sprint Nextel Corporation
Mediation No. TAM-50031
WT Docket 02-55

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 2009

Released: June 19, 2009

By the Acting Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. Before us is a case referred to us for de novo review from Wave 3, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the County of Flagler, Florida (Flagler) and Sprint Nextel Corporation (Sprint). For the reasons discussed herein, we resolve the dispute in Sprint’s favor and disallow Flagler’s claimed expense for a third “touch” to its retuned portable and mobile radios.

II. BACKGROUND

2. The parties have been unable to resolve their dispute relating to Flagler’s request for Sprint to pay the costs associated with a third touch of Flagler’s mobile and portable NPSPAC radios. In the parties’ original Frequency Reconfiguration Agreement (FRA), Sprint and Flagler agreed that the radios in the Flagler system would be touched twice, the first time to program in Flagler’s new post-rebanding channels, and the second time to remove Flagler’s old pre-rebanding channels after the system had commenced operation on the new channels. The FRA further provided that as part of the second touch, all of the pre-rebanding NPSPAC mutual aid channels as well as Flagler’s individually assigned pre-rebanding channels would be removed from the radios.

3. The reconfiguration of Flagler’s radios initially proceeded in accordance with the FRA, i.e., Flagler completed the first touch in which post-rebanding channels were programmed into its radios. When Flagler implemented the second touch of the radios, however, it removed only the individually assigned pre-rebanding channels in the radios but did not remove the old mutual aid channels as provided

1 See Recommended Resolution filed by the TA Mediator, November 6, 2008 (RR).

2 In the rebanding context, a radio “touch” refers to any time the radio is reprogrammed or otherwise modified to add or subtract channels or channel groups.

3 See RR at 3.

4 Id. at 2.

5 Id. at 3.

for in the FRA.⁶ Flagler did not notify Sprint or seek a change to the FRA prior to taking this action. Only after the second touch was completed did Flagler submit a Change Notice to Sprint seeking an additional \$82,316.92 to touch the radios a third time to remove the old mutual aid channels.⁷

4. Flagler contends that it decided to retain the old mutual aid channels when it implemented the second touch in order to preserve interoperability with the State of Florida's 800 MHz system.⁸ Flagler acknowledges that it failed to timely notify Sprint of its decision not to remove the old mutual aid channels during the second touch – as the FRA required – but alleges that “it was more concerned with officer safety at that time than the distraction of a negotiation.”⁹

5. Sprint contends that Flagler departed from the “two touch” reconfiguration plan contemplated by the FRA because of sub-standard performance by Flagler's vendor¹⁰ and that Sprint, therefore, should not be required to pay for a third touch.¹¹ Sprint also contends that Flagler could have avoided the need for a third touch by more carefully coordinating the timing of the second touch to maintain interoperability with the State.¹² It thus argues that Flagler violated the provisions of the FRA by failing to notify Sprint of Flagler's decision to deviate from the FRA.¹³

6. The TA Mediator recommends that we find that Sprint is not responsible for paying for a third touch of Flagler's radios.¹⁴ The Mediator's recommendation rests in part on Flagler's non-compliance with the FRA, *i.e.*, its failure to notify Sprint that it was deviating from the agreed-upon reconfiguration procedure.¹⁵ The Mediator also finds that Flagler has not shown that the proposed cost of a third touch would be the “minimum necessary” to complete rebanding in a reasonable and prudent manner.¹⁶

⁶ *Id.*

⁷ *Id.* at 6. Flagler later reduced its request to \$72,316.92. The third touch would raise Flagler's estimated rebanding cost from \$291,846.12 to \$364,163.04 – a 24.8% percent increase. *See id.*

⁸ *Id.* at 4–5.

⁹ *Id.* at 6.

¹⁰ Proposed Resolution Memorandum of Nextel Communications, Inc. at 7 (Oct. 21, 2008) (Sprint PRM). Sprint claims that “[Flagler's vendor] designed a confusing template, with old and new talkgroups in immediate proximity, distinguished only by the letters ‘RB,’” and contends that poor template design caused many users to attempt to operate on non-functional talkgroups. *Id.*

¹¹ RR at 6–7.

¹² Sprint PRM at 13.

¹³ RR at 8–9.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 14.

¹⁶ The mediator found that the costs incurred for a third touch “are, in one sense, duplicative of the costs of a second touch,” and, therefore, not the minimum necessary costs for retuning Flagler's radios. *Id.* *See* Improving Public Safety in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818 (2007) (affirming that licensees must certify that the costs they request are the minimum necessary to complete rebanding and clarifying the “minimum necessary” costs standard).

III. DISCUSSION

7. We find in favor of Sprint on this issue. The record indicates that Flagler unilaterally deviated from the terms of the FRA in deciding not to remove the old mutual aid channels as part of the second touch. There is also no dispute that Flagler failed to give Sprint notice or seek a change order prior to taking this action. Instead, Flagler sought a change order only after the second touch had already been completed.

8. We find that Flagler's action not only violated the terms of the FRA, but also deviated from the procedures for change orders set forth in the Commission's 2007 *Supplemental Guidance PN*.¹⁷ Under these procedures, a licensee may submit a Change Notice to Sprint and the TA to address unanticipated changes in cost, scope, or schedule that occur during implementation or in the case of an emergency.¹⁸ However, Flagler's attempt to add a third touch by Change Notice was clearly untimely and not unanticipated, because it resulted from Flagler's own unilateral action during the second touch. Nor was Flagler faced with an emergency that precluded it from raising the issue of retaining its old mutual aid channels before the second touch, so that Sprint and the TA would have an opportunity to address it in the change order process. Flagler's claim that it failed to notify Sprint ahead of time because the "distraction of a negotiation" would have compromised public safety is unpersuasive.¹⁹

9. Because Flagler failed to abide by the terms of the FRA or to follow the Commission's change order procedures, we conclude that Sprint is not responsible for the costs claimed for a third touch. Adherence to these terms and procedures is essential to the orderly and cost-effective reconfiguration of the 800 MHz band. We also note that the retention of the old mutual aid channels does not in any way compromise Flagler's ability to operate on its new channels (including the new NPSPAC mutual aid channels), and that Flagler retains the ability to remove the old mutual aid channels at a later date as part of its normal system maintenance.

IV. ORDERING CLAUSES

10. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 90.677 of the Commission's Rules, 47 C.F.R. § 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

¹⁷ See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, *Public Notice*, 22 FCC Rcd 17227, 17229 (2007) (*Supplemental Guidance PN*).

¹⁸ *Id.*

¹⁹ See *id.* at 17230 ("For systems that use mutual aid channels, have a plan in place to maintain mutual aid operations during reconfiguration. Coordinate efforts to ensure continuity of mutual aid interoperability arrangements with neighboring licensees."). See also *City of Boston, Massachusetts, and Sprint Nextel, Order*, 22 FCC Rcd 2361 (PSHSB 2007) (noting that licensees seeking to remove "old" channels face a "particularly high burden of justification").

11. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

David L. Furth
Acting Chief
Public Safety and Homeland Security Bureau