

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

In the Matter of
City of Houston, Texas Public Works Department
and Sprint Nextel
Mediation No. TAM-22090
City of Houston, Texas Police Department
and Sprint Nextel
Mediation No. TAM-22091
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 2009

Released: April 16, 2009

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from a Wave 2, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving the City of Houston, Texas Public Works Department and the Houston Police Department (collectively, Houston) and Sprint Nextel Corporation (Sprint). The issue in dispute arises from the control channel configuration of Houston's system, which uses a single control channel but can switch to one of three redundant back-up control channels when necessary. In light of this configuration, the parties dispute whether Sprint must provide Houston with upgraded radios to replace approximately 2,200 of Houston's existing Motorola "Privacy Plus" radios that are technically capable of being retuned, but lack channel capacity to carry duplicate sets of back-up control channels simultaneously in both the old and new NPSPAC bands during the period when Houston transitions from its old NPSPAC channels to its new NPSPAC channels.

2. Based on our de novo review of the mediation record, the recommended resolution submitted by the TA-appointed mediator in this case, and the parties' position statements, we find that Sprint is not required to replace the radios at issue with upgraded radios. The record indicates that alternative means exist to adequately ensure that Houston will have continuity of service and avoid the risk of system disruption during the transition.

II. BACKGROUND

3. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a Frequency Reconfiguration Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.

1 See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (800 MHz Report and Order); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order); Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005).

The FRA must provide for retuning of the licensee's system to its new channel assignments at Sprint's expense, including the expense of retuning or replacing the licensee's radio units as required.² Sprint must provide the rebanding licensee with "comparable facilities" on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.³ If the parties cannot reach agreement on a FRA, the case is referred to mediation, and issues that cannot be resolved in mediation are in turn referred to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.⁴

4. In the present case, the parties were unable to reach agreement in negotiations or mediation regarding retuning versus replacement of Houston's Privacy Plus radios. After several extensions to allow continued mediation of the issues and completion of the planning process, the TA mediator forwarded the record to PSHSB for *de novo* review and resolution.⁵ Both parties have filed Statements of Position with the Bureau in accordance with our *de novo* review procedures.⁶

A. Issue in Dispute

5. Houston operates an 11-site, 17-channel Motorola 800 MHz Smartnet communications system using Motorola Privacy Plus radios, including Max Trac, Visar, and MTX-8000 models, in addition to non-Privacy Plus mobile and portable radios.⁷ Houston's system uses a single control channel and employs three additional channels as back-up control channels in case the primary control channel cannot be used.⁸ The system can automatically switch from any one of these control channels to any other as necessary.⁹

6. The parties' dispute concerns the appropriate reconfiguration method for the Privacy Plus radios, which have sufficient memory capacity to be programmed with four control channels, but cannot be programmed with more than four control channels. Houston contends that to provide it with protection against the risk of system failure during the transition, all of its radios must be simultaneously programmed with four pre-rebanding and four post-rebanding control channels, *i.e.*, eight control channels in all.¹⁰ Because the Privacy Plus radios cannot simultaneously hold eight control channels, Houston argues that Sprint must replace these radios with an upgraded model that has sufficient channel capacity to do so.¹¹

7. Sprint responds that Houston is attempting to use the transitional control channel issue to obtain a substantial permanent equipment upgrade at Sprint's expense.¹² Sprint argues that because Houston's system uses only one control channel at a time, Houston will be able to operate its system

² 800 MHz Report and Order, 19 FCC Rcd at 14977 ¶ 11.

³ *Id.* at 14986 ¶ 26.

⁴ *Id.* at 15077 ¶ 201.

⁵ TA Mediator Recommended Resolution, at 2-4 (May 19, 2008) (TA RR).

⁶ Statement of Position of Nextel Communications, Inc. (June 3, 2008) (Sprint Statement); Statement of Position of the City of Houston (June 3, 2008) (Houston Statement).

⁷ TA RR at 5. Motorola's Privacy Plus radios allow user groups to operate on a specified set of channels in order to communicate in private.

⁸ Sprint Proposed Resolution Memorandum, at 7 (Apr. 15, 2008) (Sprint PRM). The back-up channels function as voice channels when they are not being used for control purposes. Sprint PRM, Appendix 1 at 57.

⁹ Sprint Statement at 5. A control channel in a trunked radio system is an operational channel that searches for and automatically assigns available voice channels to system users.

¹⁰ Houston Proposed Resolution Memorandum at 9-10 (Apr. 18, 2008) (Houston PRM).

¹¹ Houston PRM at 5-6; TA RR at 5, 12.

¹² Sprint PRM at 11-14.

safely and reliably during the transition by programming its Privacy Plus radios with two pre-rebanding control channels (one main and one backup) and two post-rebanding control channels (one main and one backup).¹³ Sprint contends that this approach will maintain the system's operational capability and provide sufficient redundancy to protect against system failure during the transition.¹⁴

B. Parties' Positions

8. *Houston Position.* Houston does not dispute that its Privacy Plus radios can be retuned, but argues that Sprint must replace rather than retune them because their limited control channel capacity during the transition will expose Houston to heightened risk of system failure during the transition.¹⁵ Houston also contends that Motorola has advised against reducing the number of available control channels during the transition.¹⁶

9. In response to Sprint's proposal that Houston operate the Privacy Plus radios with a reduced complement of control channels during the transition, Houston asserts that Sprint's approach is an "untried theory" and that it would deprive Houston of "comparable facilities" during the rebanding transition.¹⁷ Houston contends that Sprint has interpreted the Commission's "comparable facilities" requirement too narrowly, and maintains that Sprint is unreasonably requiring Houston to reduce its control channel capacity during the transition when other public safety licensees have not been required to do the same.¹⁸

10. *Sprint Position.* Sprint contends that it is not required to replace the Privacy Plus radios because Houston has not demonstrated that replacing the radios is the lowest-cost alternative available that would provide Houston with comparable facilities.¹⁹ Sprint notes that providing Houston with upgraded radios to replace its Privacy Plus radios would more than double the cost of reconfiguring Houston's system, even though the Privacy Plus radios represent only a portion of the system's equipment inventory.²⁰ Sprint maintains that its proposed solution meets the comparable facilities standard because the proposed reduction in the number of redundant control channels during the transition is temporary and not noticeable to the end user, and the four redundant control channels in the Houston system will be restored when the transition is complete.²¹

11. Sprint also argues that there are several available lower-cost options to mitigate the risk to Houston of operating with fewer back-up control channels during the transition. These include an expedited rebanding schedule to shorten the transition,²² and/or providing Houston with loaner radios during the transition that can hold a full complement of pre-rebanding and post-rebanding control channels.²³ Sprint asserts that Houston has unreasonably rejected these options and is attempting to "goldplate" its system through an unwarranted equipment upgrade.²⁴ Sprint also disputes Houston's

¹³ *Id.* at 8.

¹⁴ *Id.*

¹⁵ Houston PRM at 10, 15.

¹⁶ Houston Statement at 7.

¹⁷ Houston PRM at 9, 15.

¹⁸ *Id.* at 7; Reply of the City of Houston, at 3-7 (May 1, 2008) (Houston Reply).

¹⁹ Sprint PRM at 5-6, 11.

²⁰ *Id.* at 12.

²¹ Sprint Statement at 7.

²² Sprint PRM at 9, n.18. Sprint calculates that, based on Houston's Statement of Work (SOW), Houston's system would operate with a reduced complement of back-up control channels for fewer than 100 days. *Id.* at 12, n.23.

²³ Sprint PRM at 12.

²⁴ *Id.* at 6.

claim that no other public safety licensee has been required to reduce its control channel capacity, asserting that other public safety licensees have successfully done so.²⁵

12. *Mediator Recommendation.* The mediator recommends finding in favor of Sprint on this issue. The mediator states that Sprint's proposal to retune the Privacy Plus radios will not disrupt or pose an undue risk to Houston's system during the transition.²⁶ The mediator questions Houston's assertion that even a temporary diminution of its operational capability during the transition constitutes a denial of comparable facilities.²⁷ The mediator also gives weight to examples cited by Sprint of other licensees that agreed to a temporary reduction in the number of control channels used in their systems during their transitions.²⁸ The mediator rejects the assertion that Sprint proposes to treat Houston less favorably than other licensees, finding the examples cited by Houston to be distinguishable.²⁹

III. DISCUSSION

A. Procedural Matters

13. As a threshold matter, we address multiple motions to strike and related pleadings submitted by Houston and Sprint, each alleging that the other has improperly and untimely sought to introduce new arguments and submit new evidence relating to the issue of whether other 800 MHz licensees have agreed to operate with a reduced number of control channels during the rebanding process, and whether such licensees are similarly situated to Houston. The Bureau allowed both parties to file additional pleadings with the mediator on this issue, but directed both parties not to raise new issues or submit additional filings into the mediation record after May 8, 2008.³⁰ Notwithstanding the Bureau's directive, on May 9, 2008, Houston moved to strike select portions of Sprint's May 8 reply comments on the grounds that Sprint had improperly raised new issues and submitted new evidence.³¹ On May 16, 2008, Houston filed a second pleading arguing that Sprint had improperly filed new evidence and requested additional time to respond.³² On May 16, 2008, Sprint moved to strike Houston's May 16 filing.³³ On June 3, 2008, Sprint requested confidential treatment of the underlying mediation record and its Statement of Position filed on the same day.³⁴ On June 5, 2008, Sprint filed a motion to strike portions of Houston's Statement of Position filed on June 3, 2008, alleging that Houston had improperly introduced new arguments and new evidence contrary to PSHSB's *de novo* review procedures.³⁵ Houston

²⁵ Reply of Nextel Communications, Inc. to Proposed Resolution Memorandum of the City of Houston, at 4-5 (April 23, 2008) (Sprint Reply).

²⁶ TA RR at 15.

²⁷ *Id.* at 13-15.

²⁸ *Id.* at 14.

²⁹ *Id.* at 14-15.

³⁰ Email from David Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau, FCC, to Patrick R. McFadden, Counsel for Sprint, and Rebekah L. Bina, Counsel for Houston (Apr. 25, 2008).

³¹ City of Houston Motion to Strike (May 9, 2008). In the alternative, Houston requested the Bureau to strike Sprint's reply in its entirety should the Commission deny its waiver to extend the mediation deadline. *Id.* at 2.

³² Erratum and Reply of the City of Houston, Texas to the Supplemental Reply of Nextel Communications, Inc. (May 16, 2008).

³³ Sprint Motion to Strike (May 16, 2008). Sprint also requests the Bureau to find that Sprint is not responsible for Houston's filing fees associated with drafting and filing Houston's Erratum and Reply on May 16, 2008. *Id.*

³⁴ Letter to David Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission from Laura H. Phillips, Drinker Biddle & Reath, LLP, Counsel to Sprint (June 3, 2008).

³⁵ Sprint Second Motion to Strike (June 5, 2008).

opposed Sprint's request for confidentiality and motion to strike on June 19, 2008,³⁶ and Sprint filed a reply to Houston's opposition on June 26, 2008.³⁷

14. According to Section 1.46(a) of the Commission's rules, motions to accept late-filed pleadings are not to be granted routinely.³⁸ The Bureau was explicit in its instructions that the parties were only to address designated issues specified in the extension, and that the mediation record would be closed after May 8, 2008.³⁹ Accordingly, in rendering our decision in this dispute, we decline to consider any new arguments or evidence submitted by either party after May 8, 2008. We will consider the subsequent Statements of Position filed by both parties with the Bureau, but only to the extent that they are based on the mediation record as of May 8, 2008.⁴⁰

B. Issue in Dispute

15. Turning to the merits, we conclude that Sprint is not required to replace Houston's Privacy Plus radios with upgraded radios that will hold eight rather than four control channels during the transition. In this case, both parties agree that it is technically feasible to retune the Privacy Plus radios so that they carry four post-rebanding control channels to replace the four pre-rebanding control channels, and that this is sufficient to provide Houston with "comparable facilities" at the conclusion of the reconfiguration process.⁴¹ However, Houston contends that the comparable facilities standard requires Sprint to provide radios that carry double the number of control channels during the transition.⁴²

16. We disagree with Houston. The comparable facilities standard requires Sprint to provide Houston with radios that have the same channel capacity as the radios being retuned or replaced, not greater capacity.⁴³ Moreover, the Commission has not used the comparable facilities standard to evaluate temporary facilities while the licensee at issue is in transition, but rather has used the standard to define the replacement facilities that the licensee is entitled to at the end of the transition.⁴⁴ Thus, we find that applying the comparable facilities standard to transitional issues as Houston suggests, and then construing the standard to require Sprint to provide radios with twice the control channel capacity of the original radios, would be inconsistent with Commission precedent and would lead to incongruous results.

17. While we decline to adopt Houston's proposed application of the comparable facilities standard, we find that Sprint must provide reasonable means for Houston to maintain continuous

³⁶ City of Houston, Texas Opposition to Sprint Nextel's Request for Confidentiality and Motion to Strike (June 19, 2008).

³⁷ Sprint Reply to the City of Houston, Texas Opposition to the Request for Confidentiality Treatment and Motion to Strike of Nextel Communication, Inc. (June 26, 2008).

³⁸ 47 C.F.R. § 1.46(a).

³⁹ See n.30, *supra*.

⁴⁰ Statements of Position are limited to the mediation record. See Wireless Telecommunications Bureau Announces Procedures for De Novo Review in the 800 MHz Public Safety Proceeding, DA 06-224, *Public Notice*, 21 FCC Rcd 758 ¶ 4 (2006). To the extent that a party objects to the exclusion of evidence, it has the right to seek a *de novo* hearing before an Administrative Law Judge. *800 MHz Report and Order*, 19 FCC Rcd 15071-72 ¶ 194.

⁴¹ Houston PRM at 10; Sprint PRM at 7.

⁴² Houston PRM at 6, 10.

⁴³ The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) comparable operating costs. *800 MHz Report & Order*, 19 FCC Rcd at 15077 ¶ 201. See also Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079, 19112-13 ¶¶ 89-95 (1997). (Defining comparable facilities in the context of Economic Area licensees' relocation of incumbent site-based SMR licensees.)

⁴⁴ See 47 C.F.R. § 90.699(d) ("The replacement system provided to an incumbent . . . must be at least equivalent to the existing system").

operations during the transition. The *800 MHz Report and Order* requires Sprint to support “continuity of service” during the transition.⁴⁵ This standard requires Sprint to take necessary and reasonable steps to protect licensees from disruption of service during the transition, and to take prompt remedial action if any disruption occurs. However, where a licensee argues that protecting it from disruption during the transition requires an upgrade of its system at Sprint’s expense, the licensee bears a particularly heavy burden to demonstrate that there is no reasonable and less-costly alternative.

18. Applying this standard, we find that Houston has not met its burden of justifying the substantial additional expense to Sprint that would be associated with a permanent upgrade of Houston’s radios. Houston does not dispute that the Privacy Plus radios are capable of functioning normally during the transition when programmed with two pre-rebanding control channels and two post-rebanding control channels.⁴⁶ Houston instead argues that so long as the Privacy Plus radios carry a reduced complement of back-up control channels, there is an increased risk of service disruption in the event that either the pre-rebanding or post-rebanding primary control channel fails; and the associated back-up channel also fails.⁴⁷ However, Houston does not attempt to quantify this increased risk, but rather states that it “simply do[es] not know what potential communications problems may be faced by [it] as a result of reducing the number of control channels from four to two.”⁴⁸ While we are sensitive to Houston’s concerns, the mere assertion of increased risk does not demonstrate that upgraded radios are the only means to prevent disruption of service or that continuity of service cannot be ensured by less expensive means.

19. Houston also contends that Motorola has recommended against reducing the number of control channels during the transition,⁴⁹ and that no similarly situated licensee has been required to do so.⁵⁰ However, the record indicates that Motorola regards retuning of radios in this scenario as a viable option.⁵¹ Although Motorola recently developed software that it recommends for new radios that can hold duplicate channels, the record does not contain evidence that Motorola believes the Privacy Plus radios must be upgraded if they cannot support the software.⁵² In fact, Motorola recommends that licensees consider all alternatives to determine whether the affected radios can be retuned instead of replaced.⁵³

20. We also give little weight to arguments based on rebanding of other licensees’ systems. Sprint contends that other licensees have agreed to a temporary reduction of control channels in their systems,⁵⁴ while Houston contends that the instances cited by Sprint are not comparable and that it is being singled out.⁵⁵ We do not find the record to favor either Sprint or Houston on this issue. While resolution of similar issues in other mediations may be instructive, none of these cases were referred to

⁴⁵ *800 MHz Report and Order* ¶¶ 26, 148.

⁴⁶ Houston PRM at 10-11; Sprint Reply at 5, 7.

⁴⁷ Houston PRM at 11-13; Houston Statement at 8.

⁴⁸ Houston Statement at 5.

⁴⁹ *Id.* at 7-8. Houston states that “Motorola’s SOW notes that certain radios that are Privacy Plus or not intended for NPSPAC operation are to be replaced according to the table in the subscriber section.” *Id.* at 7, *citing* Motorola SOW at 25, 28. However, Houston did not submit the Motorola SOW in the record. *See* Houston Reply at 4, n.9.

⁵⁰ Houston Reply at 3-7.

⁵¹ Houston PRM at Exh. 1; Sprint PRM at 8, n.17.

⁵² TA RR at 14 (“...the Licensees refer to various studies and findings by its contractor Motorola that question the proposed reconfiguration methodology, but [] never actually offer any evidence that Motorola agrees with their position.”)

⁵³ Houston PRM, at Exh. 1.

⁵⁴ Sprint Reply at 4-5.

⁵⁵ Houston Reply at 3-4.

the Bureau, and we ultimately are not bound by them because the facts and circumstances of other mediations vary.

21. We note that Sprint has suggested several options to mitigate the risk of system disruption that would be less costly than a permanent radio upgrade. For example, Sprint has offered to provide Houston with temporary “loaner” radios with higher control channel capacity that could be used during the transition.⁵⁶ Houston states that it rejected this offer because Sprint has a poor record of providing reliable loaner equipment.⁵⁷ We find that Houston cannot insist on new permanent radios under these circumstances if Sprint is prepared to offer reliable loaner radios in sufficient quantity to mitigate the risk of disruption.

22. Sprint has also proposed to structure the transition so that the Privacy Plus radios would be the last radios returned before the system cutover to the new channels, and the first radios in which old channels would be removed and the four post-rebanding control channels would be programmed after the cutover.⁵⁸ We believe that this option proposed by Sprint is also a reasonable measure that would support continuity of service for Houston during the transition.⁵⁹ Finally, we emphasize that if an actual disruption of service occurs during the transition that is attributable to rebanding-related modifications to the system, Sprint is responsible to Houston for immediately remedying the situation.

IV. ORDERING CLAUSES

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

24. IT IS FURTHER ORDERED that the Transition Administrator shall convene a meeting of the parties within ten days of the date of this Order for the purpose of negotiating a Frequency Reconfiguration Agreement consistent with the resolution of issues set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

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

⁵⁶ Sprint PRM at 12.

⁵⁷ Houston PRM at 14-15; Sprint PRM at Appendix 3.

⁵⁸ Sprint PRM at 9, n.18.

⁵⁹ Houston should have the right to test loaner radios for sufficiency. *See* Sprint Reply at 10-11.