

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

In the Matter of)
County of Henry, Georgia)
and Sprint Nextel Corporation) WT Docket No. 02-55
Mediation No. TAM-32105)

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 2010

Released: August 19, 2010

By the Deputy Chief, Policy Division, 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 Henry, Georgia (Henry) and Sprint Nextel Corporation (Sprint) over reconfiguration of Henry’s infrastructure. Henry proposes to add three temporary “swing” channels to its system prior to reconfiguration to preserve its existing capacity throughout the process. Sprint, however, favors a less costly retuning procedure that would not involve a temporary expansion of Henry’s system. 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 pay for the implementation of swing channels during the retuning of Henry’s infrastructure.

II. BACKGROUND

2. Henry, a licensee subject to rebanding under the 800 MHz Report and Order, operates a six-site, eight-channel, NPSPAC simulcast trunked radio network that uses M/A-COM EDACS technology. Henry’s eight channels include seven voice channels and one control channel. At each of its six sites, Henry uses three transmit antennas and three associated transmitter combiners—two three-channel combiners and one two-channel combiner. Henry also operates a two-channel mutual aid facility that uses its own antenna system.

3. The 800 MHz Report and Order and subsequent orders in this docket require Sprint to negotiate a frequency relocation agreement (FRA) with each 800 MHz licensee that is subject to

1 Recommended Resolution, Mediation No., TAM-32105 (Oct. 6, 2008) (RR).

2 Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) (800 MHz Report and Order).

3 Proposed Resolution Memorandum of Henry County, Georgia (Henry PRM) at 2 (Sept. 15, 2008). Henry operates under call sign WQPC993.

4 Id. at 2.

5 Id. Combiners, as the name implies, allow two or more repeaters to share a common antenna.

6 Id. at 3.

rebanding.⁷ The FRA must provide that Sprint pay for relocation of the licensee's system to its new channel assignment(s) and for retuning or replacing the licensee's equipment as required.⁸ Sprint must provide the relocating 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.⁹ If the parties cannot reach agreement on a FRA, the case is referred to mediation. Issues that cannot be resolved in mediation are referred to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.¹⁰

4. The negotiation period for Wave 3, Stage 2 licensees commenced on November 1, 2006.¹¹ Because Henry and Sprint failed to negotiate a FRA by April 30, 2007—the end date for their mandatory negotiation period—their case was referred to a TA mediator (Mediator).¹² On September 11, 2008, the Mediator ordered the parties to submit Proposed Resolution Memoranda (PRMs) on two unresolved issues—one of which the parties resolved soon thereafter.¹³ Henry and Sprint filed PRMs on the remaining issue on September 15, 2008, and September 24, 2008, respectively.¹⁴ On October 6, 2008, the Mediator submitted its Recommended Resolution (RR), recommending that we rule in favor of Sprint on the remaining issue.¹⁵ The parties then filed Statements of Position in response to the RR.¹⁶

A. Issue in Dispute

5. This case involves a dispute over reconfiguration methodologies.¹⁷ Henry proposes a five-step plan requiring the build-out of three temporary swing channels it deems necessary to preserve an acceptable Grade of Service (GOS) during reconfiguration.¹⁸ Sprint, however, rejects Henry's proposal to add swing channels and insists that reconfiguration of Henry's infrastructure can be completed during off-peak hours when the GOS of the system can be maintained without using additional swing channels.¹⁹ Sprint describes its proposal as follows:

⁷ *800 MHz Report and Order*, 19 FCC Rcd at 15021-45, 15069 ¶¶ 88-141, 189. *See also* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*).

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

⁹ *Id.* at 14986 ¶ 26.

¹⁰ *Id.* at 15076 ¶ 201.

¹¹ RR at 2.

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 17.

¹⁶ Statement of Position of Henry County, Georgia (Feb. 4, 2009) (Henry SOP); Statement of Position of Nextel Communications, Inc. (Feb. 4, 2009) (Sprint SOP).

¹⁷ RR at 5.

¹⁸ Henry PRM at 5-6.

¹⁹ Sprint PRM at 10-12.

- At each site, one combiner will be retuned at a time. Combiners and repeaters will be retuned concurrently. When a combiner/repeater is taken out of service for retuning, at least four voice channels will remain in operation.
- Sprint estimates that each repeater will require one hour and each combiner port one half-hour to retune. Each channel will then require one-half hour for optimization.
- Three hours are required to retune repeaters and combiner ports on any three-channel combiner, and one additional half-hour is needed for optimization per channel. Thus, the first retuned voice channel would be ready for use after three and one-half hours, the second would be ready after four hours, and the third after four and one-half hours.²⁰

Under Sprint's proposal, Henry's system would be reduced to four voice channels for a period of three and one-half hours during retuning of any three-channel combiner that combines three voice channels. Henry finds this temporary reduction in capacity unacceptable,²¹ while Sprint argues that its proposed methodology is consistent with standard practice.²² Sprint contends that the cost of Henry's swing channel proposal exceeds the cost of Sprint's retuning proposal by approximately \$584,000.²³

B. Parties' Positions

6. *Henry's Position.* Henry insists that temporary swing channels are necessary during reconfiguration of its system to preserve an acceptable grade of service, which it defines as a "blocking rate" of not more than 1% with blocked calls delayed no longer than 5 seconds.²⁴ Henry has submitted an hour-by-hour analysis of traffic patterns on its network,²⁵ from which it concludes that "removing even one channel from service could significantly and negatively affect the performance of [its] system."²⁶ Thus, Henry contends, it is entitled to the three swing channels necessary to preserve its existing capacity throughout reconfiguration. In addition, Henry criticizes Sprint's proposal to "rush" reconfiguration "in just a few hours, in the middle of the night, at 6 different locations simultaneously"²⁷ and insists that temporary channels are necessary for coverage testing.²⁸ Finally, Henry alleges that Sprint accepted a proposal similar to Henry's from St. Tammany's Parish, Louisiana, which Henry characterizes as a similarly situated licensee.²⁹

7. *Sprint's Position.* Sprint argues that a temporary expansion of Henry's system is unnecessary to preserve an acceptable grade of service during reconfiguration of Henry's infrastructure.

²⁰ *Id.* at 10-11.

²¹ Henry PRM at 9.

²² Sprint PRM at 14.

²³ RR at 9. This figure takes into account Henry's agreement to use diplexers rather than temporary "swing antennas," which reduced its proposed costs by approximately \$100,000. *Id.* Henry does not object, in either its PRM or its SOP, to Sprint's estimate of the relative costs of their proposals.

²⁴ Henry PRM at 5. The use of temporary swing channels was first proposed by Tusa Consulting, Henry's consultant. *Id.*

²⁵ See *id.* at Ex. 2 ("Henry County Traffic Patterns by Hour and Day of the Week - 5 1/2 week period").

²⁶ *Id.* at 7.

²⁷ *Id.* at 11.

²⁸ *Id.* at 11-12.

²⁹ *Id.* at 13.

Although not persuaded that Henry's desired GOS is the controlling standard,³⁰ Sprint alleges that this standard can be preserved without temporarily expanding Henry's system.³¹ According to Sprint, Henry's data prove that, during certain late-night periods of more than three and one-half hours, Henry can maintain its desired GOS while operating on only four voice channels.³² Thus, Sprint argues, Henry's demand for swing channels rests solely on the "remote potential"—which Sprint's proposal addresses—that a disaster may strike during reconfiguration.³³ Sprint further explains that reconfiguration during late-night hours is not unusual and that both parties' proposals contemplate that work will be done at all six sites simultaneously.³⁴ Finally, Sprint argues that swing channels are unnecessary for coverage testing and that its mediation with St. Tammany's Parish is inapposite.³⁵

8. *Mediator's Recommendation.* The Mediator recommends finding that Henry is not entitled to a three-channel temporary build-out prior to reconfiguration of its infrastructure.³⁶ The Mediator found that Henry failed to establish that swing channels are necessary to preserve an acceptable grade of service throughout reconfiguration and that, ultimately, Henry failed to demonstrate that the costs it proposes are the "minimum necessary" to accomplish rebanding in a timely and efficient manner.³⁷

III. DISCUSSION

A. Standard of Review

9. The Commission's orders in this docket assign Henry the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use."³⁸ We note that the Commission has clarified this standard for purposes of determining whether licensee relocation costs are the "minimum necessary" to accomplish rebanding, and therefore must be paid by Sprint.³⁹ In the *Rebanding Cost Clarification Order*, the Commission stated that the term "minimum necessary" cost does not mean the absolute lowest cost under any circumstances, but the "minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner."⁴⁰ This standard takes into account not only cost, but all of the objectives of the proceeding, including completing the rebanding process in a timely and efficient manner, minimizing the

³⁰ See Sprint PRM at 8 ("From Nextel's vantage point, it is not obvious that a 1% 'blocking rate' is an 'industry standard' for a radio system such as [Henry's].").

³¹ *Id.* at 13.

³² *Id.*

³³ *Id.* at 5-6. In particular, Sprint offered to provide "standby" combiners and repeaters for "the very unlikely instance that a failure occurred." *Id.* at 6.

³⁴ *Id.* at 14.

³⁵ *Id.* at 14-16.

³⁶ RR at 17.

³⁷ *Id.* at 16.

³⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71.

³⁹ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818 (2007) (*Rebanding Cost Clarification Order*).

⁴⁰ *Id.* at 9820 ¶ 6.

burden that rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety's ability to operate during the transition.⁴¹

10. Under the *800 MHz Report and Order*, licensees are entitled to “continuity of service” during the retuning of their systems.⁴² We recently explained in *Houston*⁴³ that “[t]his standard requires Sprint to take necessary and reasonable steps to protect licensees from disruption of service during the transition, and to take swift remedial action if any disruption occurs.”⁴⁴ In that case, we also found that “the mere assertion of increased risk does not demonstrate . . . that continuity of service cannot be ensured by less expensive means [than those the licensee proposes].”⁴⁵

11. Our review of costs is also influenced by our experience in reviewing the costs incurred by other similarly-situated 800 MHz licensees in the planning process. In this regard, we have the benefit of data from the TA, *i.e.*, cost metrics from approved FRAs for systems of varying size and complexity. We use the metrics to derive presumptively reasonable amounts for the services and equipment necessary for a given reconfiguration. Depending, however, on facts that the parties have established in the mediation record, we will deviate from the metrics, when appropriate, to raise or reduce particular cost items.

B. “Minimum Necessary” Costs

12. To place this matter into perspective, we note that, (1) even under Henry's “worst case” conditions, reducing its channel capacity to four channels for a relatively brief period could result in a user encountering a few-second delay in gaining access to a channel; and that (2) avoiding that worst case, few-second delay by installing temporary swing channels would cost over a half-million dollars.⁴⁶ We thus agree with the Mediator that Henry has not met its burden of proving that its proposed reconfiguration costs are the “minimum necessary.”⁴⁷ Moreover, we find that, based on Henry's own traffic statistics, its worst case scenario is unlikely to occur.

13. Henry's own analysis shows that, for periods in which 872 or fewer calls are made, Henry can maintain its desired GOS with only four voice channels in operation.⁴⁸ Henry's traffic statistics show that fewer than 872 calls per hour were logged on any day of the week from 3:00 A.M. to 6:00 A.M.⁴⁹ On days of the week other than Wednesdays and Thursdays, however, fewer than 872 calls were logged from 1:00 A.M. to 6:00 A.M.⁵⁰ This five-hour interval would be ample time to perform retuning tasks that Sprint estimates will take only three and one-half hours—during which, Henry will

⁴¹ *Id.* at ¶ 8.

⁴² *800 MHz Report and Order*, 19 FCC Rcd at 14986, 15048 ¶¶ 26, 148.

⁴³ *City of Houston, Texas, WT Docket 02-55, Memorandum Opinion and Order*, DA 09-852 (PSHSB 2009) (*Houston*).

⁴⁴ *Id.* at ¶ 17.

⁴⁵ *Id.* at ¶ 18.

⁴⁶ RR at 9.

⁴⁷ *See supra* ¶ 9.

⁴⁸ Henry PRM at Ex. 5.

⁴⁹ *Id.* at Ex. 2.

⁵⁰ Sprint PRM at 13 (citing Henry PRM at Ex. 2).

still have full use of four voice channels.⁵¹ Therefore, assuming, *arguendo*, that Henry requires the GOS it claims, that GOS may be preserved by scheduling reconfiguration at a suitable day and time.

14. Henry also argues that Sprint's proposal "would provide no safety margin" for complications that may arise during rebanding.⁵² A channel failure or major incident, Henry insists, would leave it with "considerably reduced capacity" and a GOS far below its desired grade.⁵³ Yet, the risks Henry identifies are not unique to reconfiguration. Repeaters sometimes fail in the normal course of day-to-day operation or are taken out of service for routine maintenance without the cataclysmic results that Henry projects. Moreover, Sprint offered to provide Henry with "stand-by" combiners and repeaters that could be placed into service if an unforeseen equipment failure occurs during reconfiguration.⁵⁴ We agree with Sprint that "the 800 MHz reconfiguration and retuning process is not governed by worst-case contingencies"⁵⁵ and also find that a "mere assertion of increased risk"⁵⁶ that users could encounter a few-second delay in channel access does not justify the magnitude of costs that Henry's proposal contemplates. Because we find that Sprint has taken "necessary and reasonable steps" to protect Henry's system from disruption, we find that Henry's proposed temporary build-out is unnecessary to preserve "continuity of service" during reconfiguration of its system.⁵⁷

15. We also find that Sprint's proposal to reconfigure Henry's infrastructure "in the middle of the night" and at all sites simultaneously is consistent with the Commission's goals of imposing minimum disruption on 800 MHz licensees and completing rebanding in a timely and efficient manner.⁵⁸ Sprint's proposal that reconfiguration be accomplished in off-peak hours minimizes the consequences of any unforeseen complications that may arise during retuning.⁵⁹ Henry's proposal to retune during busier periods, on the other hand, appears inconsistent with its desire to eliminate any risk of disruption to its operations. In addition, performing work at each site simultaneously would shorten the period during which Henry must operate at reduced GOS and would promote the timely and efficient retuning of Henry's infrastructure.

16. We also find that Henry has not adequately explained why temporary channels are required for coverage testing of its system. In particular, we question the relevance of temporary channels to a process that typically occurs prior to or after reconfiguration. At any rate, Henry has failed to establish that the advantages of its approach to coverage testing justify the substantial costs associated with its swing channels proposal.

17. We also agree with the Mediator that previous mediations cited by the parties are not dispositive of this matter. As the Mediator explained, "each mediation is uniquely affected by the specific facts and circumstances involved."⁶⁰ Although the St. Tammany's Parish mediation that Henry cites may

⁵¹ *Id.* at 11.

⁵² Henry PRM at 7.

⁵³ *Id.* at 9.

⁵⁴ Sprint PRM at 6.

⁵⁵ *Id.* at 7.

⁵⁶ *See supra* ¶ 10.

⁵⁷ *See id.*

⁵⁸ *See supra* ¶ 9.

⁵⁹ Sprint SOP at 9.

⁶⁰ RR at 17.

be factually similar to its own, the burden rests on Henry to establish that its proposed costs are the “minimum necessary” for rebanding. In any event, while resolution of similar issues reached in other mediations may be instructive, we note that the St. Tammany’s Parish mediation was not referred to the Bureau, and we ultimately are not bound by the case because the facts and circumstances of other mediations vary and are not part of the record in this case. Moreover, in this case, analysis of Henry’s own data—which support Sprint’s position—outweighs consideration of the facts of any prior mediation.

18. Finally, we address Henry’s contention that “mandating a rebanding methodology by the FCC would certainly be new territory.”⁶¹ Herein, we do not mandate that Henry adopt any particular rebanding methodology. We find only that Henry has failed to provide record support for its claim that swing channels are necessary to reconfigure Henry’s system at the “minimum necessary” cost consistent with providing Henry with “continuity of service” while its system is reconfigured.⁶²

IV. ORDERING CLAUSES

19. 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.

FEDERAL COMMUNICATIONS COMMISSION

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⁶¹ Henry SOP at 7.

⁶² See *supra* ¶¶ 9-10.