

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

In the Matter of)	
)	
Illinois Public Safety Agency Network)	WT Docket No. 02-55
and)	
Nextel Communications, Inc.)	
)	
Mediation No. TAM-12389)	

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2011

Released: March 23, 2011

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 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the Illinois Public Safety Agency Network (IPSAN) and Sprint Nextel Corporation (Sprint) (collectively, Parties).¹ As discussed below, the dispute involves a single issue – whether a “second touch”² to IPSAN’s mobile data radios is needed in order to provide IPSAN with comparable facilities.³ Based on our *de novo* review of the mediation record, the Recommended Resolution submitted by the TA-appointed mediator (TA Mediator or Mediator) in this case, and the Parties’ position statements,⁴ we find the second touch unnecessary.

II. BACKGROUND

2. 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.⁵ The FRA must provide for relocation of the licensee’s system to its new channel assignment(s) at Sprint’s expense, including the expense of retuning or replacing the licensee’s equipment as required.⁶ Sprint

¹ See Recommended Resolution filed by the TA Mediator, May 21, 2010 (RR).

² In industry usage, a “touch” refers to the modification of a mobile or portable radio as part of the rebanding process, typically through installation of software to change the radio’s channel configuration. With few exceptions, 800 MHz radios require at least one “touch” in order to be capable of operating on their new channel assignments under the revised 800 MHz band plan.

³ RR at 3.

⁴ Statement of Position of Illinois Public Safety Agency Network, June 7, 2010 (IPSAN SOP); Statement of Position of Sprint Nextel Corp., June 7, 2010 (Sprint SOP).

⁵ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) (*800 MHz R&O*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007).

⁶ *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

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 relocation process.⁷ If the parties cannot reach agreement on a FRA, the case is referred to mediation and issues that cannot be resolved in mediation are referred to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.⁸ The Parties have been unable to resolve their dispute relating to the second touch issue, requiring that we resolve this issue *de novo*.

A. Issue in Dispute

3. IPSAN is licensed under call signs WPKG583, WPKX703, WPKP764, WPSP557, WPXM784, and WPHY365. Its data-only Illinois statewide network has 37 sites, 23 of which must be rebanded.⁹ More than 290 Illinois public safety agencies use approximately 4000 mobile data radios on the network.¹⁰

4. The Parties have agreed to reconfigure IPSAN’s data-only network by retuning IPSAN’s infrastructure and adding the post-rebanding frequencies, assigned by the TA, to each of IPSAN’s mobile data radios.¹¹ The mobile data radios therefore will operate on both the pre-rebanding and post-rebanding frequencies while IPSAN’s 23 base stations are rebanded.¹²

5. IPSAN, however, submits that, on completion of rebanding, the mobile data radios should be given a “second touch” to remove the pre-rebanding frequencies. It argues that, unless these frequencies are removed, the mobile data radios occasionally will encounter additional scan delay time whenever they must execute a “static list scan,”¹³ because they will be scanning both the unused pre-rebanding frequencies and the post-rebanding frequencies.¹⁴

6. Sprint argues that a second touch of the subscriber units is not needed to provide IPSAN with comparable facilities.¹⁵ It contends that any additional delay in static list scan time would be brief (relative to the current scan time delay) and that the mobile data radios execute a static list scan only infrequently.¹⁶ Sprint also submits that IPSAN’s proposed costs for a second touch are excessive.¹⁷

⁷ *Id.* at 14986 ¶ 26.

⁸ *Id.* at 15077 ¶ 201.

⁹ RR at 1.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 3-4.

¹³ When the mobile data radio is first turned on, and any time thereafter if the mobile data radio loses a signal, *e.g.*, if a data radio equipped vehicle drives through a tunnel, the radio first scans a “dynamic scan list” – a list of all nearby system stations – and “locks on” to the strongest (or most error-free) data signal. If the dynamic scan list is not present, or no station is identified, the radio executes a “static list scan” of all of the system frequencies. The static scan time is approximately 0.5 seconds per frequency for Multi Frequency Reuse base stations. *Id.* at 8.

¹⁴ *Id.* at 4.

¹⁵ Sprint Nextel Corp., Proposed Resolution Memorandum at 11, April 23, 2010 (Sprint PRM).

¹⁶ Sprint PRM at 11.

7. Negotiation, and subsequent mediation were unsuccessful because the parties could not agree on whether a second touch was necessary and, if so, the cost of the second touch. Accordingly, the TA Mediator referred the matter to the Bureau for *de novo* review and resolution, submitting the record in the case as well as a Recommended Resolution.¹⁸ IPSAN and Sprint separately filed Statements of Position.¹⁹

B. Parties' Positions

8. Under the Commission's orders in this proceeding, Sprint bears the burden of proving that IPSAN's mobile data radios are "comparable,"²⁰ post-reconfiguration, within the meaning of the *800 MHz R&O*.²¹ IPSAN bears the burden of proving that the funding it has requested for relocation is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use."²²

9. Sprint's Position. Sprint claims that the facts "do not support the assertion that there would be any material degradation in radio data modem performance if the pre-rebanding frequencies are not removed during a second touch."²³ It points out that "[t]he current potential frequency scan time for the data modems prior to rebanding is more than 40 seconds."²⁴ Although Sprint concedes that "there may be a *potential* six second increase in scan time for the data modems," it argues that "this additional time is not material, as it will not be noticed by end users."²⁵ In sum, Sprint's position is that, (a) the need for the mobile data radio to execute a static list scan is infrequent,²⁶ (b) the time required for a static list scan is unpredictable and has always been variable,²⁷ and (c) when the mobile data radio executes a static list scan with the pre-rebanding frequencies retained, the average additional delay would only be a few seconds.²⁸

(...continued from previous page)

¹⁷ Sprint PRM at 17. The Parties have agreed to a total cost of \$1,261,756.50 for all aspects of the reconfiguration, except for the second touch. RR at 4. IPSAN has requested an additional \$1,033,480.70 for the second touch. *Id.*

¹⁸ *See supra* n.1.

¹⁹ *See supra* n.4.

²⁰ Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. 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) operating costs. *800 MHz R&O*, 19 FCC Rcd at 15077 ¶ 201.

²¹ *See* Wireless Telecommunications Bureau Announces Procedures for *De Novo* Review in the 800 MHz Public Safety Proceeding, WT Docket 02-55, *Public Notice*, 21 FCC Rcd 758 (WTB 2006).

²² *Id.*

²³ Sprint PRM at 15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The additional scan delay time, Sprint argues, “should also be weighed along with the proposed costs for a second touch of IPSAN’s radio data modems – the second touch costs are estimated at \$1.033 million, which is approximately 45% of IPSAN’s total proposed rebanding costs of \$2.295 million.”²⁹

10. IPSAN’s Position. IPSAN submits that there are several reasons for not retaining the pre-rebanding channels in the mobile data radios. It states that “rebanding will require that 12 additional MFR³⁰ channels be loaded into each end unit,”³¹ and that “[a]t an agreed scan time of 0.5 seconds per channel, the parties agree that the scan time could be increased by up to six seconds.”³² IPSAN submits that “[a]lthough it has been noted that the units will first scan the Dynamic List,³³ the fact is that the Dynamic List will also be adversely affected by rebanding.”³⁴ IPSAN explains that “[t]his is because the Network Controller Configuration, which is the source of the Dynamic List, will be touched only once following rebanding.”³⁵ Thus, IPSAN argues, “as base station frequencies are cut over, the mobiles will be directed via the RNC³⁶ to channels that are no longer operating on the system.”³⁷ The effect, IPSAN argues “will be that the mobile units will go from a Dynamic List scan to a Static List scan and experience the six second delay with greater frequency as the rebanding occurs.”³⁸ Further, IPSAN contends that “[e]ven with the possible reduction in the adverse effect on scan time due to Dynamic Lists’ shorter scan time . . . the units do not always employ the Dynamic List.”³⁹ “When units are first booted up they can go through a long scan (depending on [the] condition of [the] Keep Alive Battery), thereby, assuring the adverse affect (sic) of up to the entire six seconds caused by the addition of channels.”⁴⁰ Additionally, IPSAN submits “if the MFR unit loses its signal and following two Dynamic List scans, it will go into long scan mode, creating the risk of an additional six second delay.”⁴¹ It also argues that “[s]tatic nulls,

²⁹ *Id.* at 1-2.

³⁰ Some areas are provided coverage by “multi frequency reuse” (MFR) base stations in which multiple frequencies are utilized at several sites that are constantly transmitting. In “single frequency reuse” (SFR) operations, all base stations operate on a single, common frequency throughout an area. SFR system sites do not transmit constantly; they are activated only as system activity requires.

³¹ Illinois Public Safety Agency Network Proposed Resolution Memorandum at 9, April 23, 2010 (IPSAN PRM).

³² *Id.*

³³ The Dynamic Scan List contains only the frequencies of nearby stations and therefore is shorter, and requires less time to scan, than the Static Scan List which contains all frequencies in the system. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ The Radio Network Controller (RNC) manages the routing of data messages between the office or host computer and mobile data terminals.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 10.

⁴⁰ *Id.* Note, however, that if the Keep Alive Battery is in good condition, the mobile data radio will first scan the dynamic scan list and will revert to the static scan list only if the dynamic scan list scan is unsuccessful. *Id.* at 13.

⁴¹ *Id.* at 10.

shadowing, and blockage can, therefore, easily remove the benefit of the Dynamic List, making the six second delay an immediate reality.”⁴²

11. IPSAN contends that “contrary to Sprint Nextel’s unsupported assertion that any delay in scan time ‘will go unnoticed by the end user,’ the fact is that such delays are quite noticeable and potentially deadly.”⁴³ It states that “[a] law enforcement officer’s job is akin to getting and making several 9-1-1 calls every day [and if] even one is unnecessarily delayed, that is too much.”⁴⁴ It alleges that “its end users routinely call in delays of greater than 2 seconds if there is a delay after hitting the Emergency Function.”⁴⁵ IPSAN states that “[s]ince the incidents described happen thousands of times a day to the IPSAN end users, the degradation of the mobile units by adding the six second delay is hardly immaterial to the efficient operation of mobile units.”⁴⁶ “To the contrary,” IPSAN states, “the threat is material, serious and avoidable.”⁴⁷

12. Sprint initially asked whether the scan list delay could be minimized by prioritizing the channels in the Static Scan List (using other than the present MFR first, SFR second, configuration). IPSAN responded that the mobile data radios could not be reconfigured to remove the random scanning function or to prioritize channels in the suggested manner. IPSAN confirmed this with Motorola.⁴⁸ However, in response to a subsequent TA Mediator query asking whether IPSAN’s mobile data radios were capable of prioritizing MFR channels during a scan of the Static List, IPSAN submitted a statement from Motorola acknowledging that its radios are technically capable of prioritizing channels.⁴⁹ Even so, IPSAN asserts, “[b]y giving the replacement channels a higher priority than the existing channels, the scan time following the first touch, and prior to the fixed network rebanding, would be such that the six second delay would be present, constant and recognizable by each and every unit. The suggested methodology would assure a lack of transparency during rebanding and would be more greatly injurious to access time for some months.”⁵⁰

13. IPSAN contends that it is impractical to remove the pre-rebanding channels during some future maintenance schedule.⁵¹ It argues that its “system serves hundreds of independent agencies throughout the State and maintenance schedules are neither certain nor regular.”⁵² Therefore, IPSAN contends that “if one relied on some future maintenance event the amount of time would vary greatly as to

⁴² *Id.*

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ IPSAN Sur Reply at 2.

⁵⁰ IPSAN SOP at 8.

⁵¹ IPSAN PRM at 17.

⁵² *Id.*

the duration that the mobile units would be adversely affected.”⁵³ Therefore, IPSAN argues, “[b]y assuring the removal of the channels under the FRA, the threat to the public safety officers and their effectiveness is made certain, which is the very essence of justification for including the second touch under the terms of the FRA.”⁵⁴

14. IPSAN also argues that its position is supported by Commission precedent.⁵⁵ It observes that the Commission has stated that “[c]omparable facilities are those that will provide the same level of service as the incumbent’s existing facilities”⁵⁶ IPSAN notes that “Sprint bears the burden of proving that ... relocated facilities are ‘comparable’ on their new channel assignment.”⁵⁷ IPSAN also cites an order in which the Commission “emphasize[d] that ‘comparable facilities’ requires Sprint to provide [licensees] with a system that is comparable in fact, not merely in theory . . . if testing reveals any deficiencies in the reconfigured system, Sprint must remedy them.”⁵⁸

15. IPSAN also challenges Sprint’s reliance on the Bureau’s *City of Boston* decision, arguing that, in that case, the retention of pre-rebanding frequencies in the licensee’s trunked network was undetectable by end users.⁵⁹ Although IPSAN recognizes that the Bureau’s *City of Boston* decision stated that the need for a second touch must be demonstrated by the incumbent licensee, it contends that

the Boston Order did not alter the Commission’s Orders that required that the rebanding process must be as transparent to the end user as possible. Based on that standard and the practice of providing a second touch to data units which Sprint Nextel has agreed to in a number of instances [footnote omitted] when delayed operation would affect public safety communications, IPSAN’s proposed second touch qualifies for inclusion in this rebanding and the cost of performing that second touch are recoverable.⁶⁰

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 6-7.

⁵⁶ *Id.* at 7 citing *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201; State of Maryland, WT Docket 02-55, *Memorandum Opinion and Order*, 21 FCC Rcd 11939, 11943 ¶ 10 (PSSB 2006) (*Maryland Order*); Montgomery County, Maryland, *Memorandum Opinion and Order*, 21 FCC Rcd 13086, 13098 ¶ 48 (PSSB 2006).

⁵⁷ IPSAN PRM at 7 citing *Maryland Order*, 21 FCC Rcd at 11943 ¶ 10, citing, *800 MHz Report and Order*, 19 FCC Rcd at 15064 at ¶ 178; see also, Manassas City, Virginia, Public Schools, WT Docket 02-55, *Memorandum Opinion and Order*, 21 FCC Rcd 11930, 11933 at ¶ 5 (PSSB 2006).

⁵⁸ IPSAN PRM at 7 citing *City of Overland Park*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 19984, 19988 ¶ 11 (PSSB 2007) (*Overland Park Order*) (emphasis added by IPSAN). The quoted statement was made in the context of whether M/A Com MASTR III repeaters could successfully be collocated with MASTR II repeaters.

⁵⁹ IPSAN PRM at 7 citing *City of Boston Massachusetts*, WT Docket 02-55, *Memorandum Opinion and Order*, 21 FCC Rcd 14661 (PSSB 2006) (*Boston MO&O*).

⁶⁰ IPSAN PRM at 7-8.

IPSAN also notes that, in the City of Boston FRA, Sprint ultimately agreed to a second touch of the licensee's radios and that in a mediation involving the City of Chicago, Sprint also agreed to a second touch of that licensee's radios.⁶¹

16. TA Mediator Recommendation. The TA Mediator concludes that requiring Sprint to pay for a "second touch" of IPSAN's mobile data radios is unnecessary and recommends that the Commission direct the Parties to enter into an FRA that reflects the reconfiguration costs for IPSAN's 800 MHz data radio system minus the estimated \$1.033 million cost for a second touch to the mobile data radios.⁶² The TA Mediator bases his recommendation on the observation that the "worst case" additional scan time delay, with the pre-rebanding frequencies retained in the mobile data radios, will be six seconds, and that most delays incurred will be significantly less than six seconds. Moreover, the TA Mediator finds that certain modifications to the programming of the mobile data radios could eliminate the additional delay in many instances. The TA Mediator also notes that his recommendations were affected by the following perceived inconsistencies in IPSAN's PRM.⁶³

17. First, the TA Mediator notes that IPSAN claims its users are intolerant of delays as short as two seconds, yet IPSAN asserts that its users accept "thousands" of delays when the mobile data radio must resort to its static list. If both are true, the TA Mediator points out, either "the network's users are unaware that these frequent delays are occurring," or "the delays are not occurring very frequently."⁶⁴ Even if retaining the pre-rebanding frequencies in the mobile data radios would increase the delay duration by up to six seconds (oftentimes less), the TA Mediator concludes that the additional time arguably would be "transparent" to the end user.⁶⁵

18. Second, because the network is a data-only system where all transmitted messages must be keyed in, the TA Mediator finds that IPSAN's analogy of waiting an extra six seconds on a 9-1-1 call seems "misplaced."⁶⁶

19. Third, although IPSAN claims the scanning delay could have "potentially deadly" consequences, the TA Mediator notes that IPSAN makes no mention of any efforts it has made to reduce already existing static list scan delays.⁶⁷ The "apparent disregard" for current delays, the TA Mediator states, leads to the question of whether an increase in delays would have a "detrimental, or even noticeable, impact" on network operations.⁶⁸

20. Fourth, the TA Mediator observes that IPSAN has acknowledged, "after repeated statements to the contrary," that all or most of its radios are technically capable of prioritizing the different frequencies, a capability that could be used to reduce the average post-rebanding scan time – *i.e.* by

⁶¹ IPSAN SOP at 15.

⁶² RR at 19.

⁶³ *Id.* at 17.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

designating the post-rebanding frequencies as “high” priority and the pre-rebanding frequencies as “normal” priority.⁶⁹ Mobile data radios would thus scan through the “high” priority frequencies first before scanning through the “normal” frequencies, thereby minimizing the average scan duration.⁷⁰

21. Fifth, even if the possibility of using additional prioritization is not achievable, the TA Mediator still believes that the occasional addition of up to six seconds in the scan delay will not prevent IPSAN’s reconfigured network from being “comparable” to the pre-rebanded network from the perspective of end users.⁷¹

III. DISCUSSION.

22. We agree with the TA Mediator that avoiding the need for a second touch by retaining the pre-rebanding frequencies in the mobile data radios would provide IPSAN with comparable facilities. IPSAN has failed to meet its burden of showing that its more than \$1 million proposal for adding a second touch is the minimum necessary cost to provide it with comparable facilities.

23. Sprint, however, has met its burden of proof that IPSAN and its user agencies will not lose comparable functionality of their mobile data radios if the pre-rebanding frequencies remain in the radios, *i.e.*, that, even with the pre-rebanding frequencies retained, the mobile data radios will be “technically and operationally comparable to the licensee’s existing radios.”⁷²

24. Our decision to disallow the cost of a second touch is based on the following factors: First, the added delay of concern to IPSAN would occur only infrequently. The mobile data radios revert to the static scan list only when a scan of the dynamic scan list is unsuccessful. Although IPSAN alleges that this occurs “thousands” of times during the day,⁷³ the record lacks any documentation of IPSAN’s allegation. Assuming, *arguendo*, that the allegation has a basis in fact; it suggests only that delay is currently well tolerated by users of IPSAN’s system. Second, if the pre-rebanding frequencies remain in the mobile data radios, the “worst case” additional delay when the static scan list is accessed is a maximum of six seconds. The average delay will be less. Third, in the system as it exists today, IPSAN tolerates delays of up to 38 seconds when the mobile data radios revert to the static scan list. This delay apparently has not occurred with sufficient frequency or been sufficiently lengthy to compromise safety. Fourth, IPSAN’s system is used solely for data transmission in which, compared to a voice system, information is not conveyed in “real time,” *e.g.*, the user must first key the information into the mobile data radio terminal before it is transmitted, whereas in a voice system the information is conveyed virtually instantaneously. Therefore, if faced with the need to convey urgent information, the user is unlikely to rely on the mobile data radio and would employ a voice radio instead. IPSAN’s analogizing its system to a 9-1-1 voice system is, therefore, unconvincing. Fifth, IPSAN’s citation to cases in which the Bureau approved a second touch to voice radios is unavailing. With voice radios, the pre-rebanding frequencies remain available to the user who selects frequencies manually and could, inadvertently, activate an unauthorized pre-rebanding frequency. With IPSAN’s data system, however, the selection of

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 19.

⁷² In the *800 MHz Report and Order*, the Commission stated that the comparable facilities standard entitles the relocating licensee to receive a “system with comparable technological and operational capability.” See *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

⁷³ IPSAN PRM at 10.

frequencies is user-independent – once rebanding is complete, the mobile data radios will no longer be capable of transmitting on pre-rebanding frequencies. Sixth, when establishing a standard for licensees' entitlement to post-rebanding facilities the Commission advisedly used the term “comparable,” not “identical,” thus allowing for, *e.g.*, *de minimis* differences between pre- and post-rebanding facilities. Considering that a maximum six second delay will occur only in the relatively infrequent instances in which IPSAN's mobile data radios access their static scan list, and that such an additional delay would likely be transparent to users – given the 38 second maximum delay already inherent in the existing system – IPSAN's post-rebanding system will be comparable to its pre-rebanding system without the need for a second touch to IPSAN's mobile data radios.

25. In general, rebanding does not require a second touch to remove pre-rebanding frequencies, even in the case of voice radios. The Bureau, however, has stated that licensees are free to argue that removal of pre-rebanding channels is necessary and, therefore, should be a recoverable expense. The Bureau emphasized, however, “that in each case, the licensee must present a reasonable factual basis for the recovery of such costs.”⁷⁴ It stated that, “for such costs to be recoverable, the licensee should be able to demonstrate a factual nexus between the need to remove the old channels and compliance with the ‘comparable facilities’ standard, [footnote omitted] *i.e.*, the licensee should be able to demonstrate that without removal of the old channels, operation on the new channels is likely to be compromised or degraded in comparison to the licensee's pre-rebanding operation.”⁷⁵ The Bureau further stated that “[t]he licensee may be able to meet this standard based on the technical configuration of its particular system, or on factors such as the likelihood of operator error.”⁷⁶ Ultimately, the Bureau concluded, “the determination of recoverable costs will be made based on the facts of each individual case in accordance with the standards established by the Commission's orders in this proceeding.”⁷⁷

26. Applying this guidance, we find that IPSAN has not met its burden of showing that a second touch to its mobile data radios is reasonable, prudent, and the “minimum necessary to provide facilities comparable to those presently in use.”⁷⁸ All that IPSAN has succeeded in showing is that there will be a difference – 38 seconds *vs.* 44 seconds – in the “worst case” delay that is occasionally encountered if a mobile data radio scan of the dynamic channel list is unsuccessful and the static scan list must be accessed. What IPSAN has not demonstrated, however, is that the occasional six second delay would have a practical consequence in terms of the utility, comparability and safety of IPSAN's system. Its analogy to a six second delay in a voice call to 9-1-1 is faulty, as discussed earlier. It has not shown – by example or otherwise – how a system with an inherent, occasional “worst case” 38 second delay is safe and acceptable while a system with an occasional “worst case” delay of 44 seconds is not. In the situation here – a data-only system in which delays of up to 38 seconds already are tolerated – we find an occasional additional six second delay to be *de minimis* and that IPSAN has been unable “to demonstrate a factual nexus between the need to remove the old channels and compliance with the ‘comparable

⁷⁴ City of Boston Massachusetts, WT Docket 02-55, *Order*, 22 FCC Rcd 2361, 2366 ¶ 12 (PSHSB 2007) (*Boston Order*).

⁷⁵ *Id.*

⁷⁶ *Id.* The Bureau noted, however, that if the licensee seeks recovery of expenses for removal of old channels from radios solely to avoid the risk of operator error, it will face a particularly high burden of justification, *i.e.*, it should be able to show that the risk of error cannot be adequately addressed through training or ordinary maintenance of the system.” *Id.* at n.31.

⁷⁷ *Id.* at 2366 ¶ 12.

⁷⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71 (2004).

facilities' standard." Moreover, we agree with the TA Mediator that the fact that IPSAN's users currently accept delays of up to 38 seconds forces the conclusion that either (1) the network's users are unaware that these frequent delays are occurring, or (2) the delays are not occurring very frequently.⁷⁹ In either case, we believe that an occasional additional six second – or less – delay would be essentially transparent to the user.

27. Our conclusion in that regard is bolstered by the fact that IPSAN has foregone a minor modification to its system that would decrease the occasional additional scan time delay. Specifically, IPSAN noted in its PRM that "the Network Controller Configuration, which is the source of the Dynamic List, will be touched only once following rebanding."⁸⁰ As a consequence, post-rebanding, the mobile data radios will be "directed ... to channels that are no longer operating on the system. The effect will be that the mobile units will go from a Dynamic List to a Static List and experience the six second delay with greater frequency as the rebanding occurs."⁸¹ A second touch to the Network Controller Configuration, however, would eliminate the Dynamic List being populated with unused channels. Rather than implement this second touch to the Network Controller Configuration – which IPSAN concedes would minimize the scan time – it elected to forego the second touch as a "concession" to Sprint Nextel.⁸² We are unable to reconcile IPSAN's willingness to forego this second touch to the Network Controller Configuration – with a concomitant reduction in scan delay time – with IPSAN's protestations that any scan delay in its system is "material, serious and avoidable."⁸³

28. We are not persuaded by IPSAN's argument that Sprint should pay for a second touch to IPSAN's radios because Sprint agreed to a second touch in the City of Boston FRA and in the City of Chicago mediation.⁸⁴ With respect to the Chicago mediation, we note that, while resolution of similar issues reached in other mediations may be instructive, the City of Chicago mediation was not referred to the Bureau, and we ultimately are not bound by that mediation because the facts and circumstances of other mediations vary and are not part of the record in this case.⁸⁵ As to the Boston proceeding, we note that the *Boston Memorandum Opinion and Order* held that the licensee had not justified the need for a second touch to its radios.⁸⁶ If, as IPSAN claims, Sprint later agreed to a second touch to Boston's radios, that was a matter between the licensee and Sprint. The facts and circumstances under which Sprint may have agreed to the second touch are not part of this record and the provisions of the Boston FRA are, therefore, neither relevant here nor binding precedent.

29. Following the release of the *Boston Memorandum Opinion and Order*, several licensees filed a petition for reconsideration. In a responsive *Order*, the Bureau addressed the second touch issue more generally stating, with respect to the *Boston Memorandum Opinion and Order*, that "its essential

⁷⁹ RR at 17.

⁸⁰ IPSAN PRM at 9.

⁸¹ *Id.*

⁸² *Id.* n.8.

⁸³ *Id.* at 10.

⁸⁴ IPSAN SOP at 15-16.

⁸⁵ See City of High Point, North Carolina, and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 3918, 3924 ¶16 (PSHSB 2008).

⁸⁶ *Boston MO&O*, 14661, 14666 ¶20.

finding was that the Commission did not require multiple touches in all rebanding cases because it did not contemplate that removal of pre-rebanding channels was operationally necessary in all cases⁸⁷ and that the necessity of a second touch would be decided on a case-by-case basis as we have done here. Further, that *Order* noted that the *Boston Memorandum Opinion and Order* identified an alternative to requiring a second touch – the removal of the pre-rebanding frequencies from the subscriber units during future maintenance on radios – an alternative that IPSAN fails to adequately address, other than to claim that “maintenance schedules are neither certain nor regular.”⁸⁸

30. Finally, we reject Sprint’s allegation that IPSAN exhibited bad faith in declining to provide Sprint with information necessary to determine whether the SFR base stations in IPSAN’s system could be converted to MFR stations, thereby minimizing the scan delay when the mobile data radios must access the static scan list.⁸⁹ As IPSAN points out, such a conversion would require additional frequencies in the system and Sprint did not demonstrate that additional frequencies are available.⁹⁰ We also reject IPSAN’s accusation that the TA Mediator exhibited bias in his conduct of the mediation and in his Recommended Resolution.⁹¹ We have examined the record carefully and conclude that the TA Mediator fairly considered all of IPSAN’s factual allegations and legal arguments, despite their often being inconsistent and contradictory. The TA Mediator’s Recommended Resolution is well-reasoned and grounded in the record. Accusing the TA Mediator of bias was uncalled for.

IV. CONCLUSION

31. In sum, we agree with the TA Mediator that Sprint has met its burden of proof to show that the mobile data radios, with the pre-rebanding frequencies retained, will provide IPSAN with facilities comparable to those that IPSAN had, pre-rebanding. IPSAN, however, has not met its burden of showing that its proposal represents the minimum reasonable cost of rebanding its system. IPSAN has misread the Commission’s orders respecting comparable facilities and has pointed to insubstantial differences pre- and post- rebanding in an attempt to extract an additional \$1,033,430.70 payment from Sprint. We emphasize that our holding here, relative to IPSAN’s data-only system, is specific to the parties in this proceeding, and does not preclude licensees in other cases from asserting that two (or more) touches are operationally necessary for rebanding their particular systems, or from providing for multiple touches in their rebanding agreements with Sprint.

V. ORDERING CLAUSES

32. 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,

⁸⁷ *Boston Order*, 22 FCC Rcd at 2367 ¶7. (The Petition for Reconsideration was dismissed because petitioners lacked standing, but was considered by the Bureau as an informal request for Commission action pursuant to 47 C.F.R. § 1.41.)

⁸⁸ IPSAN PRM at 17. We assume, however, if IPSAN’s system is as critical to public safety as it claims, there must be some provision for preventive maintenance of the mobile data radios.

⁸⁹ SPRINT SOP at 15-17.

⁹⁰ IPSAN SOP at 2-3.

⁹¹ IPSAN argues that the TA Mediator’s RR: (1) “echoed Nextel’s position to a tee (sic),” and held an “unfortunate bias against IPSAN”; (2) ignored Commission’s rules or relevant decisions and other rebanding deals; (3) “ignored” IPSAN’s Sur-Reply; (4) “improperly reversed the burden of proof”; and (5) produced an “inaccurately pejorative recitation of IPSAN’s negotiations.” IPSAN SOP at 2-11.

0.392, 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

33. IT IS FURTHER ORDERED, that the Transition Administrator SHALL CONVENE a meeting of the Parties, no later than 10 business days from the release date of this *Memorandum Opinion and Order* to conclude a Frequency Reconfiguration Agreement consistent herewith.

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

FEDERAL COMMUNICATIONS COMMISSION

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