

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

In the Matter of)
City of Overland Park, Kansas)
and)
Sprint Nextel Corporation)
WT Docket 02-55

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 2011

Released: April 26, 2011

By the Deputy Chief, Policy Division Public Safety and Homeland Security Bureau

By this Memorandum Opinion and Order we grant in part and deny in part, a Further Request for Waiver of the June 26, 2008 Deadline for Completion of Rebanding (Further Request) filed by the City of Overland Park, Kansas (City).

I. BACKGROUND

1. The City is licensee of 800 MHz public safety station, Call Sign WPC220. In its Further Request, the City asks that the rebanding completion date for its station be further extended until December 31, 2011. The Further Request notes that on March 14, 2011, the City filed a change notice request with Nextel Communications, Inc. (Nextel), whereby it would forego rebanding of its system and, receive a "cash-out of the reconfiguration funds under the FRA . . . to migrate to Johnson's County's Motorola Radio communications system."

2. Nextel declined the City's change order request. It points out that "[i]f the City had begun work promptly following execution of its FRA, reconfiguration would likely already be complete." It submits that the City's delaying reconfiguration for seven months after it signed its FRA "while the City contemplated a complete change of plans is prima facie unreasonable and impermissible." Nextel claims that it has already purchased equipment for reconfiguration of the City's existing system and that some of the equipment has been shipped to the City. Nextel also argues that the City's request is inconsistent with the Commission's change notice policy which is limited to "costs and other circumstances that could not be reasonably anticipated at the time of contract negotiations." It also

1 Further Request at 2.

2 Id. The City notes that it executed a Frequency Reconfiguration Agreement (FRA) with Sprint on Sept. 2, 2010. The FRA contemplated rebanding the City's existing 800 MHz system. Id.

3 Opposition to Further Request for Waiver, April 11, 2011, at 3 (Italics in original) (Opposition).

4 Opposition at 5.

5 Id. at 4 and n.4.

6 Reply at 2, citing Letter from Sprint Nextel to Overland Park, Kansas, March 22, 2011.

expresses doubt that the City's request would satisfy the 800 MHz Transition Administrator's (TA) upgrade criteria.⁷ Notwithstanding its opposition to the Further Request, Nextel offered a counterproposal to the City whereby it reduced the cash-out amount and rejected the cash-out of any equipment.⁸

3. In support of its need for an upgrade to Motorola equipment, the City claims that, after the FRA was signed, it encountered "serious technical problems" with its existing system, and approached its vendor, Harris, to quote a price for dual band radios so that the City could use the Johnson County system in the event of failure of its system.⁹ Subsequently, the City decided it would be more cost-effective to abandon the rebanding of its system and "operate under the Johnson County Motorola system and use Motorola equipment."¹⁰

4. The City disputes Nextel's claim that Nextel purchased Harris radios specifically for use in the City's system. Instead, the City believes that Nextel purchased a large number of Harris radios, in bulk, to be used in rebanding projects nationwide, and not specifically for use in the City's system.¹¹ The City speculates that Nextel has overstocked Harris radios because it did not "anticipate the TA upgrade rules and decisions by other licensees to elect to use the reconfiguration funds to upgrade or migrate to another system by another vendor."¹² The City thus submits that it should not be responsible for a business decision Nextel made before the FRA was executed.¹³

II. DISCUSSION

5. The City's proposal to migrate to the Johnson County system instead of rebanding its system is a system upgrade. Upgrade requests filed after parties have concluded an FRA create an inherent delay in the band reconfiguration process.¹⁴ Had the proposal been made earlier it likely would have substantially shortened the 4-year period leading up to the execution of the FRA during which the parties negotiated, mediated, and sought *de novo* review of disputed matters by the Public Safety and Homeland Security Bureau (Bureau).¹⁵

6. The City's inaction after it signed the FRA has introduced further delay. Rather than reband its system pursuant to the FRA, the City has done nothing for over seven months except pursue an upgrade. As Nextel points out, according to the rebanding schedule in the FRA, the City would have completed rebanding by now. For that reason alone – delay of the rebanding process – the City's request for a cash-out may be deemed unacceptable.

⁷ *Id.*

⁸ Reply at 2.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 6-7.

¹³ *Id.* at 7.

¹⁴ TA System Upgrade Fact Sheet, <http://www.800ta.org/content/resources/factsheets.asp>.

¹⁵ City of Overland Park, Kansas and Sprint Nextel, Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 19984 (PSHSB 2007).

7. From a policy standpoint, the Bureau gives heightened scrutiny to upgrade requests that arise after the parties have negotiated an FRA. The inherent delay, unnecessary commitment of resources, and expense of such post-FRA upgrades, should they become widespread, would significantly interfere with the timely completion of 800 MHz band reconfiguration, nationwide,

8. We have applied that heightened scrutiny to the Further Request, particularly to the City's claim that the initiating events for its change order request were "serious technical problems" of "systemic magnitude" that caused its "antiquated" Harris system to become unreliable after the City signed its FRA.¹⁶ The allegations are remarkably non-specific. For example, we do not know, specifically, what caused the system to become unreliable, when became unreliable, why the "technical problems" are systemic, whether the system has actually failed, or the efforts that the City has made to repair the systemic problems. This lack of specificity raises an ineluctable question: why did the City not proceed with rebanding between the time it signed its FRA and the unspecified time that its "antiquated" Harris system developed its "systemic" technical problems that, allegedly, triggered the need for an upgrade. In sum, there is insufficient information in the City's pleadings for us to ascertain whether the City's asserted need for an upgrade was foreseeable before it signed the FRA.¹⁷

9. We are not persuaded, however, by Nextel's claim that we should deny the Further Request because Harris has begun shipping radios to the City and has provided some infrastructure equipment.¹⁸ The City is correct in its belief that Nextel has an agreement with Harris to furnish radios. The radios and infrastructure equipment designated for use by the City, however, would not go unused if the City converted to Motorola radios. Rebanding is not yet complete in the Canadian border area and has not begun in the Mexican border area. In addition, there are multiple systems in the non-border area that have not completed rebanding. Thus, based on experience to date, it is reasonable to assume that many of these systems employ Harris equipment and will require replacement Harris radios and infrastructure. Thus, the fact that Nextel has "reserved" certain equipment for the City¹⁹ does not mean it cannot be used elsewhere.

10. We decline the City's invitation to ignore its lack of progress to date and, instead, to consider "what is in the best interests for the public safety of the citizens of Overland Park."²⁰ It may be that the best interests of the citizens of Overland Park would be served by providing the City with Motorola equipment. That, however, is not Nextel's responsibility. Its responsibility is to provide the City with "comparable facilities"²¹ which, in this case, means retuning the City's Harris system at the minimum necessary cost. The obligation to serve the best interests of the citizens of Overland Park rests with the City. Those interests were ill-served by the City's waiting until after it signed its FRA to reverse course

¹⁶ Reply at 4.

¹⁷ For the role of foreseeability in the evaluation of change notice requests see *Improving Public Safety Communications in the 800 MHz Band, Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512, 18522 ¶ 31 (2008). See also *Town of Wethersfield, Conn. and Nextel Communications, Inc., Memorandum Opinion and Order*, 26 FCC Rcd 1129, 1131-1132 ¶ 9 (PSHSB 2011).

¹⁸ Opposition at 5-6 n.9.

¹⁹ *Id.* at 5.

²⁰ Reply at 5.

²¹ *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, 14977 (2004).

and request an upgrade, delaying band reconfiguration in the process.

11. Finally, we note the request in the City's reply, that it be reimbursed \$4,350 for its legal fees incurred in preparation of the Further Request and the reply pleading.²² Typically, legal fees incurred in preparation of a waiver request for an extension of time in which to complete rebanding are allowable when the waiver proponent has made acceptable progress. Here, however, the greater part of the City's pleadings involve its request for an upgrade. The pleadings would not have been necessary had the City timely completed rebanding after it signed the FRA. Accordingly, Nextel is not obligated to pay the City's legal fees incurred in pursuit of its upgrade.

III. DECISION

12. Were it not for the fact that the parties have suggested that further negotiation might resolve their differences,²³ we would deny the Further Request and require completion of the City's rebanding by a date certain. The possibility of settlement however, convinces us that a brief period of mediated negotiation is warranted. Accordingly, we are waiving the June 26, 2008 rebanding completion date for 16 business days from the release date of this *Memorandum Opinion and Order*. During that 16-day period, the parties, jointly, shall confer with the TA mediator a minimum of one hour each business day until an agreement is reached or the mediator reports to the Public Safety and Homeland Security Bureau that the parties are at an impasse.²⁴ The TA mediator shall periodically inform the Public Safety and Homeland Security Bureau of the status of negotiations.

²² Reply at 7.

²³ Opposition at 4; Reply at 7.

²⁴ At the mediator's discretion, mediation sessions may be waived to accommodate parties' schedules.

IV. ORDERING CLAUSES

13. Accordingly, pursuant to the authority of 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 Further Request for Waiver of the June 26, 2008 Deadline for Completion of Rebanding filed by the City of Overland Park, Kansas IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED that the Transition Administrator Mediator shall convene a meeting of the parties on the first business day following the release dated of this *Memorandum Opinion and Order* for the purpose of negotiating an upgrade to the City of Overland Park's 800 MHz communication facilities. The Parties shall meet thereafter for a minimum of one-hour per day for a period not to exceed fifteen business days.

15. IT IS FURTHER ORDERED, that the time within which the City of Overland Park, Kansas must complete reconfiguration of its 800 MHz public safety communications system IS EXTENDED until sixteen business days following the release date hereof.²⁵

16. 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

Michael J. Wilhelm
Deputy Chief
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Public Safety and Homeland Security Bureau

²⁵ If the City has not completed rebanding by this date, it shall submit another request for waiver of the June 26, 2008 rebanding deadline together with a realistic rebanding schedule.