

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

In the Matter of	)	
	)	
State of Oklahoma	)	WT Docket No. 02-55
and	)	Mediation No. TAM-50079
Sprint Nextel Corporation	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 2, 2011**

**Released: November 2, 2011**

By the Deputy Chief, Policy and Licensing Division, 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 Wave 2, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the State of Oklahoma (Oklahoma) and Sprint Nextel Corporation (Sprint) regarding a Change Notice request submitted by Oklahoma concerning 11 replacement radios.<sup>1</sup> Based on our *de novo* review of the mediation record and the parties’ position statements,<sup>2</sup> we find that Oklahoma is liable for the cost of the 11 replacement radios and that Sprint is liable for the cost of retuning the original 11 radios.

**II. BACKGROUND**

2. Under the Commission’s 800 MHz orders, licensees are entitled to “comparable facilities” post-rebanding. Typically, comparable facilities are achieved when licensees’ radios are retuned to their post-rebanding frequencies. In some instances, however, licensees’ radios are unsuitable for retuning, *e.g.*, because they lack sufficient memory capacity. In these circumstances, Sprint must provide replacement radios that will operate satisfactorily on the post-rebanding frequencies. The determination of whether a radio would be retuned or replaced depended, in this case, on the version of the firmware in the radio as reflected in a Motorola-produced document, “MTS2000 Memory and STX NPSPAC Determination” (the Motorola Document).<sup>3</sup>

3. Oklahoma’s pre-rebanding radios consisted of a complement of Motorola STX821 Model II and Model III radios. Some of these radios were capable of being retuned. Others were not, and had to be replaced by Sprint. A post-rebanding audit by Sprint revealed that Oklahoma received 11 new radios from Sprint in exchange for radios that were not eligible for replacement because they could have been retuned. Oklahoma concedes that these 11 radios were capable of being retuned and should not have been replaced.<sup>4</sup>

<sup>1</sup> Recommended Resolution, Mediation No. TAM-50079 (Aug. 29, 2011) (RR).

<sup>2</sup> Statement of Position of Nextel Communications, Inc., TAM-50079 (Sept. 13, 2011); Statement of Position of Oklahoma, TAM-50079 (Sept. 13, 2011) (Oklahoma SOP).

<sup>3</sup> Proposed Resolution Memorandum of the State of Oklahoma, TAM-50079, Exhibit A at 6-8 (Aug. 8, 2011) (Oklahoma PRM).

<sup>4</sup> *Id.* at 2; Oklahoma Reply to Proposed Resolution Memorandum of Nextel Communications, Inc., TAM-50079 at 2 (Aug. 18, 2011) (Oklahoma Reply); Oklahoma SOP at 4-5.

4. Following the Sprint audit, Oklahoma filed a change notice request in which it sought either to (1) keep the 11 new replacement radios at no cost to Oklahoma; or (2) return the now-used replacement radios to Sprint; with Sprint paying \$3,788.39 for Oklahoma's retrieving the replacement radios from the field and for retuning the original radios.<sup>5</sup> Sprint opposed Oklahoma's change notice request, stating that it was inconsistent with Section 20(c) of the parties' Frequency Reconfiguration Agreement (FRA) – the contract entered into between Sprint and licensees for the rebanding of licensees' systems.<sup>6</sup>

5. *Oklahoma's Position.* Oklahoma argues that its proposal is reasonable because Sprint did not advise Oklahoma that the 11 radios could be retuned and did not provide Oklahoma with the Motorola Document until change notice negotiations began, well after the radios had been placed into service by Oklahoma.<sup>7</sup> Oklahoma claims that the 11 radios in dispute never would have been replaced had Sprint shared the Motorola Document with Oklahoma or its consultant (ACD Telecom) during FRA negotiations.<sup>8</sup>

6. Oklahoma notes, "Motorola, who was paid to take inventory of the subscriber units, did not mention anything about their agreement with Sprint on these radios in their Suitability Assessment Impact Report (SAIR) nor was it entered anywhere in the FRA's schedule C and/or schedule D."<sup>9</sup> Therefore, Oklahoma contends, it believed the radios were eligible for replacement. Thus, according to Oklahoma, it should not be responsible for expenses that arose from Sprint's oversight in not citing the Motorola Document in the FRA.<sup>10</sup> Moreover, Oklahoma claims that Sprint offered to allow Oklahoma to keep the radios during negotiations over the change notice request.<sup>11</sup> Finally, Oklahoma alleges that Sprint is acting in bad faith by attempting to "retroactively and unilaterally revise the FRA" and for pursuing a Proposed Resolution Memorandum (PRM) for only \$3,788.39 in costs.<sup>12</sup>

7. *Sprint's Position.* Sprint submits that Section 20(c) of the FRA requires that, when Oklahoma receives a replacement radio to which it was not entitled, Oklahoma must return the radio to Motorola, in new condition, or pay Sprint the "Product Typical Value" for that radio.<sup>13</sup> Sprint contends that Oklahoma cannot return the 11 replacement radios "in new condition" because Oklahoma already placed them into service. Therefore, Sprint argues, Oklahoma should pay \$28,325, *i.e.* the Product Typical Value of the replacement radios, by deducting that amount from any payments that Sprint still owes Oklahoma for the rebanding of Oklahoma's system.<sup>14</sup>

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<sup>5</sup> Oklahoma PRM at 2.

<sup>6</sup> Proposed Resolution Memorandum of Nextel Communications, Inc., TAM-50079 at 5-9, Appendix 1 at 10-11 (Aug. 15, 2011) (Sprint PRM).

<sup>7</sup> Oklahoma PRM at 1-2; Oklahoma SOP at 4.

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 2; Oklahoma Reply at 3. Oklahoma maintains that it returned radios that were labeled as STX821 radios, but Oklahoma concedes they were ineligible for replacement. *Id.* at 2; Oklahoma SOP at 4-5.

<sup>11</sup> Oklahoma PRM at 2; Oklahoma Reply at 2.

<sup>12</sup> Oklahoma PRM at 2.

<sup>13</sup> Sprint PRM at 8.

<sup>14</sup> *Id.* at 8-9.

8. Sprint contends that Oklahoma's first proposed alternative – keeping the radios without payment – would result in “a windfall from its vendors’ erroneous conclusion that its radios were eligible for replacement” and would be inconsistent with the policies underlying the 800 MHz reconfiguration program.<sup>15</sup> Sprint submits that Oklahoma's second proposed alternative – returning the replacement radios after they had been placed into service and billing Sprint for the retrieval of the replacement radios and for the retuning cost of the original radios – is inconsistent with the FRA and is “fundamentally inequitable” because “[Sprint] would have paid for new replacement units, but would receive used units for which it has no foreseeable use at additional cost to the [rebanding] program.”<sup>16</sup> Instead, Sprint urges that Oklahoma should be liable for the Product Typical Value of the radios, *i.e.*, \$28,325.<sup>17</sup>

9. Sprint also argues that Oklahoma should pay the Product Typical Value for the radios because tendering Oklahoma's 11 radios for replacement was due to “vendor error,” *i.e.*, Oklahoma's vendor's failure to understand the standard for replacing radios.<sup>18</sup> Additionally, Sprint contends that Oklahoma should have known that there was an issue once Sprint returned six of the ineligible radios a month before Oklahoma shipped five more ineligible radios.<sup>19</sup> Finally, Sprint denies negotiating in bad faith by refusing to settle for \$3,788.39 and, instead, calling for submission of PRMs. It submits that finding Sprint in bad faith because it pursued PRMs would yield absurd results, and that the cost to Sprint for accepting radios that already had been placed in service would not be as insignificant as Oklahoma contends.<sup>20</sup>

10. *TA Mediator Recommendation.* The TA Mediator recommends that the Bureau find that Oklahoma should be liable for the Product Typical Value of the 11 radios as specified in Section 20(c) of the FRA.<sup>21</sup> The TA Mediator notes that Oklahoma acknowledged that the 11 radios did not qualify for replacement under the Motorola Document and that Oklahoma cannot return the 11 radios in new condition as required by Section 20(c) of the FRA,<sup>22</sup> because they have already been placed into service.<sup>23</sup> The TA Mediator also concludes that Sprint did not breach its obligation to participate and negotiate in good faith.<sup>24</sup>

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<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 8-9.

<sup>18</sup> *Id.* at 10-11.

<sup>19</sup> *Id.* at 12-13.

<sup>20</sup> *Id.* Although Sprint recognizes that Oklahoma does not seek reimbursement for mediation costs, Sprint requests we make clear that Oklahoma may not seek reimbursement in the event Oklahoma reconsiders. Sprint SOP at 13. We decline to rule on Sprint's request because to do so would be premature.

<sup>21</sup> RR at 10. Under Section 20(c) of the FRA, if Oklahoma fails to return equipment that qualifies for replacement to Motorola for destruction, or fails to return the related replacement equipment in new condition within 60 days, Sprint may deduct the Typical Product Value of such replacement equipment from the sums due to Oklahoma.

<sup>22</sup> *Id.* at 9-10.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.* at 11.

### III. DISCUSSION.

11. The record demonstrates that Oklahoma, in the FRA, specifically agreed to either reimburse Sprint for the Typical Product Value of the replacement radios or return the replacement radios in new condition. It did neither. To the extent that Oklahoma is seeking an economic benefit by retaining the new radios without paying for them, it runs afoul of the Commission's "minimum necessary cost" standard.<sup>25</sup> Oklahoma would have met the minimum cost standard only by retuning the 11 radios rather than submitting them for replacement with new radios. Providing Oklahoma with new radios, at Sprint's expense, would represent an unwarranted "upgrade." Therefore, Oklahoma has failed to meet its burden of proof that the funds it requests from Sprint are the minimum necessary to effect rebanding.

12. We are not persuaded by Oklahoma's argument that it should not be liable for the Typical Product Value of the replacement radios because Sprint failed to provide Oklahoma with the Motorola Document until negotiations had commenced over the change notice request. Oklahoma has not established any duty on Sprint's part to provide the document. Moreover, the inventory of Oklahoma's radios was undertaken by Motorola itself, which should have been capable of consulting its own document to determine which radios were eligible for replacement. To the extent that Motorola or Oklahoma's other vendor erred in determining which radios were eligible for replacement, it is from those companies – not Sprint – that Oklahoma should seek redress.

13. The Commission has emphasized in this proceeding that good faith negotiation by all parties is essential to achieving the Commission's rebanding objectives.<sup>26</sup> Among the indicia of good faith negotiation are (a) the steps a party has taken to determine the actual cost of relocation to comparable facilities; (b) whether a party has unreasonably withheld from the other party information, essential to the accurate estimation of relocation costs and procedures, requested by the other party and (c) whether a party has made a counteroffer when presented an offer by the other party.<sup>27</sup> Oklahoma has not claimed that Sprint has failed to conform to any of these indicia of good faith; it has only alleged that Sprint acted in bad faith in pursuing Proposed Resolution Memoranda for what Oklahoma regarded as an insignificant amount of money. We disagree with Oklahoma that pursuing Proposed Resolution Memoranda evinces bad faith and do not regard the sum of money at issue as trivial. Accordingly, we find that Sprint has not breached its obligation to negotiate in good faith with Oklahoma. Finally, we attach no decisional significance to the fact that Sprint, in the course of negotiation, may have offered Oklahoma the ability to retain the replacement radios. That offer was coupled with cost concessions from Oklahoma, and was never accepted by Oklahoma.

14. In sum, we find that Oklahoma's change notice request deviates from the terms of the FRA and that Oklahoma has failed to show that its claimed costs were the minimum necessary to reconfigure its system. We also find that Oklahoma's allegation of bad faith by Sprint is unfounded. Thus, on the

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<sup>25</sup> The Commission's orders in this docket assign Oklahoma 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." See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15074 ¶ 198 (2004) (*800 MHz Report and Order*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120, 25152 ¶ 71 (2004). The Commission has clarified 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." See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007).

<sup>26</sup> See 47 C.F.R. § 90.677(c). See also *800 MHz Report & Order*, 19 FCC Rcd 15076-77 ¶ 201. See also e.g. *Reminder to 800 MHz Wave Three Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations*, *Public Notice*, WT Docket No. 02-55, 21 FCC Rcd 7122 (WTB 2006).

<sup>27</sup> See *800 MHz Report and Order*, 19 FCC Rcd at 15076-77 n.524.

record before us, we find that Oklahoma is liable for the Product Typical Value of the 11 replacement radios. Further, we find that Sprint is liable for the cost of retuning the original 11 radios – a cost it would have incurred in any event had Oklahoma not submitted the radios for replacement.

#### IV. ORDERING CLAUSE

15. 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.

16. 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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