

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

In the Matter of	)	
	)	
<b>Arizona Public Service Company</b>	)	WT Docket No. 02-55
	)	
and	)	Mediation No. TAM-45010
	)	
<b>Nextel Communications, Inc.</b>	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 24, 2015**

**Released: April 24, 2015**

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

**I. INTRODUCTION**

1. Under consideration is the Request for Stay of Arizona Public Service Company (Stay Request) filed April 10, 2015 by 800 MHz licensee, Arizona Public Service Company (APS). APS seeks a stay of one provision of the *Memorandum Opinion and Order* released March 10, 2015, which provision requires APS and Nextel Communications, Inc. (Sprint)<sup>1</sup> to convene a meeting every business day until the parties reach agreement on a Frequency Reconfiguration Agreement (FRA) for the rebanding of APS’s system.<sup>2</sup> For the reasons stated below we deny the request.

**II. BACKGROUND**

2. After release of the *Memorandum Opinion and Order*, APS filed a petition for reconsideration accompanied by a new estimate of the cost of rebanding APS’s system. The new estimate was provided by vendor Creative Communications (Creative). APS submits that the *Memorandum Opinion and Order* should be reconsidered and that the cost of APS’s rebanding should be based on Creative’s quote. A stay is warranted, APS contends, because “[s]ince Sprint has stated it will not discuss the Creative quote, and has merely supplied a draft Agreement that fits the Bureau’s *Order* and APS will not be executing an Agreement until the conclusion of litigation in this proceeding, there is no valid reason for the Division mandated daily meetings and negotiations until such time as the Commission has considered and ruled on the APS Petition for Reconsideration.”<sup>3</sup>

<sup>1</sup> For purposes of uniformity in 800 MHz band reconfiguration proceedings, we refer to Sprint wholly-owned subsidiaries, such as Nextel Communications, Inc., by the name of their principal, Sprint.

<sup>2</sup> Arizona Public Service Company and Sprint Corp., *Memorandum Opinion and Order*, \_\_\_ FCC Red \_\_\_ (DA 15-306 (released March 10, 2015 ))(*Memorandum Opinion and Order*) (“representatives of Sprint Corporation and Arizona Public Service Company, each with the authority to bind its principal, SHALL MEET under the auspices of the Transition Administrator TA Mediator, within ten business days of the release date of this *Memorandum Opinion and Order* to conclude a Frequency Reconfiguration Agreement consistent herewith and that such meeting shall continue from business day to business day until the parties reach agreement in principle.”) *Id.* at ¶ 96.

<sup>3</sup> Stay Request at 2-3.

### III. DISCUSSION

3. The Commission's criteria for grant of a stay are the same as those enunciated by the D.C. Circuit in *Virginia Petroleum Jobbers Association v. FPC*:

- Has the proponent of a stay made a strong showing that it is likely to prevail on the merits?
- Has the proponent of a stay shown that, without such relief, it will be irreparably injured?
- Would the issuance of a stay substantially harm other parties interested in the proceeding?
- Where lies the public interest?<sup>4</sup>

#### A. APS is Procedurally Barred from Prevailing on the Merits

4. As noted, APS submitted the Creative quote after the record had closed, and simultaneously with its petition for reconsideration. In negotiations and mediation with Sprint, in APS' proposed resolution memorandum, and in its statement of position to the Bureau, APS advanced a rebanding proposal based on services to be provided by Harris Corporation. Then, after the *Memorandum Opinion and Order* found that APS' rebanding proposal did not comport with the "Minimum Necessary Cost Standard,"<sup>5</sup> APS parried with the offer of more evidence, the Creative quote. It is axiomatic that "[w]e cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."<sup>6</sup>

5. Section 1.106 of the Commission's rules<sup>7</sup> stands as a separate and independent procedural barrier to APS prevailing on the merits. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing

<sup>4</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers*); *Hispanic Information and Telecomm. Network, Inc., Memorandum Opinion and Order*, 20 FCC Rcd. 5471, 5480, ¶ 26 (2005). See also *Phone Depots Inc. d/b/a Mobilefone Radio System, Memorandum Opinion and Order*, 91 FCC 2d 1244, ¶6 (1982) (stay motion summarily denied because movant's "request failed to discuss and does not satisfy the criteria for a stay"). APS' reliance on *Davis v. Pension Ben, Guar. Corp.*, 571 Fed. 3d 1288 (D.C. Cir. 2009), Stay Request at 3 n.8, is entirely unavailing. First, the cited case dealt with a preliminary injunction, not a stay request. Second, the preliminary injunction was denied for the same reason we deny the Stay Request here: the appellants showed neither a "substantial likelihood of success on the merits nor irreparable harm." 571 Fed. 3d at 1290.

<sup>5</sup> See, e.g., *Port Authority of New York and Nextel Communications, Inc., Memorandum Opinion and Order*, 27 FCC Rcd 1888, 1904 ¶ 60 (PSHSB 2012) ("The Commission's orders in this docket assign [licensee] 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' (Minimum Necessary Cost Standard)[footnote omitted]. The Commission subsequently 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'[footnote omitted]. The Minimum Necessary Cost Standard thus 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 and a seamless transition that preserves public safety's ability to operate during the transition [footnote omitted].

<sup>6</sup> *Canyon Area Residents for the Environment, Memorandum Opinion and Order*, 14 FCC Rcd 8152, 8154 ¶7 (1999) citing *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

<sup>7</sup> 47 C.F.R. § 1.106(c).

until after the petitioner's last opportunity to present such matters.<sup>8</sup> Section 1.106(c) provides that a petition for reconsideration which relies on facts or arguments not presented to the designated authority will be considered only under the following limited circumstances:

- The petition relies on new facts or changed circumstances;
- The petition relies on facts or arguments unknown to the petitioner, which facts or arguments could not, with diligence, have been raised earlier.<sup>9</sup>

The petition for reconsideration does not rely on new facts or changed circumstances; it merely rests on a revised rebanding proposal submitted by APS.<sup>10</sup> To the extent that the revised rebanding costs were unknown to APS, they could have been ascertained earlier had APS exercised diligence in choosing a vendor that could provide services that comported with the minimum necessary cost standard.<sup>11</sup>

6. In sum, APS has not made a strong showing that it will prevail on the merits; in fact it does not even attempt to make such a showing in its Stay Request.

### **B. Irreparable Injury**

7. The injury that APS will “suffer” if the stay is not granted is that it will have to meet with Sprint and negotiate an FRA consistent with the *Memorandum Opinion and Order*. As APS would have it, however, it will suffer irreparable harm because, if the stay is not granted, it will be “forced to conduct a procurement” to identify vendors that will reband APS’ system at the “Bureau’s approved amounts.” The associated expense, APS argues, “may not even be necessary once the Commission completes its review [of APS’ petition for reconsideration].” However, as established above, APS’ petition for reconsideration is procedurally infirm and subject to dismissal. Accordingly, assuming that APS would, in fact, have to conduct a procurement to identify a vendor that would reband its system at the minimum necessary cost, such would be necessary because of APS’ failure to do so in the first instance, not because of denial of its Stay Request. Any injury suffered by APS, therefore, would be a consequence of its failure to meet its evidentiary burden of showing that its proposal represented the minimum necessary cost of rebanding its system and not a consequence of its requested stay being denied.

### **C. Substantial Harm to Other Parties**

8. Denial of APS’ requested stay would benefit, not harm, other parties. Thus, with the stay denied, APS would be required timely to negotiate an FRA with Sprint to the benefit of the rebanding program overall. APS suggests that Sprint would be harmed by the need to participate in “needless conference calls.”<sup>12</sup> It submits that the calls are “needless” because Sprint has “merely supplied a draft Agreement that fits the Bureau’s *Order*, and APS will not be executing an Agreement until the conclusion of litigation in this proceeding.”<sup>13</sup> Concluding an “Agreement that fits the Bureau’s [*Memorandum Opinion and Order*]” is precisely what APS is obligated to do unless it satisfies the criteria for the extraordinary remedy of a stay, which it has not. Reaching such an agreement will benefit, not harm,

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<sup>8</sup> *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

<sup>9</sup> 47 C.F.R. § 1.106(b)(2)(i)-(ii).

<sup>10</sup> See Petition for Reconsideration and/or Clarification of Jones Eastern of the Outer Banks, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 6800, 6802 (1992)(Applicant’s submission of a new staffing proposal was “neither a ‘newly discovered fact’ nor a ‘changed circumstance,’ but is merely a new proposal.”)

<sup>11</sup> 47 C.F.R. § 1.106(b)(2)(ii).

<sup>12</sup> Stay Request at 3.

<sup>13</sup> *Id.* at 2-3.

Sprint, and no other party stands to be harmed at all, let alone substantially, by APS heeding the requirements of the *Memorandum Opinion and Order*.

#### **D. The Public Interest Favors Denial of the Stay Request**

9. The 800 MHz rebanding program exists because it frees public safety and other “high site” licensees in the 800 MHz band from unacceptable interference from cellular-architecture licensees in adjacent bands.<sup>14</sup> The program is approaching completion, with only the Mexico border licensees remaining to be rebanded. According to APS, however, Sprint “has admitted on several conference calls with APS that it has absolutely no idea when APS’ new Mexican Border Area frequencies will be available.”<sup>15</sup> Ignoring the hearsay nature of this claim, it is no basis for delaying rebanding negotiations of APS or any other border-area licensee. Instead, it is in the public interest to have FRAs concluded for all U.S. border area licensees – including APS – so that, when frequencies do become available, which likely will be on an incremental basis, rebanding can be completed without delay. Thus, to the degree that denial of APS’ requested stay accelerates its conclusion of an FRA with Sprint, that action will result in border area rebanding progress – progress clearly in the public interest.

#### **IV. CONCLUSION**

10. A stay is an extraordinary remedy and the stay criteria are stringent. APS has failed to convince us that a stay is warranted in this instance. APS has not made a strong showing that it could prevail on the merits. Indeed, the procedural infirmities in its petition for reconsideration preclude our reaching the merits. Requiring APS to negotiate an FRA with Sprint, as ordered by the *Memorandum Opinion and Order*, creates no irreparable injury to APS or any other party. The public interest requires that APS promptly conclude an FRA with Sprint. Accordingly, for APS’ failure to meet the stay criteria established by *Virginia Petroleum Jobbers Association v. FPC*, and its progeny<sup>16</sup> we must deny the Stay Request. APS and Sprint shall continue to negotiate an FRA as directed by, and consistent with, the *Memorandum Opinion and Order*. Failure to do so by either party will be taken as lack of good faith with the imposition of the appropriate remedies therefor.

#### **V. ORDERING CLAUSE**

11. Accordingly, IT IS ORDERED, pursuant to Sections 1.43, 1.106, and 90.677 of the Commission’s rules, 47 C.F.R. §§ 1.43, 1.106, 90.677, and Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Request for Stay of Arizona Public Service Company IS DENIED.

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<sup>14</sup> *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 (2004); *Erratum*, WT Docket No. 02-55 (rel. Sep. 10, 2004); *Second Erratum*, 19 FCC Rcd 19651 (2004); *Third Erratum*, 19 FCC Rcd 21818 (2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Erratum*, WT Docket No. 02-55 (rel. Jan. 19, 2005) *review denied sub nom. Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Order*, 21 FCC Rcd 5503 (2006); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Erratum*, WT Docket No. 02-55 (rel. July 26, 2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007); *Second Report and Order*, 23 FCC Rcd 7605 (2008), *Erratum*, WT Docket No. 02-55 (rel. May 28, 2008); *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512 (2008); *Third Report and Order*, 25 FCC Rcd 4443 (2010); *Fourth Report and Order*, 26 FCC Rcd 1937 (2011); *Fifth Report and Order*, 28 FCC Rcd 4085 (2013). *See also Kay v. FCC*, No. 06-1076 (D.C. Cir. filed Feb. 24, 2006).

<sup>15</sup> Stay Request at 3.

<sup>16</sup> *See supra* n. 4.

12. 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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