

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

In the Matter of
Arizona Public Service Co.
and
Sprint Nextel Corp.
WT Docket No. 02-55

ORDER ON RECONSIDERATION

Adopted: May 4, 2015

Released: May 4, 2015

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

1. On April 9, 2015, the Arizona Public Service Company (APS or Licensee) filed a Petition for Reconsideration... we dismiss the Petition.

I. BACKGROUND

2. APS is a public utility located in the State of Arizona. Under the terms of the 800 MHz Report and Order and subsequent orders and precedent, APS must relocate its system within the 800 MHz band at minimum necessary cost, but at Sprint Corporation's (Sprint) expense.

1 Petition for Reconsideration filed by Arizona Public Service Company (filed April 9, 2015)(Petition). Nextel Communications, Inc. filed an Opposition to Petition for Reconsideration (filed April 20, 2015)(Opposition) and Arizona Public Service Company filed a Reply of Arizona Public Service (filed April 27, 2015)(Reply).

2 Arizona Public Service Company and Nextel Communications, Inc., Memorandum Opinion and Order, 61 Communications Reg. (P&F) 1727 (PSHSB 2015) (MO&O).

3 Id.

4 TA Recommended Resolution, Mediation No. TAM-45010, filed September 8, 2014 (RR).

5 800 MHz Report & Order, 19 FCC Rcd at 14977, ¶ 11. For purposes of uniformity in 800 MHz rebanding orders, we refer to subsidiaries of Sprint Corp., such as Nextel Communications, Inc. as their parent company, Sprint.

repeater sites, and approximately 3,100 subscriber radios as part of the 800 MHz rebanding process. It submitted a cost estimate (Statement of Work or SOW) of \$2.67 million.⁶

3. The parties were unable to negotiate a Frequency Reconfiguration Agreement (FRA) for the APS system at the \$2.67 million cost and entered mediation under the auspices of the Transition Administrator (TA) Mediator. In the course of mediation, both APS and the TA Mediator observed that Sprint had not produced an alternative quote for rebanding APS's system. Accordingly, Sprint obtained a rebanding quote from Creative Communications of Phoenix, Arizona (the Creative Quote).⁷ To obtain this quote Sprint provided Creative with some basic information about the proposed rebanding work. The Creative quote was significantly lower than APS's estimate, which was based on the rebanding work being done by the Harris Corporation (Harris) – a radio equipment manufacturer – notwithstanding that APS' has a Motorola system.⁸

4. The Commission has stated that relocating licensees, such as APS, are entitled to payment of “any reasonable and prudent expense directly related to the retuning of [an] 800 MHz system.”⁹ The relocating licensee must certify that “the funds requested for reconfiguration are the minimum necessary to provide facilities comparable to those presently in use.”¹⁰ The licensee bears the burden of proof to show that its claimed expenses meet the Minimum Necessary Cost Standard.¹¹

5. At the Bureau's direction, the TA Mediator provided “TA Metrics” reports comparing APS's and Sprint's cost estimates to cost estimates of similarly sized licensees.¹² In his recommended resolution the TA Mediator cited these reports in support of his conclusion that APS had not met its evidentiary burden. The Bureau, in its *MO&O*, agreed with the TA Mediator's determination that APS had not carried its burden to show that its cost estimate met the Commission's Minimum Necessary Cost Standard.

6. In its *MO&O* the Bureau agreed with APS that the Creative Quote was not as complete as the Harris quote but was sufficient to show that it was possible to retune APSC's system at lower cost than the Harris SOW.¹³ The Bureau approved \$1,193,208 for the rebanding of APS' system. The approved amount is \$1,435,514 less than APSC's requested \$2,628,722, but \$405,913 more than the Creative Quote.¹⁴

⁶ Proposed Resolution Memorandum of Licensee dated August 7, 2014 (APS PRM) at 2; *See* RR at 2.

⁷ RR at 11.

⁸ *Id.* at 3.

⁹ *800 MHz Supplemental Order*, 19 FCC Rcd at 25152, ¶ 71.

¹⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15074, ¶ 198.

¹¹ *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).

¹² *See* Supplemental Statement of Position of Sprint Corporation, filed Nov. 10, 2014 (Sprint Supplemental SOP) and Comments on Transition Administrator Metrics of Arizona Public Service Company, filed Nov. 10, 2014 (APSC Supplemental SOP).

¹³ *See* Statement of Position of Arizona Public Service Company, filed September 22, 2014 (APS SOP) at 4.

¹⁴ TA Metrics Report, DL8910418957, Arizona Public Service Company, TAM 45010 (Oct. 28, 2014).

7. The Bureau found that APS failed to demonstrate that its radios were unique or that its infrastructure was particularly challenging to warrant its proposed level of effort.¹⁵ Moreover, even though APS described its system as “a public safety system on steroids,”¹⁶ it did not explain how the APS system with equivalent radios and indistinguishable infrastructure differed at all from a comparable public safety system.¹⁷

8. The *MO&O* required Sprint and APS to meet to conclude an FRA consistent with the *MO&O*, *i.e.*, rebanding of APS’ system at a cost of \$1,193,208. Instead, APS filed the instant Petition accompanying it with a revised quotation that it solicited from Creative. The revised Creative quote included costs for services that had been disallowed in the *MO&O*. APS claims that this new, post-decision quote proves that the Harris quote was reasonable, and therefore that APS is entitled to reconsideration pursuant to Section 1.106¹⁸ of the Commission’s Rules.¹⁹ APS also notes that in one rebanding case, the Bureau ordered the parties back into mediation and reopened the record, because it had insufficient information to make a factual determination.²⁰ APS thus implies that the Bureau should remand this matter to the TA Mediator to admit APS’ revised Creative quote into the record.

II. DISCUSSION

9. APS is attempting to use its Petition as a vehicle to introduce new evidence into the record.²¹ Precedent, however, reminds us 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.”²²

10. Section 1.106 of the Commission’s rules precludes us from considering the Petition on the merits because 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 until after the petitioner’s last opportunity to present such matters.²³ APS has shown no material error or omission in the *MO&O*. Based on the record information before it, the Bureau’s decision was correct: APS had not carried its evidentiary burden of showing that \$2,628,722 was the minimum necessary cost of rebanding its system. Moreover, Section 1.106(c) of the Commission’s rules precludes our considering the extra-record revised Creative quote.²⁴ That rule section provides that a petition for reconsideration which relies on facts or

¹⁵ *MO&O* at 18.

¹⁶ Proposed Resolution Memorandum of Licensee dated August 7, 2014 (APS PRM) at 58 n.36.

¹⁷ *MO&O* at 18. The comparable systems that the TA Mediator used were for public safety systems.

¹⁸ 47 C.F.R. §1.106

¹⁹ Petition at 3.

²⁰ *Id.* at 2. See also *Mississippi State University and Nextel Communications, Inc.*, WT Docket 02-55, *Second Order Reopening the Record*, 28 FCC Rcd 61 (PSHSB 2013).

²¹ APS has not filed a motion to reopen the record.

²² *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).

²³ *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).

²⁴ See Opposition at 3-4.

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.²⁵

11. The revised Creative Quote is not a matter of record and, in any event, does not constitute “new facts or changed circumstances.” Submission of a new proposal does not satisfy the new facts or changed circumstances prong of Section 1.106 of the Commission’s rules.²⁶ Moreover, APS cannot rely on facts or arguments associated with the revised Creative Quote because, with diligence, it could have obtained that quote – or some other quote meeting the minimum necessary cost criterion – before the record closed. APS’ implication that the Bureau should have remanded the case for the taking of additional evidence is unavailing: APS had ample planning time to produce a cost estimate that comported with the Minimum Necessary Cost Standard. It chose, however, to rely on a higher cost estimate, not withdrawing that estimate until after the record had closed and a decision issued.

12. The Commission has held that “[p]arties’ conformity to the Commission’s procedural rules is essential to the timely completion of 800 MHz rebanding.”²⁷ Accordingly, we do not consider the extra-record revised Creative Quote and dismiss the Petition.

III. DECISION AND ORDERING CLAUSE

13. Since APS fails to demonstrate how its Petition complies with Section 1.106 of the Rules, we are procedurally precluded from addressing it on the merits and therefore, must dismiss it.

14. Accordingly, pursuant to the authority of Sections 0.191, 0.392, 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.191, 0.392, and 1.106; and Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) IT IS ORDERED that the Petition for Reconsideration filed by Arizona Public Service Company IS DISMISSED.

²⁵ 47 C.F.R. § 1.106(b)(2)(i)-(ii).

²⁶ See, e.g., *Jones Eastern of the Outer Banks, Memorandum Opinion and Order*, 7 FCC Rcd 6800, 6802 (1992) (“Petitioner's decision to assign a management person to the main studio represents neither a ‘newly discovered fact’ nor a ‘changed circumstance,’ but is merely a new proposal.”)

²⁷ *State of Indiana and Nextel Communications, Inc., Memorandum Opinion and Order*, 27 FCC Rcd 11469, 11474 ¶16 (2012).

15. 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

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