

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

In the Matter of)	
)	
City of High Point, North Carolina and Sprint Nextel Corporation)	WT Docket No. 02-55
)	
Mediation No. TAM-32109)	

MEMORANDUM OPINION AND ORDER

Adopted: April 1, 2009

Released: April 1, 2009

By the Acting Chief, 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 3, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the City of High Point, North Carolina (High Point) and Sprint Nextel Corporation (Sprint).¹ The single issue in dispute relates to whether certain replacement radios offered by Sprint are comparable to High Point's existing radios. Based on our *de novo* review of the mediation record and the parties' position statements, we find in favor of Sprint on this issue.

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.² 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.³ Sprint 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.⁴ If the parties cannot reach agreement on a FRA, the case is referred to mediation and issues that cannot be resolved in this mediation are referred to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.⁵

A. Issue in Dispute

3. This case concerns approximately 129 Motorola Spectra mobile radios that are part of High Point's system. These radios are licensed to operate on twelve NPSPAC channels under High

¹ Recommended Resolution, Mediation No. TAM-32109, filed April 28, 2008 (RR).

² 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) (*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).

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

⁴ *Id.* at 14986 ¶ 26.

⁵ *Id.* at 15077 ¶ 201.

Point's call signs WNL725 and WQDK272.⁶ The Spectra radios are dash-mounted in vehicles owned by High Point and utilize a "W7" control head.⁷ Sprint proposes to replace the Spectra radios with new Motorola XTL2500RB (XTL2500) radios that utilize an "M5" control head and dual-tone multi-frequency (DTMF) microphones.⁸ High Point claims that the XTL2500 is not comparable to the Spectra because the M5 control head functions differently and has a different "look and feel" from the W7 control head.⁹ Consequently, High Point argues that Sprint should replace the Spectra radios with Motorola XTL5000 (XTL5000) radios, a more expensive radio model that can be fitted with the W7 control head.¹⁰

4. The parties were unable to reach agreement regarding the comparability of the XTL2500 radio in negotiations or TA-sponsored mediation.¹¹ After mediation proved unsuccessful, the mediator referred the matter to the PSHSB for *de novo* review and resolution, submitting the record in the case as well as a Recommended Resolution (RR).¹² High Point and Sprint separately filed Statements of Position.¹³

B. Parties' Positions

5. Under the Commission's orders in this proceeding, Sprint bears the burden of proving that High Point's replacement radios are "comparable" within the meaning of the *800 MHz R&O*.¹⁴ High Point 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."¹⁵

6. *High Point's Position.* High Point argues that the only adequate replacement for its Spectra radios is the XTL5000 with a W7 control head.¹⁶ High Point states that when the W7 control head is installed in a vehicle, it allows the user to control the channel-switching capabilities of the radio with one hand.¹⁷ High Point states that this capability is important during rapid-response situations and is a critical safety function of the current radios.¹⁸

7. High Point argues that the XTL2500 radio being offered by Sprint as a replacement model is not comparable because it cannot be used with a W7 control head and thus lacks a critical

⁶ RR at 1.

⁷ *Id.* at 3. A control head contains the function buttons that allow the user to operate the radio.

⁸ *Id.*

⁹ Proposed Resolution Memorandum of High Point, North Carolina, April 16, 2008 (High Point PRM) at 3-4, Ex. A.

¹⁰ *Id.* at 4.

¹¹ RR at 3.

¹² See High Point PRM; Proposed Resolution Memorandum of Sprint Nextel Corp., April 16, 2008 (Sprint PRM); Reply of Sprint Nextel Corp., April 18, 2008 (Sprint Reply); Supplement of Sprint Nextel Corp, April 23, 2008 (Sprint Supplement).

¹³ Statement of Position of High Point, North Carolina, May 12, 2008 (High Point SOP); Statement of Position of Nextel Communications, Inc., May 12, 2008 (Sprint SOP).

¹⁴ 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).

¹⁵ *Id.*

¹⁶ High Point PRM at 1. High Point argues that Motorola recommended the XTL5000 radios as replacements for its existing Spectra radios. *Id.*

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 3.

operational component of the Spectra radio.¹⁹ High Point asserts that the addition of the DTMF microphone with the M5 control head offered by Sprint is insufficient to make the XTL2500 comparable to the Spectra radio.²⁰ High Point contends that this microphone/control head configuration will render its officers overly dependent on the microphone and therefore hinder their ability to operate the radio in a safe and efficient manner, particularly while driving.²¹ High Point also argues that the XTL2500 with the M5 control head does not allow for “private calling” from one user to another when the contents are not broadcast across the entire talk group.²²

8. High Point also contends that Motorola has recommended the XTL5000 as a replacement for the Spectra, and that the higher cost of the XTL5000 is not unreasonable. Although the XTL5000 costs substantially more per unit than the XTL2500, High Point argues that the XTL2500’s DTMF microphone is more expensive to replace than the conventional microphone that accompanies the XTL5000.²³ Finally, High Point notes that Sprint agreed to replace Spectra radios with XTL5000s in two other FRAs, one involving Citrus County, Florida, and the other involving the City of Lakeland, Florida.²⁴

9. *Sprint Position.* Sprint contends that the XTL2500 is comparable to the Spectra model used by High Point.²⁵ Sprint argues that the M5 control head can be positioned in the same location as the W7 control head and that—when used with the DTMF microphone—it enables a driver to control a radio without looking down while driving.²⁶ To permit High Point to familiarize its users with the new radios, Sprint offers to provide High Point with funds to conduct training.²⁷ Additionally, Sprint states that the XTL2500 will support private calling using four different methods, one of which is not available on the Spectra radio, and are functionally easier to operate than the private calling feature on the Spectra.²⁸ With regard to High Point’s argument that its users rely on the W7 control head, Sprint notes that Motorola is only providing XTL5000 radios with W7 control heads in connection with rebanding, and will not offer the W7 on new radio purchases after the completion of the program. Thus, Sprint asserts, High Point, in the future, may be unable to acquire XTL5000 radios with W7 control heads.²⁹ Sprint has also offered High Point additional spare microphones for the XTL2500 radios in case of a malfunction or damage.³⁰

10. With respect to the Citrus County and Lakeland FRAs cited by High Point, Sprint responds that, in Citrus County, it replaced four Spectra radios with XTL5000s because the radios were

¹⁹ *Id.* at 3-4.

²⁰ *Id.*

²¹ *Id.* at 3.

²² Declaration of High Point at 1 (dated April 22, 2008).

²³ High Point PRM at 4.

²⁴ *Id.* at 4-6.

²⁵ *See* Sprint PRM at 5.

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 6-7.

²⁸ Sprint Supplement at 3. In response to High Point’s claim that Motorola recommended the XTL5000 radios as replacements for High Point’s Spectra radios, Sprint argues that High Point instructed Motorola that High Point would accept only W7 control heads and that, as a result, Motorola included the XTL5000 model in its Statement of Work. Sprint Reply at 5.

²⁹ Sprint PRM at 7.

³⁰ *Id.*

motorcycle-mounted and the XTL5000 was the only available Motorola radio suitable for motorcycles.³¹ Sprint notes that Citrus County accepted XTL2500 radios with DTMF microphones as replacements for their 334 Spectra radios that were dash-mounted in vehicles.³² In the Lakeland case, Sprint states that it replaced one Spectra console radio with a XTL5000 because the XTL2500 is not available for use in a console mode, and replaced four helicopter-mounted Spectra radios equipped with headsets rather than microphones with XTL5000s because DTMF microphones were not an option.³³ Sprint also agreed to replace four other Spectra radios with XTL5000s to avoid litigation and because the added cost was *de minimis*.³⁴ Lastly, Sprint notes that in a mediation involving the University of California, Berkeley, the TA mediator in that case recommended in Sprint's favor on the identical issues, and Berkeley ultimately accepted XTL2500 radios equipped with M5 control heads and DTMF microphones as a comparable replacement for its Spectra radios.³⁵

11. *TA Mediator Recommendation.* The TA mediator recommends that the Commission find in favor of Sprint on the comparable facilities issue.³⁶ The mediator concludes that the XTL2500 radio with an M5 control head and DTMF microphone will provide the same level of functionality as the Spectra radio currently used by High Point "with the transition as transparent as possible to the end user."³⁷ Specifically, the mediator finds that the M5 control head with the DTMF microphone provides the user with the same ability as the W7 control head configuration to switch channels with one hand.³⁸ Additionally, the mediator finds that the XTL2500 is capable of providing private calling functionality.³⁹

III. DISCUSSION

12. We conclude that Sprint has met its burden of proof that the XTL2500 radio being offered as a replacement model by Sprint is comparable to the Spectra radio currently used by High Point. To meet the comparable facilities standard, Sprint must provide mobile radios that are "technically and operationally comparable to the licensee's existing radios."⁴⁰ In this case, there appears to be no dispute that the XTL2500 radio has the same overall technical and operational capability as the Spectra. High Point, however, argues that the comparable facilities standard also requires the radios to be comparable in "ergonomic design including physical and mechanical features such as keypad and unit display."⁴¹ High Point then argues that the XTL2500 is not comparable because the M5 control head and DTMF microphone are configured differently from the W7 control head and conventional microphone on the Spectra radio.⁴²

³¹ Sprint Reply at 8-9.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 7.

³⁶ RR at 9.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 10.

⁴⁰ County of Tazewell, Illinois, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 8675, 8679 ¶ 9 (PSHSB 2007) (*Tazewell*).

⁴¹ High Point SOP at 6.

⁴² *Id.*

13. We disagree with High Point's interpretation of the comparable facilities standard. 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."⁴³ The characteristics of the system are "defined functionally from the end user's point of view."⁴⁴ However the Commission has never interpreted comparable facilities to require mobile radios that are functionally and operationally comparable to also be comparable in their "ergonomic design." Indeed, we are concerned that applying the comparable facilities standard in this manner could lead to protracted disputes over minor variations in the "look and feel" of different equipment models that offer the same basic capabilities.

14. Even if we were to apply the comparable facilities standard to the ergonomic design of such features as radio control heads and microphones, we do not find the design differences in the configuration of the two radios presented in this case to be material. While ease of use in emergency situations is an important factor for radio equipment used by first responders, we do not believe it requires Sprint to provide High Point with replacement radios that have the identical control head and microphone configuration as High Point's existing radios, so long as the replacement radios provide comparable ease of use.⁴⁵ Here, Sprint has shown that the XTL2500 radio supports equivalent features and functions to those provided by the Spectra radios used by High Point. Specifically, the record demonstrates that: (i) channel-switching on the XTL2500 radio with an M5 control head is executable as a one-step and single-hand activity;⁴⁶ (ii) the DTMF microphone can be programmed to control the radio and can be placed anywhere in the front seat area of the car based on the driver's preference;⁴⁷ and (iii) the XTL2500 radio supports "private calling."⁴⁸ The record does not suggest that High Point users would have difficulty in adjusting to the XTL2500, and Sprint has offered to fund training to support the transition.

15. We give no weight to High Point's claim that Motorola recommended the XTL5000 radio as a replacement for High Point's existing Spectra radios. The record before us suggests that Motorola's recommendation was driven by High Point's stated preference for a radio with the same control head design.⁴⁹ We also note that Motorola plans to discontinue providing the XTL5000 with the W7 control head after rebanding. Thus, regardless of which radio model it receives, High Point will have to adjust to changes in radio design due to the evolving nature of the equipment manufacturing market. Similarly, we consider High Point's claim that the replacement radios offered by Sprint will result in a higher operating costs to be speculative, particularly given that Motorola is discontinuing production of the control head model that High Point prefers. Although the replacement cost of the more functional DTMF microphones furnished with the XTL2500 radios may be higher, High Point has not shown that

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

⁴⁴ *Id.* at 19112-19114 ¶¶ 92-95.

⁴⁵ High Point contends that the Bureau's decision in *Tazewell* supports its position that the XTL2500 is not comparable to the Spectra. High Point SOP at 6. We disagree. In *Tazewell*, we found that Sprint was required to provide replacement radios that had the same technical capability as the licensee's existing radios to operate on all NPSPEC channels. *Tazewell*, 22 FCC Rcd at 8677-78 ¶¶ 8-11. Here, however, there is no dispute that the XTL2500 and Spectra are technically comparable. Instead, High Point seeks to extend the concept of comparability to encompass the "look and feel" of equipment. *Tazewell* neither compels nor supports this result.

⁴⁶ Sprint Reply at 4.

⁴⁷ Sprint PRM at 6.

⁴⁸ Sprint Supplement at 3.

⁴⁹ See High Point SOP at 13, Ex. 1.

there is a frequent need to replace microphones, and Sprint has offered to supply spare DTMF microphones as replacements for DTMF microphones that may fail.⁵⁰

16. Finally, we are not persuaded by High Point's argument that Sprint should replace High Point's Spectra radios with XTL5000s because Sprint has agreed to do so in some prior mediations. While resolution of similar issues reached in other mediations may be instructive, we note that none of these cases were referred to the Bureau, and we ultimately are not bound by them because the facts and circumstances of other mediations vary and are not part of the record in this case. Additionally, the facts in the cases cited by High Point suggest that Sprint has provided only a small number of XTL5000 radios to other licensees, and then only in unusual circumstances not present here, *e.g.*, to replace helicopter-mounted or motorcycle-mounted radios for which the XTL2500 was not suitable. Moreover, both the Citrus County and Berkeley cases provide instances where licensees have accepted the XTL2500 as a replacement radio for the Spectra model.

17. In sum, we agree with the mediator that Sprint has met its burden of proof to show that the Motorola XTL2500 radios will provide High Point with facilities comparable to those available with its current Spectra radios equipped with the obsolescent W7 control heads. High Point's argument to the contrary is not persuasive – it relies on only insubstantial differences between two comparable radios.

18. Because High Point's PRM reflects a misunderstanding of the comparable facilities standard, we take this opportunity to remind licensees that "comparable" does not equate to "identical," *i.e.*, that small differences, such as the "look and feel" of equipment as professed in the case here, do not justify what amounts to "upgrading" to a more expensive alternative at Sprint's expense. In addition, using extended negotiations, mediations, and requests for *de novo* to litigate disputes over small differences is counterproductive and imposes unnecessary delay and expense on the rebanding process. Accordingly, we strongly urge parties currently in negotiations to resolve such minor differences outside of the mediation and *de novo* review processes.

IV. ORDERING CLAUSES

19. IT IS ORDERED, pursuant to 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, that this *de novo* review is resolved in Sprint Nextel's favor.

20. IT IS FURTHER ORDERED, that reconfiguration of the 800 MHz system of the City of High Point, North Carolina, SHALL PROCEED promptly and consistent with this *Memorandum Opinion and Order*.

21. 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

David L. Furth
Acting Chief
Public Safety and Homeland Security Bureau

⁵⁰ See Sprint PRM at 7.