



# Alternative Dispute Resolution (ADR)

October 24, 2006

Slide 0



- ❑ Joseph P. Markoski serves as the TA's Chief Mediator. Joe is the Managing Partner of the Washington, DC and Tysons Corner Offices of Squire, Sanders & Dempsey LLP ("SSD"), and the Head of SSD's Communications Group.
  
- ❑ Jonathan Jacob Nadler is a member of the TA's ADR Team. Jack is a partner in SSD's Communications Group, with nearly twenty years experience. He is based in SSD's Washington, DC office. Jack is assisting Joe in developing and implementing the TA's ADR Program.
  
- ❑ Elaine Ayensu, comes to the TA with experience in organizational change, communication and technology. Elaine is a Consultant for the TA and assists in the facilitation of Outreach, Events and Education.

## Introduction





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2

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Slide 2



## Learning Objectives

**Upon completion of this module, participants will have a better understanding of:**

- The TA's Alternative Dispute Resolution ("ADR") Plan;
- The situations in which TA mediation can occur;
- The standards and procedures that TA Mediators will use; and
- The parties' rights and responsibilities in the TA's ADR process.









## Agenda

- Background
- Negotiations and ADR
- Mediators' and Parties' Primary Responsibilities
- Mediation of FRA Disputes
- Recommended Resolution
- Mediation of PFA Disputes
- Reimbursement of Mediation Costs
- Confidentiality
- Recommendations

**To which of the following groups do you belong?**






Polls are closed.

- Public Safety - Channels 1-120 
- Public Safety - NPSPAC 
- Public Safety - Both 
- CII 
- B/ILT 
- Other 

[ Poll 1 ]

### How close are you to executing an FRA?

Polls are open.


- Almost Done - Minimal work left 
- Working on PFA and/or Cost Estimate 
- Completed Cost Estimate, waiting on signatures from my Organization 
- Still in Negotiations with Sprint Nextel 
- No where near close - Will not execute an FRA by 10/31/06 

[ Poll 3 ]

**Are you actively negotiating a Frequency Reconfiguration Agreement with Sprint Nextel?**

Polls are closed.

Yes 

No 

[ Poll 2 ]

**Of those of you in negotiations, do you think you will reach an agreement by the end of the mandatory negotiations period?**

Polls are closed.



[ Poll 4 ]



## Negotiations & ADR

The FCC has established a three-stage process for the negotiation of FRAs.

1. The first stage is a three-month **voluntary negotiation** period, during which the parties are *strongly encouraged* to begin negotiating an FRA.
2. The second stage consists of a three-month **mandatory negotiation** period, during which the parties *must* negotiate in good faith.
3. If the parties have not submitted an FRA to the TA by the end of the mandatory negotiation period, the FCC requires that the matter be **automatically** referred to a **TA Mediator**.

All ADR procedures conducted by the TA are governed by the TA's ADR Plan, which has been developed, and which is being implemented, by the TA General Counsel, SSD.



## Negotiations and ADR

The TA's **ADR Plan** – which has been revised periodically to reflect experience gained during prior mediation periods– addresses a broad range of ADR-related issues. A copy of the ADR Plan is available on the TA's website, at [www.800TA.org/content/PDF/policy/ADRplan.pdf](http://www.800TA.org/content/PDF/policy/ADRplan.pdf).

1. Types of disputes that the TA can – and cannot – mediate (Sec. 2)
2. Statement of purpose (Sec. 3)
3. Restrictions to maintain the TA's independence (Sec. 5)
4. Confidentiality of ADR materials (Sec. 6)
5. *Ex parte* communications (Sec. 6)
6. Reimbursement of licensee's ADR costs (Sec. 7)
7. Procedures for FRA mediation (Sec. 8)
8. Procedures for mediation of "Other Disputes" (Sec. 9)
9. Procedures following TA rejection of an FRA (Sec. 10)
10. Template Proposed Resolution memorandum (Annex)



## Negotiations and ADR

- The TA's ADR Plan makes clear that the ADR process is **results-oriented**; the primary goal is to help the parties resolve disputes in a manner that is:
  1. Prompt;
  2. Equitable; and
  3. Consistent with FCC rules and TA policies.
  
- If the parties do not resolve their disputes within the allotted time, the mediator must prepare a **Recommended Resolution (RR)** for the FCC.
  
- Agreements are successes; referrals to the FCC are failures.**
  
- The TA anticipates that the vast majority of disputes that go to mediation will be disputes between incumbent licensees and Sprint Nextel in reaching **FRAs**. However, in the coming Mediation period, the TA expects to mediate a significant number of disputes regarding **Planning Funding Agreements (PFAs)**



## Negotiations and ADR

- ❑ TA Mediators will also be available to mediate certain **Other Disputes**, such as disputes regarding the **modification** or **implementation** of an FRA, that may arise during the course of reconfiguration.
- ❑ The TA will employ **customized procedures** that combine aspects of mediation and arbitration.
- ❑ Parties may also agree to submit any dispute to **non-binding arbitration**, at their own expense.
- ❑ All FRAs – *including those arrived at through mediation* — must be **submitted to**, and **approved by**, the TA.



## Primary Responsibilities

### **The Mediators' primary responsibilities:**

1. Determine the state of the negotiations, including progress made to date and relevant interoperability issues.
2. Identify the disputed issues.
3. Establish the mediation schedule, including a schedule for any required exchange of information.
4. Conduct conferences (individual or joint).
5. Determine whether to require parties to file written materials, including Proposed Resolution Memoranda (PRMs).
6. Maintain the Record.
7. If unable to settle the dispute, prepare a Recommended Resolution.



## Primary Responsibilities

### **The Parties' responsibility: Negotiate/mediate in good faith.**

1. Submit the required FCC confidentiality waiver.
2. Prepare for, and participate in, all required mediation sessions.
3. Promptly and fully comply with the TA Mediator's directions.
4. Limit negotiation/mediation costs to those that are "reasonable, prudent, and directly related to reconfiguration."
5. Inform the TA Mediator if the parties reach agreement on an FRA.



# Interactive Q&A

**TA Contact:**

Phone: 1-888-800-8220  
Website: [www.800TA.org](http://www.800TA.org)  
Email: [comments@800TA.org](mailto:comments@800TA.org)

**FCC – 800 MHz Reconfiguration:**

Website: <http://800MHz.gov>

## FRA Mediation Stage One – Voluntary Negotiation Period

- Most TA mediations will involve the adoption of an FRA.
- TA Mediators generally will play a limited role during Stage One, the three-month voluntary negotiation process.
  1. The TA, upon the request of either party, will provide **assistance in communicating** with the other party, including the transmission of documents and other information between the parties.
  2. The TA, in its discretion, may direct a TA Mediator to **mediate** if *both* parties request mediation. The parties may do so by filing a Request for Mediation (“RFM”) using the form located on the TA website.
- If the TA initiates a mediation during Stage One, it will use informal procedures, such as holding conferences.



## FRA Mediation Stage Two – Mandatory Negotiation Period

If the parties have not negotiated an FRA by the end of the three-month voluntary negotiation period, the parties must enter into **mandatory negotiations**.

During this period:

1. The Parties must negotiate in the **utmost good faith**.
2. If any reasonable **offer** is made, the other party is required to make a **counter-offer**.
3. The TA, upon the request of either party, will provide **assistance in communicating** with the other party and with the transmission of documents and other information between the parties.
4. The TA, in its discretion, may direct a TA Mediator to **mediate** negotiations between the parties if:
  - i. *either* party requests mediation or
  - ii. the TA concludes that the parties are otherwise unlikely to negotiate a FRA by the end of Stage Two.

Parties may request mediation by filing an **RFM** using the form on the TA website.



## FRA Mediation Stage One and Stage Two – Mandatory Negotiation Period

- If a matter is referred to mediation during Stage Two, the TA Mediator generally will use **informal procedures** until the end of the negotiation period.
- If, at any point in the mediation, the TA Mediator chooses to **require the filing of PRMs**, the Mediator will have to prepare a RR with 30 working days after the filing of the “responsive PRM.”



## FRA Mediation Stage Three – Mediation Period

- Most FRA mediations will occur during Stage Three.
- Pursuant to the FCC's Rules, **any party in Wave 1, Stage 2 that has not submitted an FRA to the TA by October 31, 2006 will automatically be referred to mediation** starting on November 1, 2007.
- A few days before the end of the mandatory negotiation period, a TA Mediator will contact you to:
  1. **Discuss** the status of the negotiation.
  2. **Answer** any questions you may have.
  3. **Explain** the mediation process.
  4. **Schedule** the initial joint conference.
- The parties should **continue to negotiate**.



## FRA Mediation Stage Three – Mediation Period

At the **initial joint conference**, the TA Mediator will:

1. Discuss the “**ground rules**” for the mediation.
2. Seek to **identify relevant issues**, including disputed issues and concerns regarding interoperability.
3. Establish the need for, and timing of, the **exchange of information** between the parties.
4. Schedule **additional mediation sessions**.
5. Adopt other **appropriate procedures**.

## FRA Mediation Stage Three – Mediation Period

- During the mediation period, the TA Mediator may schedule **in-person or telephone conferences** to understand the parties' positions, mediate an agreement, hear argument, or request further information from the parties.
- TA Mediators may initiate or receive ***ex parte* communications** to explore the parties' positions. No information obtained from an *ex parte* communication will be made part of the Record, or be relied on in developing an RR, unless it has been timely disclosed to the other party.
- In extraordinary circumstances, the TA Mediator may conduct an **oral evidentiary hearing**, in which testimony will be given on the record.
- The TA Mediator may require the parties to file **Proposed Resolution Memoranda**, or to make other filings, either jointly or separately, which will become part of the Record.



## FRA Mediation Stage Three – Mediation Period

If the parties appear unlikely to resolve the dispute, the TA Mediator will require each party to file a **Proposed Resolution Memorandum**. Each party's PRM must include:

1. A brief **summary** of the parties' most recent offer and counter-offer;
2. An identification of any **information requested** by the party but withheld by the other party;
3. A discussion of any allegation of **breach of the duty to negotiate in good faith**;
4. A discussion of **each issue in dispute**, with reference to supporting documents or other exhibits contained in an Appendix, and the party's proposed resolution of each issue; and
5. An **Appendix** containing an index and consecutively paginated copies of all documents and other relevant exhibits.



## Recommended Resolution

After receiving the PRMs, the TA Mediator will promptly compile the Record and propose a recommended resolution of each relevant issue in dispute.

The RR will include:

1. A recommended resolution of each relevant **factual issue** in dispute, and a statement of reasons for each recommendation.
  - i. Recommendations with respect to disputed facts will be based solely on the Record.
  - ii. The RR may include alternative recommendations, or recommend that further proceedings be conducted regarding particular issues.
2. A recommended resolution of each **legal or policy issue** in dispute. Recommendations with respect to disputed legal policy issues will be based on the FCC Rules, FCC Orders, TA Policies, and the Reconfiguration Handbook. Prior RRs are not precedential.



## Recommended Resolution

The RR may include a recommendation that the parties be given additional time for negotiation. The TA will only make such a recommendation where:

1. The parties have been negotiating in **good faith** and are likely to **reach agreement** (or significantly narrow clear disputes) if given a **small amount** of additional time; or
2. The parties have reached agreement, but the Licensee requires additional time to obtain approval from a **governmental authority**.



## Recommended Resolution

The mediation proceeding will not be governed by formal rules of evidence. The TA Mediator will apply the following evidentiary standards in preparing the RR:

1. Sprint Nextel bears the burden of proof as to the **comparability of facilities**.
2. The Reconfiguring Licensee bears the burden of proof as to the **cost of relocation**.
3. The **preponderance of the evidence** test will be applied in recommending the resolution of disputed facts.
4. If a party does not meet its burden, the TA Mediator may:
  - i. Accept the other party's position, if reasonable; or
  - ii. Make an independent finding of fact based on the Record.



## Recommended Resolution

The RR will be forwarded to the FCC along with the **Mediation Record**. The Record will consist of:

1. The parties' **PRMs** (including the Reply, if any) and any supplements, amendments, or other filings;
2. Any **stipulations** entered into by the parties;
3. All **notices or orders** issued by the TA Mediator;
4. Copies of, or references to, all **TA Policies** and information that the TA Mediator relied on, but that are not contained in the PRMs; and
5. Copies of proposed replies or amendments to the parties' PRMs or Appendices that the TA Mediator **did not permit or consider** in preparing the RR.



## Recommended Resolution

- At the time the TA forwards the Record and RR to the FCC, the Mediator will electronically serve the parties with a copy.
- The parties should **continue to negotiate** after the Record and RR have been submitted to the FCC.
- At that point, the parties may agree to **expedited, non-binding arbitration** in a non-TA ADR forum. If they do, they should advise the TA. Such arbitration will be conducted at the party's expense. It must be completed within thirty days of the date on which the Record and RR are forwarded to the FCC.
- If the parties **subsequently reach agreement** on an FRA through non-binding arbitration, by accepting the RR, or otherwise, they must provide a copy of the FRA to the TA. The FRA must be approved by the TA.



## Recommended Resolution

**Stage Three mediations could have the following major milestones:**

- W-Day 1 or 2:** Initial joint conference
- W-Day 7:** Status conference
- W-Day 15:** Status conference
- W-Day 20:** Licensee files PRM
- W-Day 25:** Sprint Nextel files PRM
- W-Day 28:** Licensee files Reply
- W-Day 30:** Final conference; mediation period ends
- CD+10:** CM sends Record and RR to the FCC

Mediators will seek to resolve all disputes within **30 working days**. While the FCC has authorized the TA to grant **brief extensions**, the TA will only do so in **extraordinary circumstances**. Parties should not expect to receive exclusions routinely.

### Mediation of PFA Disputes

1. TA strongly encourages parties to complete PFA negotiations as early as possible.
2. In some cases, at the start of the mediation period, parties may still be negotiating a PFA.
3. The Mediator will seek to reach agreement on a PFA by the end of the mediation period. The Mediator may ask the parties to consider: (i) using the Fast Track process or (2) negotiating a hybrid PFA/FRA
4. If parties reach agreement on a PFA, the TA can recommend that the FCC provide a limited amount additional time for planning and FRA negotiation.
5. In such cases, the FCC requires the TA to report bi-weekly regarding the status of the planning process. Therefore, the Mediator will conduct a bi-weekly conference with the parties to monitor the progress of the planning process.



## Planning Funding Agreements

### **Planning During the Mediation Period**

Where the parties have reached agreement on a PFA by the end of the negotiation period, but are in the planning process, the TA will monitor the process until the parties are prepared to begin FRA negotiations



# Interactive Q&A

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## Reimbursement of Mediation Costs

### Reimbursement of mediation costs

1. Generally, Sprint Nextel must will pay Reconfiguring Licensees' mediation costs.
2. However, Sprint Nextel may not agree to pay these costs if it believes that:
  - i. The Reconfiguring Licensee has not **mediated in good faith**; or
  - ii. The Reconfiguring Licensee's mediation costs are not **reasonable and prudent**.
3. This matter should be addressed during mediation.
4. All requests for reimbursement of costs and expenses must comply with the procedures specified in the Reconfiguration Handbook.
5. The **post-ADR costs** incurred by parties in any case in which a matter is referred to the FCC for resolution are **not reimbursable**.



## Confidentiality

The TA recognizes that parties have a legitimate interest in protecting from disclosure confidential information submitted during the ADR process.

The TA has adopted a **Confidentiality Policy**, which provides that:

1. The TA will use information provided by Licensees only to fulfill its reconfiguration-related responsibilities.
2. The TA does not intend to disclose Licensee information to the public or to individual stakeholders.
3. The TA will provide Licensee information to the FCC when required, requested, or deemed appropriate.
4. The TA will treat the ADR Record – including the RR – as “**Protected Confidential Information.**”



## Confidentiality

### Protected Confidential Information

1. The TA will restrict access to ADR materials to TA Mediators.
2. If the Record is forwarded to the FCC, the TA will request the FCC:
  - i. Treat the information as “information that is not subject to public disclosure” under the Freedom of Information Act; and
  - ii. Provide advanced notice, and an opportunity to challenge and/or negotiate a protective order, before any public disclosure.



## Recommendations

- Start negotiations **early** – especially if you are a large system that needs planning funding.
- Try to resolve disputes through **private negotiation**, but **contact the TA** if you believe TA intervention is necessary to reach an agreement.
- Understand the **ADR Plan**, and comply with all requirements.
- Use mediation to **resolve disputes**, not to “make a record” for the FCC.
- Negotiate **reasonably, creatively, and efficiently**.
- Keep **accurate and detailed** records of the negotiation process.
- Keep negotiating.**



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## Next Steps

- Follow-up Survey:** The TA will be sending you an evaluation to provide feedback to us.
- Recording of Module:** A recording of this presentation will be on the TA website [www.800TA.org](http://www.800TA.org) within 48 hours.
- Upcoming Webinars:** Future Webinars will be available soon. Please check the TA website <http://www.800ta.org/content/news/webinars.asp> for dates and times.



## Contact Information

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- Phone: 1-888-800-8220
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