

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

In the Matter of
Manassas City Public Schools
and Sprint Nextel
Mediation No. TAM-11106
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2006

Released: October 24, 2006

By the Associate 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 1, Phase 1 mediation by the 800 MHz Transition Administrator (TA) and involving issues in dispute between the Manassas City Public Schools (Manassas) and Sprint Nextel Corporation (Sprint). Based on our de novo review of the mediation record, the recommended resolution submitted by the TA-appointed mediator in this case, and the parties' position statements, we make the following findings. Pending before us are three disputed issues that involve disagreements over transaction cost estimates for 1) labor performed by two Manassas employees, 2) attorneys fees, and 3) consultant fees. With respect to these issues, we find that Manassas is entitled to partial recovery of its claims in these categories. Also before us are three additional disputed issues concerning disagreements over language in the parties' draft Frequency Relocation Agreement (FRA). We find that the changes to the FRA proposed by Sprint and the mediator are sufficient to resolve these disputes. Manassas also seeks de novo review on the issue of whether Sprint has failed to negotiate with Manassas in good faith. We find that Sprint did negotiate in good faith. Finally, Manassas has raised several new issues in its position statement, filed after the case was referred to us by the TA. We find that these issues are outside the scope of our de novo review.

II. BACKGROUND

2. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee that is subject to rebanding. The FRA must provide for relocation of the licensee's system to its new channel assignment at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required. Sprint must provide the relocating licensee with

1 See 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, 15021-45, 15069 ¶¶ 88-141, 189 (2004) as amended by Erratum, 19 FCC Rcd 19651 (2004), and Erratum, 19 FCC Rcd 21818 (2004) (800 MHz R&O); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order); and Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) as amended by Erratum, DA 05-3061 rel. Nov. 25, 2005 (800 MHz MO&O).

2 The channel change(s) are commonly referred to as a "retuning" of the system. In some instances, however, a channel change requires that equipment must be replaced rather than retuned. For convenience, unless the context

(continued....)

“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.<sup>3</sup>

3. To facilitate FRA negotiations, the Commission established a three-month voluntary negotiation period and a three-month mandatory negotiation period for Sprint to negotiate with each relocating licensee.<sup>4</sup> If a licensee and Sprint are unable to negotiate a FRA at the end of the mandatory negotiation period, they must enter into a thirty-day mediation period under the auspices of a TA-appointed mediator. If the parties do not reach agreement by the end of the mediation period, the mediator forwards the mediation record and a recommended resolution to the Commission’s Public Safety and Homeland Security Bureau (PSHSB).<sup>5</sup> Within ten business days of the mediator’s submission of the record and recommended resolution, the parties may file position statements. Position statements may not, however, raise issues not presented during mediation.<sup>6</sup> Thereafter, PSHSB conducts a *de novo* review of the mediation record, evaluates the parties’ position statements and the mediator’s recommended resolution, and issues an order disposing of all disputed issues.<sup>7</sup>

4. In the instant case, Manassas’ 800 MHz system (license WNJW728) consists of 85 Motorola radios, including 79 school bus radios, four portable radios, and one MICOR repeater, and operates on a single channel.<sup>8</sup> The TA’s Regional Prioritization Plan calls for Manassas to relocate its system during Wave I of the multi-phased reconfiguration process.<sup>9</sup> In negotiations, the parties agreed that Manassas would relocate its system from its original channel assignment to frequency 856.6125 MHz.<sup>10</sup> The parties also agreed that the hard costs to reconfigure Manassas’ system would be \$8,347.<sup>11</sup> Manassas, however, claimed that Sprint should also pay associated transaction costs of \$30,370.87,<sup>12</sup> to which Sprint would not agree.<sup>13</sup> As a result, Manassas and Sprint did not conclude an FRA during either the voluntary mediation period, which began on June 27, 2005, and ended on September 26, 2005, or during the mandatory negotiation period, which began on September 28, 2005 and ended on December 26, 2005.<sup>14</sup> The parties entered into mediation on December 26, 2005, and mediation concluded on February 8, 2006, with certain

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requires otherwise, “retuning” as used herein also encompasses equipment replacement if existing equipment cannot be retuned.

<sup>3</sup> Comparable facilities are those that will provide the same level of service as the incumbent’s existing facilities, with transition to the new facilities as transparent as possible to the end user. The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. *800 MHz R&O*, 19 FCC Rcd at 15077 ¶ 201.

<sup>4</sup> Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator’s 800 MHz Regional Prioritization Plan, *Public Notice*, 20 FCC Rcd 5159, 5160 (2005).

<sup>5</sup> The *800 MHz R&O* originally provided for referral and *de novo* review of unresolved mediation issues by the Public Safety and Critical Infrastructure Division of the Commission’s Wireless Telecommunications Bureau (PSCID). *800 MHz R&O*, 19 FCC Rcd at 15075 ¶ 201. However, on September 25, 2006, the Commission delegated this authority to the new Public Safety and Homeland Security Bureau. *See* Establishment of Public Safety and Homeland Security Bureau, *Order*, FCC 06-35, rel. Sep. 25, 2006.

<sup>6</sup> Wireless Telecommunications Bureau Announces Procedures For De Novo Review In The 800 MHz Public Safety Proceeding, *Public Notice*, 21 FCC Rcd 758 (2006) (*De Novo Procedures PN*). at ¶ 4.

<sup>7</sup> *Id.* at ¶¶ 4, 10.

<sup>8</sup> Sprint Proposed Resolution Memorandum (Sprint PRM) at 2.

<sup>9</sup> TA Mediator Recommended Resolution (RR) at 1.

<sup>10</sup> Sprint PRM at 2.

<sup>11</sup> RR at 3.

<sup>12</sup> The mediator found that Manassas had claimed \$30,580.21 in transaction costs. RR at 3. For the reasons explained in n. 24, *infra*, the correct amount should be \$30,370.87.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2.

issues unresolved.<sup>15</sup> On February 21, 2006, the mediator forwarded the mediation record and his Recommended Resolution to PSCID.<sup>16</sup> Manassas filed its position statement on March 6, 2006, and Sprint filed its position statement on March 7, 2006.

5. Under the Commission's orders in this proceeding, Sprint bears the burden of proving that Manassas' relocated facilities are "comparable" on their new channel assignment within the meaning of the *800 MHz R&O*.<sup>17</sup> Manassas 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."<sup>18</sup> The Commission's orders allow Manassas to be compensated for both "hard costs," which include the price of equipment and the labor necessary to install, tune, and test the equipment, as well as reasonable "transaction costs," which include staff administrative time and, when necessary, attorneys and consultants fees required to plan for reconfiguration and negotiate the FRA. With respect to transaction costs, however, the *800 MHz Supplemental Order* requires that we give a "particularly hard look to any request involving transaction costs that exceed two percent" of the hard costs involved.<sup>19</sup> The Commission has stated that, in the vast majority of such cases, the party requesting transaction costs will have to meet a "high burden" of justification. The Commission declined, however, to impose the two percent rule as a fixed limit because public safety entities may need outside expertise to negotiate agreements.<sup>20</sup> The FRAs contain provisions that would permit relocating licensees to later amend their cost estimates, if necessary, after agreement with Sprint and subject to the approval of the TA.<sup>21</sup>

6. Any party that alleges bad faith on the part of another shall bear the burden of proceeding and the burden of proof.<sup>22</sup> Among the factors relevant to a good-faith determination are: (1) whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party.<sup>23</sup>

### III. DISCUSSION

#### A. Employee Labor

7. The parties dispute the amount that Manassas should receive for the past and future labor of two of its employees, Tim Fitzwater and Dave Schauer, towards the reconfiguration of the Manassas system. We grant Manassas partial relief with regard to these claims.

8. Manassas asserts that Fitzwater has already spent 31 hours, and will spend another 24 hours, on reconfiguration-related work. At Fitzwater's rate of \$45.70 per hour for 55 hours, Manassas therefore claims a total of \$2,513.50 for his labor costs. Manassas also contends that Schauer has spent 17 hours, and will spend another 32 hours, on the reconfiguration. At Schauer's rate of \$69.78 per hour, Manassas

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

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *800 MHz R&O*, 19 FCC Rcd at 15064 ¶ 178.

<sup>18</sup> *Id.* at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71; *De Novo Procedures PN*, 21 FCC Rcd at 759 ¶ 9.

<sup>19</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25151 ¶ 70.

<sup>20</sup> *Id.*

<sup>21</sup> The Commission's rebanding procedures require the TA to audit the amounts expended during reconfiguration. *Id.* at 25152 ¶ 71; *800 MHz R&O*, 19 FCC Rcd at 15073 ¶ 198.

<sup>22</sup> *De Novo Procedures PN*, 21 FCC Rcd at 759 ¶ 9.

<sup>23</sup> *800 MHz R&O*, 19 FCC Rcd at 15076 n.524.

claims \$3,419.22 for his labor costs.<sup>24</sup>

9. During mediation, Sprint argued that Manassas had not presented sufficient evidence to support these labor cost claims.<sup>25</sup> Sprint stated that it was willing to compensate Manassas for eight hours that Fitzwater had already spent on reconfiguration, but that it would not pay for any future time.<sup>26</sup> With regard to the time Schauer had already spent on reconfiguration, Sprint claimed that it was not necessary, but that Sprint would be willing to compensate Manassas for up to ten hours of Schauer's future time if Manassas could provide adequate justification.<sup>27</sup>

10. The mediator found that Manassas' labor cost claims were inadequately documented. With regard to Fitzwater, the mediator stated that Manassas was not able to provide contemporaneous time records to show how much time Fitzwater had spent on reconfiguration or to provide specific descriptions of the tasks completed.<sup>28</sup> The mediator also found that Manassas provided little evidence to support its estimate for Fitzwater's future labor.<sup>29</sup> After considering the hours that Sprint was willing to agree to during mediation, and the limited documentation provided by Manassas, the mediator recommended compensating Manassas for ten hours of Fitzwater's past work and nine hours of his future work on the reconfiguration.<sup>30</sup> As for Schauer, the mediator found that the vast majority of the time claimed for Schauer was not necessary to accomplish the relocation.<sup>31</sup> The mediator recommended that Manassas be compensated for four hours of Schauer's past labor and four hours of his future labor.<sup>32</sup> In total, the mediator recommended that Manassas receive \$1,426.54 for Fitzwater and Schauer's past and future labor costs.<sup>33</sup>

11. After an independent review of the record, we find that Manassas has only justified a portion of the amount it claims for the labor of these two employees and so we grant partial relief. Manassas' claim for labor costs amounts to more than seventy percent of the stipulated hard cost total to retune the system, which already includes the labor cost associated with the actual retuning process. Moreover, the Manassas system is a simple single-channel system with a small number of mobile radios and a single repeater.<sup>34</sup> Given the system's small size and lack of complexity, we find that Manassas has not provided a sufficient explanation as to why over 100 hours of its employees' time is required for reconfiguration-related work beyond the labor associated with retuning itself. Although Manassas has described Fitzwater as a maintenance supervisor, it has not documented how all of Fitzwater's time contributed to the reconfiguration effort. Manassas has presented even less justification for Schauer: indeed, there is nothing in Manassas' PRM or its other record documents that explains Schauer's title or how his duties relate to reconfiguration. After considering the size of Manassas' system, and Manassas' lack of explanation for the time it claims for Fitzwater and Schauer, we find it reasonable for the mediator to conclude that \$1,426.54 was an appropriate amount for the labor of Fitzwater and Schauer. If, however, Manassas ultimately incurs labor costs in excess of this amount, and can document that the additional labor was

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<sup>24</sup> RR at 3-5. The TA Mediator found that Manassas claimed a total of \$6,142.06 for the labor costs of Fitzwater and Schauer. *Id.* at 3. This appears to be the result of a mathematical error. Using the same hourly rate and number of hours that the TA Mediator used, we arrived at \$5,932.72

<sup>25</sup> Sprint Reply to Manassas Proposed Resolution Memorandum (Manassas PRM) at 5-6.

<sup>26</sup> RR at 5-6.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 15.

<sup>30</sup> *Id.* at 13-15.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.* at 15-16.

<sup>33</sup> *Id.* at 14-16.

<sup>34</sup> Sprint PRM at 2.

necessary to the reconfiguration of its system, Manassas may use the FRA true-up process to recover those expenses.<sup>35</sup>

#### **B. Attorneys fees**

12. Manassas claims \$6,457.50 for attorney fees as the minimum necessary to reconfigure its system. We grant Manassas partial relief with regard to these claims.

13. Manassas asserts that its counsel, Martin Crim, spent 8.4 hours at \$175.00 per hour on the PRM, and would spend another 28.5 hours on the project after January 17, 2006.<sup>36</sup> The mediator found that Manassas failed to justify its full attorneys fees claim. The mediator also found that Crim became involved in the relocation negotiations in December 2005, only a short time before mediation commenced, and did little to help the parties agree to an FRA. After considering the nature of the issues involved and the positions counsel took during mediation, the mediator recommended that Crim be reimbursed for 12 hours at \$175 per hour, for a total of \$2,100.<sup>37</sup>

14. We find that Manassas has partially but not fully justified its attorneys fee claim. Manassas claim' for 36.9 hours of attorney time appears to be unnecessarily disproportionate to the relatively small size and lack of complexity of the Manassas system. After our own independent assessment, we believe the mediator's recommendation that Manassas should be compensated for 12 hours of attorneys fees is reasonable. We therefore find that Manassas should receive \$2,100 in attorneys fees. If Manassas ultimately incurs legal fees in excess of this amount, and can document that the additional legal effort was necessary to the reconfiguration of its system, the true-up provisions in the FRA would permit Manassas to request that additional amount.

#### **C. Consulting fees**

15. Manassas claims \$17,980.65 for the cost of retaining RCC Consultants (RCC) to assist it with the reconfiguration process. We grant partial relief with respect to this claim.

16. The mediation record reflects the following costs charged by RCC: \$3,149.80 for a frequency analysis; \$5,861.99 for conducting an inventory, \$4,275.90 for engineering and implementation planning, and \$4,692.96 for project management services.<sup>38</sup> Sprint objects to paying any cost for RCC, contending that RCC's services are not necessary to retune Manassas' radios.<sup>39</sup> The mediator recommends that Manassas not receive any payment for consultant fees. The mediator notes that: 1) Manassas did not confirm its decision to hire a consultant until February 1, 2006, seven days prior to the end of the mediation period; 2) RCC proposed to conduct an inventory at a cost of \$5,861.99, but Manassas had already performed an inventory before RCC became involved; 3) in response to the mediator's request that Manassas provide a written justification for RCC's work, Manassas provided only language from a TA form document used for requesting upfront planning funds.<sup>40</sup>

17. We find that Manassas is entitled to recover consulting fees charged by RCC except for the \$5,861.99 attributable to system inventory. Frequency analysis, engineering and implementation planning, and project management services are the type of reasonable and prudent services that a relocating licensee may need to perform to ensure that the retuned system performs satisfactorily. Although RCC's fees for

<sup>35</sup> 800 MHz R&O, 19 FCC Rcd at 15073 ¶ 198.

<sup>36</sup> RR at 6.

<sup>37</sup> *Id.* at 16-18.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.* at 8-9.

<sup>40</sup> *Id.* at 18-19.

these services in this case were significantly higher than the presumptive two percent limit on transaction costs, we recognize that public safety entities, particularly small entities with limited resources, may need to retain outside expertise to assist in the planning and FRA negotiation process.<sup>41</sup> Under the facts in this case, we find that Manassas provided sufficient justification for these services. However, we believe the mediator was appropriately concerned that Manassas raised this issue late in the mediation process, and we generally admonish relocating 800 MHz licensees to raise and address issues relating to consultants as early as possible in negotiations. We also deny Manassas' claim for fees to pay RCC for performing a system inventory. Although system inventory is a legitimate relocation-related expense, Manassas has conceded in this case that it was unnecessary for RCC to perform this service because Manassas had already performed an inventory before it retained RCC's services.<sup>42</sup>

#### **D. Requests to add clarifying language to the FRA**

18. Manassas contends that the FRA is unclear as to the parties' responsibilities in three areas and asks for additional language to address those concerns. We find that revised FRA language proposed by Sprint and the mediator is sufficient to resolve these disputes.

19. First, Manassas claims it is unclear whether the cost estimate in the draft FRA is subject to the "true-up" provisions in the FRA.<sup>43</sup> Manassas is apparently concerned that under the draft FRA, it could be denied payment for reasonable expenses it incurs if those expenses exceed its estimates. Sprint proposes language to make clear that the relocation costs it will pay to Manassas will be subject to the true-up provisions of the FRA. Those provisions permit Manassas to amend its relocation cost claims to include necessary costs to the extent agreed to by Sprint and approved by the TA.<sup>44</sup> We find that these provisions are sufficient to address Manassas' concerns.

20. Second, Manassas requests that a cross-indemnification provision in the FRA be stricken, with each party to be liable for its own costs that might result from a breach of the FRA.<sup>45</sup> Sprint proposes the following language: "Neither party is assuming, nor is either party responsible for, any liabilities or obligations of the other arising out of or in connection with this Agreement."<sup>46</sup> The mediator recommended that the FRA include Sprint's proposed language and the phrase "except for those obligations expressly set forth herein," to ensure that Sprint remains obligated to make direct payments to vendors.<sup>47</sup> We find that the mediator's proposed language addresses the concerns Manassas raised on this issue during mediation.

21. Finally, Manassas requests FRA language stating that Sprint will take the necessary steps to remove any lien applied to Manassas' facilities as a result of Sprint's failure to make any direct payment to a vendor that relates to configuration costs covered by the FRA.<sup>48</sup> Sprint proposes to add language clarifying that: (a) Sprint will discharge any liens or security interests that attach to any of Manassas' facilities in favor of a vendor; and (b) if Sprint fails to discharge the liens and security interests, it will be responsible for all costs directly resulting from the liens.<sup>49</sup> We find that Sprint's language addresses

<sup>41</sup> 800 MHz Supplemental Order, 19 FCC Rcd at 25151 ¶ 70.

<sup>42</sup> Manassas Position Statement (Manassas PS) at 4.

<sup>43</sup> RR at 21.

<sup>44</sup> Sprint Proposed FRA at 2; RR at 11, 21. To Section 3(b), which is entitled "Payment Terms," and specifies that Sprint will pay the costs incurred to reconfigure Incumbents' system, Sprint added "subject to Sections 3(b)(i)-(iv) and Sections 8 and 25 of this Agreement."

<sup>45</sup> RR at 11.

<sup>46</sup> Sprint Proposed FRA at 6; RR at 12, 21-22.

<sup>47</sup> RR at 22.

<sup>48</sup> *Id.* at 12.

<sup>49</sup> Sprint Proposed FRA at 6; TA Mediator RR at 12, 22.

Manassas' concerns.

### **E. Good faith negotiation**

22. Manassas claims that Sprint failed to negotiate in good faith by failing to provide Manassas with planning funds, making threats, and negotiating with low-ranking Manassas employees who did not have the authority to bind the licensee.<sup>50</sup> We reject this claim.

23. Sprint contends that it submitted a good faith offer with its PRM.<sup>51</sup> It further argues that Manassas failed to provide a complete cost estimate as required by the Commission and the TA.<sup>52</sup> Sprint also contends that Manassas has not filed a request for planning funds.<sup>53</sup>

24. The mediator recommends that we find that Sprint negotiated in good faith. The mediator cites e-mails attached to Sprint's PRM as demonstrating cooperation between Manassas and Sprint to obtain competitive pricing to reconfigure Manassas' system.<sup>54</sup> The mediator also notes that there is no evidence of a disagreement between the parties until December 2005, when Manassas requested \$5,000 for internal costs and \$10,000 for attorney fees. The mediator also notes that Manassas did not inform Sprint until February 2006 of its consultant fee claim for \$17,980.65.<sup>55</sup>

25. We find that Sprint has negotiated in good faith. While the negotiations and mediation between the parties reflect significant differences and have clearly been contentious, we find no evidence in the record that Sprint engaged in bad faith tactics.

### **F. New Issues Raised In Manassas' Position Statement**

#### **1. Timing of the mediator's recommended resolution filing**

26. Manassas claims that under the provisions of the TA's Alternative Dispute Resolution Plan, the mediator should have filed his recommended resolution on March 2, 2006, 30 working days after Manassas filed its PRM, rather than on February 21, 2006.<sup>56</sup> We dismiss this claim as outside of the *de novo* review process and without merit. The *de novo* process is intended to give parties the opportunity to seek review of relocation disputes that arose during mediation. Whether the mediator filed his recommended resolution on time is not relevant to the merits of any disputed issue between Manassas and Sprint. We also note that Manassas has not alleged any harm that resulted from the filing of the recommended resolution on February 21. In any event, we find that the mediator's filing was timely under the procedures established by the Wireless Bureau, which specify that mediators are to file their recommended resolutions within ten days of the end of the mediation period.<sup>57</sup>

#### **2. Alleged mediator bias**

27. We dismiss the claim that the mediator behaved either in an inflexible or biased manner or failed to give due regard to Manassas. The examples Manassas cited include setting rigid deadlines, siding with Sprint in the negotiation of relocation costs, and making allegedly false statements in the mediator's

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<sup>50</sup> Manassas PRM at 5, 9.

<sup>51</sup> Sprint Reply to Manassas PRM at 7-8.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.* at 4-5.

<sup>54</sup> RR at 20.

<sup>55</sup> *Id.* at 20-21.

<sup>56</sup> Manassas PS at 1.

<sup>57</sup> *De Novo Procedures PN*, 21 FCC Rcd 758 ¶ 1.

recommended resolution.<sup>58</sup> However, because this review is *de novo*, the mediator's findings are advisory only, and the conduct of the mediator is not at issue in this review. In any event, we see no evidence of bias or improper behavior on the part of the mediator.<sup>59</sup> The record indicates the mediator properly followed the policies the Commission adopted in the 800 MHz proceeding.<sup>60</sup>

### 3. Fairness of the mediation process

28. Manassas claims that: 1) the mediation process improperly imposes the burden on incumbents to prove the relocation costs are the minimum necessary; 2) the presumptive limitation that transaction costs should not exceed two percent of hard costs is unreasonable; and 3) the deadlines in the mediation process are unreasonable. Manassas also disputes the manner in which the mediator arrived at his recommended amount of transaction costs.<sup>61</sup> We dismiss these claims as untimely and beyond the scope of this *de novo* review proceeding. Manassas' complaints about the mediation process amount to an untimely petition for reconsideration of decisions made by the Commission in the *800 MHz R&O*. With respect to Manassas's concern about the presumptive two percent limitation on transaction costs, however, we reaffirm that this is not a cap on transaction costs, but merely subjects transaction costs that exceed two percent of hard costs to greater scrutiny.<sup>62</sup>

### 4. Proposed additional FRA modifications

29. In its position statement, Manassas requests additional changes to the FRA that it did not seek in mediation. Specifically, Manassas seeks to require Sprint to pay disputed charges and sue to recover them if it feels that these charges should not be paid, and requests addition of a fee-shifting provision enabling Manassas to recover its expenses if Sprint fails to pay disputed charges.<sup>63</sup> Because these issues were not raised in mediation, we dismiss Manassas' request as untimely and beyond the scope of the *de novo* review process. Under the *de novo* review procedures, parties must limit their position statements to issues raised in the course of mediation and to facts contained in the record.<sup>64</sup>

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<sup>58</sup> Manassas PS at 1-4.

<sup>59</sup> The Commission has determined that "[a] party alleging actual bias on the part of a judge must prove that claim by evidence of the judge's extra-judicial conduct or statements that are plainly inconsistent with his responsibilities as an impartial decision maker." In the Matter of Family Broadcasting, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 19332, 19333 ¶ 7 (2002). The Commission has also instructed about the principles the Supreme Court has ordered lower courts to use when assessing claims that a judge was biased: "'opinions formed by the judge on the basis of facts introduced in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias ... unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Ibid*, quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994). The standards in *Liteky* have been widely applied to administrative proceedings. D.C. Circuit has applied these principles to allegations of bias against a special master. *Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988). The Commission has explained that the TA Administrator serves a function similar to special masters. *800 MHz R&O*, 19 FCC Rcd at 14976, 15071 ¶¶ 8, 194.

<sup>60</sup> *800 MHz R&O*, 19 FCC Rcd at 15071-15074 ¶¶ 193-198.

<sup>61</sup> Manassas PS at 4-5.

<sup>62</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25151 ¶ 70 (Explaining that the Commission "decline[s] to use two percent as a fixed limit," but instructs the TA to give a "hard look" at requests for transaction costs above that amount).

<sup>63</sup> Manassas PS at 5.

<sup>64</sup> *De Novo Procedures PN*, 21 FCC Rcd 758 ¶ 4.



**IV. ORDERING CLAUSE**

30. Accordingly, pursuant to the authority of Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331; 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, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

FEDERAL COMMUNICATIONS COMMISSION

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