

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

In the Matter of)
)
City of Chesapeake, Virginia) WT Docket No. 02-55
and Sprint Nextel)
)
Mediation No. TAM-12105)

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2007

Released: July 18, 2007

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 2 mediation by the 800 MHz Transition Administrator, LLC (TA) involving disputes between the City of Chesapeake (Chesapeake) and Sprint Nextel Corporation (Sprint). The disputes relate to certain planning-related costs requested by Chesapeake, its consultant, and its vendor. Based on our *de novo* review of the mediation record and subject to the directions we provide below, we find that Chesapeake is entitled to compensation from Sprint for the majority of its requested costs.

II. BACKGROUND

2. Chesapeake is licensed to operate an 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) system under the call signs WPMA403 and WPWY440. Chesapeake is licensed for 23 channels with four simulcast sites. There are approximately 2300 units on the system, which is used by twelve city agencies.¹

3. The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a Frequency Relocation Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.² To ensure meaningful FRA negotiations, licensees may seek initial funding for activities associated with planning for the reconfiguration of their communications systems.³ This process is initiated by the submission to the TA of a Request for Planning Funding (RFPF), which is reviewed and approved by the TA and then forwarded to Sprint so that the parties can negotiate a Planning Funding Agreement (PFA). If the parties cannot reach agreement on a PFA, the case is referred to mediation.

4. In 2006, Chesapeake and Sprint commenced PFA negotiations regarding planning for

¹ See Sprint Proposed Resolution Memorandum (Sprint PRM) at 2; Chesapeake Proposed Resolution Memorandum (PRM) at 1-2.

² 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) (*800 MHz Report and Order*); 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) (*800 MHz MO&O*).

³ See generally http://www.800ta.org/org/planning_neg/submit1.asp.

retuning of the system.⁴ The case was referred to mediation as part of Wave 1 Stage 2 on October 31, 2006. During mediation, Chesapeake and Sprint were unable to reach agreement on planning funding costs. On January 12, 2007, after mediation proved unsuccessful on these issues, the mediator referred the matter to PSHSB for *de novo* review and resolution, submitting the record in the case as well as a Recommended Resolution.⁵ Sprint filed its Statement of Position with PSHSB on January 29, 2007.⁶

5. While Chesapeake and Sprint have agreed to \$187,252 in planning costs, they continue to dispute approximately \$152,101,⁷ of which \$19,440 was requested for Chesapeake, \$120,761 for Chesapeake's consultant, Televate LLC (Televate), and \$11,899 for Chesapeake's vendor, Motorola.⁸ Sprint and Chesapeake dispute the level of detail that the licensee must provide in documentation to support the hours requested for the PFA. In addition, the parties dispute how the city and its consultant should divide tasks, avoid duplication of effort, and manage the consultant's employees.

III. DISCUSSION

A. Standard of Review

6. As an initial matter, the Commission's orders in this docket assign to Chesapeake 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."⁹ We note that the Commission has recently clarified this standard for purposes of determining whether licensee relocation costs are the "minimum necessary" to accomplish rebanding, and therefore must be paid by Sprint.¹⁰ In the *Rebanding Cost Clarification Order*, the Commission stated 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."¹¹ This standard takes into account not just cost but all of the objectives of the proceeding, including timely and efficient completion of the rebanding process, minimizing the burden rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety's ability to operate during the transition.¹²

7. Our review of costs is also influenced by our experience in reviewing the costs incurred by other similarly-situated 800 MHz licensees in the planning process. In this regard, we have the benefit of data from the TA that can provide us with cost metrics for approved planning funding agreements for systems of varying size and complexity.¹³ We stress that these metrics are only one guiding factor

⁴ TA Recommended Resolution in Mediation No. TAM-12105 (RR) filed January 12, 2007, at 2.

⁵ See *id.*

⁶ Sprint Statement of Position, filed January 29, 2007 (Sprint SOP). Chesapeake relies on its PRM and Reply Proposed Resolution Memorandum (Reply PRM) filed with the mediator.

⁷ This number is an approximation because at the time that Chesapeake provided these figures, it still believed that Sprint would challenge the city's inventory and testing costs, which Sprint has not. For example, because Sprint did not challenge the mediator's award of 54 hours to Chesapeake for its "Baseline and Acceptance Testing Procedures Plan," we find this issue to be resolved and award Chesapeake 54 hours for this line item. See Sprint SOP at 10.

⁸ Chesapeake Reply PRM at 20.

⁹ 800 MHz Report and Order, 19 FCC Rcd at 15074 ¶ 198; 800 MHz Supplemental Order, 19 FCC Rcd at 25152 ¶ 71.

¹⁰ Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, FCC 07-92, rel. May 18, 2007 (*Rebanding Cost Clarification Order*).

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶ 8.

¹³ See http://800ta.org/content/PDF/other/Planning_Funding_Cost_Metrics.pdf.

underlying our analysis of the reasonableness of planning costs. Depending on the facts the licensee has established in the record, we may disapprove costs that fall below the guidelines or, conversely, approve costs that exceed the guidelines.

B. Level of Task Detail Necessary to Justify Total Hour Requests

8. Because this issue underlies most of the line items at dispute in this appeal, we address it at the outset. For most of its line item requests, Chesapeake listed a series of sub-tasks associated with the line item and the total number of hours to accomplish the entire list of sub-tasks. During mediation, Sprint requested that Chesapeake provide more detail by listing how many hours would be devoted specifically to each sub-task. Chesapeake declined to do so for the reasons set forth below. We conclude that Chesapeake has provided a sufficient level of detail regarding the line items at issue.

9. *Chesapeake's Position.* Chesapeake argues that its requested hours are based on its expertise and the expertise of its consultant in the city's public safety system.¹⁴ In the RFPF, Chesapeake provided a total amount of hours necessary to complete a task, and provided a list of sub-tasks necessary to accomplish the task. Chesapeake argues that Sprint's "request to provide such fine details for hours to [be] spent on sub-tasks puts an unfair burden and risk on the City's efforts."¹⁵ At the time that Chesapeake prepared its RFPF, Chesapeake states that it did not wish to run the risk of requesting fewer hours than necessary and that it did not have sufficient information to know, before the planning phase began, how many hours specific tasks would take.¹⁶ In particular, Chesapeake states that, when the RFPF was created,

[T]here was little knowledge as to issues such as: (1) what information would be necessary from radios to determine whether the radio must be replaced; (2) the amount of negotiations necessary with Motorola to reach a rebanding agreement; (3) changing procedures by the TA; (4) payment issues created by Nextel and/or the TA in the myriad of reconciliation and closing documents required of licensee; and (5) what would happen "in the field" when subscriber reads and inventory were conducted.¹⁷

10. Chesapeake also argues that special circumstances warrant its above-average request for planning funding.¹⁸ Chesapeake operates regional and national aid channels that provide interoperable communications with all government networks in the Hampton Roads, VA, area, including interoperable communications for the United States Department of the Navy.¹⁹ Chesapeake states that it must cooperate with other licensees in the region to ensure that its system remains interoperable post-rebanding.²⁰ Thus, until this group of licensees completes its interoperable rebanding plan, Chesapeake asserts that it will be unable to further specify the number of hours that particular tasks will take.²¹

11. *Sprint's Position.* Sprint argues that Chesapeake has failed to demonstrate that the requested hours are reasonable, prudent, and necessary because Chesapeake has not broken down its

¹⁴ Chesapeake PRM at 5.

¹⁵ Chesapeake Reply PRM at 11-12.

¹⁶ Chesapeake PRM at 4; Chesapeake Reply PRM at 11 (some details "cannot be provided until specific tasks are completed").

¹⁷ Chesapeake PRM at 4.

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.*

requested hours by sub-task.²² Sprint states that without this specificity, Sprint is unable to determine if there is “duplication of efforts, unreasonable efforts, and wasteful expenses.”²³ Sprint further contends that Chesapeake and its consultant, Televate, should not be reimbursed for hours already expended because Chesapeake has declined, to date, to provide it with information regarding what sub-tasks were performed, the hours spent on each sub-task, and which individual performed the work.²⁴

12. *Mediator's Recommendation.* The mediator recommends that the Bureau disallow hours that Chesapeake has not broken down by sub-tasks, including hours that the city and Televate have already expended.²⁵

13. *Discussion.* We agree with Chesapeake that in light of the special circumstances facing this licensee, coupled with the burden of providing more detailed hourly requests, Chesapeake has provided sufficient documentation of its requested hours for planning tasks. Under the standard articulated by the Commission in the *Rebating Cost Clarification Order*, Chesapeake has satisfied its burden by providing an estimated hourly figure for each task, and is not required to provide a further breakdown of how many hours it intends to spend on each sub-task.²⁶ We agree with Chesapeake that it is difficult to know how long each task will take before it is performed, and that Chesapeake's participation in region-wide rebating may justify an upward adjustment in funding.

14. We note, however, that when Chesapeake seeks payment from Sprint for time actually spent on planning, it must provide further documentation. It must, at that time, identify sub-tasks on an hourly basis and identify the individual who performed the sub-task.²⁷ Likewise, when Chesapeake submits for payment hours that its consultant has already expended, it must provide such documentation.²⁸ This will permit Sprint and the TA to verify at the time of payment that Chesapeake's actual expenditures have been reasonable, necessary, and prudent in accordance with standard articulated in the *Rebating Cost Clarification Order*.

C. Frequency Analysis

15. *Chesapeake's Position.* Chesapeake contends that a frequency analysis is necessary to ensure that there is no danger of post-rebating interference to its system from co-channel and adjacent channel licensees.²⁹ Chesapeake states that it performed a frequency search and located two Wave 3 Channel 1-120 licensees in North Carolina within 55 miles of its transmitter sites.³⁰ According to Chesapeake, the channels these two licensees occupy are co-channel or adjacent to the channels that

²² Sprint SOP at 5.

²³ *Id.*

²⁴ *Id.*

²⁵ RR at 15, 19-20.

²⁶ See City of Naperville, Illinois and Sprint Nextel, *Memorandum Opinion and Order*, DA 07-2615 at ¶ 18, rel. June 14, 2007 (*Naperville MO&O*) (“We reject Sprint's contention that [the city's] claim should be disallowed because it did not provide an itemized statement of this component of [the consultant's] work detailing the specific tasks that [the consultant] would perform under this category.”).

²⁷ See *Naperville MO&O* at ¶ 23 (finding insufficient documentation to support a claim for reimbursement of actual costs to a consultant).

²⁸ See *Naperville MO&O* at ¶ 18 (“We also remind Naperville that, as with all tasks for which it seeks reimbursement, the time specified is not a liquid amount that will automatically be credited, but that Naperville must document that the budgeted time is actually spent in the manner described and contributes to rebating of the system.”).

²⁹ Chesapeake PRM at 6-7.

³⁰ Chesapeake Reply PRM at 8.

Chesapeake has been assigned as part of the new NPSPAC band.³¹ Although the two Wave 3 licensees are slated to relocate from their current channels as part of Stage 1 of the rebanding process, Chesapeake states that this has not yet occurred, and that the Wave 3 licensees might not relocate until after Chesapeake moves to its new NPSPAC frequencies, thereby raising the possibility of interference.³² According to Chesapeake, Sprint fails to acknowledge that these licensees exist, even though the city states that this "information was readily available to Nextel on its Wizard software." Chesapeake has offered to move this task to the FRA stage so long as Sprint agrees to the proposed frequency analysis cost.³³

16. *Sprint's Position.* Sprint proposes to consider this request for frequency analysis costs in the negotiation of the FRA.

17. *Mediator's Recommendation.* The mediator recommends that the Commission direct the parties to address this issue during their negotiation of the FRA.

18. *Discussion.* We defer this issue to the FRA stage, at which point Sprint must either (1) agree to relocate the two Wave 3 licensees in time for Chesapeake to relocate to its new frequencies or (2) pay for a frequency analysis and the resolution of any interference issues that the analysis uncovers. The *800 MHz Report and Order* requires Sprint to relocate all Channel 1-120 licensees to other channels in order to accommodate relocation of NPSPAC licensees to the new NPSPAC band.³⁴ The need for a frequency analysis in this case will depend on whether Sprint accomplishes this task in a timely manner. If Sprint relocates Channel 1-120 licensees in the vicinity of Chesapeake by the time Chesapeake moves to its new NPSPAC channel assignments, there is no risk of interference from such licensees and a frequency analysis will not be necessary. On the other hand, if Channel 1-120 licensees in the area have not been relocated by the time Chesapeake moves to its new channel assignments, we agree with Chesapeake that there is a risk of interference. Because the timing of Chesapeake's relocation will not be decided until the FRA stage, we will defer the issue until then. However, we emphasize that resolution of this issue is Sprint's responsibility. If there are still Channel 1-120 licensees in the vicinity when Chesapeake relocates, Sprint must pay the cost of analyzing and resolving any interference issues that arise.

D. System Inventory

19. Although it appears that Sprint may have challenged some of the city's RFPF hours for system inventory, Sprint did not challenge these hours in its PRM or in its SOP. In addition, the mediator did not address this issue. Thus, we assume that Sprint has decided to withdraw its challenge on the system inventory line item and award to the city the full amount requested – \$7,440 for 248 hours to the City, \$24,865 for 238 hours to Televate, and \$12,988 for 79 hours to Motorola.³⁵

E. Implementation and Interoperability Planning

20. *Chesapeake Position.* Chesapeake requests 364 hours for implementation planning and 220 hours for interoperability planning, for a total of 584 hours.³⁶ Chesapeake proposes that Televate receive authorization for 225 hours for implementation planning and 86 hours for interoperability

³¹ *Id.*

³² *Id.*

³³ *Id.*

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

³⁵ Chesapeake Reply PRM at 9-10.

³⁶ *Id.*

planning, for a total of 311 hours.³⁷

21. *Sprint Position.* Sprint proposes 168 hours for the city and 98 hours for Teleate. Sprint argues that the tasks that Chesapeake lists for implementation planning are duplicative of tasks on Chesapeake's list of interoperability tasks.³⁸ Sprint also argues that the way Teleate manages its consultants and its time is unreasonable. For example, Sprint argues that it is unreasonable for Teleate to schedule 12 separate four-hour meetings with each of Chesapeake's 12 agencies with eight hours of travel time budgeted for each separate meeting.³⁹ Sprint also argues that some of the tasks proposed in this category, such as preparation and production of the FRA, are more appropriate for the implementation phase of the negotiations.⁴⁰

22. *Mediator Recommendation.* The mediator agreed with Sprint that there appeared to be duplication between Chesapeake's implementation and interoperability tasks and recommended reducing Chesapeake's implementation hours to 190 hours.⁴¹ The mediator also agreed that certain tasks were more appropriate for the implementation phase of negotiations and that Teleate's hours should be reduced because they were not broken down according to sub-tasks.⁴²

23. *Discussion.* We agree with Chesapeake that 584 hours for the city and 311 hours for Teleate is a reasonable estimation for the PFA stage. For the reasons stated in Section III.B above, we find that Chesapeake is not required to provide a breakdown of hours associated with each sub-task for this item. We also do not find the listed tasks to be duplicative, but we caution Chesapeake to ensure that the consultant schedules meetings with various agencies on the same or consecutive days where possible in order to save travel expenses. Finally, we disagree with the view that some costs should be disallowed because they may relate more to the FRA than the PFA. The relevant issue is whether the costs further the goals of this proceeding. If they do, as we conclude they do here, it is appropriate to require Sprint to pay for them at the PFA stage. Provided that the licensee does not double bill for the same activity at the FRA stage, Sprint must pay for these items at some point, and payment sooner rather than later will promote the "timely and efficient completion of the rebanding process."⁴³

F. Internal Legal Costs

24. *Chesapeake Position.* Chesapeake requests 195 hours or \$5,850 for internal city legal costs.⁴⁴ Chesapeake states that its internal counsel spent 40 hours on the original RFPF.⁴⁵ Chesapeake states that the remaining hours will be spent on two sets of Motorola agreements (planning and reconfiguration) and the PFA and the RFA.⁴⁶

25. *Sprint Position.* Sprint argues that all of the city's proposed tasks could have been accomplished in the 40 hours accrued to date.⁴⁷ Moreover, Sprint argues that outside counsel has

³⁷ *Id.*

³⁸ Sprint SOP at 9.

³⁹ Sprint PRM at 14.

⁴⁰ Sprint SOP at 6.

⁴¹ RR at 15.

⁴² *Id.* at 16-17.

⁴³ *Id.*

⁴⁴ Chesapeake PRM at 10.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Sprint SOP at 9.

performed many of these tasks.⁴⁸

26. *Mediator Position.* The mediator recommends that the Bureau award the city 85 hours for internal legal costs.⁴⁹ The mediator finds that continued negotiations with Sprint and Motorola should be included in the 40 hours that have accrued to date and that 45 hours is reasonable to grant inside counsel for further tasks.⁵⁰

27. *Discussion.* Given the *de minimus* amount of funding requested, we award Chesapeake 195 hours or \$5,850 for this line item.⁵¹

G. Project Management

28. *Chesapeake Position.* Chesapeake requests that Televate be awarded 323 hours for planning support and 135 hours for negotiations support, for a total of 458 hours or \$59,950.⁵² Chesapeake states that, as of October 31, 2006, Televate has spent 236 hours on planning support and 63.75 hours on negotiations support.⁵³ In addition to the sub-tasks listed on the RFPF, Chesapeake lists a page of sub-tasks that have been performed by the city and Televate.⁵⁴ Chesapeake acknowledges that some of the sub-tasks were performed by a representative from the city and a representative from Televate attending the same meeting.⁵⁵ Televate has assigned five of its personnel to the Chesapeake rebanding project, with different degrees of seniority and different types of expertise.⁵⁶

29. *Sprint Position.* Sprint objects to this line item primarily on the grounds that, to date, Chesapeake has not provided it with hourly breakdowns of sub-tasks and the identities of the individuals who performed the sub-task.⁵⁷ Sprint also objects to the number of Televate employees assigned to this project and the possibility that more than one Televate employee may attend a meeting.⁵⁸

30. *Mediator Recommendation.* The mediator recommends that the Bureau reduce Televate's hours for this line item to 138 on the grounds that Chesapeake has not provided more detailed documentary support for the requested total hours.⁵⁹

31. *Discussion.* We agree with Chesapeake that \$59,950 for 458 hours is reasonable. For the reasons set forth in Section III.B above, we decline to reduce Televate's hours. However, again, we caution the city to avoid duplicative, unreasonable costs. We note that a five-person consultant team appears to be reasonable on its face, so long as that team's talents and time are managed wisely. In this regard, while it might be reasonable for both the city and its consultant to attend a meeting for planning

⁴⁸ *Id.*

⁴⁹ RR at 18-19.

⁵⁰ *Id.*

⁵¹ The Commission has stated that costs may be deemed reasonable if the possibility of identifying further cost reductions is outweighed by the cost and time required to pursue further negotiation and mediation. *Rebanding Cost Clarification Order* at ¶ 10; see also *Naperville MO&O* at ¶ 14.

⁵² Chesapeake PRM at 11-12.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ *Id.* at 11.

⁵⁶ Chesapeake Reply PRM at 18-19.

⁵⁷ Sprint SOP at 7-8.

⁵⁸ Sprint PRM at 20.

⁵⁹ RR at 19-20.

purposes, it might not be reasonable for more than one Televate employee to attend a meeting. Televate does not have a blank check. At the end of planning, the city is accountable to ensure that Televate's work is reasonable and necessary.⁶⁰

IV. ORDERING CLAUSES

32. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392, 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.

33. IT IS FURTHER ORDERED that the Transition Administrator shall convene a meeting of the parties within seven days of the date of this Order for the purpose of negotiating a Planning Funding Agreement consistent with the resolution of issues set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

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

⁶⁰ See *Naperville MO&O* at ¶ 18.