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

In the Matter of	)	
	)	
County of Hinds, Mississippi	)	WT Docket No. 02-55
and	)	
Sprint Nextel Corporation	)	
	)	
Mediation No. TAM-50047	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 2010 **Released: August 23, 2010**

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

I. INTRODUCTION

1. Before us is 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 County of Hinds, Mississippi (the County) and Sprint Nextel Corporation (Sprint) (collectively the Parties) regarding a Change Notice submitted by the County.[1] For the reasons discussed below, we resolve the dispute in Sprint's favor.

II. BACKGROUND

2. In the Frequency Reconfiguration agreement (FRA) between the County and Sprint, the Parties agreed that all reconfiguration work would be performed by Motorola, at a cost of $ 573,067.83.[2] There were no provisions in the FRA for consultants, outside legal counsel, or the County's internal labor costs.[3] The Change Notice seeks an additional $1,309,892.00 from Sprint for those added services.[4]

3. After the County submitted its Change Notice, the TA Mediator requested the County, *inter alia*, to "[p]rovide Sprint Nextel . . . with timesheets and other detail supporting the additional costs already incurred and for which reimbursement is requested in the Change Notice."[5] The County responded:

> No time sheets or supporting documents were filed (no resourses (sic) were funded to file documentation).
>
> Hinds County has no records of any work being performed in Hinds County (funding needs to be made availible (sic) for (admin asst, project manager and clerk, attorney, consultant).[6]

[1] *See* Recommended Resolution, Mediation No. TAM-50047 at 3-4 (March 6, 2009) (RR).

[2] *See* Proposed Resolution Memorandum of Nextel Communications, Inc., Appendix 3 at 1 (March 20, 2009) (Sprint PRM).

[3] RR at 3. Specifically, the Change Notice allocates $1,032,342 to the County's internal labor costs, $215,300 to the County's consultant, AIRWAVE, and $62,250 to the County's outside legal counsel, Martin & Associates. *Id*.

[4] *Id*.

[5] Scheduling Order, Mediation No. TAM-32110 (January 12, 2009).

[6] Letter from Vern O. Gavin, County Administrator, Hinds County, to 800 MHz Transition Administrator, LLC, January 14, 2009 at 1 (Hinds Letter).

4. *Hinds County's Position.* In its Proposed Resolution Memorandum the County argued that the services, and associated costs, described in the Change Notice were unforeseeable at the time the FRA was negotiated.[7] In support of its unforeseeability argument, the County avers that its former employee, Captain John Wilson (Wilson) - now a Motorola executive - negotiated the FRA but neglected to include the services and associated costs sought in the Change Notice.[8] Thus, the County claims that the "acts/costs were certainly not foreseeable when the top negotiator [Wilson] unofficially waived them in his negotiations without proper or actual authority."[9] Further, the County asserts that the services included in the Change Notice "became unforeseeable at the point [Sprint] negotiations were limited to only Captain Wilson and Motorola."[10] It contends that the FRA was not negotiated in good faith "because costs were only limited to one entity, Motorola, with no contemplation of any other internal costs,"[11] and that "the FRA in this instance required services from additional entities to effect the reconfiguration, including but not limited to Hinds County itself and a consultant."[12] The County argues that, because the FRA specifies that Sprint must pay for all reasonable reconfiguration costs, Sprint must pay for the services covered by the County's Change Notice.

5. *Sprint's Position.* Sprint contends that the County's Change Notice conflicts with the FRA and the Commission's Change Notice policies.[13] Sprint argues that it is not liable for the costs allegedly incurred by the County for its own services and those of a consultant and attorney because the need for those services was "entirely foreseeable during FRA negotiations and, in some cases, [the services] were explicitly foregone by the County."[14] Sprint contends that the County should have foreseen the need for the 290 hours of legal work that was performed before the FRA was executed and, therefore, should have been included in the FRA.[15] Speaking to consultant fees, Sprint states that "if the County felt it needed external technical advice to complete negotiations or to accomplish the reconfiguration, that certainly should have become apparent during the FRA negotiation itself," especially because "Hinds received planning funding."[16] Finally, Sprint notes that the County negotiated the reconfiguration of 800 MHz systems in the cities of Ridgeland and Madison, Mississippi under the same FRA.[17] The FRA specified

[7] Proposed Resolution Memorandum of Hinds County, at 3-4 (March 17, 2009) (Hinds PRM). Hinds County states that the following costs and expenses were not, but should have been, included in the FRA: Subscriber Equipment Reconfiguration (for staff labor and consultant AIRWAVE), Infrastructure Equipment Reconfiguration (County and AIRWAVE), Engineering and Verification (County and AIRWAVE), Contracts and Legal (Martin & Associates), and additional Project Management and Taxes (AIRWAVE). *Id*. at 3.

[8] *Id*. at 4.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] Sprint PRM at 3-8; 12-13.

[14] *Id*. at 5.

[15] *Id*. at 7, Appendix 2 at 4. The County claims that 290 hours, at a fee of $62,250.00, were charged for "FRA Legal Advice," "FRA Negotiations," "FRA Contract Review," and "FRA Legal Advice and Negotiations." The County denies it has invoices or other documentation of these legal fees. *See supra* n.6.

[16] *Id*. at 8.

[17] *Id*. at 9.

that the Ridgeland and Madison Mississippi systems would be reconfigured entirely by Motorola, and, according to Sprint, they were.[18] Sprint therefore questions why the County's system could not similarly have been reconfigured entirely by Motorola without the need for a consultant and legal counsel.[19]

6. Sprint denies the County's allegations of bad faith and deems them irrelevant to the foreseeability issue.[20] It states that the FRA was subject of intensive negotiations which contemplated Motorola "providing essentially a turnkey reconfiguration for the County."[21] Sprint claims that the reason that the County's internal labor costs were not included in the FRA is that the County "explicitly and repeatedly"[22] represented that it was not seeking payment for its internal labor costs and that "it would be too much trouble to report those costs."[23] Thus, Sprint argues, it was what the County agreed to in an arms-length negotiation - and not bad faith on Sprint's part - that accounts for the FRA not including the County's internal costs and the cost of consultants and outside counsel.[24]

7. Further, Sprint argues that the FRA's specification of Motorola as the sole vendor for reconfiguration services is neither a manifestation of bad faith on Sprint's part, nor an indication that the negotiations somehow failed.[25] Sprint asserts it has negotiated "dozens of FRAs where Motorola was the sole vendor participating in the reconfiguration activities."[26] As examples, it cites the Ridgeland and Madison, Mississippi systems, *supra*, where Motorola reconfigured the cities' systems without the need for a consultant or outside legal counsel."[27]

8. *The Mediator's Position.* The TA Mediator recommends that the Commission find that Sprint is not responsible for paying for the services included in the County's Change Notice.[28] The TA Mediator concludes that the County failed to prove that the need for the services specified in the Change Notice were not reasonably foreseeable, and finds that the County has not shown that the need for those services "were not considered and rejected" in the course of negotiation.[29] The TA Mediator rejects the County's bad faith claim, concluding that Sprint reasonably relied on the positions taken by the County's principal representative – Wilson – during FRA negotiations.[30] Finally, the TA Mediator concludes that

[18] *Id*. at 8 n.13.

[19] RR at 6-7.

[20] Sprint PRM at 8-11.

[21] *Id*. at 2.

[22] *Id*.

[23] *Id*. at 6; Appendix 1 (email correspondence between Sprint's negotiator and Captain Wilson).

[24] *Id*. at 6.

[25] *Id*.

[26] *Id*. at 6, 9.

[27] *Id.*

[28] RR at 12.

[29] *Id.* at 12.

[30] *Id*. at 9-11.

the County failed to satisfy its burden of demonstrating that the claimed costs were reasonable under the Commission's Minimum Cost standard.[31]

III. DECISION

9. We find in favor of Sprint for three reasons. First, the record demonstrates that the County, during FRA negotiations, specifically waived many of the costs it now seeks in its Change Notice. It is impossible to verify the County's claim for an additional $1,309,892.00 for reconfiguration services because the County refuses to provide time records, invoices, or other evidence documenting that the services were performed. Indeed, it claims it "has no records of any work being performed in Hinds County."[32] The claim is problematic inasmuch as the County offers no explanation of why the records do not exist, or why it has not attempted to recreate them.[33] We therefore agree with Sprint that it would be irresponsible to "more than triple the costs associated with Hinds' reconfiguration" without any supporting documentation.[34] The Commission's 800 MHz orders place the burden on licensees to establish that the funding they request from Sprint is for equipment and services that are reasonable and prudent[35] in light of the overall goals of band reconfiguration, nationwide[36] By refusing to document its costs, the County has failed to meet its burden.

10. Second, the County violated the terms of the FRA and deviated from the procedures for Change Notices established in the Commission's 2007 *Supplemental Guidance PN*.[37] If licensees encounter unanticipated changes in cost, scope, or schedule during implementation – or in the case of an emergency – they may recover the resultant costs through the Change Notice process.[38] The Change Notice process, however, cannot be used to renegotiate agreements after the fact on issues that were raised or should have been raised during negotiations.[39] Assuming, *arguendo*, that the reconfiguration of the County's system reasonably required a consultant, outside legal counsel and the County's internal labor, we find that the County has failed to show why the need for those services was not anticipated during negotiations.[40] The *Supplemental Guidance PN* makes it clear that licensees may not recover costs that were reasonably foreseeable.

---

[31] *Id*. at 12. Sprint endorsed the TA Mediator's Recommended Resolution. *See* Statement of Position of Sprint Nextel, TAM-50047 (April 10, 2009). We note that Hinds County did not file a Statement of Position.

[32] Hinds Letter at 1.

[33] Our experience with 800 MHz band reconfiguration confirms the self-evident proposition that consultants and attorneys provide written invoices for their services.

[34] Sprint PRM at 12.

[35] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, 19 FCC Rcd 14969 at 15074 ¶ 198 (2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 at 25152 ¶ 71 (2004).

[36] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Memorandum Opinion and Order*, WT Docket No. 02-55, 22 FCC Rcd 9818, 9820 ¶ 8 (2007).

[37] *See* FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, WT Docket 02-55, *Public Notice*, 22 FCC Rcd 17227 (2007) (*Supplemental Guidance PN*).

[38] RR at 11.

[39] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Fourth Memorandum Opinion and Order,* 23 FCC Rcd 18512, 18521 ¶ 31 (2008).

[40] *Supplemental Guidance PN*, 22 FCC Rcd at 17229.

11. Third, we reject the County's unfounded implication that the need for services, in addition to those provided by Motorola, was unforeseeable because the County's employee – Wilson –deliberately ignored the need for those services during FRA negotiations in favor of a turnkey Motorola contract and later became a Motorola executive. As Sprint points out, Wilson was not a sole actor in the negotiation process.[41] Both the County's Planning Funding Agreement (PFA) and FRA were negotiated by Wilson, but the FRA was reviewed by the County's legal counsel and ratified by the president of its Board.[42] Therefore, we reject the County's claim that Wilson lacked "proper or actual authority"[43] to negotiate the FRA as a Motorola turnkey project on the County's behalf.

12. Motorola's reconfiguring the County's system on a turnkey basis is neither remarkable nor suggests that Wilson somehow colluded with Motorola against the County's interests. Finally, there is nothing in the record to suggest that the County's Change Notice arose out of any kind of "emergency" that required retention of a consultant and outside counsel.

13. In sum, we agree with the TA Mediator that Hinds County has failed to show that its claimed costs were not reasonably foreseeable and the minimum necessary to reconfigure its system. Thus, on the record before us, we find that Sprint is not responsible for the County's internal costs, consultant's fees or legal fees sought in the Change Notice. The Change Notice is disallowed.

IV. ORDERING CLAUSES

14. 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.

15. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief - Policy Division
Public Safety and Homeland Security Bureau

[41] Sprint PRM at 11.

[42] *Id*.

[43] Hinds PRM at 4.