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

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| In the Matter of | ) | |
| | ) | |
| Broward County, Florida | ) | WT Docket No. 02-55 |
| and | ) | |
| Sprint Nextel Corporation | ) | |
| | ) | |
| Mediation No. TAM-50073 | ) | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 24, 2011** **Released: May 25, 2011**

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

## I. INTRODUCTION

1. Before us is a case referred for *de novo* review from Wave 3, Stage 2 mediation by the 800 MHz Transition Administrator (TA). At issue is whether Broward County, Florida (Broward) is entitled to payment from Sprint Nextel Corporation (Sprint) for various equipment, reprogramming, legal fees and future consultant costs submitted in a change notice request (Change Notice). Based on our review of the mediation record, the TA-appointed mediator's (TA Mediator) Recommended Resolution (RR)[1], and the parties' Statements of Position (SOP),[2] we approve Broward's external communications counsel's fees but disallow its claimed equipment, reprogramming and future consultant costs.

## II. BACKGROUND

2. Broward operates 800 MHz public safety stations, call signs KNJH368, KNNR246, and WQAV305.[3] It uses a 28-channel Motorola SmartZone trunked, simulcast system with one control site and 11 RF remote sites.[4] Eight of the remote sites are transmit/receive sites, two are receive-only sites, and one is a stand-alone backup transmit-receive site.[5] Broward's system also includes three NPSPAC Mutual Aid repeaters at three sites.[6] The system serves over 11,000 subscriber units.[7]

3. The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate an FRA with each 800 MHz licensee subject to rebanding.[8] On October 2, 2006, the

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[1] Recommended Resolution, Mediation No. TAM-50073 (filed Jan. 24, 2011) (RR).

[2] Statement of Position of Broward County, Florida (filed February 3, 2011) (Broward SOP); Statement of Position of Nextel Communications, Inc. (filed February 7, 2011) (Sprint SOP).

[3] RR at 2.

[4] Proposed Resolution Memorandum of Broward County, Florida at 1 (filed Dec. 3, 2010) (Broward PRM).

[5] *Id*.

[6] *Id*. at 2.

[7] *Id*.

[8] Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *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*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd (continued....)

Commission issued a *Public Notice* announcing that the start of a mandatory six-month negotiation period for Wave 3, Stage 2 would commence on November 1, 2006.[9] When parties fail to negotiate an FRA within this mandatory six-month negotiating period, they must participate in mandatory mediation with a TA Mediator.[10] Because the parties here did not successfully negotiate a Frequency Reconfiguration Agreement (FRA) by the end of the Wave 3, Stage 2 mandatory negotiation period, the matter was referred to a TA Mediator.[11]

4. After extended mediation, the parties successfully negotiated and signed an FRA on May 19, 2009.[12] Under the FRA, Sprint agreed to pay Broward $3,104,101.55 for its rebanding costs.[13] The FRA was amended on July 27, 2010 to increase the payment amount to $3,104,737.25.[14] On August 2, 2010, Broward submitted a Change Notice seeking an additional payment of $1,741,805.38[15] for the following equipment and reprogramming related tasks:

- Loaner Radios. $326,572 for 771 loaner radios including installation and de-installation;
- User "Down Time" $360,607;
- Additional Template Labor $104,720;
- Reprogramming Tasks $365,966 for additional infrastructure testing, database management and training, coordination of users, and project management time;
- Testing $303,780 for pre- and post-tests of radios;
- Future services of consultant $90,000;
- Outside counsel $30,450 for external communications counsel, including fees for filing Proposed Resolution Memorandums (PRM) and supplemental briefs.[16]

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25120 (2004) (*Supplemental Order*); *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).

[9] *See* Wireless Telecommunications Bureau Announces That 800 MHz Band Reconfiguration Will Commence November 1, 2006 in the NPSPAC Regions Assigned to Wave 3 for NPSPAC Channels, WT Docket No. 02-55, *Public Notice*, 21 FCC Rcd 11140 (WTB 2006).

[10] *See 800 MHz Report and Order*, 19 FCC Rcd at 15076 ¶ 201.

[11] The negotiating period for Wave 3, Stage 2 ended on April 30, 2007.

[12] RR at 2.

[13] Broward PRM, Ex. 4 at 59.

[14] Amendment 1 to Reconfiguration Agreement dated July 27, 2010 at 12.

[15] RR at 2.

[16] *See* Supplemental Proposed Resolution Memorandum of Nextel Communications Inc. dated January 5, 2011 at 7-8 (Sprint Supplemental PRM). The TA Mediator's *S*upplemental Scheduling Order asked the Parties to clarify the amount at issue for each category of Change Notice requests. *See* Supplemental Scheduling Order dated December 30, 2010. Sprint provided the costs estimates set forth above, but the Broward's supplemental brief did not address the issue or dispute Sprint's estimates of the cost. *See generally* Supplemental Proposed Resolution Memorandum of
(continued....)

On August 9, 2010, Sprint responded to the Change Notice and agreed to pay an additional $103,771.65, but declined to pay the remaining $1,638,033.73 sought by Broward.[17]

5. Pursuant to Section 90.677(d)(2) of the Commission's Rules,[18] the Change Notice dispute was referred to the TA Mediator who was unable to resolve the dispute through mediation.[19] The TA Mediator accordingly submitted the RR and the mediation record, including PRMs for both parties, to the Bureau for de *novo review* on January 24, 2011.[20] Broward filed a Statement of Position on February 3, 2011 and Sprint filed a Statement of Position on February 7, 2011.

## III. DISCUSSION.

6. We evaluate Broward's claims against four facets of Commission guidance in this area: First, as a general matter, change notices are appropriate only when licensees are faced with unanticipated changes in cost, scope, or schedule which occur during implementation or in the case of an emergency.[21] Second, costs incurred by a licensee in excess of those authorized in a Planning Funding Agreement (PFA) or FRA are at the licensee's risk until a Change Notice is submitted and approved. Third, a licensee may not use the Change Notice process to recover costs that were reasonably foreseeable during PFA or FRA negotiations but were not raised in negotiations, or that were considered and rejected.[22] Fourth, costs sought in a Change Notice must meet the Commission's Minimum Necessary Cost standard.[23] Following this guidance, and for the reasons set out below, we approve $30,450 for external communications counsel legal fees and disallow the remainder of Broward's claims.

### A. Loaner Radios

7. *Introduction*. In the rebanding process, radios are reprogrammed so they may access both the "old" (pre-rebanding) channels and "new" (post-rebanding) channels. A trunked radio system, such as Broward's, has one or more "control channels." The control channels carry information which, *inter alia*, instructs a radio which voice channel to use at a given time. Pre-rebanding, Broward's radios were capable of accommodating a full complement of voice channels and up to four control channels. Redundant control channels in the radio allow the system to operate in the event a base station control channel fails and a "backup" control channel is activated. Thus, Broward's radios – capable of

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Broward County, Florida dated January 12, 2011 (Broward Supplemental PRM). We accept, as did the TA Mediator, the amounts at issue as provided by Sprint.

[17] RR at 2.

[18] 47 C.F.R. § 90.677(d)(2).

[19] RR at 3.

[20] *Id*.

[21] Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512, 18522 ¶ 31 (2008) (*800 MHz Fourth MO&O*).

[22] *Id.*

[23] The Commission's orders in this docket assign Broward 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." *See 800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *Supplemental Order,* 19 FCC Rcd at 25152 ¶ 71. The Commission has clarified 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." *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007) (*Rebanding Cost Clarification Order*).

accommodating 4 control channels – could remain operational if the main base station control channel failed, the first backup control channel failed and the second and third backup control channels failed.

8. Certain radios in Broward's system, however, lack the memory capacity to accommodate both the "old" voice channels, (and their attendant 4 control channels), and the "new" voice channels, (plus their attendant 4 control channels). Consequently, the parties agreed in their FRA negotiations that, during system reconfiguration, these radios would operate, temporarily, on the "old" channels with only 2 control channels, and on the "new" channels with only 2 control channels. As a result of this compromise the radios with only two control channels could fail if both the main and first backup control channels at the base station site failed.

9. *Broward's Position.* Broward contends that the compromise—having radios operate with only 2 control channels during system reconfiguration—was acceptable under normal weather conditions. It contends, however, that the parties had agreed to complete reprogramming Broward's limited-memory radios within 3 months of the signing of the FRA, before the hurricane season began.[24] Now, however, Broward submits that unanticipated delays in rebanding its system will extend radio reprogramming work into the hurricane season[25] and that, if a hurricane occurs, there is an increased chance of hurricane damage causing multiple control channel failures.[26] Thus, to maintain system reliability throughout the hurricane season, Broward asserts that it requires the "loaner radios" sought in its Change Notice.[27] These loaner radios would have sufficient memory capacity to accommodate both the "old" and "new" sets of voice channels (and their eight attendant control channels) during reconfiguration of Broward's system. After reconfiguration was complete, Broward would reprogram the memory-limited radios to the "new" channels, with the attendant 4 control channels, and return the loaner radios. Broward seeks $326,572 for the loaner radios.[28]

10. Broward attributes the delay in radio reprogramming beyond 3 months to the following 3 factors, none of which, it claims, it could have foreseen:[29]

- A lack of "archived templates" for the radios.[30] Consequently, Broward assets, new templates must be written, reviewed and approved before reprogramming can proceed.[31]
- Radios must be programmed using DOS-based programs which are more complicated to use, and, hence, more time-consuming, than Windows-based programs.[32]
- Users are not making their radios available for reprogramming as promptly as originally anticipated.

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[24] Broward PRM at 8.

[25] The hurricane season extends from June 1 to Nov. 30. *See* http://www.nhc.noaa.gov/.

[26] Broward PRM at 9.

[27] *Id*.

[28] The cost of using the loaner radios includes installation and removal of 548 Motorola Maxtrac mobiles and 223 Motorola STX or MTX portables.

[29] Broward PRM at 8-9.

[30] A template, as used herein, is a set of software or firmware instructions which determine, *inter alia*, which groups of users (police, fire, etc.) will be accessible on a given external switch position on the radio.

[31] *Id*; Broward Reply PRM at 2, 8.

[32] Broward PRM at 8-9.

Given the above constraints, and based on an email from Motorola modifying the estimated completion of radio reprogramming, Broward now anticipates that it will take 9 months, instead of the originally anticipated 3 months, to reprogram its memory-limited radios. The additional delay would require Broward to operate some of its radios with only 2 control channels during the hurricane season and justifies, so Broward contends, the requested loaner radios.

11. In the RR, the TA Mediator stated the record contained no evidence supporting Broward's assertion that it anticipated operating the memory-limited radios with 2 control channels for only 3 months.[33] Broward, however, submits that the TA Mediator erred in this conclusion. Specifically, it points to steps 33-35 in the Motorola Methods of Procedure,[34] which state that Broward's "memory-limited" radios would be programmed separately from the rest, on a "last in - first out" basis. Broward argues that, because reprogramming of the memory-limited radios would be accomplished first, reprogramming of those radios would have been complete within 3 months, with the remainder of the radios to follow.[35] Broward also challenges as faulty Sprint's estimate that the "lock down" period (the period during which some radios would have only 2 control channel capability) would only last 6 months because the estimate is premised on the time it would take to reband all of the radios, including those that are not memory-limited.[36]

12. Broward also claims it is entitled to additional reprogramming funds because, prior to signing the FRA, both parties recognized that the reprogramming methodology might change if additional information was uncovered.[37] Thus, Broward argues that Sprint—not Broward—should be responsible for additional costs incurred as a consequence of Broward's changing the reprogramming methodology.[38]

13. Broward also claims it was not given an adequate chance, procedurally, to challenge Sprint's assertion that Broward could improve the radio reprogramming rate.[39] Broward asserts Sprint should have raised this challenge during the Change Notice negotiations rather than raising it for the first time in the parties' PRMs.[40] Therefore, Broward argues, the RR violates the Commission's goals for negotiations.[41] Broward also argues that the TA Mediator incorrectly assumed that one agency operates all memory-limited radios, when in fact, those radios are spread throughout the County's agencies, and, therefore, take longer to identify and make available for reprogramming.[42]

14. Finally, Broward claims the TA Mediator erred in finding Broward's proposal for loaner radios did not meet the Commission's Minimum Necessary Cost standard. Broward claims it met that standard by demonstrating that: (1) rebanding of radios was taking longer than expected; (2) in similar

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[33] Broward SOP at 7.

[34] *Id*.

[35] Broward Supplemental PRM at 1-3.

[36] *Id*.

[37] Broward SOP at 8.

[38] *Id*.

[39] *Id*.

[40] *Id*. at 9.

[41] *Id*.

[42] *Id*.

situations, Sprint has agreed to provide licensees with loaner radios; and (3) even after the Change Notice, Broward's reconfiguration costs would still be in the lower end of the TA Cost Metrics.[43]

15. *Sprint's Position*. Sprint claims that the parties thoroughly discussed the memory-limited radio issue and resolved it in FRA negotiations.[44] It states that Broward's FRA negotiators accepted a reconfiguration plan for those radios that included temporary operation with only 2 control channels and the County Board ratified this decision.[45] Sprint disputes Broward's claim that Broward anticipated that 2 control channel operation would only last 3 months, noting that the October 2008 Motorola Statement of Work (SOW) anticipated that 2-control-channel operation would persist for approximately 16 months.[46] Sprint argues that, regardless of the time during which 2 control channel operation is conducted, Broward still will have full control channel redundancy in the event of main control channel failure.[47]

16. Sprint claims that Broward should be responsible for the cost of the additional time associated with reprogramming Broward's radios because it was Broward's decision to change the programming methodology that accounted for the extra time. Specifically, Broward is sending a rebanding team, individually, to each County agency,[48] whereas the FRA only contemplated radios being brought to a central location.[49] Sprint also argues that Broward's attributing the extra time to a lack of archived templates is irrelevant because the parties agreed that a master template would be derived for the radios before reprogramming began.[50]

17. Sprint also contends that Broward could shorten the time during which the memory-limited radios are able to access only 2 control channels by reprogramming those radios last during the first touch,[51] and first during the second touch.[52] Assuming that 25 radios could be reprogrammed per day, Sprint estimates that each touch would require only 31 days.[53]

[43] *Id*. at 9-10. The TA Metrics contain historical data on the cost of rebanding 800 MHz systems compiled by the 800 MHz TA. These data are derived from the rebanding costs documented in approved Frequency FRAs, and amendments thereto, between Stage 2 public safety licensees and Sprint Nextel Corporation. *See* Public Safety and Homeland Security Bureau Announces Enhancements to the Metric Data Used in 800 MHz Rebanding Negotiations and Mediations, Docket 02-55, *Public Notice*, 25 FCC Rcd 8151 (PSHSB 2010). The data are classified by function, *e.g.*, legal, engineering, and internal costs, consultant and management fees, vendor costs, etc. and by system size. Cost information is presented for the 25th percentile, 50th percentile (median) and 75th percentile of approved systems. *See* http://www.800ta.org/content/resources/FRA_ Metrics.pdf (Apr. 15, 2010) v. 8.

[44] Sprint PRM at 12-13.

[45] *Id*. at 14.

[46] *Id*. at 13-14.

[47] *Id*. at 18 n.28.

[48] *Id*. at 23.

[49] *Id*. at 23 and n. 27.

[50] *Id*. at 20.

[51] In industry usage, a "touch" refers to the modification of a mobile or portable radio, typically through installation of software to change the radio's channel configuration. Most frequently, the "touch" is made in the field—as opposed to the factory—requiring the user of the radio to deliver it to a central location.

[52] Sprint PRM at 18.

[53] *Id*. at 20-21.

18. Sprint disagrees that reprogramming the radios with a DOS-based program has significantly slowed the rate of reprogramming.[54] According to Sprint's testing and calculations, the relative time to reprogram a radio using a DOS-based program *vs*. a Windows-based program is insignificant, *i.e.,* the DOS-based program takes only 1 minute longer.[55] Further, Sprint questions why Broward cannot increase the rate of reprogramming by applying additional resources to the task.[56] Finally, Sprint argues that the fact it may have provided loaner radios to similarly situated licensees does not compel a conclusion that it must do so here.[57]

19. *TA Mediator's Recommendation*. The TA Mediator recommends the Commission reject Broward's request for loaner radios.[58] First, the TA Mediator finds that the parties agreed during negotiation that certain of Broward's radios would operate with only 2 control channels during reconfiguration of Broward's system.[59] The TA Mediator finds no record evidence supporting Broward's claim that the parties contemplated that the period during which the radios would operate with only 2 control channels would be limited to 3 months. Therefore, the TA Mediator sees no basis to undo the parties' agreement and require Sprint to pay for loaner radios.

20. Second, the TA Mediator finds that Broward can shorten the "lock down" period by increasing the radio reprogramming rate.[60] Specifically, the TA Mediator finds Broward has neither explained what efforts it has made to make such an increase, nor why those efforts may have failed.[61] Further, the TA Mediator finds that Broward was unjustified in changing its reprogramming methodology when it encountered an unanticipated large number of templates. Instead, the TA Mediator finds that Broward should have honored its commitment to create a reliable set of master templates prior to rebanding.[62] Third, the TA Mediator does not credit Broward's claim that scheduling difficulties have lengthened the reprogramming effort, because Broward failed adequately to explain the nature of those difficulties. Fourth, the TA Mediator does not take issue with Sprint's analysis that DOS-based reprogramming has only a minimal influence on reprogramming time.[63]

21. In sum, the TA Mediator finds Broward has provided no facts or meaningful arguments demonstrating that it cannot improve the radio reprogramming rate, any evidence of efforts it has undertaken to do so, and why its change in methodology is justified.[64] Accordingly, the TA Mediator

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[54] *Id*. at 23.

[55] *Id*. at 19. Sprint claims that its tests reveal that it takes approximately one minute and 24 seconds to reprogram a Maxtrac radio using a DOS-based program and approximately 24 seconds to reprogram a Maxtrac using a Windows-based program.

[56] *Id*. at 21.

[57] *Id*. at 16-17.

[58] RR at 13.

[59] *Id*.

[60] *Id*. at 14.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*.

determined that Broward has not met its burden of demonstrating that the costs associated with loaner radios meet the Commission's Minimum Necessary Cost standard.[65]

22. _Decision._ Broward explicitly agreed to forego 4 control channel capability in its memory-limited radios during reconfiguration, but now contends that it agreed to do so only during the 3-month period that precedes hurricane season.[66] As did the TA Mediator, we find no record substantiation of Broward's contention. Broward's reference to Steps 33-35 in the Motorola Methods of Procedure[67] is unavailing because the document says no more than that the memory-limited radios will be reprogrammed separately from the rest, on a "last in - first out" basis. It says nothing about the time required to do so. Indeed, the only record evidence of the time necessary for reprogramming the radios is the 5½ months in the Motorola Statement of Work, and the subsequent email from Motorola stating that the effort would require 9 months to complete. Either period would take the reprogramming project well into—and beyond—the hurricane season.

23. Having decided that there is no record evidence to support Broward's contention that the parties understood that Broward would operate with 2 control channel capacity for only 3 months, it is unnecessary, for resolution of the loaner radio issue, to delve into Broward's claims about why reprogramming took longer than 3 months. We thus find that Broward's commitment to forego 4 control channel capacity extended throughout the reconfiguration process with no time limitation.

24. We conclude, therefore, that Broward's request for loaner radios arises more out of "buyer's remorse" than anything in the record, and that Broward is "using the change notice process to attempt to re-negotiate [its] agreement[] after the fact based on issues that [were] actually raised earlier."[68] We have consistently held that doing so is a misuse of the change notice process[69] and so hold here: Broward is not entitled to payment from Sprint for loaner radios.

### B. Reimbursement for User Down Time

25. Broward seeks $360,607 for the additional "user down time" it claims it is experiencing due to delays in rebanding.[70]

26. _Broward's Position._ Broward concedes that, in the FRA, it agreed to forego any payment for user down time – the time expended by radio users in making their radios available for reprogramming.[71]

[65] *Id*.

[66] *Cf.* City of Houston, Texas Public Works Department and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 4655 (PSHSB 2009). In the *Houston* case, Sprint had agreed to provide loaner radios to a licensee to allow it to maintain 4-control-channel capability during reconfiguration. *Id*. at 4657 ¶ 11. The licensee, however, argued that it was entitled to new radios instead. *Id*. at ¶ 8. We held that the loaner radios were sufficient. *Id*. at 4661 ¶¶ 21-22. *Houston*, however, is not controlling here because, unlike the *Houston* licensee, Broward explicitly agreed to forego 4-control-channel capacity in its memory-limited radios during reconfiguration.)

[67] Broward SOP at 7.

[68] *800 MHz Fourth MO&O*, 23 FCC Rcd at 18522 ¶ 31.

[69] *See, e.g.,* State of Indiana and Sprint Nextel, Docket 02-55, *Memorandum Opinion and Order on Reconsideration,* 26 FCC Rcd 5067, 5072, ¶21, (PSHSB 2011) (app. for rev. pending); Dallas Fort Worth International Airport Board and Sprint Nextel, Docket 02-55, *Memorandum Opinion and Order,* 26 FCC Rcd 1116, 1125-1126, ¶33, (PSHSB 2011) (DFW Order); Town of Wethersfield, Connecticut and Sprint Nextel, *Memorandum Opinion and Order,* Docket 02-55, 26 FCC Rcd 1129, 1131-1132, ¶9, (PSHSB 2011) (Wethersfield).

[70] RR at 4, 14.

[71] Broward PRM at 10.

In its Change Notice, however, Broward claims it is encountering down time in excess of the 15 minutes of down time it contemplated during FRA negotiations.[72] It says, for example, that additional down time is associated with the larger than anticipated number of templates it has found in the course of reprogramming the radios. It states that its assumption that a master template could be developed has proven incorrect, thus requiring technicians to "read" discrete radios to determine their existing template parameters – an exercise that adds to the time necessary to reprogram the radios and, hence, the associated user down time. Broward contends that the additional time was unforeseeable at the time of FRA negotiations[73] because it did not have an accurate count of the number or characteristics of the templates required.[74] Thus, notwithstanding it waived being paid for user down time in the FRA, Broward now asserts that it should be compensated because the user down time was greater than the 15 minutes per radio that Broward first anticipated.[75]

27. _Sprint's Position_. Sprint contends that Broward agreed to forgo reimbursement for user down time after the matter was thoroughly discussed in FRA negotiations.[76] Sprint claims that Broward should have known that its estimate of 15 minutes down time per radio was unrealistically low because the Motorola Statement of Work established that retuning a radio would take from 30 to 54 minutes.[77] Thus, Sprint argues, Broward should have known that the down time per radio was going to be at least twice its 15 minute estimate.[78]

28. Sprint claims that the issue of whether it was "reasonably foreseeable" that the radios would require more than 15 minutes down time is an objective standard, established by the Motorola data. Consequently, Sprint argues, it is irrelevant that Broward may have had the subjective impression that rebanding a radio would require only 15 minutes of user down time.[79] If the Bureau were to credit Broward's arguments, Sprint submits, that would allow costs discussed and waived in an FRA to be renegotiated if the licensee later discovered that it made a mistake.[80]

29. _TA Mediator's Recommendation_. The TA Mediator recommends that we find that Broward has failed to satisfy its burden with respect to foreseeability.[81] Based on Motorola's proposals included with the FRA, the TA Mediator does not find it credible that Broward anticipated only 15 minutes of user down time per unit.[82] Alternatively, the TA Mediator finds that, if Broward actually expected only 15 minutes of user down time, then that expectation was not reasonable.[83] The TA Mediator also finds that Broward presented no evidence that its waiver of user down time in the FRA was partial or conditional.[84]

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[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] Broward SOP at 10-11.

[76] Sprint PRM at 23-24.

[77] *Id*. at 25.

[78] *Id.*

[79] *Id*. at 24.

[80] *Id*. at 24, 67.

[81] RR at 16.

[82] *Id*.

[83] *Id*.

[84] *Id*.

Further, the TA Mediator finds that Broward makes no effort to demonstrate that the $360,607 requested for user down time satisfies the Commission's Minimum Cost standard.[85]

30. *Decision*. We are not persuaded by Broward's contention that the parties understood that the waiver of user down time was conditioned on the down time being no more than 15 minutes. The Motorola Statement of Work, incorporated into the FRA,[86] clearly identifies the amount of time required to retune Broward's various radios. No radio requires as few as 15 minutes.[87] We thus agree with the TA Mediator that the need for extended user down time was foreseeable and, therefore, that Sprint is not required to pay the $360,607 Broward seeks for additional user down time. Even were we to conclude that the amount of user down time was not foreseeable, we would agree with the TA Mediator that Sprint is not liable for the $360.607 payment because Broward failed to meet its burden of showing that $360,607 is the minimum necessary cost attributable to user down time.

### C. Template Labor

31. The third dispute between the parties involves Broward's claim for $104,729 in additional template development time. Broward claims that the need for additional template work was unforeseeable.[88]

32. *Broward's Position*. Broward claims it did not foresee the need for additional template work because it did not have an archive of radio templates. Lacking that archive, Broward claims, it could only estimate during FRA negotiations, how many templates were in the field and how long it would take to rewrite them.[89] It also claims that it did not foresee how involved its staff would be in assisting Motorola with developing the new templates.[90]

33. Broward concedes that, during FRA negotiations, it agreed to complete the template work before it started reprogramming radios, whereas, now, it is performing reprogramming and template development in parallel. It admits that, during negotiations, it realized that there was an unknown number of templates in the field. It claims, however, that it did not realize how large that number would turn out to be.[91] Additionally, Broward argues that the large number of templates that it encountered made it impractical to create its planned "master templates" for all of the radios.[92]

34. *Sprint's Position*. Sprint claims that the parties thoroughly discussed Broward's lack of a template archive and the need for master templates during the FRA negotiations.[93] Sprint also asserts that it agreed to Broward's chief negotiator's proposal that Sprint pay for only part of Broward's template work because Broward would be receiving an improved set of templates as a result of the template

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[85] *Id*.

[86] *See* Broward PRM Ex. 4 at 32.

[87] *Id.* Ex. 4 at 53. Motorola's proposals in the FRA for reprogramming subscriber units range from 30 minutes to 54 minutes.

[88] RR at 4.

[89] Broward PRM at 11.

[90] Broward SOP at 7.

[91] *Id*. at 6.

[92] *Id*.

[93] Sprint PRM at 22.

development project.[94] Though nothing in the record supports Sprint's assertion, Broward has not disputed it.[95] Furthermore, Sprint asserts that the parties agreed to a template development methodology in the FRA which required all master template work to be performed prior to programming the radios.[96] Thus, because Broward departed from the template development methodology agreed to in the FRA, Sprint argues Broward should bear the additional costs associated with its choice to deviate from the agreed-upon methodology.[97]

35. _TA Mediator's Recommendation_. The TA Mediator recommends that the Bureau reject Broward's request for additional funding to cover the costs of template development.[98] The TA Mediator finds it impossible to determine whether Broward meets the Commission's Minimum Necessary Cost standard because Broward has not quantified the difference between the number of templates it assumed would be necessary and the number that eventually proved necessary. Broward states only that it has been faced with a "sheer volume" of new templates. Without data on the exact number of new templates and the cost per template, the TA Mediator is unable to determine whether the $104,729 in licensee time for template development, sought by Broward, is reasonable.[99]

36. The TA Mediator also finds that Broward failed to show that the need for additional licensee involvement in template development was unforeseeable. The TA Mediator concludes that the additional cost was foreseeable because Broward, at the negotiation stage, knew that it lacked a template archive and that its templates were in disarray.[100] This is confirmed, the TA Mediator asserts, because the parties negotiated the cost of template development, *i.e.,* Broward agreed to receive a lesser payment for template development because the new templates would be a significant improvement over its existing disarrayed templates. The TA mediator submits that Broward should be held to the basis of its bargain, and not be paid an additional amount for template development.

37. _Decision_. We disagree with the TA Mediator's conclusion that the need for additional template development was foreseeable. Although Broward had a general sense that its templates were in disarray, neither Broward nor Sprint knew to what extent. Indeed, both parties were of the view that a few "master templates" would suffice to rectify the problem. It was only when Broward began the template development process that it discovered that template information would have to be downloaded from individual radios in order to generate new templates for the rebanded frequencies. The process proved much more time consuming than developing a few master templates. Thus, we find that Broward could not reasonably have foreseen the complexity of the template development process.

38. We also find, however, that Broward has not met its burden of demonstrating that $104,729 is the minimum necessary cost for Broward's participation in the template development process. As did the TA Mediator, we have looked to the record and are unable to find the derivation of this cost. Other than stating that there is a "sheer volume" of new templates to be developed, Broward has not attempted to quantify the number of such templates, the time that will be required to develop them, or the cost per template. Indeed, Broward is even unaware of the number of radios it has in service.

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[94] *Id*.

[95] *See generally* Broward Reply PRM.

[96] Sprint PRM at 23.

[97] *Id*.

[98] RR at 18.

[99] *Id*.

[100] *Id*.

39. Sprint provided funds to Broward to allow it to plan for reconfiguration pursuant to a Planning Funding Agreement (PFA). Yet, Broward now claims ignorance of the number of radios in its system and the characteristics of the templates in its radios. It has failed to explain why it did not derive this information during the Sprint-funded planning process, and still has not even approximated the number of templates that will require development. Thus, lacking this critical information, we cannot responsibly merely assume that the $104,729 requested by Broward for additional template development work represents the minimum necessary cost.

40. We are not persuaded by Broward's argument that its inability to determine the number of templates requiring development was due to Sprint's alleged refusal to negotiate the Change Notice.[101] Determining an exact quantity of radios and templates is a matter of inventory not negotiation. Accordingly, we have no alternative but to disallow Broward's change order request to the extent it asks for additional template development funds.

### D. Additional Infrastructure Testing, Database Management and Training, Coordination of Users, Additional Project Management Time

41. *Broward's Position*. Broward seeks $365,966 for these various reprogramming-related tasks.[102] It claims that it underestimated the extent of these tasks when it negotiated the FRA and that it should also be paid for additional infrastructure testing, database management and training, coordination of users, and project management time.[103] Broward concedes it foresaw the need for these activities during FRA negotiations. Its sole justifications for these costs are (a) other licensees have been paid similar costs, and (b) even with the additional costs, Broward would still rank below average for costs, using the TA Metrics as a guideline.[104]

42. *Sprint's Position*. Sprint argues that Broward's Change Notice provides no detail supporting its claimed costs and fails to explain why costs that were foreseeable should be addressed now.[105] Sprint claims that Broward's reliance on the TA's Costs Metrics Report is flawed because it is irrelevant to the question of foreseeability.[106] Finally, Sprint asserts that Broward's citation to costs allowed to other licensees does not establish that the costs are either reasonable or that the services are necessary in this particular project.[107]

43. *TA Mediator's Recommendation*. The TA Mediator recommends that the Commission reject Broward's request for funding for additional infrastructure testing, database management and training, coordination of users, and additional project management time.[108] The TA Mediator finds Broward contradicts itself by first conceding that the requested costs were foreseeable during negotiations and then

[101] Broward PRM at 11.

[102] RR at 4.

[103] Broward PRM at 12.

[104] *Id*.

[105] Sprint PRM at 27.

[106] *Id*.

[107] *Id*. at 28.

[108] RR at 19.

later claiming they were unforeseeable.[109] The TA Mediator thus finds Broward has failed to meet the Commission's foreseeability standard.[110]

44. The TA Mediator also finds that Broward has not met the Commission's Minimum Necessary Cost standard because it has offered no justification for the requested costs.[111] Other than its assertion that it underestimated these costs during FRA negotiations, Broward does not explain what activities the costs would cover, or explain how the increased costs would meet the Commission's Minimum Necessary Cost standard.[112] The TA Mediator also rejects Broward's argument that the costs are reasonable because they fall in a relatively low percentile in the TA's Cost Metrics. The TA Mediator finds that the TA Metrics do not override a licensee's obligation to show that claimed costs are reasonable, prudent and necessary.[113] In sum, the TA Mediator recommends that we find Broward has failed to meet both the Commission's foreseeability standard and its Minimum Necessary Cost standard.[114]

45. *Decision*. Broward's admission that the claimed costs were foreseeable during FRA negotiations is fatal to its claim for additional payment for infrastructure testing, database management and training, coordination of users, and additional project management time. Moreover, even were we to find that Broward met the foreseeability standard, we would disallow the costs because Broward failed to show that it has met the Commission's Minimum Necessary Cost standard, *i.e.,* it failed to state, with any detail, why particular services were needed, or what work the costs would cover. We are not persuaded by Broward's contention that the costs should be allowed because Broward's overall project costs fall in a relatively low percentile in the TA Metrics. Although the TA Metrics are useful guidelines for determining allowable costs, they are not a substitute for a licensee's obligation to show that the costs requested are the minimum necessary for the goods or services requested.

### E. Pre- and Post-Tests for Both Touches

46. Broward seeks payment of $303,780 for testing of its radios before and after reprogramming.[115] We disallow the request.

47. *Broward's Position*. Broward asserts the FRA includes costs for testing mobile radios, but that the parties inadvertently omitted the costs for testing portable radios.[116] It argues that Sprint has failed to explain why it will pay for the testing of mobile, but not portable, radios.[117] Broward also disputes the TA Mediator's contention that the FRA does not include costs for testing either mobile or portable radios.[118] Thus, it points to the following line item in Schedule C, Section 4.1 of the FRA:

[109] *Id*.

[110] *Id*.

[111] *Id* at 19-20.

[112] *Id*. at 20.

[113] *Id*.

[114] *Id*.

[115] *Id*. at 4.

[116] Broward PRM at 11.

[117] *Id*.

[118] Broward SOP at 11.

> Retune Existing Mobile Radios - • Functional Pre-Test of existing radio - Talk group call on system • Retune existing radio (no obstruction to retuning of radio) • Functional post test of existing radio - Talk group call on system (691 units @ 0.70 hrs each @ $118.00 /hr = $57,076.60).[119]

Broward notes that Schedule C of the FRA contains no comparable line item for testing portable radios.[120] It concludes, therefore, that the parties intended that Motorola was to test the mobile radios and that Broward's staff was to test the portables.[121] Broward submits that it should be paid for testing the portables because the associated cost was inadvertently excluded from the FRA.[122]

48. _Sprint's Position_. Sprint argues the FRA does not include internal costs for Broward to test mobile or portable units, because such testing unnecessarily would duplicate that performed by Motorola.[123] Sprint claims that, during FRA negotiations, the parties discussed having Broward's staff test the radios, but that they ultimately agreed that Motorola, not Broward, would perform the tests.[124] Sprint also submits that Broward failed to offer any evidence that the $303,780 that Broward seeks for testing by its staff is reasonable, prudent, or necessary.[125] In sum, Sprint says payment for testing by Broward's staff is redundant and outside the parties' agreement.[126]

49. _TA Mediator's Recommendation_. The TA Mediator finds Broward's argument that testing of the portable radios was inadvertently omitted from the FRA is faulty and lacks support in the record or the FRA.[127] The TA Mediator notes that testing of the radios is covered in the FRA, which allots $96,254 to Broward to, *inter alia*, "insure reconfigured radios are working properly." In that task description, no distinction is made between portable and mobile radios.[128]

50. The TA Mediator also finds that Broward has not met its burden of establishing that the requested testing costs satisfy the Commission's Minimum Necessary Cost standard.[129] According to the TA Mediator, Broward has not explained (a) why the funds allocated in the FRA are inadequate for rebanding Broward's system, including testing, (b) what tests Broward would perform that Motorola is not performing.[130]

51. _Decision_. In a previous case, we partially approved a Change Notice in an instance in which, through mistake, the licensee had failed to include the fees of a consulting engineer in its FRA.[131] We did so, *inter alia*, because "we see no evidence of [the licensee] abusing the change notice process by

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[119] *Id*.; Broward PRM Ex. 4 at 54.

[120] Broward SOP at 11.

[121] *Id*.

[122] *Id*.

[123] Sprint PRM at 30.

[124] *Id*. at 30-31.

[125] Sprint SOP at 10.

[126] Sprint PRM at 30-31.

[127] RR at 21.

[128] *Id*.

[129] *Id*.

[130] *See generally* Broward Reply PRM.

[131] *DFW Order*, 26 FCC Rcd at 1122.

'padding' its rebanding costs or attempting to renegotiate matters already considered in negotiation of the PFA."[132] Here, however, funds for testing radios were included in the FRA, and we are not persuaded by Broward's argument that testing of portable radios inadvertently was not included in the FRA and that the parties understood that Broward, rather than Motorola was to test the portable radios. We thus regard Broward's request for $303,870 to test the portable radios as an attempt "to renegotiate matters already considered in negotiation of the FRA." Moreover, even were we to accept Broward's argument, we would disapprove its request because it has not established that $303,870 is the minimum necessary cost for testing its portable radios.[133]

### F. Outside Consultant

52. Broward seeks $90,000 for the future services of an outside consultant.[134] We disapprove the request.

53. *Broward's Position*. Broward states it is not seeking payment of costs already incurred for an outside consultant.[135] Instead, Broward seeks $90,000 for a consultant's future services.[136] Broward argues that the consultant is necessary because the rebanding effort has strained Broward's staff to the point where Broward lacks sufficient staff resources to complete rebanding.[137]

54. *Sprint's Position*. Sprint argues the Bureau's decision in *Hinds* is directly on point and that the distinction between past and future activities is irrelevant.[138] It claims that, if the need for an outside consultant was foreseeable during FRA negotiations, then Broward's request must be denied.[139] Sprint also argues that Broward fails to meet the Commission's Minimum Necessary Cost standard because it fails to explain what the consultant would do or why the consultant is needed.[140]

55. *TA Mediator's Recommendation*. The TA Mediator recommends that the Commission find Broward has failed to satisfy its burden with respect to the outside consultant under both the foreseeability standard and the Minimum Necessary Cost standard.[141] According to the TA Mediator, Broward's sole justification for hiring an outside consultant is that its internal staff is strained.[142] The TA Mediator finds Broward has not even attempted to explain the services the outside consultant would perform, much less that the $90,000 cost for those services is reasonable, prudent and necessary.[143] The TA Mediator agrees

[132] *Id.* at 1122 ¶ 18.

[133] *Supra* n.22.

[134] Broward PRM at Ex. 4 at 54-55.

[135] RR at 21.

[136] Broward PRM at 12.

[137] *Id*. Ex. 8 at 97.

[138] Sprint PRM at 31 *citing* Hinds County, Mississippi and Sprint Nextel Corp., WT Docket No. 02-55, *Memorandum Opinion and Order*, 25 FCC Rcd 12336 (PSHSB 2010) (*Hinds Order*).

[139] Sprint PRM at 31.

[140] Broward PRM at 13-14

[141] RR at 22.

[142] *Id*.

[143] *Id*.

with Sprint that Broward's request is controlled by *Hinds,* and that Broward has failed to meet the Commission's foreseeability standard.

56. Decision. We agree with the TA Mediator's recommendation and reject Broward's request for additional funding for an outside consultant. In *Hinds*, the licensee requested over $1 million for services allegedly already performed in support of the licensee's reconfiguration, but refused to supply any documentation substantiating that the services had been performed.[144] The Bureau held that the need for the alleged services should have been foreseen by the licensee during FRA negotiations, and incorporated into the FRA, and that, because of a failure to describe the services to be performed, or the costs thereof, the licensee had not met the Commission's Minimum Reasonable Cost standard.[145]

57. Broward's attempt to distinguish *Hinds* because that case dealt with past services, whereas, here we are dealing with future services,[146] is a distinction without a decisional difference. The Commission's Minimum Reasonable Cost standard applies to future services as well as past ones as illustrated by numerous cases holding that the cost of future services must be reasonable, prudent, and necessary.[147] Broward, having failed to specify what services its outside consultant would provide, much less show that those services are necessary and prudent, meets none of the Minimum Reasonable Cost criteria. Having found that Broward has not met the Minimum Necessary Cost standard, we need not address the question of whether the need for an external consultant was unforeseeable.

### G. Outside Counsel

58. Broward seeks $30,450 for the services of outside counsel.[148] We approve Broward's request.

59. Broward's Position. Broward argues that the need to negotiate the Change Notice and file PRMs was unforeseeable at the time of FRA negotiations.[149] Broward also argues that Sprint does not consider negotiating Change Notices or filing PRMs to be foreseeable events and thus, during FRA negotiations, would not have agreed to pay for outside counsel's future fees for preparing a Change Notice request and the subsequent PRM.[150]

60. Sprint's Position. Sprint states that outside counsel's services played no part in Sprint's decision to agree to pay some of the minor costs sought in Broward's Change Notice request.[151] As to the other costs, Sprint argues that Broward failed to demonstrate that the costs were reasonable, prudent or necessary.[152] It also contends that the payments to outside counsel were "wasteful and imprudently

[144] *Hinds Order*, 25 FCC Rcd at 12339 ¶ 9.

[145] *Id*.

[146] Broward PRM at 12.

[147] *See, e.g.*, County of Charles, Maryland and Sprint Nextel, WT Docket No. 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 12749 (PSHSB 2009) and City of Manassas, Virginia and Sprint Nextel, WT Docket No. 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 8526 (PSHSB 2007).

[148] Broward PRM Ex. 4 at 54-55.

[149] *Id*. at 13-14.

[150] *Id.*

[151] Sprint PRM at 28.

[152] *Id*.

expended."[153] Sprint submits that the Bureau need not analyze whether outside counsel fees were foreseeable or not, but, rather, should focus on whether the fees were reasonable, prudent, or necessary.[154]

61. TA Mediator's Recommendation. The TA Mediator states that the Commission will not approve legal fees if a Change Notice is "patently frivolous" or advanced in bad faith.[155] However, even if a licensee does not prevail on the merits, legal fees may be allowed if the licensee makes an "arguable case" for the Change Notice.[156] Under this standard, the TA Mediator concludes that the legal fees associated with the Change Notice are allowable because they were neither frivolous nor advanced in bad faith.[157] The TA Mediator found that Broward presented an arguable case on several major issues raised in the Change Notice request, notwithstanding Broward did not prevail.[158] The TA Mediator also found that the legal fees Broward requested did not appear unreasonable given the need for an initial and supplemental round of PRMs,[159] and rejected Sprint's arguments to the contrary.[160] The TA Mediator thus recommends that the Bureau approve Broward's request for $30,450 in legal fees.

62. Decision. We allow payment of Broward's legal fees in connection with the Change Notice request. First, the requests in the Change Notice are neither frivolous on their face nor advanced in bad faith.[161] Second, Broward made an arguable case that the Change Notice, and the legal fees incurred, were necessary to bring the matter before the mediator and, ultimately, before the Bureau, thus avoiding a stalemate between the parties with a consequent delay in the rebanding of Broward's system. Third, Sprint has not contended, and we cannot conclude, that the change notice requests were advanced in bad faith. Therefore, we allow Broward's outside counsel fees connected with the change notice requests and subject to documentation.[162]

### H. Good Faith Negotiation

63. Broward's Position. Broward claims that Sprint declined to engage in substantive discussion of various issues raised by the Change Notice and, therefore, failed to negotiate in good faith.[163] Broward submits that Sprint treated it differently from other licensees in comparable circumstances.[164] Broward also claims that, given Sprint's experience in rebanding, Sprint was obliged to inform Broward during the

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[153] *Id.*

[154] *Id*. at 29.

[155] RR at 23; *See also* City of Virginia Beach, Virginia and Sprint Nextel, WT Docket No. 02-55, *Memorandum Opinion and Order*, 25 FCC Rcd 10898, 10913 ¶ 51 (PSHSB 2010) (Virginia Beach); City of Hartford, Connecticut and Sprint Nextel, WT Docket 02-55, *Memorandum Opinion and Order*, 25 FCC Rcd 12329, 12335 ¶ 23 (PSHSB 2010).

[156] RR at 23 citing *Virginia Beach*, 25 FCC Rcd at 10913 ¶ 51.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *See, e.g., Wethersfield*, 26 FCC Rcd at 1129 ¶ 18.

[162] The subject fees, as with all rebanding-related fees and expenses, are subject to itemization, review, and reconciliation by the TA when rebanding of Broward's system is complete.

[163] Broward PRM at 10-12, 14.

[164] *Id*. at 10-12, 14.

FRA negotiations that the amount of time allocated to certain tasks was insufficient.[165] Broward also claims that the TA Mediator made no attempt to have the Parties negotiate any of the issues, contrary to Commission intent and inconsistent with the actions of other TA Mediators who inform parties that they cannot refuse to negotiate.[166] Had the TA Mediator been more assertive, Broward argues, the negotiations could have yielded results favorable to Broward.[167]

64. Broward also claims it was prejudiced during mediation because the TA Mediator conducting the Change Notice mediation was not the same mediator who presided over the parties' negotiations leading to the FRA.[168] Therefore, Broward asserts, the TA Mediator lacked direct knowledge of the FRA negotiations and was poorly positioned to prepare a Recommended Resolution.[169] Broward claims that Commission rules require Change Notices to be reviewed by Sprint and TA personnel who are "already familiar with the Licensee's FRA and rebanding requirements wherever possible."[170] Broward claims this requirement was intended to ensure a "more efficient and effective use of the Change Notice mediation process by injecting into the process the objective person with the greatest familiarity with what has gone before in the case."[171] Broward asserts that the replacement TA Mediator made recommendations based on negotiations which the mediator did not witness and which the previous TA Mediator would have been better situated to address. Thus, Broward claims it was prejudiced because the RR was not prepared by the TA Mediator having most familiarity with the case.[172]

65. *Sprint's Position*. Sprint counters Broward's claim of bad faith negotiation by stating that, when costs are plainly barred by the Commission's standards, Sprint is not obligated "to engage in extended negotiations just to avoid an accusation of bad faith."[173] Sprint argues the parties have diametrically opposed views on the costs requested in the Change Notice request, and that extended negotiations would serve no purpose other than to drive up transactional costs.[174]

66. Sprint counters Broward's claim that Sprint failed to warn Broward that Broward's proposed costs were inadequate to successfully reband, by stating that Sprint has "every incentive to ensure that the funds and the scope of the work negotiated in any FRA are sufficient to allow the successful reconfiguration of a licensee's system."[175] Sprint also urges recognition that rebanding involves an arms length transaction in which both sides are free to negotiate their positions.[176] Sprint did not address the alleged unfairness of assigning a different TA Mediator to the Change Notice proceedings.[177]

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[165] *Id*. at 6-7 and 13-14.

[166] Broward SOP at 4 *citing Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 ¶ 50.

[167] *Id*.

[168] Broward Reply PRM at 6.

[169] *Id*.

[170] Broward SOP at 2 *citing* FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, WT Docket No. 02-55, 22 FCC Rcd 17227 (2007) (*Supplemental Guidance PN*).

[171] *Id*. at 3.

[172] *Id*.

[173] Sprint PRM at 32.

[174] *Id*.

[175] *Id.*

[176] *Id*.

[177] RR at 24.

67. <u>*TA Mediator's Recommendation*</u>. The TA Mediator recommends the Commission find that Broward has not established that Sprint failed to act in good faith.[178] The TA Mediator notes that the mediation sessions in this case were truncated and that most discussions between the mediator and the parties were *ex parte.*[179] The TA Mediator states that the mediation sessions were truncated and the *ex parte* contacts instituted because the parties were polarized and unyielding, making it apparent that PRMs and a subsequent appeal to the Bureau would be necessary to resolve disputed issues.[180]

68. Notwithstanding that Sprint was unyielding is its negotiation position, the TA Mediator found no evidence of bad faith on Sprint's part.[181] The TA Mediator notes that Sprint initially engaged in protracted negotiations with Broward over an FRA which committed Sprint to spend several million dollars for Broward's rebanding.[182] The TA Mediator finds that Sprint did not withhold any information or engage in any malfeasance during negotiations.[183] The TA Mediator also found that Sprint's agreement to pay over $100,000 of the costs contained in the Change Notice was evidence that Sprint had not simply "dug in its heels" with respect to the Change Notice, though it did take a "hard line" approach in negotiation.[184]

69. The TA Mediator found no merit to Broward's claim that it was prejudiced by having a new mediator assigned to the Change Notice mediation instead of the mediator that presided over the FRA negotiations.[185] First, the TA Mediator found that the TA's Alternative Dispute Resolution (ADR) Plan does not require that a mediator overseeing FRA negotiations must also be assigned to subsequent mediations involving the same parties.[186] Second, the TA Mediator notes that he invited Broward on multiple occasions to discuss the Change Notice and present its arguments.[187] Third, the TA Mediator reasoned that a TA Mediator is not a fact witness, but rather has the limited role of mediating differences between the parties and, when necessary, preparing a Recommended Resolution grounded on the record.[188]

70. <u>*Decision*</u>. We find that Broward has failed to meet the requisite burden of proof to show that Sprint has not negotiated in good faith.[189] The Commission has emphasized that utmost good faith negotiation by all parties is critical to achieving the Commission's rebanding objectives.[190] Among the indicia of good faith negotiation are (a) the steps a party has taken to determine the actual cost of

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[178] *Id*. at 25.

[179] *Id*. at 24.

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] *Id*.

[184] *Id*.

[185] *Id*. at 25.

[186] *Id*.

[187] *Id*. at 25-26.

[188] RR at 26.

[189] *De Novo Procedures PN,* 21 FCC Rcd at 759 ¶ 9.

[190] 47 C.F.R. § 90.677(c). *See also 800 MHz R&O*, 19 FCC Rcd at 15076-77 ¶ 201; Reminder to 800 MHz Wave Three Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations, *Public Notice*, WT Docket No. 02-55, 21 FCC Rcd 7122 (WTB 2006).

relocation to comparable facilities; (b) whether a party has unreasonably withheld from the other party information, essential to the accurate estimation of relocation costs and procedures, requested by the other party and (c) whether a party has made a counteroffer when presented an offer by the other party.[191] That the parties here may have had "significant differences" and engaged in "contentious" negotiations, does not, standing alone, support a finding of failure to negotiate in good faith.[192]

71. We find Broward's claim that it was prejudiced by the substitution of mediators completely unmeritorious. Broward places unwarranted reliance on the Commission's statement, relative to Change Notices, that the TA: "*should*" have requests reviewed by personnel that are already familiar with the licensee's FRA and rebanding requirements, "*wherever possible*."[193] In this case, maintaining the same mediator for the FRA negotiations and the Change Notice negotiations was not practically possible. Moreover, Broward has not shown that the successor mediator failed to follow the policies the Bureau adopted governing the Change Notice process.[194]

## IV. CONCLUSION

72. It is apparent that Broward negotiated an FRA which it later deemed disadvantageous and then sought to renegotiate settled terms of the FRA by using the Change Notice process. The Commission has held, however, that "it is not reasonable for licensees to use the change notice process to attempt to re-negotiate their agreements after the fact based on issues that should have been or actually were raised earlier."[195] Therefore, we disallow Broward's Change Notice, with the exception of Broward's request for reimbursement of $30,450 in outside counsel fees associated with the Change Notice.

## V. ORDERING CLAUSE

73. Accordingly, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 0.191, 0.392, and 90.677 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392, 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

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

FEDERAL COMMUNICATIONS COMMISSION

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

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[191] RR at 25. *See 800 MHz Report and Order*, 19 FCC Rcd at 15076-77 n.524.

[192] RR at 25 *citing* Manassas City Public Schools, WT Docket 02-55, *Memorandum Opinion and Order*, 21 FCC Rcd 11930, 11936 ¶ 22 (PSHSB 2006).

[193] *Supplemental Guidance PN,* 22 FCC Rcd at 17229 [emphasis added].

[194] *Id. citing Rebanding Cost Clarification Order*, 22 FCC Rcd 9818.

[195] *800 MHz Fourth MO&O*, 23 FCC Rcd at 18522 ¶ 31.