

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

In the Matter of
THE STATE OF INDIANA
and
SPRINT CORPORATION
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WT Docket No. 02-55
TAM-12005

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2017

Released: May 22, 2017

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

I. INTRODUCTION AND BACKGROUND

1. On January 11, 2017, the Federal Communication Commission’s (Commission) Public Safety and Homeland Security Bureau (Bureau), under delegated authority, issued an Order Designating Issues for Briefing (Briefing Order) to the parties in the above-captioned proceeding. The Bureau issued the Briefing Order after the 800 MHz Transition Administrator (TA) reported that the State of Indiana (Indiana or State) and Sprint Corporation (Sprint) (collectively Parties) had reached an impasse in negotiating the costs to be reconciled as part of the closing of their Frequency Reconfiguration Agreement (FRA). This cost reconciliation is required by the Commission’s orders governing the nationwide 800 MHz rebanding initiative. In the Briefing Order, the Bureau directed the Parties to address fourteen disputed issues separating the Parties in the cost reconciliation process.

2. On January 13, 2017, Indiana filed a motion arguing that the Commission lacks jurisdiction in this matter and requesting that the Bureau vacate the Briefing Order and suspend the briefing schedule (State Motion). On January 17, 2017, Sprint filed an opposition to the State Motion (Sprint Opposition). On January 30, 2017, Indiana timely filed its issue brief with the TA, and on

1 State of Indiana and Sprint Corporation, Order Designating Issues for Briefing, (PSHSB, Jan. 11, 2017) (Briefing Order). The Briefing Order is attached as Appendix A.

2 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 paras. 88-141, 189 (2004) (800 MHz Report and Order).

3 See generally Briefing Order.

4 Motion to Vacate Order Designating Issues for Briefing, Motion to Dismiss, filed Jan. 13, 2017 by the State of Indiana (State Motion).

5 Opposition to Motion to Vacate, filed Jan 17, 2017 by Sprint Corporation (Sprint Opposition)

6 Brief of Issues, filed by the State of Indiana on January 30, 2017 (State Brief).

February 24, 2017, Sprint timely filed its issue brief.<sup>7</sup> Neither party asked for leave to file additional pleadings. On March 3, 2017, the TA forwarded the record of this dispute to the Bureau.<sup>8</sup>

3. In this Memorandum Opinion and Order, we deny Indiana's motion to vacate the Briefing Order and address the issues identified in the Briefing Order on the merits.

## II. DISCUSSION

### A. Indiana's Motion

#### 1. Indiana's Stay Request is Both Deficient and Moot.

4. We first address the State's request that the Commission stay the briefing schedule set forth in the Briefing Order until the Commission rules on the State's Motion.<sup>9</sup> The State offers no justification for its stay request. As the Bureau has previously observed, a stay is an extraordinary remedy, and to support its request the State has the burden of demonstrating that "(i) it is likely to prevail on the merits; (ii) it will suffer irreparable harm, absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest favors a grant of the stay."<sup>10</sup> Because the State has failed to address any of these criteria for demonstrating that a stay is warranted, or to otherwise provide a justification, we deny its request. In any event, because the State complied with the briefing schedule, its stay request is moot and will be dismissed as such.

#### 2. Indiana's Motion is, in Substance, a Petition for Reconsideration.

5. Although the State characterized its pleading as a Motion to Vacate and a Motion to Dismiss, we find that this appellation "is of no effect since it is evident that [the State] s[eeks] reconsideration of the Commission's previous order."<sup>11</sup> Because the State's request is, in substance, a petition for reconsideration of the Briefing Order, we will review the State's pleading under the standards established in Commission rules and case law regarding petitions for reconsideration.<sup>12</sup>

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<sup>7</sup> Issue Brief of Sprint Corporation, filed by Sprint Corporation on February 24, 2017 (Sprint Brief).

<sup>8</sup> Transmittal of Record and Request for Confidential Treatment, filed by the 800 MHz Transition Administrator on March 2, 2017.

<sup>9</sup> State Motion at 1.

<sup>10</sup> *State of Indiana and Sprint Nextel Corp.*, Order, 26 FCC Rcd 3682, 3683 para. 3 (PSHSB 2011) *citing Cincinnati Bell Telephone Company*, Memorandum Opinion and Order, 8 FCC Rcd 6709 (1993), *citing Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921 (D.C. 1958); *modified by Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Phone Depots Inc. d/b/a Mobilefone Radio System*, Memorandum Opinion and Order, 91 FCC 2d 1244, para. 6 (1982) (stay motion summarily denied because movant's request "failed to discuss and does not satisfy the criteria for a stay").

<sup>11</sup> *Good Music Station, Inc. and RKO Teleradio Pictures, Inc.*, Memorandum Opinion and Order, 21 FCC 717, 719 para. 7 (1956).

<sup>12</sup> 47 CFR § 1.106. Even if we were to construe the State's motion as a request to vacate, the State would likewise fail to meet the standard for granting such a motion. The Commission has found that it should deny requests to vacate its orders unless the parties meet the significant burden of demonstrating "some special circumstances" for reopening a closed matter. *Starpower Communications, LLC v. Verizon South, Inc.*, Order, 19 FCC Rcd 7592, 7594 para. 5 (2004) ("[T]he Commission presumes that its orders should remain intact, and may hold otherwise only if the parties make an exceptional demonstration of good cause."), *citing U.S. Bancorp Mortgage v. Bonner Mall Partnership*, 513 U.S. 18 (1994). The State makes no such good cause showing here, and the public interest would not be served by disturbing the finality of the order in question. *Id.*

### 3. Indiana's Claims

6. The State raises a number of arguments objecting to the propriety of the Commission entertaining the case at this juncture. First, the State asserts that the Commission lacks jurisdiction over the matter itself. It contends that: (a) the Commission lacks jurisdiction over the State because the State has completed physical rebanding of the 800 MHz band;<sup>13</sup> (b) there is no claim or suggestion that the State has violated the Commission's rules or that the FCC may preempt state law;<sup>14</sup> (c) the Commission lacks the authority to compel the State to use public funds to pay Sprint;<sup>15</sup> and (d) contract claims against the State must be adjudicated in Indiana courts.<sup>16</sup> Second, the State argues that the Commission lacks personal jurisdiction over the Parties and over those parties who would be named as additional parties to any suit.<sup>17</sup> Third, the State claims that Indiana is the proper forum to resolve the controversy because the Commission is a *forum non conveniens*.<sup>18</sup> We briefly address the State's arguments below.

#### a. The Commission Retains Jurisdiction Over Rebanding Licensees Until Costs are Reconciled and the Licensee Certifies Completion of Rebanding.

7. Indiana argues that the Commission lacks jurisdiction because "the only matters [remaining] before the Commission are claims made by Sprint that it is not responsible for certain monetary obligations, which it asserts are the responsibility of the State."<sup>19</sup> According to the State, Sprint's claims "are tantamount to damages for breach of contract and/or a demand for specific performance arising from a private contract," neither of which is grounded in a rule or regulation enacted by the FCC or can be tied to the Commission's statutory authority.<sup>20</sup> Because the State has completed its physical rebanding of the 800 MHz band and has migrated fully onto the replacement channels, Indiana argues that "[t]here exists no further regulatory interest that would support the FCC's involvement in adjudicating the parties' claims."<sup>21</sup>

8. Contrary to the State's argument, the Commission retains jurisdiction over rebanding licensees until all costs are reconciled and the licensee submits certification that rebanding has been completed. To hold otherwise would eviscerate the financial reconciliation process the Commission put into place in the original *800 MHz Report and Order* to ensure that Sprint does not realize a windfall in the band reconfiguration process.<sup>22</sup> As noted *supra*, the State and Sprint are at an impasse in negotiating the costs to be reconciled as part of the closing of their FRA. As the Bureau explained in 2015, licensees continue to have rebanding obligations even after they have concluded physical rebanding and are operating on their replacement channels.<sup>23</sup> Specifically, the State still must undergo Actual Cost Reconciliation and Closing Certification before Sprint's obligations to the licensee and the licensee's

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<sup>13</sup> State Motion at 2.

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

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> *Id.* at 5-7.

<sup>18</sup> *Id.* at 7-8.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 1-2.

<sup>21</sup> *Id.* at 1-2.

<sup>22</sup> *800 MHz Report and Order*, 19 FCC Rcd 14969, 15123-25, paras. 329-332.

<sup>23</sup> *Supplemental Requests for Waiver of June 26, 2008 Rebanding Deadline for Non-Border Regions, March 19, 2012 Rebanding Deadline for Puerto Rico and April 15, 2013 Rebanding Deadline for U.S.-Canada Border Regions*, Order, 30 FCC Rcd 200, 202 para. 10 (PSHSB 2015).

obligations to Sprint are finally determined.<sup>24</sup> These “closing activities—including return of equipment, completion of actual cost reconciliation (ACR) for an FRA or Planning Funding Agreement (PFA), and execution and delivery of the closing documents—are requirements of the reconfiguration program and are specifically provided for in each PFA and FRA.”<sup>25</sup>

9. Since closing activities are part of band reconfiguration, disputes arising during these activities are governed by Section 90.677(d) of the Commission’s rules, which provides that issues that remain unresolved after mediation by the TA shall be referred to the Bureau for resolution.<sup>26</sup> As noted above, the TA referred this matter to the Bureau on March 3, 2017. Thus, the Commission’s jurisdiction over this matter is specifically provided for in the Commission’s rules, and the Commission retains jurisdiction over this matter until costs are reconciled and the State certifies that the rebanding is complete. We need not address Indiana’s claim that we lack jurisdiction over non-parties because we are not asserting jurisdiction over any party other than Sprint or the State.

**b. The State is Estopped From Arguing That This Matter is Governed by Indiana Law.**

10. In its Motion, the State claims that “[t]he language of the FRA is clear that the agreement is to be interpreted and governed in accord with Indiana law.”<sup>27</sup> It fails to note however, an exception the FRA makes with respect to certain rebanding-related disputes between the parties, including rebanding costs and payments. Paragraph 30 of the FRA provides, in pertinent part, that:

This Agreement is governed by the laws of the State of Indiana without regard to conflict of laws principles thereof. This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana and suit, if any, must be brought in the State of Indiana, *provided, however, this Section shall be subject to Section 16 herein* (emphasis added).

Paragraph 16 of the FRA deals with disputes between the parties and reads:

The parties agree that any dispute related to the Replacement Frequencies, [Sprint’s] obligation to pay any of the cost of the Reconfiguration of Incumbent’s system contemplated by this Agreement and/or the Order, or the compatibility of Incumbent’s reconfigured system to Incumbent’s existing system prior to Reconfiguration which is not resolved by mutual agreement, shall be resolved in accordance with the dispute resolution provisions of the [800 MHz Report and] Order, as it may be modified or amended from time to time.

11. When it signed the FRA, the State contractually agreed with Sprint that disputes over rebanding payments are governed by the dispute resolution provisions of the *800 MHz Report and Order*. Having done so, the State is estopped from now arguing that the dispute should be resolved in Indiana courts or that Indiana’s law is controlling in this matter.

**c. The Bureau is Not Attempting to Compel the State to Use Public Funds to Pay Sprint.**

12. Indiana’s argument that the Commission lacks the authority to compel Indiana to use public funds to pay Sprint is premature. The only action the Bureau took in the Briefing Order was to

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 47 CFR § 90.677(d).

<sup>27</sup> State Motion at 5.

order the Parties to brief fourteen specified questions and to require responses by a date certain. The Commission's power to propound such questions to licensees stems from Section 308(b) of the Communications Act of 1934, as amended (the Act)<sup>28</sup> and Section 1.17 of the Commission's rules.<sup>29</sup> This Memorandum Opinion and Order solely addresses whether the Parties have met their respective burdens of proof as to the issues designated for briefing, and resolves those issues to allow the parties to complete the reconciliation process. Nothing herein compels Indiana to use public funds to pay Sprint.

## **B. Issues Designated for Briefing**

13. We now address the fourteen issues the Bureau designated for briefing. In the Briefing Order we directed the Parties to address only the issues designated and cautioned them that we would disregard any material extraneous to the designated issues.<sup>30</sup>

### **1. Burden of Proof**

14. *Issue in Dispute.* The Parties differ as to which party bears the burden of proof regarding cost reconciliation in this proceeding.<sup>31</sup>

15. *State Position.* The State contends that the burden of proof is on the party seeking a remedy.<sup>32</sup> According to Indiana, if a licensee claims that additional payments are due from Sprint and Sprint disagrees, then the burden of proof is upon the licensee to make that claim.<sup>33</sup> If Sprint is claiming a refund from the licensee, the State argues the burden of proof is upon Sprint to demonstrate that such a refund is due.<sup>34</sup>

16. The State claims that its position is a basic tenet of contract law but cites no case law or legal treatise to support its position.<sup>35</sup> The State also claims that no Commission rules or precedent are applicable to the burden of proof issue.<sup>36</sup> It argues that none of the Commission's orders dictates "actions to be taken other than to recommend alternative dispute resolution of litigation in the courts."<sup>37</sup> The State contends that the Commission does not award money damages arising out a dispute involving a contract between parties, but claims that money damages are what Sprint is seeking.<sup>38</sup>

17. *Sprint Position.* Sprint cites two TA publications, the 800 MHz Reconfiguration Handbook and the Alternative Dispute Resolution Plan for 800 MHz Transition Administrator, LLC, for the proposition that "when there is a dispute in rebanding with regard to the reasonableness of a disputed cost, the party with the burden of proof is the incumbent 800 MHz licensee. Conversely, Sprint has the burden of proof if the issue in dispute is whether a licensee has received facilities post-rebanding that are comparable to its pre-rebanding facilities."<sup>39</sup>

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<sup>28</sup> 47 U.S.C. § 308(b).

<sup>29</sup> 47 CFR § 1.17.

<sup>30</sup> Briefing Order at para. 2.

<sup>31</sup> *Id.* at para. 3, Issue 1.

<sup>32</sup> State Brief at 1.

<sup>33</sup> *Id.* at 1-2.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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

<sup>39</sup> Sprint Brief at 3 *citing* the 800 MHz Reconfiguration Handbook and the Alternative Dispute Resolution Plan for 800 MHz Transition Administrator, LLC.

18. *Decision.* As discussed *supra*, closing activities are part of band reconfiguration and, pursuant to the Commission's rules, unresolved disputes arising during these activities are referred to the Bureau for resolution. Commission precedent is clear that, in disputes, Sprint bears the burden of demonstrating that proposed facilities are "comparable" within the meaning of the *800 MHz Report and Order* and the licensee has the burden of demonstrating that the cost of relocation is "the minimum necessary to provide facilities comparable to those presently in use" within the meaning of the *800 MHz Report and Order*.<sup>40</sup> Although Indiana claims a lack of relevant precedent on this point, we observe that the Bureau reiterated this allocation of burden of proof in 2011 while resolving a previous dispute between Indiana and Sprint.<sup>41</sup>

19. We will use this allocation of the burden of proof for the eleven disputed issues that involve equipment costs, *i.e.*, Indiana must show that the compensation it seeks from Sprint for the cost of equipment that it received was the minimum necessary to achieve relocation.<sup>42</sup> The remaining two issues do not involve equipment costs. The first remaining issue – Sprint's allegation of bad faith by Indiana – is decided based on the requirements of the 800 MHz rebanding orders as is the second remaining issue -- whether Indiana is entitled to reimbursement for its legal fees in responding to the Briefing Order.

## 2. Equivalency in Number of Replacement and Replaced Radios

20. *Issue in Dispute.* The Parties dispute whether the number of EFJ 5100 and EFJ 5300 replacement radios received by Indiana exceeded the number of old radios Indiana turned in for replacement<sup>43</sup>.

21. *State Position.* The State claims that EFJ provided 920 radio units to J&K Communications, Inc. (J&K) and attached a list of 913 serial numbers and a statement from J&K providing an explanation for the 7 units for which J&K did not collect serial numbers.<sup>44</sup> The State claims the 920 radios consisted of 337 EFJ5300 mobile radios and 583 EFJ5100 portable radios.<sup>45</sup> The State claims J&K returned:

- 256 old mobile radios that had been replaced with EFJ5300 radios;
- 87 excess EFJ5300 radios;<sup>46</sup>
- 325 old portable radios that had been replaced with EFJ5100 portable radios; and
- 245 excess EFJ5100 radios.<sup>47</sup>

22. The State contends that J&K received 337 mobile radios and returned 343 mobile radios and received 583 portable radios and only returned 570 portable radios.<sup>48</sup> The State did not provide a complete list of serial numbers for these returned radios.<sup>49</sup>

<sup>40</sup> *Wireless Telecommunications Bureau Announces Procedures For De Novo Review in the 800 MHz Public Safety Proceeding*, Public Notice, 21 FCC Rcd 758 (WTB 2006).

<sup>41</sup> *State of Indiana and Sprint Nextel Corporation*, Memorandum Opinion and Order, 26 FCC Rcd 1023, 1032 para. 32 (PSHSB 2011).

<sup>42</sup> Had a comparability issue been raised, Sprint would have had the burden of showing that the facilities furnished Indiana were comparable to its prior facilities.

<sup>43</sup> Briefing Order at para. 3, Issue 2.

<sup>44</sup> State Brief at 2 *citing* Appendix 2.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> Excess units are units which Indiana did not need to accomplish rebanding.

<sup>47</sup> State Brief at 3.

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

23. *Sprint Position.* Sprint states that the FRA required Sprint to provide the State with 920 new EFJ radios but contends the mix comprised 336 mobile and 584 portable radios.<sup>50</sup> In support of its claim Sprint provides the packing lists created by EFJ when it sent the radios to the State.<sup>51</sup> Sprint claims that the State returned the following radios:

- 254 old mobile radios that had been replaced with EFJ5300 radios;
- 82 excess EFJ5300 radios;
- 324 old portable radios that had been replaced with EFJ5100 portable radios; and
- 249 excess EFJ5100 radios.<sup>52</sup>

Sprint claims that the State returned 336 mobile radios but only returned 573 portable radios and supports its claims with a list of serial numbers of the returned radios.<sup>53</sup>

The following table summarizes the Parties' positions on this issue:

|         | New Radios Issued<br>(Mobiles/Portables) | Mobile Radios<br>Returned<br>(Replacement/Excess) | Portable Radios<br>Returned<br>(Replacement/Excess) |
|---------|--|---|---|
| Indiana | 920 (337/583)                            | 343 (256/87)                                      | 570 (325/245)                                       |
| Sprint  | 920 (336/584)                            | 336 (254/82)                                      | 573 (324/249)                                       |

Under either set of numbers—the State's or Sprint's—the State did not meet the minimum cost standard because it received more radios than were necessary to achieve comparable facilities and did not adequately account for the difference. Under the State's set of facts, the State received 13 more portable radios than it returned but returned 6 more mobile radios than it received. However, as stated above, under Sprint's set of facts, the State received 11 more portable radios than it returned.

24. *Decision.* The State bears the burden of proof of showing that it met the minimum cost standard. However, it failed to provide evidence that its count of radios returned to Sprint is accurate. Sprint, on the other hand, supported its claim with a list of serial numbers of the returned radios. We find that Sprint has supported its position that the State received 11 more portable radios than were necessary to achieve comparable facilities. Accordingly, we resolve this issue in Sprint's favor.

### 3. Radios Returned to Motorola

25. *Issue in Dispute.* Did the State's vendor (EMR) attempt to return the 185 disputed Motorola XTL 2500 radios and the five disputed XTS 2500 radios within the timeframe allowed for returns under the framework of the relevant contracts?<sup>54</sup> If the radios were not returned within the allowed timeframe, Sprint contends that Indiana is responsible to reimburse Sprint for the cost of the radios.

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<sup>49</sup> The State claims to have returned 913 radios but only provided 594 serial numbers.

<sup>50</sup> Sprint Brief at 7.

<sup>51</sup> *Id.* citing Sprint Appendix 2A.

<sup>52</sup> *Id.* at 7-8 citing Sprint Appendices 2C, 2D and 2E.

<sup>53</sup> Sprint Brief at 8 citing Sprint Appendices 2C and 2E.

<sup>54</sup> Briefing Order at para. 3, Issue 3.

26. *State Position.* The State claims that it cannot state with specificity the dates upon which the subject radios were received by its vendor, EMR, but that shipments of radios occurred in 2009 and 2010.<sup>55</sup> Indiana does not provide the dates when EMR attempted to return the radios to Motorola. The State claims that the contract between EMR and Motorola was adjusted to modify the requirement that all replaced equipment must be returned to Motorola within 90 days of receipt of replacement equipment. According to the State, the “adjusted” contract contained no time limit for the return of unused replacement equipment and Motorola stated that it would accept such radios on an open-ended basis.<sup>56</sup> The State has not produced the “adjusted” contract or any other documentation that would support its position that it was free to return the radios to Motorola for credit at any time. The State claims that EMR first became aware of Motorola’s return policy in 2013 when it attempted to return the 190 radios at issue.<sup>57</sup> However, the State provides no evidence to substantiate this claim.

27. With regard to whether Sprint can withhold or recoup the Product Typical Value (PTV)<sup>58</sup> associated with these radios, the State contends that Sprint cannot claim PTV because the contract between Motorola and EMR states that “[Sprint] would not pay for replacement radios which were unmatched with replaced equipment.”<sup>59</sup>

28. *Sprint Position.* Sprint cannot state with specificity when Motorola shipped the radios since shipments were made in 2010, 2011 and 2012.<sup>60</sup> Sprint claims, however, that the 185 mobile radios could not have been shipped later than April 2010, since that was the last date on which Motorola shipped requested mobile radios.<sup>61</sup> Sprint does not address when EMR attempted to return the radios.

29. Sprint states that both the FRA and the Motorola/EMR contract specified that “unmatched equipment” be returned to Motorola within 90 days of receipt.<sup>62</sup> Sprint contends that since both the FRA and the EMR/Motorola agreement were signed in 2009, EMR had notice of the return conditions at that time.<sup>63</sup> Sprint also notes that in an October 2012 email, EMR complained to Sprint that Motorola would not take back radios that EMR had had for over a year.<sup>64</sup>

30. *Decision.* While it is impossible to ascertain from the record exactly when particular radios were shipped from Motorola to EMR, the record indicates that the 185 mobile radios were shipped no later than April 2010 while the 5 portable radios could have been shipped as late as 2012. We are unable to ascertain from the record exactly when EMR attempted to return the radios.

31. Given that both the FRA and the Motorola/EMR contract were signed in 2009, and both of those contracts contained the 90-day return policy, EMR had, at a minimum, constructive notice of Motorola’s return policy at that time. No record evidence exists to support the State’s claim that Motorola altered its return policy to allow returns at any time. Because the State failed to meet its burden of proof with respect to minimum cost, this issue is resolved in Sprint’s favor.

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<sup>55</sup> State Brief at 4.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> The Product Typical Value is an agreed-upon cost of an item of equipment, which is set out in Appendix E of the FRA.

<sup>59</sup> State Brief at 5.

<sup>60</sup> Sprint Brief at 9 *citing* Appendix 3A.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 11. While Sprint cites Section 3.5 of the Motorola/EMR contract agreement, it does not reference a specific section of the FRA

<sup>63</sup> Sprint Brief at 13-14.

<sup>64</sup> *Id.* at 14 *citing* Appendix 3D.

#### 4. Motorola Radio Accessories

32. *Issue in Dispute.* Did the State's vendor (EMR) attempt to return Motorola radio accessories within the timeframe allocated for returns under the framework of the relevant contracts?<sup>65</sup>

33. *State Position.* The State incorporates its response to Issue 3 in response to this question and provides no additional substantive information.<sup>66</sup> It merely claims that Sprint is not entitled to recoup the PTV of the disputed equipment.<sup>67</sup>

34. *Sprint Position.* Sprint generally notes that the same issues that applied to Issue 3 apply to this issue.<sup>68</sup> Sprint reiterates its position that both the Motorola/EMR contract and the FRA require the return of unneeded excess equipment with 90 days and asserts that it is entitled to recoup the PTV of the disputed equipment.<sup>69</sup>

35. *Decision.* We are unable to ascertain when the accessories were shipped to EMR or when EMR attempted to return them to Motorola. However, we find that EMR had at least constructive knowledge of the 90-day return policy in 2009. Thus we find that the State has failed to meet its burden of proof with respect to minimum cost and resolve this issue in Sprint's favor.

#### 5. Storage, Insurance and Handling Costs

36. *Issue in Dispute.* The parties dispute whether Sprint is liable for \$32,881 in storage, insurance and handling costs incurred by the State's vendor in connection with the disputed 190 Motorola replacement radios and accessories.<sup>70</sup>

37. *State Position.* The State contends that these fees were incurred due to Motorola's refusal to accept the returned equipment.<sup>71</sup> The State asserts that the charges were reasonable and necessary to protect the equipment.<sup>72</sup> It argues that, because Sprint paid all the storage charges prior to the time Motorola refused to accept the return shipment, the storage costs subsequent to that time are also a portion of the cost of rebanding.<sup>73</sup> The State avers that the storage, insurance and handling charges have never been separated in the way the Bureau ordered and that it was not positioned to demand the storage company itemize the charges.

38. *Sprint Position.* Sprint argues that the State is responsible for these charge because its contractor, EMR, incurred them by failing timely to return the equipment.<sup>74</sup> Sprint argues that the fact that it paid for some storage as part of rebanding did not commit it to pay for storage costs for years on end when the project was no longer active.<sup>75</sup>

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<sup>65</sup> Briefing Order at para. 3, Issue 4

<sup>66</sup> State Brief at 9.

<sup>67</sup> *Id.*

<sup>68</sup> Sprint Brief at 17.

<sup>69</sup> *Id.* at 18.

<sup>70</sup> Briefing Order at para. 3, Issue 5.

<sup>71</sup> State Brief at 9.

<sup>72</sup> *Id.* at 10.

<sup>73</sup> *Id.*

<sup>74</sup> Sprint Brief at 19.

<sup>75</sup> *Id.* at 20.

39. *Decision.* This issue is resolved in Sprint's favor. The disputed costs arose because EMR failed to return the Motorola equipment as required under the terms of the FRA and the Motorola/EMR contract.

## 6. Radios Allegedly Not Part of Indiana System

40. *Issue in Dispute.* Sprint claims that it should be able to recoup the PTV for 10 XTL 2500 and nine XTS 2500 Radios that were provided to the State to replace 19 radios that Sprint contends were not programmed to operate on the State's pre-rebanding system, where it is uncontested that Delaware County stated in an affidavit that 18 of those 19 radios had been destroyed, and Sprint states that Delaware County received replacement radios in return for those 19 radios.<sup>76</sup>

41. *State Position.* The State contends that it was "not involved in Delaware County's original rebanding effort...[and] has no knowledge of the contents of Delaware County's FRA nor what specific efforts Delaware County expended in its performance under its FRA."<sup>77</sup> The State declares that it has determined that the radios in question were all part of the original inventory of radios upon which the FRA was based, were accounted for in the equipment inventory, and thus were eligible for rebanding.<sup>78</sup>

42. *Sprint Position.* Sprint states that it conducted a review of the radios and determined that the radios were not programmed to operate on the State's system.<sup>79</sup> Sprint supported this assertion with a declaration from a technician recounting the steps taken to analyze each radio's programming, and a representative printout of the programming for the radios: one with the appropriate coding and one without.<sup>80</sup> Sprint also provided a declaration from the relevant Project Manager confirming that the PTV has not been collected from Indiana or deducted from monies owing Indiana for these radios.<sup>81</sup>

43. *Decision.* Sprint has provided evidence that the radios at issue were not radios from Indiana's system because they did not have Indiana's operating frequencies installed therein. Sprint has provided evidence that the radios were erroneously replaced and that Sprint has not collected or deducted PTV for these radios. Thus, by receiving replacement radios for which it was not entitled, the State has failed to meet the minimum cost standard. This issue is resolved in Sprint's favor.

## 7. Delaware County Replacement Radios

44. *Issue in Dispute.* Sprint claims that it should be able to recoup the PTV for three XTL2500 and 21 XTS2500 radios that were provided to the State to replace 24 radios that Sprint contends were programmed to operate on the State's pre-rebanding system, but where it is uncontested that Delaware County stated in an affidavit that the 24 replaced radios had been destroyed, and Sprint states that Delaware County received replacement radios in return for those radios.<sup>82</sup>

45. *Decision.* On February 22, 2017, Sprint informed the Bureau that it had reached a settlement of this issue with Indiana. The issue will, therefore, not be addressed further.

## 8. Alleged Damaged or Defective Radios

46. *Issue in Dispute.* Sprint contends that 13 radios (four XLT 2500, eight XTS 2500, and one XTS 5000 radio) submitted to Sprint by the State or its vendor were (a) not in working condition (two

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<sup>76</sup> Briefing Order at para. 3, Issue 6.

<sup>77</sup> State Brief at 11.

<sup>78</sup> *Id.* at 13 *citing* Appendix 6.

<sup>79</sup> Sprint Brief at 22.

<sup>80</sup> *Id.* at n.40 *citing* Appendices 6A and 6B.

<sup>81</sup> Sprint Brief and 25 *citing* Appendices 6E and 6F.

<sup>82</sup> Briefing Order at para. 3, Issue 7.

XTL 2500, five XTS 2500 and one XTS 5000 radios), or (b) not a model eligible for replacement (one XTL 2500 and three XTS 2500 radios), or (c) not capable of operation in the 800 MHz band (one XTL 2500 radio).<sup>83</sup>

47. *State Position.* The State contends that the two XTL2500, five XTS 2500, and one XTS5000 were somehow damaged between the time the State took the radios out of service in working condition and their receipt by Motorola.<sup>84</sup> The State claims that “locating documentation regarding the maintenance of a radio that is no longer in an agency’s inventory or identifying specific technicians for the provision of an affidavit regarding events that occurred over five years ago is an impossible task.”<sup>85</sup> The State concedes that it is possible that it inadvertently returned for replacement four ineligible STX radios.<sup>86</sup> The State claims that it initially checked STX radios to ensure that the radios contained software that made them eligible for replacement.<sup>87</sup> The State then argues that since the FRA did not contain a specific line item for this activity or associated budget, the State, in an attempt to save time and money, stopped checking the radios.<sup>88</sup> The State does not claim credit for the one UHF radio that the State claims was inadvertently sent to Motorola in exchange for an XTL2500.<sup>89</sup>

48. *Sprint Position.* Sprint notes that both the FRA and a factsheet distributed by the TA require that equipment returned to Motorola for replacement be returned in working condition.<sup>90</sup> Sprint claims the State returned seven radios that were not functional, including two labeled as “bad” with a 2012 date, and supports its contention with a declaration from a radio technician.<sup>91</sup> Sprint states that Indiana returned an Astro Spectra unit which is ineligible for replacement and 4 STX radios with firmware which does not support operation on the NPSPAC channels.<sup>92</sup> Sprint claims that checking a radio for the proper firmware can be done in at most approximately 40 seconds and that the State’s decision to stop checking radio firmware put the state at risk of misrepresenting what it was presenting for replacement.<sup>93</sup> Sprint also claims that Indiana returned one radio for replacement which was not even capable of operating in the 800 MHz band.<sup>94</sup>

49. *Decision.* We find that Sprint has satisfactorily demonstrated that Indiana returned 13 radios for replacement that were ineligible for replacement. In so doing, Indiana failed to meet the minimum cost standard and this issue, therefore, is resolved in Sprint’s favor.

## 9. Replacement Radios to Preserve Continuity of Service

50. *Issue in Dispute.* The Parties dispute whether Sprint may deduct or recoup the PTV of seven new replacement radios (four XTL 2500 and three XTS 2500 radios) that the State deployed to preserve “continuity of service” where the State claims that Motorola field personnel were unable to

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<sup>83</sup> Briefing Order at para. 3, Issue 8.

<sup>84</sup> State Brief at 14-15.

<sup>85</sup> *Id.* at 15, n.6.

<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Sprint Brief at 27 *citing* FRA Section 21(a) and TA Factsheet, Preparing for Implementation, pg.2.

<sup>91</sup> *Id.* at 28 *citing* Appendix 8D.

<sup>92</sup> Sprint Brief at 28-29.

<sup>93</sup> *Id.* at 29 *citing* Appendices 8E and 8C.

<sup>94</sup> *Id.* *citing* Appendix 8F.

reband the replaced radios in the field, but where Sprint subsequently determined that the radios could be rebanded.<sup>95</sup>

51. *Indiana Position.* The State argues, without any supporting documentation, that seven replacement radios failed and that Motorola was unable to make them operational.<sup>96</sup> The State claims, again without supporting documentation, that it would take weeks to replace the radios and therefore in the interest of public safety, it replaced these units with seven new units.<sup>97</sup>

52. *Sprint Position.* Sprint contends that a process existed to repair radios that failed during reprogramming and provides an email exchange where this process was described to the state's vendor.<sup>98</sup> Sprint further contends that only two of the radios were defective, but one of those units had a problem that was unlikely to have been caused by the rebanding process. The other five radios were operable and reprogrammed with the appropriate firmware.<sup>99</sup> Sprints supports its contention with a declaration from a radio technician.<sup>100</sup>

53. *Decision.* The State has not shown that using new radios to replace radios that failed in the field meets the minimum cost standard. The issue is resolved in Sprint's favor.

## 10. Offsetting Replacement Radios

54. *Issue in Dispute.* The Parties dispute whether – if the State returned more replacement-eligible radios than it received for one model of radio, and returned fewer replacement-eligible radios than it received for another model of radio – the State may use the overage in one category to offset the shortfall in another category.<sup>101</sup>

55. *Decision.* Although the parties briefed this issue, we have determined in addressing Issues 2 and 3 that Indiana did not return more radios than it received for any model category. Thus, there is no overage that Indiana could use to offset a shortfall. This renders this issue moot.

## 11. SIP Terminals

56. *Issue in Dispute.* The Parties dispute whether Sprint may deduct or recoup the PTV for two new SIP terminals where Sprint replaced two old terminals, but the State failed to return the old replaced terminals.<sup>102</sup>

57. *Indiana Position.* The State concedes that it did not return the two SIP terminals to Sprint.<sup>103</sup> The State claims that Sprint is not harmed by this because Sprint would have destroyed the terminals anyway.<sup>104</sup> The State believes the terminals were destroyed but provides no evidence that this occurred.<sup>105</sup>

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<sup>95</sup> Briefing Order at para. 3, Issue 9.

<sup>96</sup> State Brief at 16.

<sup>97</sup> *Id.* at 16-17.

<sup>98</sup> Sprint Brief at 31 *citing* Appendix 9A.

<sup>99</sup> Sprint Brief at 31-32.

<sup>100</sup> Sprint Brief, Appendix 9B.

<sup>101</sup> Briefing Order at para. 3, Issue 10.

<sup>102</sup> *Id.*, Issue 11.

<sup>103</sup> State Brief at 18.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

58. *Sprint Position.* Sprint contends that the State had an obligation under the FRA to return the used SIP equipment and that it failed to do so.<sup>106</sup> Sprint notes that the State “presumes” the old terminals were destroyed but cannot confirm this.<sup>107</sup> Sprint contests the State’s assertion that the failure to return the SIP terminals will not cause harm to Sprint, contending that it is unlikely that Sprint will receive credit for the purchase of the new terminals without proof of the return of the replaced equipment to support the purchase.<sup>108</sup>

59. *Decision.* Section 23 of the FRA provides that all equipment replaced by Sprint must be returned within 90 days. Indiana failed to do so. Absent the return of the equipment the State cannot demonstrate that it met the minimum cost standard. This issue is resolved in Sprint’s favor.

## 12. Vendor Costs

60. *Issue in Dispute.* The Parties dispute whether Sprint must pay the State for costs its vendor, EMR, asserts it incurred in connection with cost reconciliation and, if so, the amount that Sprint must pay.<sup>109</sup>

61. *State Position.* The State argues that the cost overruns were due to unforeseen issues that arose during the reconciliation process.<sup>110</sup> The State contests Sprint’s assertion that EMR engaged in poor record keeping; and asserts that Sprint benefitted from EMR’s efforts since those efforts reduced the number of issues in dispute during reconciliation.<sup>111</sup> The State details EMR’s costs at Appendix 12 of its brief.<sup>112</sup>

62. *Sprint Position.* Sprint argues that it should not be liable for EMR’s reconciliation costs in excess of the \$16,500 set out in the FRA because most, if not all, of the additional hours EMR expended on reconciliation could have been avoided if EMR had performed its responsibilities in a reasonably professional and timely fashion during the implementation phase of the project.<sup>113</sup> Sprint asserts that paying additional time beyond that forecast in the FRA for reconciliation would be wasteful from a program spending perspective and would fail to hold EMR to the same program standards other vendors are held to.<sup>114</sup>

63. *Decision.* The State is correct that EMR’s activities, regardless of any inefficiencies, did help narrow the scope of the reconciliation process. Sprint does not contend that the State violated any material terms of the FRA nor does it offer a legal basis upon which we can evaluate what particular aspects of EMR’s activities would fall outside of the minimum cost standard. Thus, we find in favor of Indiana on this issue.

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<sup>106</sup> Sprint Brief at 37.

<sup>107</sup> *Id.* at 38.

<sup>108</sup> *Id.*

<sup>109</sup> Briefing Order at para. 3, Issue 12.

<sup>110</sup> State Brief at 21.

<sup>111</sup> *Id.* at 22.

<sup>112</sup> *Id.* citing Appendix 12.

<sup>113</sup> Sprint Brief at 41.

<sup>114</sup> *Id.* at 43.

### 13. Legal Fees

64. *Issue in Dispute.* The Parties dispute whether Sprint must pay the State for external legal fees, in addition to those provided for in the FRA, but requested by a change notice, for legal services its external legal counsel asserts were provided in connection with the reconciliation process.<sup>115</sup>

65. *State Position.* Indiana states that all external legal costs related to rebanding were to borne by Sprint in accord with the 800 MHz Orders and as reflected under the FRA including reconciliation which is a portion of the overall rebanding process.<sup>116</sup>

66. *Sprint Position.* Sprint does not object to paying the State's counsel for reasonable documented time involved in preparing its brief in this matter, but argues that it should not be required to pay counsel's fees for the preparation of the Motion to Vacate, which Sprint deems frivolous.<sup>117</sup>

67. *Decision.* In 2008, the Commission addressed two petitions for reconsideration challenging a determination by the Wireless Telecommunications Bureau that Sprint's obligation to pay licensee rebanding costs does not require it to pay licensees' post-mediation litigation costs when rebanding disputes are brought before the Commission.<sup>118</sup> We denied the reconsideration petitions on both statutory and policy grounds. First, we found that in the absence of specific statutory authorization, we lacked the authority to require one party to pay another party's costs in litigation before us.<sup>119</sup> Second, we found that even if we possessed such authority, requiring Sprint to pay post-mediation litigation costs "would only increase the likelihood of litigation and add cost and delay to the rebanding process."<sup>120</sup> Since this is post-mediation litigation, we find that Sprint is not required to reimburse the state for legal fees associated with either Indiana's motion to vacate or its brief.

### 14. Good Faith

68. *Issue in Dispute.* Sprint contends that the State has failed to fulfill its duty to act in utmost good faith during the reconciliation process. The State contends that while the mediation was contentious it will not make any assertion that Sprint acted in bad faith.<sup>121</sup>

69. *State Position.* Indiana argues that while many circumstances can delay and frustrate the reconciliation process, delay and frustration are not bad faith.<sup>122</sup>

70. *Sprint Position.* Sprint contends that the State or its vendors failed to engage in the requisite utmost good faith in the reconciliation process.<sup>123</sup> According to Sprint, the costs presented were excessive, the entities were unprepared on mediation calls, and the State failed to produce records that might have moved the process more quickly.<sup>124</sup> Sprint suggests it should not have to pay more than it has

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<sup>115</sup> Briefing Order at para. 3, Issue 13.

<sup>116</sup> State Brief at 23.

<sup>117</sup> Sprint Brief at 44.

<sup>118</sup> See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, Second Memorandum Opinion and Order, 22 FCC Rcd 10467, 10483-86 paras.47-50 (2007) (800 MHz Second MO&O).

<sup>119</sup> *Id.* at 10485-86 paras. 49-50.

<sup>120</sup> *Id.* at 10486 para. 50.

<sup>121</sup> State Brief at 24-25.

<sup>122</sup> *Id.* at 25.

<sup>123</sup> Sprint Brief at 46.

<sup>124</sup> *Id.* at 47.

already to EMR as the State's vendor. It also suggests that the FCC or the TA maintain cost reconciliation oversight to ensure that the FRA is timely closed.<sup>125</sup>

71. *Decision.* While we recognize Sprint's frustration with the pace of the reconciliation process, we do not find breach of the good faith obligation by either Indiana or Sprint. However, we agree with Sprint that the TA should maintain oversight of this matter to ensure a prompt resolution, and instruct the TA to inform the Commission should either party delay the reconciliation process.

### III. ORDERING CLAUSES

72. Pursuant to sections 4(i), 4(j), and 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), and 308(b), for the reasons set forth above IT IS HEREBY ORDERED that the Motion to Vacate Order Designating Issues for Briefing Motion to Dismiss (including the request for stay contained therein) filed by the State of Indiana on January 13, 2017, IS DISMISSED IN PART and DENIED IN PART.

73. Pursuant to the authority of Sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission's Rules, 47 CFR § 90.677, IT IS FURTHER ORDERED that the dispute submitted by the Transition Administrator is resolved as discussed above.

74. IT IS FURTHER ORDERED, that representatives of Sprint Corporation and the State of Indiana, each with the authority to bind its principal, SHALL MEET under the auspices of the Transition Administrator TA Mediator, within ten business days of the release date of this *Memorandum Opinion and Order* to conclude the closing and reconciliation of the Frequency Reconfiguration Agreement consistent herewith and that such meeting shall continue from business day to business day until the parties conclude that process.

75. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 CFR §§ 0.191 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>125</sup> *Id.*



shall be reproduced, single-spaced, at the beginning of each response. Accordingly, the Parties are ordered to brief the disputed issues, exactly as specified herein. At the conclusion of the response to each issue, each party shall indicate the financial consequence of a decision in its favor (*i.e.*, the amount that Sprint would be required to pay, or would be able to withhold or deduct, if the party prevails). Each document filed by the State or Sprint shall be served, by email, on the opposing party the day it is filed.

*Issue 1.* Address by reference to the FRA, the Commission's 800 MHz orders, rules, and precedent, which party bears the burden of proof regarding cost reconciliation in this 800 MHz proceeding. Three pages.

*Issue 2.* State the number of EFJ 5100 and EFJ 5300 radios sent to the State, the number of eligible old and new radios returned to Sprint as replacements for those radios, and the derivation of those numbers. A decision on the number of radios sent or received will be made with reference to the dispatch rule, *i.e.*, a party providing evidence that radios were shipped by submitting a bill of lading or other, non-party, shipping document indicating the number of radios shipped, will presumptively be deemed to have proven that number of radios was shipped and received. If there is no shipping document reflecting the number of radios shipped or received, provide an affidavit or declaration under penalty of perjury from a party with first-hand knowledge of the number of radios shipped or received. If a party is unable to furnish such documentary evidence of shipment or receipt, this issue may be decided adversely to that party. Two pages.

*Issue 3.* State the date(s) on which 185 disputed Motorola XTL 2500 radios and the five disputed XTS 2500 radios were shipped to the State's vendor (EMR) and the date(s) on which the vendor attempted to return the radios to Motorola for credit. Provide the relevant provisions of the contract between Motorola and EMR regarding the return of the radios. State the date on which EMR knew, or should have known, of Motorola's return policy. The claimed dates shall be supported by documentation. Address whether, if EMR did not have actual or constructive notice of Motorola's return policy, or Motorola's policy was inconsistent with the terms of its agreement with EMR, Sprint may still withhold or recoup the Product Typical Value (PTV) of the 190 radios. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Seven pages.

*Issue 4.* The State shall provide the date(s) that its vendor claims that disputed Motorola radio accessories were shipped to the vendor and the date(s) on which the vendor claims it attempted to return the accessories to Motorola for credit. Provide, as an attachment, the relevant provisions of the contract between Motorola and EMR regarding the return of the accessories. State the date on which EMR knew, or should have known, about Motorola's return policy. The claimed dates shall be supported by documentation. The Parties shall address whether, if EMR did not have actual or constructive notice of Motorola's return policy, or Motorola's policy was inconsistent with the terms of its agreement with EMR, Sprint may withhold or recoup the PTV of the accessories. In addressing this issue, the Parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

*Issue 5.* Address whether Sprint is liable for \$32,881.00 in storage, insurance and handling costs incurred by the State's vendor in connection with the disputed 190 Motorola replacement radios and accessories. In addressing this issue, parties shall support their position by reference to the FRA and shall address the question of whether the storage, insurance and handling charges were reasonable and necessary, or whether they were the result of EMR either ordering or accepting more radios than reasonably necessary for rebanding of the State's system or failing to return the radios to Motorola in a timely manner. Storage, insurance and handling charges shall be stated separately. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

Issue 6. Address the basis of Sprint's claim that it should be able to deduct or recoup the PTV for 10 XTL 2500 and nine XTS 2500 radios that were provided to the State to replace 19 radios that Sprint contends were not programmed to operate on the State's pre-rebanding system, where it is uncontested that Delaware County stated in an affidavit that 18 of those 19 radios had been destroyed, and Sprint states that Delaware County received replacement radios in return for those 19 radios. Sprint shall support its claim by documentary evidence, *e.g.* an affidavit, or declaration under penalty of perjury, demonstrating how Sprint determined (a) the radios were programmed for frequencies other than those used by the State in its system prior to rebanding, (b) evidence that Delaware County received replacement radios, and (c) that Sprint has not deducted or recouped PTV from Delaware County in connection with these radios. The State shall address how it, or its vendor, came to be in possession of the Delaware County radios. The State, by reference to the FRA shall demonstrate why it should be entitled to credit for radios not previously programmed to operate on its system. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Seven pages.

Issue 7. Address the basis of Sprint's claim that it should be able to deduct or recoup the PTV for three XTL2500 and 21 XTS2500 radios that were provided to the State to replace 24 radios that Sprint contends were programmed to operate on the State's pre-rebanding system, where it is uncontested that Delaware County stated in an affidavit that the 24 replaced radios had been destroyed, and Sprint states that Delaware County received replacement radios in return for those radios. Sprint shall support its claim by documentary evidence, *e.g.* an affidavit, or declaration under penalty of perjury, demonstrating how Sprint determined the radios were programmed for frequencies used by the State in its system prior to rebanding and evidence that Delaware County received replacement radios and that Sprint has not deducted or recouped PTV from Delaware County in connection with these radios. The State shall address how it, or its vendor, came to be in possession of the Delaware County radios. The State, by reference to the FRA shall demonstrate why it should be entitled to credit for these radios. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Four pages.

Issue 8. Sprint shall document its contention that 13 radios (four XLT 2500, eight XTS 2500, and one XTS 5000 radios) submitted to Sprint by the State or its vendor were (a) not in working condition (two XTL 2500, five XTS 2500 and one XTS 5000 radios), or (b) not a model eligible for replacement (one XTL 2500 and three XTS 2500 radios), or (c) not capable of operation in the 800 MHz band (one XTL 2500 radio). Acceptable evidence shall be (a) an affidavit or declaration under penalty of perjury of the person responsible for the determination that the radios were not in working condition; or (b) a copy of the radio label demonstrating that it was not a model eligible for replacement; or a (c) copy of the radio label and a manufacturer's specification sheet demonstrating that the radio was not capable of operating on the 800 MHz band. The State, with reference to such radios, shall (a) demonstrate by maintenance records or an affidavit or declaration under penalty of perjury from a State technician that the radios were in working condition when submitted; (b) demonstrate that the radios were on a list of radios eligible for replacement; or (c) demonstrate by reference to the manufacturer's specification sheet that a disputed radio is capable of operating on the 800 MHz band. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

Issue 9. Address whether Sprint may deduct or recoup the PTV of seven new replacement radios (four XTL 2500 and three XTS 2500 radios) that the State deployed to preserve "continuity of service" where the State claims that Motorola field personnel were unable to reband the replaced radios in the field, but where Sprint subsequently determined that the radios could be rebanded. The State shall document its contention that Motorola could not reband the radios in the field by contemporaneous records or an affidavit or declaration under penalty of perjury from a State or Motorola technician. Sprint shall document its contention that seven radios could be rebanded by an affidavit or declaration under penalty of perjury of the person responsible for the determination that the radios were capable of being rebanded. The State shall also explain why it was necessary and consistent with the FRA to replace the

seven radios with new radios, rather than using a spare radio or obtaining a temporary or permanent used replacement radio from Sprint. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

*Issue 10.* Address, by reference to the FRA and the Commission's 800 MHz orders and case law, whether – if the State returned more replacement-eligible radios than it received for one model of radio, and returned fewer replacement-eligible radios than it received for another model of radio – the State may use the overage in one category to offset the underage in another category. Propose a methodology for applying any offset. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

*Issue 11.* Address by reference to the FRA and the Commission's 800 MHz orders and case law whether Sprint may deduct or recoup the PTV for two new SIP terminals where Sprint replaced two old terminals, but the State failed to return the old replaced terminals. In addressing this issue, the parties shall recognize that Sprint is not responsible for vendor failure in 800 MHz rebanding projects. Three pages.

*Issue 12.* Address by reference to the FRA, the Commission's 800 MHz orders and case law whether Sprint must pay the State for costs its vendor, EMR, asserts it incurred in connection with cost reconciliation and, if so, document the reasonable amount that Sprint must pay. Address whether costs up to the amount specified in the FRA (\$16,500) should be treated differently from costs in excess of that amount. Four pages.

*Issue 13.* Address by reference to the FRA, the Commission's 800 MHz orders and case law whether Sprint must pay the State for external legal fees, in addition to those provided for in the FRA, but requested by a change notice, for legal services its external legal counsel asserts were provided in connection with the reconciliation process? If so, document the reasonable additional amount that Sprint must pay. Four pages.

*Issue 14.* Address by reference to the FRA, the Commission's 800 MHz orders and case law, whether either party has failed to fulfill its duty to act in utmost good faith<sup>2</sup> during the reconciliation process. 5 pages.

### III. FURTHER INSTRUCTIONS

4. In briefing the issues, the parties shall address only the issues designated above. Any material extraneous to the designated issues will be disregarded. All assertions in the briefs shall be supported by documentation or citation to relevant authority. Copies of documentation shall be supplied as an appendix to the briefs with each document keyed to the number of the issue to which it relates. Citations to Commission documents shall include the FCC Record page and paragraph number. Each response shall consist of the designated issue, single spaced, reproduced exactly as set out above, followed by a party's response, double spaced, to that issue.

5. Sprint shall be responsible for reasonable legal fees incurred by the State in preparation of its brief. Fees charged by counsel shall be at an hourly rate no greater than counsel has billed the State for its services to date. Attachments shall be limited to documents described herein (or those clearly relevant and necessary to support a Party's position) and shall not contain argument. Extensions of time within which to submit the briefs will be granted, if at all, only on a showing of exceptional circumstances supported by affidavit or declaration under penalty of perjury setting out such exceptional circumstances. Failure timely to submit briefs without a showing of exceptional circumstances may result in an issue or

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<sup>2</sup> 47 CFR § 90.677(c). See also *800 MHz Report and Order*, 19 FCC Red at 15076-77 ¶ 201.

issues being decided against the delinquent party. We encourage the Parties to engage in good faith negotiations, thereby to moot some or all of the designated issues.

6. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission’s rules, 47 CFR §§ 0.191 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
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Michael J. Wilhelm  
Deputy Chief, Policy and Licensing Division  
Public Safety and Homeland Security Bureau

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