

recommended resolution to the Bureau for *de novo* review.⁶

3. After a mediation that began in 2006, Indiana and Sprint executed a FRA that the TA approved on June 16, 2009. The FRA covers Indiana's agreed-upon rebanding costs of approximately \$27 million. After the FRA was executed, however, Indiana submitted change notices, asserting that Sprint was responsible for paying the following additional costs:

- \$164,907.13 for recalling and retuning 1,073 new radios that the State deployed without programming replacement frequencies⁷ into the radios;
- \$100,000 for its vendor to file license modification applications for the State's reconfigured system.⁸

4. The Bureau disapproved both requests in a *Memorandum Opinion and Order* on February 2, 2011.⁹ It found that the need to deploy the new radios with the replacement channels programmed into them was foreseeable by Indiana. Therefore, the Bureau held, Indiana's request was inconsistent with a 2007 Commission Public Notice stating that "[l]icensees may not use the change notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations."¹⁰ The Bureau also disapproved Indiana's change notice for \$100,000 for filing license applications because Indiana had not met its burden of showing – as required by the *800 MHz Report and Order* – that \$100,000 was the "minimum necessary cost" of performing the essentially clerical task of entering license modification data into the Commission's Universal Licensing System database.¹¹ Indiana then filed a petition for reconsideration of the *Indiana Order on De Novo Review* which the Bureau denied on procedural and substantive grounds on April 4, 2011.¹²

III. DISCUSSION

5. *Radio Reprogramming.* Indiana claims that its obligation to deploy new radios with

⁶ The *800 MHz Report and Order* originally provided for referral and *de novo* review of unresolved mediation issues by the Public Safety and Critical Infrastructure Division of the Commission's Wireless Telecommunications Bureau. *800 MHz Report and Order*, 19 FCC Rcd at 15075 ¶ 201. However, the Commission has since delegated this authority to the Public Safety and Homeland Security Bureau. See Establishment of Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

⁷ As part of its 800 MHz rebanding obligations, Sprint must pay incumbent licensees to relocate their operating frequencies so that they will be less susceptible to interference. See generally *800 MHz Report and Order*.

⁸ Indiana Petition for Reconsideration at 11-12.

⁹ State of Indiana and Sprint Nextel, Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 1023 (PSHSB 2011) (*Indiana Order on De Novo Review*).

¹⁰ *Id.* at 1024 ¶ 4. See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, *Public Notice*, 22 FCC Rcd 17227, 17230 (2007) (Guidance PN).

¹¹ The Commission's orders in this docket assign licensees the burden of proving that the funding they request is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use" (Minimum Necessary Cost Standard). *800 MHz Report and Order*, 19 FCC Rcd at 15074; Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004). 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." Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); see Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007).

¹² *Indiana Reconsideration Order supra* n.2.

replacement channels programmed into them arose after it had already deployed the radios, *i.e.*, it claims the obligation arose on a date approximately 30 days after the parties executed the FRA.¹³ Therefore, Indiana argues, the cost of reprogramming the radios that Indiana deployed before that date should be Sprint's responsibility.¹⁴ In support of its claim that its obligation arose "30 days after the parties executed the FRA" Indiana cites to Schedule C of the FRA which, Indiana submits, "clearly show[s] that the loading of replacement channels into the subscriber units would not commence until a date estimated to be 30 days beyond the date that the FRA was executed by the parties."¹⁵ Indiana relies on Schedule C of the FRA for the first time in its application for review. The Bureau had no opportunity to pass on the relevance of Schedule C of the FRA in its *Indiana Reconsideration Order*. Indiana thus is offering new matter and argument in the context of an application for review. As explained below, precedent forecloses us from considering it.

6. In *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (*BDPCS*), the Court of Appeals for the District of Columbia Circuit affirmed the Commission's dismissal of an application for review filed by a petitioner that, as here, raised claims in its application for review that it had not raised in its petition for reconsideration before the Wireless Telecommunications Bureau. The court characterized the Commission's dismissal of the petitioner's application for review as an "open-and-shut case: the Commission's rules do not permit the Commission to grant an application for review 'if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.'"¹⁶

7. Indiana's claim that it should be paid for retrieving the deployed radios and adding replacement channels to them, rests entirely on Schedule C of the FRA. Because Indiana failed to raise the Schedule C provisions before the Bureau, we must dismiss that portion of Indiana's application for review dealing with the cost of reprogramming the new radios.¹⁷

8. As an alternative and independent basis for rejecting Indiana's application for review, however, we reach the merits and decline to overturn the Bureau's decision. Sprint claims that the "approximately 30 day" provision in Schedule C of the FRA relates only to radios that were already in Indiana's inventory, not the new radios that were to be deployed with the replacement channels programmed into them.¹⁸ Indiana, however, contends that Schedule C is silent as to whether it applies to radios in inventory or the newly deployed radios.¹⁹ It is plain however that Schedule C applies only to radios in inventory because Indiana's change notice request sought to amend Schedule C to incorporate

¹³ Indiana Application for Review at 2-3.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 2-3.

¹⁶ 351 F.3d 1177, 1184 *citing* 47 C.F.R. § 1.115(c).

¹⁷ *See, e.g.*, Spectrum IVDS, L.L.C., *Memorandum Opinion and Order*, 25 FCC Rcd 10457, 10463 (2010). ("Because Spectrum IVDS failed to present this argument to the Bureau, the argument cannot now provide Spectrum IVDS with a basis for relief."); Fireside Media, *Memorandum Opinion and Order*, 25 FCC Rcd 7754, 7757 (2010); North County Communications Corp. v. Metro PCS California, LLC, *Memorandum Opinion and Order*, 24 FCC Rcd 14036, 14043 (2009); Twenty-One Sound Communications, *Order on Review*, 23 FCC Rcd 2436, 2436-37 (2008); Mescalero Apache School, *Order*, 20 FCC Rcd 5848, 5854 (2005); *but see*, Paulino Bernal Evangelism, *Order on Review*, 23 FCC Rcd 15959, 15964 (2008) (public interest exception to Rule 1.115).

¹⁸ Sprint Opposition at 5. ("The Bureau properly did not refer to or rely upon Schedule C of the FRA because that schedule addresses the reprogramming of radios already operating on the State's network, not those being activated on the State's radio system for the first time.")

¹⁹ Reply to Opposition to Application for Review at 2-3.

the new radios. Had the new radios already been covered by Schedule C, as Indiana contends, such an amendment would have been unnecessary. We have reviewed Schedule C to the FRA and find nothing therein that could be construed to require Sprint to pay costs that Indiana incurred in recalling and programming radios that Indiana deployed to the field without the proper programming. We thus agree with Sprint that “the State understood in April 2010, that the [new] radios now in dispute were not covered in the June 2009 Schedule C or in the Schedule C milestones,”²⁰ and that Indiana’s reliance on Schedule C in its application for review is, therefore, “very misleading.”²¹

9. Therefore we affirm the Bureau’s determination that, when Indiana deployed the new radios without the replacement channels programmed into them, it was reasonably foreseeable that Indiana would have to recall those radios from the field for reprogramming. The Bureau properly disallowed the change notice for retrieval and reprogramming of the new radios as being inconsistent with the Commission’s foreseeability standard for the acceptability of change notices.²²

10. Indiana argues, however, as it did below, that the Bureau impermissibly ignored contract law when it determined that the need to reprogram the new radios was foreseeable.²³ Indiana claims that the merger clause in the FRA barred the Bureau from considering any extrinsic documents or understandings concerning the deployment of the new radios with the replacement channels programmed into them.²⁴ We agree with the Bureau, however, that its finding of foreseeability was not governed by Indiana contract law.²⁵ In determining that Indiana foresaw the need to deploy the new radios with the replacement channels programmed into them, the Bureau neither interpreted, nor enforced nor amended, the parties’ FRA. The Bureau’s determination of foreseeability rested on record evidence that “Indiana knew, at least four months before the radios were deployed, of the need to program the radios with both sets of frequencies.”²⁶ The Bureau’s decision, therefore, conformed to the mandate that “[I]censees may not use the change notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations but were not raised in negotiations, or that were considered and rejected.”²⁷

11. Indiana’s digression, in its application for review, concerning the Commission’s supposed lack of authority to govern the terms of FRAs,²⁸ while not essential to our decision, nonetheless merits brief comment here lest similar misunderstandings arise in the future. Indiana theorizes that any rebanding payment by Sprint to a licensee is allowable so long as Sprint does not seek “credit for paying any amount that the Commission deemed unreasonable or outside the scope of rebanding.”²⁹ This novel

²⁰ Sprint Opposition at 6.

²¹ *Id.*

²² *See supra* n.10. Arguably, as Sprint suggests, Sprint Opposition at 4, the failure to deploy the radios with the replacement channels programmed into them was due to negligence by Indiana’s vendor, EMR Consulting, Inc. (EMR). If so, Indiana should look to EMR for a remedy, not Sprint.

²³ Indiana Application for Review at 5.

²⁴ *Id.* at 2. We also note that the Commission, not being a party to the FRA, is not bound by its provisions in making its foreseeability determination.

²⁵ *Indiana Order on De Novo Review*, 26 FCC Rcd at 1030 ¶ 26.

²⁶ *Indiana Reconsideration Order*, 26 FCC Rcd at 5072 ¶ 21 *citing Indiana Order on De Novo Review*, 26 FCC Rcd at 1031 ¶ 29

²⁷ *Guidance PN*, 22 FCC Rcd at 17230.

²⁸ Indiana Application for Review at 5.

²⁹ *Id.* at 6.

and unsupported theory is inconsistent with the requirement that licensees certify that their rebanding has been accomplished at the “minimum necessary cost.”³⁰ Thus, neither the TA nor the Commission would approve “side deals” between Sprint and licensees to evade the minimum necessary cost requirement, independent of whether Sprint claimed credit for the side deal expense in the “true up” at the conclusion of rebanding.³¹ Stated more generally, Planning Funding Agreements (PFA) and FRAs must be consistent with the Commission’s rules and policies or they will not be approved. Payments to licensees from Sprint must be limited to the minimum necessary cost of rebanding, regardless of whether or not Sprint claims credit for those payments in the final true-up.

12. In sum, the operative question before the Bureau in this case was not one of contract. It was whether or not it was reasonably foreseeable to Indiana that, if it deployed the new radios without the replacement channels programmed into them, it would have to recall the radios from the field for reprogramming. Relying on record evidence, the Bureau correctly resolved the question: the cost of reprogramming the radios, sought in Indiana’s change notice request, was reasonably foreseeable.³² The Bureau was therefore correct in disallowing the Indiana change notice and upholding that disallowance in its *Indiana Reconsideration Order*.

13. *License Modification Filing Costs.* The Commission has established that “Sprint should not propose to pay and the TA should not approve payment of higher costs when a lower-cost alternative is clearly available that would provide the licensee with comparable facilities.”³³ Indiana initially claimed that its chosen vendor, EMR, had quoted \$200,200 for the essentially clerical task of entering license modification data into the Commission’s Uniform Licensing System database.³⁴ When Sprint objected to the cost, Indiana reduced it to \$100,000.³⁵ Sprint, which had offered to perform the work at no cost to Indiana, then located a vendor that would perform the work for \$51,590.³⁶ Therefore, in the *Indiana Order on De Novo Review*, the Bureau found (a) that Indiana had not met its burden of showing that \$100,000 was the minimum necessary cost and (b) that Sprint had shown that a lower cost alternative was clearly available.³⁷ In its subsequent petition for reconsideration of the *Indiana Order on De Novo Review*, Indiana, for the first time, argued that EMR’s license modification services actually included engineering work such as co-channel and adjacent-channel interference analyses.³⁸ Therefore, Indiana argued that the quote from the vendor identified by Sprint, the Enterprise Wireless Association (EWA), was unacceptable because it did not include those engineering services.³⁹ The Bureau’s *Indiana Order on*

³⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15073-74 ¶ 198.

³¹ At the conclusion of rebanding, Sprint’s rebanding costs will be compared to the value of the 1.9 GHz spectrum that Sprint received in consideration of its paying all reasonably necessary 800 MHz rebanding costs and clearing the 1.9 GHz band of Broadcast Auxiliary Service users. *800 MHz Report and Order*, 19 FCC Rcd at 15123-15125 ¶¶ 329-332.

³² *Indiana Order on Reconsideration*, 26 FCC Rcd at 5072 ¶ 22.

³³ Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9821 (2007).

³⁴ *Indiana Order on De Novo Review*, 26 FCC Rcd at 1031 ¶ 30.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Indiana Petition for Reconsideration at 6.

³⁹ *Id.*

Reconsideration disregarded Indiana's contention that EWA's services were unacceptable, *inter alia*, because Indiana had raised that claim, and others,⁴⁰ for the first time in a petition for reconsideration, contrary to precedent warning parties that one cannot "'sit back' and hope that a decision will be in its favor, and when it isn't, to parry with an offer of more evidence."⁴¹

14. In its application for review, Indiana now claims – again for the first time – that the EWA quote was non-responsive because EWA supposedly would file only 154 single applications, whereas each of the 154 facilities in Indiana's system requires two modification applications, one to add the replacement frequencies, another to delete the former frequencies, for a total of 308.⁴² We reject Indiana's claim for two reasons. First, the claim is impermissibly made for the first time in an application for review, thereby depriving the Bureau of the opportunity to pass on it. Second, the matter is moot. Indiana asserts that on May 9, 2011 – after Indiana filed its application for review – the parties amended the FRA such that EMR will provide licensing services for \$51,590, the amount offered by Sprint.⁴³ Accordingly "the issue is no longer in dispute as the State accepts this pricing model."⁴⁴

15. *Indiana's Failure to Comply With Procedural Rules.* In its application for review, Indiana faults the Bureau for relying on the Commission's procedural rules to reject arguments that Indiana introduced for the first time in its petition for reconsideration of the *Indiana Order on De Novo Review*.⁴⁵ Indiana claims that, in doing so, the Bureau acted contrary to the Commission's "overarching policy" that rebanding should be cost neutral for public safety, that the Bureau did not read the FRA, failed to exhibit licensing expertise, failed to properly apply contract law, demonstrated pique rather than reasoned decision making and, in general, intended to chill licensees' due process rights.⁴⁶ Indiana does not explain, however, how this litany of accusations relates to Indiana's failure to heed the Commission's rules prohibiting the introduction of new matter in petitions for reconsideration and applications for review.⁴⁷ The documentation on which Indiana's claims rest – Schedule C and the updated EWA proposal – were readily available to it before it filed its application for review. Indiana has offered no excuse for not raising its arguments earlier so that the Bureau had the opportunity to pass on them. Section 1.115(c) of the Commission's rules unambiguously states that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."⁴⁸

16. Parties' conformity to the Commission's procedural rules is essential to the timely completion of 800 MHz rebanding.⁴⁹ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)

⁴⁰ Indiana earlier claimed that the TA Mediator was biased, *id.* at 12 n.16, and that Sprint had colluded with EWA to provide a "bogus" quote, *id.* at 9.

⁴¹ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (*Colorado Radio*).

⁴² Indiana Application for Review at 7.

⁴³ State of Indiana Reply filed May 31, 2011.

⁴⁴ *Id.* at 1-2. It is unclear why Indiana uses the term "pricing model" instead of "price" or "cost."

⁴⁵ Indiana Application for Review at 9.

⁴⁶ *Id.* at 9-10.

⁴⁷ 47 C.F.R. §§ 1.106 (b)(2)(i)-(ii), 1.115(c).

⁴⁸ 47 C.F.R. § 1.115(c).

⁴⁹ *See, e.g.,* Ottawa County, Ohio, *Order*, 26 FCC Rcd 2205 (PSHSB 2011). ("The Commission's resources are unnecessarily burdened by pleadings of the type submitted by Ottawa that ignore the Commission's procedural rules and are foreclosed by clear precedent. Accordingly, we are dismissing Ottawa's petition and cautioning parties to (continued....)")

teaches that a petitioner may not “parry with an offer of more evidence” when it does not prevail,⁵⁰ and cautions that “[n]o judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”⁵¹ Yet, that is what Indiana has done here on two occasions, offering new evidence and advancing new arguments, both in its petition for reconsideration before the Bureau and, again, in its instant application for review before the Commission.

17. Nationwide 800 MHz band reconfiguration cannot proceed efficiently if the Commission’s resources are burdened with pleadings so patently in violation of the Commission’s procedural rules as those Indiana has submitted to date. Accordingly, we find Indiana’s procedurally defective pleadings are fundamentally at odds with the Commission’s dual goals of timely eliminating objectionable interference to public safety communications and timely making more spectrum available for public safety use. Therefore, and because the Commission’s procedural rules and the cases interpreting those rules so require, we are dismissing Indiana’s application for review. As an alternative and independent basis for rejecting Indiana’s application for review, we reach the merits and deny its claims.

IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303 and Section 1.115(c) of the Commission’s rules,⁵² that the application for review submitted May 4, 2011 by the State of Indiana, IS DISMISSED. As an alternative and independent holding as set forth herein, the application for review IS DENIED. The Bureau’s *Memorandum Opinion and Order on Reconsideration* IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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the 800 MHz proceeding that procedurally deficient filings--such as Ottawa's--may be dismissed summarily. Moreover, we advise parties that the expense of preparing and filing procedurally barred pleadings is not recoverable from Sprint as a prudent and necessary rebanding cost.”)

⁵⁰ *Colorado Radio*, 188 F.2d at 26.

⁵¹ *Id.*

⁵² 47 C.F.R. § 1.115(c).