

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

In the Matter of)
County of Charles, Maryland) WT Docket No. 02-55
and) Mediation No. TAM-12003
Sprint Nextel Corporation)

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2012

Released: September 21, 2012

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny an application for review1 filed by the County of Charles, Maryland (Charles) of an October 19, 2009 Memorandum Opinion and Order (Charles County Order)2 issued by the Public Safety and Homeland Security Bureau (Bureau) addressing a dispute between Charles and Sprint Nextel Corp. (Sprint) over the reconfiguration costs of Charles' 800 MHz public safety communications system.

II. BACKGROUND

2. The 800 MHz Report and Order and subsequent orders in this docket require Sprint to negotiate a Frequency Reconfiguration Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.3 The FRA must provide for relocation of the licensee's system to its new channel assignment(s) at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required. If a licensee and Sprint are unable to negotiate a FRA, they enter mediation under the auspices of a mediator appointed by the 800 MHz Transition Administrator (TA). If the parties do not agree in mediation, the mediator forwards the mediation record and a recommended

1 Application for Review, filed November 18, 2009 by the County of Charles, Maryland (Charles AFR). On December 3, 2009 Sprint Nextel Corp. filed an Opposition to Application for Review (Sprint Opposition), and on December 14, 2009 Charles filed a Reply to the Sprint Opposition (Charles Reply).

2 County of Charles, Maryland and Sprint Nextel Corp., Memorandum Opinion and Order, 24 FCC Rcd 12749 (PSHSB 2009) (Charles County Order).

3 See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (800 MHz Report and Order); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order); Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) (800 MHz MO&O).

resolution (RR) to the Bureau for *de novo* review.⁴ The *Charles County Order* is a product of the *de novo* review process.

3. The dispute between Charles and Sprint centers on the reasonableness of Charles' claim for costs for various services provided by its consultant, RCC Consultants, Inc. (RCC) and its vendor, Motorola, Inc. (Motorola). Charles sought \$2,948,002.10 in rebanding costs; Sprint contended the amount should be \$1,942,206.70, a difference of \$1,005,795.40.⁵ In the RR, the TA Mediator accepted some of Charles' costs and rejected others, subtracting slightly more than \$400,000 from Charles' overall estimate.⁶

4. In the *Charles County Order*, the Bureau agreed with some of the TA Mediator's recommendations, but rejected others, and disallowed an additional \$600,000 of Charles' claimed costs, eventually approving \$1.865 million in disputed costs.⁷ The Bureau, referring to the TA Metrics,⁸ found that Charles' costs estimate was "more than three and one quarter times greater than the median" amount for systems of comparable size (2001-4000 subscriber units).⁹ It stated that the "exceptionally large deviation [from the TA Metrics] warrant[ed] careful scrutiny" and that Charles bore the evidentiary burden of providing a "valid rationale" for the increased costs.¹⁰

5. The Bureau ultimately found that Charles had "provided little if any justification" for its exceptionally high costs and had offered no valid rationale for why the costs for reconfiguring its system deviated so significantly from those of similarly sized systems.¹¹ In discussing use of the TA Metrics as a reasonableness guideline, the Bureau stated that "at this late stage in the rebanding process, and in light of the substantial cost data that underlie the TA Metrics, [it] intend[s] to rely increasingly on the TA Metrics as a baseline for determining the reasonability of costs" and that "[l]icensees claiming costs significantly in excess of the metrics for comparable systems face a high burden of justification."¹² The Bureau observed, however, that—even after all the disallowed costs—the \$1.865 million of approved project costs "still exceed the metrics for comparable systems by a substantial margin."¹³

⁴ The *800 MHz Report and Order* originally provided for referral and *de novo* review of unresolved mediation issues by the former 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 subsequently 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).

⁵ *Charles County Order*, 24 FCC Rcd at 12751 ¶ 6.

⁶ Charles AFR at 3.

⁷ *Charles County Order*, 24 FCC Rcd at 12774 ¶ 106, n. 229.

⁸ The TA Metrics are a set of aggregated data on retuning costs for 800 MHz systems approved by the TA. Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, 22 FCC Rcd 172 (PSHSB 2007). 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.

⁹ *Charles County Order*, 24 FCC Rcd at 12751 ¶ 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 12774 ¶ 105.

¹³ *Id.* at n.229.

6. On November 18, 2009, Charles filed the instant application for review. Charles contends that the Bureau relied too heavily on the TA Metrics in arriving at its decision, *i.e.*, that the *Charles County Order* gave the TA Metrics decisional weight.¹⁴ It also challenges the Bureau's applying an increasingly higher burden of proof as a function of the degree to which costs deviate from the TA Metrics,¹⁵ and requests access to the underlying data that make up the TA's Metrics.¹⁶ Finally, Charles claims that the Bureau either misconstrued or ignored the evidence Charles offered in support of its claimed costs for subscriber unit and infrastructure retuning, testing, global management services and interoperability coordination.¹⁷

III. DISCUSSION

7. An application for review must specify how a decision on delegated authority (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error.¹⁸ As developed below, we find that the staff's decision is correct, consistent with sound precedent, does not involve novel questions of law or policy, and is procedurally proper.

A. Role of the TA Metrics

8. Charles contends that the Bureau's application of the TA Metrics represented a departure from their original "informational" purpose.¹⁹ Specifically, Charles challenges the Bureau's statement that the TA Metrics "establish a presumptively valid cost unless the licensee establishes that its system is materially different from the systems from which the metrics were derived."²⁰ In opposing Charles' application for review, Sprint claims that the Bureau correctly followed its policy of using the TA Metrics as only one factor to evaluate the reasonableness of a licensee's proposed costs and that Charles merely does not like the outcome of the Bureau's analysis.²¹

9. The Commission determined in the *800 MHz Supplemental Order* that, while Sprint is required to absorb all costs of band reconfiguration, including "soft" (*i.e.*, transactional) costs, as stated in the *800 MHz Report and Order*, if "soft" costs (management and consultant fees, etc.) were more than two percent of "hard" costs (equipment, supplies, installation labor, etc.) the TA was required to give soft costs a "particularly hard look."²² The Commission observed, however, that, in the case of public safety licensees, soft costs could well exceed two percent of hard costs, and that the presence of

¹⁴ Charles AFR at 4-6.

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7, 18-19.

¹⁷ *Id.* at 7, 18.

¹⁸ 47 C.F.R. § 1.115(b)(2)(i)-(v).

¹⁹ Charles AFR at 7, 18.

²⁰ *Id.* at 4 (*quoting Charles County Order*, 24 FCC Rcd at 12761 ¶ 45).

²¹ Sprint Opposition at 3.

²² *800 MHz Supplemental Order*, 19 FCC Rcd at 25150-51 ¶ 70 ("[W]e decline to use two percent as a fixed limit in the knowledge that, particularly with respect to public safety entities, outside expertise may be required in the negotiation of agreements and in analysis of 'comparable facilities' proposals. We can foresee that such outside costs could raise the transactional cost above two percent of the 'hard costs'").

the TA would guard against excessive soft costs.²³ The Commission addressed such costs again in its *Minimum Cost Order*, where it clarified that whether a cost is “reasonable and prudent” may—and indeed should—take into account the overall goals of this proceeding, not just the issue of minimum cost.²⁴ Thus, the Commission approved allowing more than the absolute minimum cost when doing so avoids the greater expense of negotiating and mediating disputed costs, and furthers timely and efficient rebanding.²⁵ In addition, the Commission explicitly allowed using the costs of other approved rebanding agreements as a guideline when determining whether a licensee has met the minimum cost standard.²⁶

10. As rebanding progressed and increasingly large amounts of data became available on the actual negotiated costs of rebanding, it became clear that “soft” costs were commonly higher than the assumed two percent—often significantly higher. As a result, parties were spending inordinate amounts of time and effort negotiating and mediating the reasonableness of soft costs. Accordingly, implementing the Commission’s directives in the *800 MHz Report and Order*, *800 MHz Supplemental Order*, and *Minimum Cost Order*, the Bureau conserved time and effort – and expedited the progress of rebanding – by placing increasingly greater reliance on the TA Metrics as a useful benchmark for the reasonableness of claimed costs.²⁷ However, the Bureau did not, as Charles claims, disallow Charles’ costs simply because they deviated from the TA Metrics. Rather, the Bureau evaluated whether Charles met its evidentiary burden of showing that its claimed costs were reasonable, prudent, and the minimum necessary to ensure that Charles receives comparable facilities at the conclusion of rebanding as stated in the Commission’s prior orders, and found that Charles failed to do so.²⁸

11. To the extent that claimed costs comport, generally, with the TA Metrics, the Bureau approves them.²⁹ To the extent they exceed the TA Metrics benchmarks, a licensee is required to demonstrate that the costs are, nonetheless, reasonable in accordance with the minimum cost standard, *e.g.*, by adducing evidence that there are characteristics unique to its system that warrant the costs claimed by the licensee.³⁰ To the extent that a licensee, such as Charles, fails to meet its evidentiary burden of demonstrating reasonableness, its excessive costs are disallowed. Although Charles claims that it “cannot possibly differentiate itself from an aggregate of unknown licensees,”³¹ Charles is not required to do so to meet the minimum cost standard; rather, as set forth in prior orders, Charles is required to show why its own costs are justified. Charles’ claim also mischaracterizes the TA Metrics,

²³ *Id.* The Commission thus distinguished its use of the two percent limit in the 800 MHz rebanding from previous rebandings, where it was a fixed limit, and where there was no TA present.

²⁴ Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, WT Docket No. 02-55, 22 FCC Rcd 9818, 9821 ¶ 8 (2007) (*Minimum Cost Order*).

²⁵ *Id.* at ¶ 10.

²⁶ *Id.* at ¶ 12.

²⁷ The Bureau’s application of the metrics in lieu of the presumptive two percent cap on soft costs actually benefits licensees such as Charles that encounter significant soft costs.

²⁸ *Charles County Order*, 24 FCC Rcd at 12750-51 ¶ 4.

²⁹ See *Minimum Cost Order*, 22 FCC Rcd at ¶ 12 (“In cases where Sprint and a licensee reach a Planning Funding Agreement (PFA) or FRA with costs that the TA can verify are consistent with these benchmarks, we will presume that the costs comply with the Commission’s cost standard as articulated in this and prior orders in this proceeding”).

³⁰ Public Safety and Homeland Security Bureau Announces Enhancements to the Metric Data Used in 800 MHz Rebanding Negotiations and Mediations, *Public Notice*, 25 FCC Rcd 8151, 8152 (PSHSB 2010).

³¹ Charles AFR at 9.

which classify licensees in terms of numbers of subscriber units, base stations, etc., thus providing the Bureau with the ability to evaluate the reasonableness of costs based on discrete classes of licensees, as opposed to an “aggregate.”

12. Charles argues that the TA Metrics were determinative of the Bureau’s decision and that the Bureau errs in requiring a higher degree of proof from licensees whose claimed costs significantly exceed the TA Metrics median values.³² It also complains that it was deprived of information on the systems from which the TA Metrics were derived.³³

13. We disagree with Charles’ contentions. The *Charles County Order* correctly applies the Commission’s minimum cost standard as set forth in prior orders and illustrates that the Bureau did not regard the TA Metrics as determinative. For example, certain of the County’s costs that the Bureau approved were significantly higher than those in the TA Metrics.³⁴ The Bureau allowed those costs nonetheless because it found that the County had adequately justified them.

14. Charles could not have been surprised that licensees are held to a higher degree of proof when their costs greatly exceed the TA Metrics. As noted above, in the *800 MHz Supplemental Order* the Commission stated that soft costs in excess of two percent were to be given a “particularly hard look” by the TA³⁵ and numerous Bureau decisions apply this principle in cases of large deviations from the TA Metrics.³⁶

15. Even where data underlying the TA Metrics could have been useful to Charles in preparing its cost justifications, Charles made no request for the data prior to its Application for Review. Charles cites a 2009 request from various public safety officials that the Bureau require the TA to disclose the data underlying the TA metrics.³⁷ The Bureau acceded to that request and the data underlying the cost metrics were available, on request, while Charles was in negotiation and mediation. The appropriate time for Charles to have requested those data would have been then, rather than in an application for review.³⁸ Nothing in the record shows that Charles requested the underlying data from the TA earlier, much less that the data were withheld from Charles.³⁹

1. Evaluation of the Record

16. Charles argues that the Bureau either misconstrued or ignored evidence it proffered to justify its costs, and requests that we now restore, in full, the amounts recommended by the TA

³² Charles AFR at 6-7.

³³ *Id.* at 5, 7.

³⁴ For example, the Bureau approved \$444,963 for Motorola’s efforts to reconfigure Charles County’s 800 MHz infrastructure. *Charles County Order*, 24 FCC Rcd at 12756 ¶ 25. This is almost six times the 75th percentile of the *total* infrastructure costs for a similarly sized system. *Id.* at 12751-52 ¶ 7.

³⁵ *Supra* n. 22.

³⁶ *See, e.g.*, City of Manassas, Virginia and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 8526 (PSSB 2007); City of Irving, Texas and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 16708 (PSSB 2007).

³⁷ Charles AFR at 7, n.14, 18-19.

³⁸ *Id.*

³⁹ Charles notes that data underlying the TA Metrics were provided at the request of Montgomery County, Maryland, on June 29, 2009. There is no indication in the record that Charles made a similar request until it filed its application for review.

Mediator for subscriber and infrastructure retuning costs, testing costs, and global management costs.⁴⁰ Charles urges the Commission to find that Charles' requests for these costs were "reasonable, prudent and timely" in light of Charles' "historic use of resources."⁴¹ We decline to do so. In the *Charles County Order*, the Bureau evaluated the evidence offered by Charles and found it insufficient to justify its costs. Thus, the Bureau properly found that Charles' claimed costs were duplicative and unnecessary under the minimum necessary cost standard, as discussed below.

2. Subscriber costs

17. Charles challenges the Bureau's disapproval of its request for \$465,113 for the management and oversight services of both RCC and Charles' internal staff in connection with the reconfiguration of Charles' subscriber units.⁴² It argues that the disapproval was inconsistent with the Bureau's approval of similar costs in the *Charles PFA Order*,⁴³ and contrary to the recommendation of the TA Mediator in the RR. It claims that the Bureau improperly discounted the County's prior experience in subscriber unit retuning management and that the Bureau should have found that the County's approach to resource deployment reflects prudence and caution. Charles submits that the record requires a finding that the services of RCC and Charles' internal staff were not duplicative and that the Bureau improperly relied on the TA Metrics.⁴⁴ We find none of these arguments persuasive.

18. We do not agree that the Bureau's disapproval of Charles' subscriber unit management costs conflicts with the position taken by the Bureau in the *Charles PFA Order*. In particular, the *Charles PFA Order* states that Charles, at the planning stage, "is entitled to decide how tasks will be apportioned between internal staff, RCC and Motorola, provided that it reasonably avoids duplication of effort."⁴⁵ In the *Charles County Order*, the Bureau found that Charles failed to show why subscriber unit inventory and reconfiguration plan design should be duplicated in the implementation phase when funds had been provided for those activities in the planning phase.⁴⁶ The Bureau found that many of the disputed costs stemmed from Charles' insistence on having a Motorola manager, two Charles employees and an RCC representative all present during the subscriber unit retuning process.⁴⁷ Finding that the *Charles PFA Order* specifically cautioned against such duplication of effort, the Bureau stated that it was "not prepared to say which of these individuals overseeing the process is dispensable or not; only that [Charles] has not shown that all of them are essential for retuning [Charles'] radios consistent with the Minimum Necessary Cost standard."⁴⁸ Accordingly, we find that nothing in the *Charles PFA Order* compelled the Bureau to ignore record evidence of duplication of effort simply to accommodate Charles' preferred retuning management practices.⁴⁹

⁴⁰ Charles AFR at 7, 17.

⁴¹ *Id.* at 8-9. By "historic" Charles refers to the resources that were applied during the planning phase of its rebanding.

⁴² *Id.* at 9, 12.

⁴³ County of Charles, Maryland and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 16769 (PSSB 2007)(*Charles PFA Order*).

⁴⁴ Charles AFR at 8, 12.

⁴⁵ *Charles PFA Order*, 22 FCC Rcd at 16772 ¶ 11 (emphasis supplied).

⁴⁶ *Charles County Order*, 24 FCC Rcd at 12761 ¶ 46.

⁴⁷ *Id.* at 12761-12762 ¶¶ 47-48.

⁴⁸ *Id.* at 12762 ¶ 50.

⁴⁹ *Charles PFA Order*, 22 FCC Rcd at 16773 ¶ 15.

19. With regard to alleged conflict between the *Charles County Order* and the TA Mediator's RR, we reiterate that the Bureau's review is *de novo*. We disagree with Charles' claim that the Bureau ignored the evidence put forth by Charles and, instead, conclusively relied on the TA Metrics. As Sprint correctly points out in its Opposition, "[t]he fact that the Bureau simply found the arguments and evidence Charles presented insufficient to justify [Charles'] proposed costs does not mean the required review did not take place."⁵⁰

3. Infrastructure costs

a. RCC

20. Charles challenges the Bureau's disapproval of \$59,511.60 for RCC's consulting services in connection with the reconfiguration of Charles' 800 MHz infrastructure.⁵¹ At issue is Charles' insistence on using a "tripartite" management structure for reconfiguration implementation. The Bureau acknowledged that the *Charles PFA Order* contemplated that Motorola, RCC, and Charles representatives would meet frequently in "'planning, execution and problem-solving capacities' during the \$275,000 planning phase of the project."⁵² In its application for review, however, Charles argues that the *Charles County Order* "proceeds from a misunderstanding of the application of the approved tripartite structure of Motorola, RCC and County staff to the implementation of reconfiguration."⁵³

21. We disagree. The Bureau did not interpret the *Charles PFA Order* "as requiring an RCC employee and a [Charles] employee to 'shadow' Motorola's subcontractor's technicians at each stage of rebanding implementation at a cost of \$59,511.60—over \$5,400 per site."⁵⁴ Similarly, we do not read the *Charles PFA Order* as approving RCC's, Motorola's and Charles' "tripartite" participation extending into the implementation phase of Charles' rebanding project. To the contrary, the *Charles PFA Order* specifically warned Charles against duplicative and unnecessary costs going forward.⁵⁵ As the Bureau noted in the *Charles County Order*, "[t]he County represent[ed] that its plans for reconfiguration already [had] been 'defined, refined and agreed upon.'"⁵⁶ Accordingly, "[i]mplementing those plans therefore should not require the duplication of effort the County proposes."⁵⁷

b. Motorola Documentation

22. Charles' application for review disputes the Bureau's finding that it failed to meet its burden of proof with regard to Motorola's drafting a completely new set of documentation for the temporary overlay system that will be used while Charles rebands its system.⁵⁸ Charles argued

⁵⁰ Sprint Opposition at 9.

⁵¹ Charles AFR at 13.

⁵² *Charles County Order*, 24 FCC Rcd at 12757 ¶ 30.

⁵³ Charles AFR at 12.

⁵⁴ *Id.*

⁵⁵ *Charles PFA Order*, 22 FCC Rcd at 16772 ¶ 11.

⁵⁶ *Charles County Order*, 24 FCC Rcd at 12757 citing Charles County Reply PRM at 13.

⁵⁷ *Charles County Order*, 24 FCC Rcd at 12757.

⁵⁸ Charles AFR at 14.

extensively in its Proposed Resolution Memorandum (PRM) and Reply PRM⁵⁹ about the importance of documentation in maintaining a system and that it required quality system documentation during the anticipated 3-year period that the overlay system was in place.⁶⁰ The Bureau concluded “that the comparable facilities standard dictates that [Charles’] documentation should be as complete and detailed at the conclusion of rebanding as it was before,” *i.e.*, that Charles was entitled to new documentation once its rebanded system was completed.⁶¹ The Bureau also found, however, that it was “unreasonable for [Charles] to request drafting of new documentation for the temporary overlay system and separate, newly-drafted documentation when rebanding is complete and the temporary overlay system is discontinued.”⁶² Instead, the Bureau found it adequate for Motorola to update the existing documentation to show the temporary overlay equipment and approved \$9,980 for this task.⁶³

23. As a general matter, Sprint must assure that a rebanding licensee has “comparable facilities” on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.⁶⁴ Thus, although the comparable facilities standard requires Sprint to provide Charles with the same level of final documentation as it had before rebanding began, Sprint is only required to provide for a seamless transition during the retuning process. Although Charles claimed that “documentation can be a major contributor to whether a technician can quickly restore a compromised system,”⁶⁵ it did not explain why updated documentation—as opposed to new documentation—would not suffice to provide the information necessary for system maintenance and restoration as part of a seamless transition.

24. As the Bureau has noted, “the Commission has not used the comparable facilities standard to evaluate temporary facilities while the licensee at issue is in transition, but rather has used the standard to define the replacement facilities that the licensee is entitled to at the end of the transition.”⁶⁶ Accordingly, the Bureau correctly held that Sprint should not be required to pay for new documentation for an interim system but only for the level of documentation necessary for a seamless transition. Charles’ request for completely new documentation for a temporarily-installed system is inconsistent with the Commission’s Minimum Necessary Cost standard.

4. Testing costs

25. Charles disputes the Bureau’s disapproval of \$15,200 for Motorola’s services in connection with functional system testing.⁶⁷ During mediation, and in its Statement of Position, Charles claimed

⁵⁹ Charles Reply PRM at 10, 11. Charles argument ignores the fact that the Bureau approved the cost of updating the existing documentation to reflect the addition of the overlay system. *Charles County Order*, 24 FCC Rcd at 12756 ¶ 24.

⁶⁰ Charles AFR at 13-14 *citing* Charles County Reply PRM at 10-11.

⁶¹ *Charles County Order*, 24 FCC Rcd at 12756 ¶ 24.

⁶² *Id.*

⁶³ *Charles County Order*, 24 FCC Rcd at 12756 ¶ 24.

⁶⁴ *800 MHz Report and Order*, 19 FCC Rcd at 14986 ¶ 26.

⁶⁵ Charles AFR at 14.

⁶⁶ City of Houston, Texas Public Works Department and City of Houston, Texas Police Department and Sprint Nextel Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd 4655, 4659 ¶ 16 (PSHSB 2009) (*Houston Order*).

⁶⁷ *Id.* at ¶ 15.

that its “RF based fire station alerting” feature requires additional functional testing,⁶⁸ but did not explain what additional tests were required and why. The Bureau therefore found that “[t]he record . . . contains no more than an assertion that this fire station alerting feature requires additional functional testing” and that “no basis exists to allocate more than \$1,520 to cover Motorola’s 4-test protocol [used for other components of Charles’ system].”⁶⁹

26. Charles argues that the *Charles County Order* “neglects the record” because a Motorola representative stated, in an email, that the additional functional testing was “required to conduct the full battery of tests requested by [Charles].”⁷⁰ The TA mediator, in the RR, deemed this explanation adequate support for Charles’ claimed additional cost.⁷¹ The Bureau did not, however, and found that Charles had “not described the extent of such additional testing, much less the associated time and cost required.”⁷²

27. We provide Charles’s explanation below:

Most jurisdictions have accepted a 4-test package best described as one all-sites test and three additional functional tests that can be conducted from a single location by a lone System Technician, with 4 to 8 hours to conduct those tests. Charles County has requested a 19-test battery. Included is one comprehensive all-sites test of the trunking system, which requires either one technician visiting each site while a second is at the Prime Site, or nine technicians testing simultaneously, or a combination thereof, who will roll through verifying each of the proper frequencies/control channels that have been programmed into the new system codeplug and the talkgroups are performing as designed. The testing of fire station server functionality in trunking and Failsoft modes, and testing the fire alerting functions at single stations and at multiple stations, requires personnel at the ECC and the stations to verify each function. Tom Kulp of Wireless Communications indicated that frequency changes can affect the phasing of the alerting system resulting in a critical failure. The remaining tests are less manpower-intensive, but many require at least two people as site trunking tests/Failsoft tests are conducted at a remote site while a technician at the Prime Site puts the system into Site Trunking and/or Failsoft. There is no comparison to the “typical” tests noted by Nextel as consuming 4-8 hours. None of the other licensees accepting 8 hours employed RF based fire station alerting. Eighty hours is required to conduct the full battery of tests requested by the County.⁷³

⁶⁸ *Charles County Order*, 24 FCC Rcd at 12763 ¶¶ 54-56.

⁶⁹ *Id.* at 12764 ¶ 59.

⁷⁰ Charles AFR at 15 *citing* e-mail from James Charron to James Hobson, Esq., Feb. 10, 2009. *See also* Charles PRM at 8-9. The email, however, was not a recommendation from Motorola that the “full battery” of tests be conducted; it was only a response to what Charles had requested, *i.e.*, “Eighty hours is required to conduct the full battery of tests requested by the County.” Charles PRM at 8-9 (emphasis supplied).

⁷¹ Charles AFR at 15.

⁷² *Charles County Order*, 24 FCC Rcd at 12764 ¶ 59.

⁷³ Charles AFR at 15 *citing* e-mail from James Charron to James Hobson, Esq., Feb. 10, 2009. *See also* Charles PRM at 8-9.

28. We find that, while Charles adequately explained the nature of the testing it preferred, it failed to develop a record explaining why Charles' system required a 19-test battery when "most jurisdictions have accepted a 4-test package best described as one all-sites test and three additional functional tests that can be conducted from a single location by a lone System Technician, with 4 to 8 hours to conduct those tests."⁷⁴ Although Charles attempted to distinguish itself from other licensees that accepted the 4-test package by noting that Charles "employed RF based fire station alerting," it did not explain why this feature of its system justified increasing the testing time tenfold, from 8 to 80 hours.⁷⁵ It thus failed to meet its burden of showing that the sum it requested from Sprint for functional testing represented the minimum necessary cost for that service.⁷⁶

5. Global Management Services costs

29. Charles also challenges the Bureau's disapproval of a portion of the \$ 531,969.80 sought for 2188.5 hours of effort by Motorola, RCC and Charles' own personnel for managing the reconfiguration of Charles' system.⁷⁷ In the *Charles County Order*, the Bureau disallowed \$ 17,148.40 of these "global" management costs that Charles had requested *in addition to* project management costs associated with each discrete reconfiguration task, noting that while "every discrete task in [Charles'] proposal has an associated project management cost . . . [Charles has] 'layered' onto those costs another \$400,000 for the overall management of the rebanding project."⁷⁸

30. In its application for review, Charles reiterates its arguments that the *Charles PFA Order* approved Charles' "tripartite project management structure."⁷⁹ It claims that the Bureau misunderstands the nature of the relationship between Motorola, RCC and Charles, and, therefore, erred in classifying Charles' global management costs as "duplicative."⁸⁰ As we discussed at paragraph 21 *supra*, approval of the tripartite participation of Motorola, RCC and Charles in the planning process does not mean that such participation was automatically approved to continue in the implementation phase of the project. Accordingly we uphold the Bureau's determination that the duplicative "global" management services proposed by Charles are inconsistent with the Minimum Necessary Cost standard.

6. Interoperability Coordination

31. Charles' application for review disputes the Bureau's only approving \$35,000 and 508 hours of effort by RCC and Charles' staff to coordinate interoperability with neighboring jurisdictions.⁸¹ The \$35,000 and 508 hours reflect all of Charles's requested internal hours and costs, but reduce the number of RCC's hours from 444 to 64.⁸² In the RR the mediator noted that the planning phase of Charles' reconfiguration had a similar task, but that the County sought 390 hours of internal time and only 20 hours of RCC time and that Charles had never explained why it was able to support

⁷⁴ *Id.*

⁷⁵ *Charles County Order*, 24 FCC Rcd at 12764 ¶ 59.

⁷⁶ *See supra* ¶ 11.

⁷⁷ *Id.*

⁷⁸ *Id.* at 12771 ¶ 91.

⁷⁹ Charles AFR at 12-16.

⁸⁰ *Id.*

⁸¹ *Id.* at 17.

⁸² *Charles County Order*, 24 FCC Rcd at 12771-12773 ¶¶ 96, 101, 103.

interoperability coordination with minimal support from RCC at the planning phase but now required significantly more participation for this same task at the implementation phase.

32. In its Statement of Position (SOP) before the Bureau, Charles tried, for the first time, to justify the elevated level of RCC's interoperability coordination services (444 hours out of a total of 954 hours in the reconfiguration agreement as opposed to only 20 hours out of a total of 410 hours during the planning phase).⁸³ The Bureau refused to consider Charles' extra-record justification, noting that Section 90.677(d) of the Commission's rules restricted its *de novo* review to the mediation record and that Charles' late-filed justification deprived Sprint of the opportunity to respond.⁸⁴ In its application for review, Charles claims that, in providing the information concerning RCC's participation in the interoperability coordination process, it "was responding to a point made in the RR, which implied that [Charles] had been asked – but failed – to explain why the contribution of RCC on this topic in the PFA was so 'modest' by comparison with the much larger role envisioned in the FRA," and that it was "surprised by the Mediator's statement in the RR, and . . . had every right to respond to it at the only opportunity given [it]."⁸⁵ It therefore submits that its arguments "be considered a part of the record."⁸⁶

33. Charles had full opportunity to explain RCC's participation in interoperability coordination during mediation and make it part of the record. Indeed, the record reflects that the question of RCC's costs for interoperability coordination came up in mediation but that Charles did not attempt to justify RCC's costs at the time.⁸⁷ Thus, the Bureau acted within its discretion when it concluded that the public interest in safeguarding the integrity of the mediation and *de novo* review process outweighed any benefit that would have been realized by allowing Charles to present extra-record evidence. In any event, the Bureau concluded that RCC's elevated costs for interoperability coordination were unnecessary because the limited tasks associated with Charles' interoperability coordination do not require enhanced levels of technical expertise and could readily be performed by Charles' internal staff.⁸⁸ Accordingly, on procedural grounds, and on the merits, we affirm the Bureau's rejection of Charles' attempt to introduce new evidence after the record closed.

⁸³ Charles County SOP at 7-8.

⁸⁴ *Charles County Order*, 24 FCC Rcd at 12773 ¶ 103 citing 47 C.F.R. § 90.677(d).

⁸⁵ Charles AFR at 17.

⁸⁶ *Id.*

⁸⁷ *Charles County Order*, 24 FCC Rcd at 12773-12774 ¶ 100-101.

⁸⁸ *Id.* at 12773 ¶ 103.

IV. ORDERING CLAUSE

34. 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 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review, filed November 18, 2009, by County of Charles, Maryland IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary