

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

In the Matter of
Montgomery County
and Sprint Nextel
Mediation No. TAM-11109
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2006

Released: November 3, 2006

By the Associate Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from Wave 1, Phase 1 mediation by the 800 MHz Transition Administrator (TA) and involving issues in dispute between Montgomery County and Sprint Nextel Corporation (Sprint). The TA's initial Recommended Resolution referred several cost disputes to us involving site, fleet, and acceptance tests to be conducted by RCC Consultants (RCC) and DiDonato Communications Services (DCS); cost of testing by RCC to establish "baseline" measurements of co-channel interference and environmental noise; cost of project management by County employees, Motorola, RCC, and DCS; county full-time equivalents (FTEs) required for coordination of the retuning process; salary, overtime, and other costs associated with time spent by police officers bringing in their vehicle radios for retuning; consulting services performed by RCC and DCS. We find that the County is entitled to the costs it claims for each of these services except the baseline measurements and the DCS consulting services.

2. Both parties also raised new issues in their Statements of Position, filed after the referral of the case by the TA. Montgomery County requests additional compensation for consulting work performed by RCC and DCS after January 31, 2006. Sprint seeks replacement of the mediator assigned to this case by the TA. We find that the County could be entitled to DCS fees incurred after January 2006, if during the project cost reconciliation process, it provides adequate justification for these consulting fees. Sprint's request for a new mediator, however, is outside the scope of the de novo review process.

3. In a Supplemental Recommended Resolution, the TA referred several disputes to us related to contractual language in the draft Frequency Relocation Agreement (FRA) between the County and Sprint. Rather than approve the specific contractual language requested by either Montgomery County or Sprint, we address the legal issues underlying the language disputes. The disputes are: 1) can the parties bifurcate and extend the retuning schedule in the manner suggested by the County; 2) can a vendor's failure to perform its obligations under an agreement with the County relieve Sprint of its responsibility to pay reconfiguration costs; 3) is the County entitled to test its new facilities to determine whether they are

1 See County of Montgomery, Maryland and Sprint Nextel, Recommended Resolution, filed by the TA on March 6, 2006 (RR) at 3-18.
2 See Statement of Position, filed by Montgomery County on March 16, 2006 (MC PS) at 3.
3 See Statement of Position, filed by Sprint Nextel on March 16, 2006 (Sprint PS) at 20.

comparable; 4) is Sprint responsible for cost overruns; 5) is the County entitled to full prepayment of all estimated costs upon executing the FRA; 6) can the County and Sprint reserve their rights to object to or terminate the FRA; and 7) should the FRA include language specifying that it was drafted by Sprint and the TA?<sup>4</sup> We find for the County on the first four issues, subject to certain conditions or clarifications. On the fifth, we find that, while Sprint is not required to prepay a relocating licensee upon signing an FRA, the payment schedule must ensure that the County need not use its own funds to pay for any relocation expenses. On the last two issues, we conclude that the FRA need not address them because they are outside the scope of the mediation process.

## II. BACKGROUND

4. The Commission's orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee that is subject to rebanding.<sup>5</sup> The FRA must provide for relocation of the licensee's system to its new channel assignment at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required.<sup>6</sup> Sprint must provide the relocating licensee with "comparable facilities" on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the relocation process.<sup>7</sup>

5. To facilitate FRA negotiations, the Commission established a three-month voluntary negotiation period and a three-month mandatory negotiation period for Sprint to negotiate with each relocating licensee.<sup>8</sup> If a licensee and Sprint are unable to negotiate a FRA at the end of the mandatory negotiation period, they must enter into a thirty-day mediation period under the auspices of a TA-appointed mediator. If the parties do not reach agreement by the end of the mediation period, the mediator forwards the mediation record and a recommended resolution to the Commission's Public Safety and Homeland Security Bureau (PSHSB).<sup>9</sup> Within ten business days of the mediator's submission of the record and recommended resolution, the parties may file position statements. Position statements

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<sup>4</sup> See Supplemental Recommended Resolution Regarding Contract Terms and Conditions, filed by the TA on April 6, 2006 (Supp. RR) at 3-22.

<sup>5</sup> 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) as amended by Erratum, 19 FCC Rcd 19651 (2004), and Erratum, 19 FCC Rcd 21818 (2004) (*800 MHz R&O*); Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*); and Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 2005 WL 2465886 (Oct. 5, 2005) (20 FCC Rcd 16015 (2005) as amended by Erratum, DA 05-3061 rel. Nov. 25, 2005 (*800 MHz MO&O*)).

<sup>6</sup> The channel change(s) are commonly referred to as a "retuning" of the system. In some instances, however, a channel change requires that equipment must be replaced rather than retuned. For convenience, unless the context requires otherwise, "retuning" as used herein also encompasses equipment replacement if existing equipment cannot be retuned.

<sup>7</sup> Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. *800 MHz R&O*, 19 FCC Rcd at 15077 ¶ 201.

<sup>8</sup> Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, *Public Notice*, 20 FCC Rcd 5159, 5160 (2005).

<sup>9</sup> The *800 MHz R&O* 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 (PSCID). *800 MHz R&O*, 19 FCC Rcd at 15075 ¶ 201. However, on September 25, 2006, the Commission delegated this authority to the Public Safety and Homeland Security Bureau. See Establishment of Public Safety and Homeland Security Bureau, *Order*, FCC 06-35, rel. Sep. 25, 2006.

may not, however, raise issues not presented during mediation.<sup>10</sup> Thereafter, PSHSB conducts a *de novo* review of the mediation record, evaluates the parties' position statements and the mediator's recommended resolution, and issues an order disposing of all disputed issues.<sup>11</sup>

6. In the instant case, the Montgomery County data system at issue uses two paired channels: 808/853.6625 MHz at its Germantown site and 809/854.9625 MHz at its National Capitol Region (NCR) site.<sup>12</sup> The system has 1501 mobile units,<sup>13</sup> of which approximately 1,000 units—600 police department radios and 400 fire department radios—are in use.<sup>14</sup> At the outset of negotiations, the County claimed that the total cost of retuning the system would be \$885,386.35.<sup>15</sup> Sprint initially asserted that the County's claim was unsupported and that comparable facilities could be provided for \$101,625.<sup>16</sup> During mediation, the County revised its cost estimate and reduced its claim for recoverable costs to \$525,712.19.<sup>17</sup> The parties further narrowed the issues in dispute but continued to disagree on a number of relocation cost issues.<sup>18</sup> As to these issues, the County claimed an aggregate cost of \$166,171.14, while Sprint asserted that all necessary services could be provided at a cost of \$36,518.36.<sup>19</sup> The mediator issued a Recommended Resolution in which he found that the County had provided sufficient justification for \$135,860.43 in costs.<sup>20</sup> As a result, Montgomery County and Sprint did not conclude an FRA during either the voluntary mediation period, which began on June 27, 2005, and ended on September 26, 2005, or during the mandatory negotiation period, which began on September 27, 2005 and ended on December 26, 2005.<sup>21</sup> The parties entered into mediation on December 27, 2005. The mediation period was extended from February 8, 2006 to February 24, 2006, and concluded with certain issues unresolved.<sup>22</sup>

7. Under the Commission's orders in this proceeding, Sprint bears the burden of proving that Montgomery County's relocated facilities are "comparable" on their new channel assignment within the meaning of the *800 MHz R&O*.<sup>23</sup> Montgomery County bears the burden of proving that the funding it has requested for relocation is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use."<sup>24</sup> The Commission's orders allow Montgomery County to be

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<sup>10</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) (*De Novo Procedures PN*).

<sup>11</sup> *Id.* at 758-59 ¶¶ 4, 10.

<sup>12</sup> See E-mail, dated October 27, 2005 from Gene Cummings, Montgomery County to Benjamin Aron, Sprint Nextel (Record Tab 4). Only the channel pair used at the Germantown site is in Channel 1-120 and needs to be retuned. Nevertheless, this requires retuning of all mobile radios in the system so that they can continue to operate at both sites.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also Supplemental Filing at 3-4 .of Nextel Communications Inc., filed on February 26, 2006 (Sprint Supplemental Filing) at 3-4.

<sup>15</sup> See Proposed Resolution Memorandum of Montgomery County, Maryland, filed January 17, 2006 (MC PRM) at 8.

<sup>16</sup> See Proposed Resolution Memorandum of Nextel Communications, Inc., filed January 17, 2006 (Sprint PRM) at 6 (Record Tab 1)..

<sup>17</sup> See Montgomery County Rebanding Cost Estimate Summary, version 15 dated February 24, 2006 (Rebanding Cost Estimate) at 3; see also Sprint PS at 3.

<sup>18</sup> RR at 2.

<sup>19</sup> Sprint PS at 3 and n.10.

<sup>20</sup> TA Mediator RR at 10-18.

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

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

<sup>23</sup> *800 MHz R&O*, 19 FCC Rcd at 15064 ¶ 178.

<sup>24</sup> *Id.* at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71; *De Novo Procedures PN*, 21 FCC Rcd at 759 ¶ 9.

compensated for both “hard costs,” which include the price of equipment and the labor necessary to install, tune, and test the equipment, as well as reasonable “transaction costs,” which include staff administrative time and, when necessary, attorneys and consultants fees required to plan for reconfiguration and negotiate the FRA. With respect to transaction costs, however, the *800 MHz Supplemental Order* requires that we give a “particularly hard look to any request involving transaction costs that exceed two percent” of the hard costs involved.<sup>25</sup> The Commission stated that, in the vast majority of such cases, the party requesting transaction costs will have to meet a “high burden” of justification. The Commission declined, however, to impose the two-percent rule as a fixed limit because public safety entities may need outside expertise to negotiate agreements.<sup>26</sup> The FRAs contain provisions that would permit relocating licensees to later amend their cost estimates, if necessary, after agreement with Sprint and subject to the approval of the TA.<sup>27</sup>

8. On March 6, 2006, the TA forwarded the mediation record and the initial Recommended Resolution about the relocation cost disputes to PSCID.<sup>28</sup> Montgomery County and Sprint filed their position statements on March 20, 2006. The mediator indicated, in the Recommended Resolution, that the parties would continue to negotiate on disputes over contractual language in the FRA. The parties were not able to resolve those disputes. Consequently, the mediator forwarded a Supplemental Recommended Resolution about the contractual language issues on April 6, 2006. The County and Sprint filed their position statements with regard to the Supplemental Recommended Resolution on April 20, 2006.

9. In the initial Recommended Resolution, the mediator recommended that Montgomery County receive the money it seeks for RF site, fleet and acceptance tests, not be allowed credit for baseline drive tests, be reimbursed for project management costs incurred by county employees and consulting firms, be allowed to use its estimates of the amount of personnel costs (including overtime and associated costs).<sup>29</sup> The mediator also recommended full recovery for those consulting fees that Montgomery County could document and partial recovery for those costs that were not documented.<sup>30</sup>

10. In the Supplemental Recommended Resolution, the mediator found that the parties should continue to negotiate on the ultimate retuning schedule rather than leaving it to the Commission to determine, but that the County can request 120 days to clear its old channels. The mediator also found that language insulating the TA and Sprint from a vendor’s failure to perform was unnecessary, that the FRA should contain language that Sprint will have completed its obligations when it pays all the amounts and taken all actions required by the FRA. The mediator found that the FRA should contain language stating that work may exceed cost estimates, but rejected language that conflicted with the TA guidelines with regard to cost over runs and prepayment of costs. The mediator found that the FRA should contain language giving Sprint the right to terminate the FRA in the event of an adverse decision against the rebanding orders, and that the FRA state that the document was primarily drafted by Sprint and the TA but rejected the County’s request to include language stating that the County agreed to the FRA under duress.<sup>31</sup>

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<sup>25</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25151 ¶ 70.

<sup>26</sup> *Id.*

<sup>27</sup> The Commission’s rebanding procedures require the TA to audit the amounts expended during reconfiguration. *Id.* at 25152 ¶ 71; *800 MHz R&O*, 19 FCC Rcd at 15074 ¶ 198.

<sup>28</sup> *Id.* at 18.

<sup>29</sup> RR at 10-17.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> Supp. RR at 17, 21.

### III. DISCUSSION

#### A. Referral of Issues

11. As an initial matter, we note that to ensure that the *de novo* review process is implemented efficiently, the process is structured to bring all disputed issues in an unresolved case to PSHSB at one time, instead of through multiple successive referrals. While our procedures permit the TA to recommend an extension of the mediation period when, in the TA's opinion, the parties could settle some of their issues with more time,<sup>32</sup> we did not anticipate that the parties would use this extension period to raise new issues in addition to those initially presented to the mediator. To avoid this piecemeal accretion of issues in dispute, we direct the TA to close the record prior to referring a case to PSHSB and present all issues for *de novo* review at one time.

#### B. Cost Disputes Referred From Mediation

##### 1. RF site, fleet, and acceptance tests

12. We find that Montgomery County has demonstrated that its anticipated costs for RF site, fleet and acceptance tests are reasonable and prudent and are the minimum necessary to provide facilities comparable to those presently in use. It is therefore entitled to the full amount it claims for each of these three tests.

13. Montgomery County claims: (a) \$4,320 for RF site testing by RCC; (b) \$2,040 for fleet testing by DCS; and (c) \$2,040 for acceptance tests by DCS for a 30-day period.<sup>33</sup> The County contends that the three types of testing are necessary to ensure that it receives comparable facilities. The tests are described as involving "the development of documentation, analysis and recommendation comparability certification as the physical testing of the infrastructure equipment." The County cites its prior experience with "similar efforts" to provide documentation of method, procedures, and tolerances of the fixed measurements as evidence that such testing is necessary.<sup>34</sup>

14. Sprint contends that the three tests are duplicative of testing that will be performed by Motorola, and that they are therefore not reasonable, prudent, or necessary to achieve reconfiguration—the standard for allowable services established by the *800 MHz R&O*.<sup>35</sup>

15. The mediator found that the tests complement rather than duplicate Motorola's testing, and recommended that Montgomery County receive the \$8,400 it claims.<sup>36</sup>

16. After conducting our own review of the record, we concur with the mediator's finding that the testing is not duplicative. While the vendor can provide important services, we believe the County is entitled to conduct its own site and fleet testing as opposed to relying exclusively on the vendor to determine whether it will receive comparable facilities. We also accord weight to the County's judgment that such testing is necessary based on its prior experience with equipment replacement issues. Therefore, we find that Montgomery County is entitled to the full amount it claims for each of these three tests.

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<sup>32</sup>*De Novo Procedures PN*, 21 FCC Rcd 758 ¶ 2.

<sup>33</sup> RR at 3-4.

<sup>34</sup> See Final Mediation Submission of Montgomery County Maryland, filed February 24, 2006, (Final Mediation Submission) Exhibit D at 5; see also Consolidated Supplemental Response of Montgomery County, filed February 1, 2006 at 6-14.

<sup>35</sup> Sprint Supplemental Filing at 2.

<sup>36</sup> RR at 11.

## 2. Baseline drive tests

17. Montgomery County claims \$11,790 for the cost of conducting baseline drive test measurements of co-channel signals on one of the channels currently used by the County system.<sup>37</sup> We find that the County is not entitled to reimbursement for baseline drive testing. The retuning of the County's system will not involve significant reconfiguration of the type that would justify drive testing under the TA's guidelines and the Commission's rules.

18. The County contends that baseline testing is necessary because there will be three co-channel licensees in closer proximity to the County system on its new channel assignment than the co-channel systems on its current channel. The County claims that one of these prospective co-channel licensees produces an interference contour that overlaps with the County's service contour.<sup>38</sup> The County seeks to use the proposed baseline measurements to determine whether the new channel assignment is "comparable" from the standpoint of potential co-channel interference.<sup>39</sup>

19. Sprint argues that Montgomery County should not be credited for baseline testing. According to Sprint, the TA has issued guidelines stating that drive testing is not reimbursable unless rebanding requires significant changes to be made to the configuration of the licensee's own system. Sprint contends that retuning Montgomery County's system does not involve such significant changes.<sup>40</sup> The mediator found that retuning the Montgomery County system would not involve significant changes that would require the proposed testing, and therefore recommended disallowing the County's claim on this issue.<sup>41</sup> In its position statement filed with PSCID, the County stated that it will not challenge the mediator's finding on baseline testing at this time, but will seek to recover these costs if the reconfiguration later establishes their necessity.<sup>42</sup>

20. We find that the County is not entitled to the amounts it claims for baseline drive testing. The parties agree that the retuning of the County's system will not involve significant reconfiguration of the type that would justify drive testing under the TA's guidelines. Instead, the County seeks drive testing to compare its current co-channel environment against the anticipated co-channel environment on its new channel. However, the requirement that licensees receive "comparable facilities" does not entitle a licensee to the exact same co-channel environment that it had prior to rebanding, provided that all co-channel licensees on the new channel are separated from the licensee's system in accordance with the same interference protection rules that applied prior to rebanding. In the 800 MHz band, the applicable rules provide that co-channel systems (both pre-rebanding and post-rebanding) are to be spaced at least seventy miles apart.<sup>43</sup> The County will receive this same level of interference protection on its new channel that it received on its old channel. Even if the co-channel systems on its old channel were more than seventy miles distant, this does not entitle the County to the identical co-channel spacing on its retuned channel.

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<sup>37</sup> RR at 4.

<sup>38</sup> Final Mediation Submission at 6.

<sup>39</sup> *Id.*

<sup>40</sup> Sprint Supplemental Filing at 2.

<sup>41</sup> RR at 11.

<sup>42</sup> MC PS at 2.

<sup>43</sup> Co-channel spacing may be less than seventy miles if stations use smaller antennas and lower their power in accordance with the Commission's short-spacing table. *See* 47 CFR § 90.621(b) (4).

### 3. Project management conducted by County employees and consulting firms

21. We find that Montgomery County is entitled to the full amount it seeks for project management services. We note, however that these costs will be subject to review in the post-reconfiguration project cost reconciliation process and could be adjusted at that time.

22. Montgomery County claims that its personnel, Motorola, DCS, and RCC all perform different project management functions.<sup>44</sup> The County further states that retaining outside vendors to provide management services is necessary because the County's radio unit is understaffed by three positions. The County states that the claimed project management costs are intended to be caps and that only actual time and expenses will be billed.<sup>45</sup>

23. Sprint argues that it is inefficient and duplicative for four different entities to perform project management.<sup>46</sup> It appears from the record, however, that Sprint's specific dispute with the program management costs is the amount claimed for DCS' project management services. The County claimed \$6,120;<sup>47</sup> Sprint offered \$3,875.<sup>48</sup> The mediator recommended finding in favor of the County, stating that the project management plan does not demonstrate duplicative functions.<sup>49</sup>

24. We find that Montgomery County has furnished sufficient record support to meet its burden of proof with regard to the \$6,120 it claims for DCS' management services and that these services do not demonstrated duplicative efforts. Accordingly, we credit the County with that amount.

### 4. Personnel costs to coordinate the retuning effort

25. We find that the County is entitled to the full amount of the personnel costs it is claiming it will need to coordinate the retuning effort. The County has sufficiently explained the factors that entered into its analysis and Sprint's arguments in rebuttal are not persuasive.

26. Montgomery County estimates that in order to coordinate and complete retuning within the schedule the TA has imposed, two full-time equivalents (FTEs) must coordinate the retuning of police and fire department radios, with 320 hours allotted to each FTE.<sup>50</sup> In support of this estimate, the County notes that it has prior experience with retuning large numbers of radios and that it typically has underestimated the time required.<sup>51</sup> The County also believes that, based on its experience, retuning the final twenty percent of radios will take more than fifty percent of the coordination effort.<sup>52</sup> The County further explains that while police radios outnumber fire radios by a 60/40 ratio, it has allocated the same amount of time (320 hours) to retuning each group because coordinating the retuning of fire department radios is more complex.<sup>53</sup>

27. Sprint argues that the County's estimate of 640 hours for coordinating the retuning of radios is excessive. Sprint points out that the 640 hour total for 1000 radios amounts to 38.4 minutes per radio, which Sprint argues is 3.8 to 6.4 times more than the time it takes to retune a radio once it is in a

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<sup>44</sup> RR at 5; MC PRM at 10

<sup>45</sup> Final Mediation Submission, Exhibit D at 4.

<sup>46</sup> Sprint Supplemental Filing at 3.

<sup>47</sup> Final Mediation Submission, Exhibit D at 4.

<sup>48</sup> Sprint PS at 3.

<sup>49</sup> RR at 12.

<sup>50</sup> RR at 5-6; Final Mediation Submission, Exhibit D at 4, Exhibit B at 1-2.

<sup>51</sup> RR at 5-6.

<sup>52</sup> *Id.*

<sup>53</sup> Consolidated Supplemental Response of Montgomery County at 40-42; RR at 5-6.

technician's hands. Sprint also claims that it is illogical to allot the same retuning time for fire radios as for police radios because there are more police department radios than fire department radios.<sup>54</sup> The mediator found that Montgomery County had met its burden of proof on this issue and recommended approving the County's estimate.<sup>55</sup>

28. Although Sprint claims that the County's time estimate per radio exceeds the average time required for a technician to physically retune the radio, it is reasonable for the County to factor in additional time for unanticipated contingencies based on its prior experience with retuning. The County has also adequately explained its allocation of equal time to retuning police and fire department radios despite the larger number of police radios that require retuning.

#### **5. Overtime and other costs associated with retuning police radios**

29. We find that as between the two parties, the County is in the best position to assess its overtime needs. We therefore defer to the County's assessment as to the necessity for overtime, which appears reasonable in light of the record as a whole.

30. Montgomery County claims \$37,829 in salary, overtime, and other costs attributable to police officers bringing in vehicle radios for retuning.<sup>56</sup> The County claims the retuning process will require 510 police officers to bring in vehicle radios, and estimates that to minimize risk of disruption to police operations, 85 percent of the retuning effort should take place outside the officers' normal duty hours. Therefore, the County has allotted 2.25 hours of paid time, including 1.5 hours of overtime, for each police officer who brings in a vehicle radio for retuning, for a total of \$34,425 in wages.<sup>57</sup> The County also claims these police officers should be compensated \$3,404 for mileage and gas expenses. The County contends that it should have discretion to require that substantial retuning of police radios occurs during overtime to minimize interference with public safety operations, provided that the County exercises its discretion in good faith after considering alternative methods.<sup>58</sup> The County acknowledges that there is some uncertainty with respect to its assumption that eighty-five percent of retuning should be attributed to overtime: based on past experience, the County states that as little as seventy percent or as much as 100 percent of retuning could require overtime payments. The County contends that its estimate of eighty-five percent attribution to overtime represents a reasonable apportionment of this risk between the County and Sprint.<sup>59</sup>

31. Sprint contends that Montgomery County has failed to establish that the retuning effort cannot take place entirely during normal duty hours.<sup>60</sup> Sprint further argues that the County's attribution of eighty-five percent of costs to overtime is unpersuasive given the County's acknowledgement that the actual figure could range between 70 and 100 percent.<sup>61</sup> The mediator found that Montgomery County has met its burden of proving the necessity of these costs and recommended finding in favor of the County on this claim.<sup>62</sup>

32. The County is in the best position to assess how best to minimize disruption to police operations while retuning is ongoing. Therefore, we generally defer to the County's assessment as to the

<sup>54</sup> Sprint Supplemental Filing at 4.

<sup>55</sup> RR at 12-13.

<sup>56</sup> *Id.* at 13-14.

<sup>57</sup> *Id.*; Rebanding Cost Estimate at 8.

<sup>58</sup> RR at 7-8; MC PRM at 12.

<sup>59</sup> Final Mediation Submission at 3-4.

<sup>60</sup> Sprint Supplemental Filing at 4.

<sup>61</sup> Sprint PS at 14-15.

<sup>62</sup> RR at 14.

necessity for overtime so long as the assessment appears reasonable in light of the record as a whole. In addition, Sprint has not presented a persuasive rationale why the County should not be entitled to that deference here. The County's analysis of overtime requirements is based on prior experience about when public safety personnel may be diverted from other duties to have their radios retuned. While there is some uncertainty in the County's estimate, its proposed apportionment of the risk appears reasonable under the circumstances.

## **6. Consulting fees to RCC and DCS**

33. We find that the County should be credited for the full amount it seeks for consulting services it received from RCC but the fees for DCS' services should be disallowed. We make these findings based upon the level of documentation the County provided for these services.

34. Montgomery County claims the work of RCC and DCS is required to ensure safe, effective, and timely retuning of the County's mobile data system. The County contends that this consulting work has resulted in a more streamlined retuning process that will result in substantial cost savings to Sprint.<sup>63</sup>

35. Sprint argues that the County should not be reimbursed for RCC's consulting fees because the system at issue is not a complex system that warrants such consulting expenses. Sprint also contends that most of the consulting work being performed by DCS is unnecessary and that the County has not presented sufficient time and work records to support the fees claimed for DCS.<sup>64</sup>

36. The mediator found that Montgomery County met its burden of proof as to RCC and should receive the full amount claimed for RCC's consulting fees. With regard to the consulting services performed for DCS, however, the mediator found that the County had not met its burden with respect to the vast majority of these costs. Since Sprint conceded that Montgomery County should receive one-ninth of the costs claimed for DCS, the mediator recommended \$2,689.96 for DCS' consulting fees.<sup>65</sup>

37. We find that the County should be credited for the consulting services performed by RCC but the fees for DCS' services should be disallowed. All of RCC's fees are for work already completed, and the County has described RCC's work in sufficient detail to warrant the conclusion that it was necessary to ensure that the County receives comparable facilities. Sprint's assertion that the County system is not complex is insufficient to show that the work was unnecessary. The County has not, however, provided sufficient documentation in the record to support the amount claimed for DCS' consulting fees.

## **C. New Issues Raised In Parties' Position Statements**

### **1. Montgomery County claim of fees for RCC and DCS consulting services performed after January 31, 2006**

38. Montgomery County argues that the mediator erroneously limited his findings regarding consultant costs to costs incurred on or before January 31, 2006.<sup>66</sup> According to the County, the record also supports award of actual costs incurred in February and the first week of March 2006. The County notes that one option would be to remand the case to the mediator for additional findings, but instead suggests that the parties be directed to include post-January expenses in their subsequent negotiations.<sup>67</sup> We find that the County could be entitled to these fees if, during the project cost reconciliation process, it

<sup>63</sup> Final Mediation Submission at 5; RR at 9, 15-16.

<sup>64</sup> RR at 9-10; Sprint Supplemental Filing at 5.

<sup>65</sup> RR at 16-17.

<sup>66</sup> MC PS at 3.

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

provides adequate justification for these consulting fees.

## 2. Sprint request to replace the mediator

39. Sprint contends that the mediator's analysis of many of the cost disputes was flawed because the mediator failed to hold Montgomery County to its burden of proof.<sup>68</sup> Sprint argues that these errors were so numerous that the TA should replace the mediator.<sup>69</sup> We dismiss Sprint's claim as outside the scope of the *de novo* review process. The mediator's findings are advisory only. Therefore, the conduct of the mediator is not at issue in this review.

### D. FRA Language Disputes

#### 1. Retuning schedule

40. We find in favor of Montgomery County with respect to the provisions it seeks in the FRA relating to the retuning schedule. The County wants language added to the FRA specifying that its 800 MHz data channels will be reconfigured during the first stage of Wave I, while the retuning of its radios that use NPSPAC channels will occur at a later date.<sup>70</sup> The County also wants to include language in the FRA specifying that it will not be required to complete retuning off of its old frequencies until 120 days after Sprint has informed the County that its new frequencies have been cleared and are available for use by the County. The County contends that the clearance period should be extended from 60 to 120 days because, based on its experience, 120 days is a more reasonable estimate.<sup>71</sup>

41. Sprint agrees to the bifurcated channel removal plan but requests that the schedule for retuning be left for later resolution.<sup>72</sup> Sprint will negotiate with the County on the appropriate time frame to allow for retuning, but contends that the 120 days requested by the County is excessive.<sup>73</sup> The mediator believes the Commission need not resolve whether the FRA should contain language about the bifurcated nature of the retuning schedule because the parties should be able to reach agreement through further negotiations.<sup>74</sup> As for the County's request for 120 rather than 60 days to retune off of its old channels, the mediator believes this is a reasonable request because it is based on the County's experience and Sprint has not demonstrated that a time frame shorter than 120 days would be more reasonable.<sup>75</sup>

42. In the rebanding orders, the Commission explained that one of the goals of its reconfiguration policies was an expedited settlement of relocation issues.<sup>76</sup> Therefore, the County should not be required to accede to Sprint's request to defer negotiations on this issue until a later date. We also find it reasonable for the County's to have 120 days from receipt of notice of the decommissioning of the replacement frequencies to clear all users from the incumbent frequencies. This issue is within the County's expertise and Sprint has not offered a persuasive counterproposal.

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<sup>68</sup> Sprint PS at 19.

<sup>69</sup> *Id.* at 19-20.

<sup>70</sup> Supp. RR at 3; Supplemental Position Statement of Montgomery County, filed April 16, 2006 (MC Supp. PS) at 3.

<sup>71</sup> Supp. RR at 3, 9; MC Supp. PS at 9-10.

<sup>72</sup> Supp. RR at 3; Supplemental Position Statement of Nextel, Inc., filed April 16, 2006 (Sprint Supp. PS) at 4-6.

<sup>73</sup> Supp. RR at 9.

<sup>74</sup> *Id.* at 16.

<sup>75</sup> *Id.* at 19.

<sup>76</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25122 ¶¶ 2-3; *800 MHz R&O*, 19 FCC Rcd at 14976 ¶ 8.

## 2. Responsibility for a vendor's failure to perform

43. Montgomery County wants language deleted from the draft FRA that states that neither the TA nor Sprint is responsible if one of the County's vendors fails to perform its obligations under any contract between the County and the vendor. We conclude that the language may be deleted but clarify that this is not dispositive of the issue of who is responsible in the event of vendor failure.

44. The County argues that the Commission's rebanding orders specify that the reconfiguration will occur at no cost to the incumbents and makes no exceptions for the failure of an incumbent's vendor to perform.<sup>77</sup> Sprint contends that deleting this language could cause it to become a party to disputes between the County and its vendors. Sprint further asserts that if the County incurs additional costs because of vendor failure, its concerns can be addressed through the change order provisions of the FRA.<sup>78</sup> The mediator recommends that the Commission reject the County's proposed language on this issue. The mediator agrees with Sprint's view that disputes between incumbents and vendors are to be addressed through the FRA change notice process.<sup>79</sup>

45. Our rebanding orders authorize the TA to approve cost estimates and to set forth procedures to efficiently resolve cost disputes.<sup>80</sup> The change order process currently in the FRA is consistent with these purposes and suitable for resolving cost issues that may arise when a vendor fails to perform. Such determinations will be highly fact-specific and subject to review by the TA. Therefore, contractual language conclusively assigning or relieving either party of responsibility for costs resulting from vendor failure is generally not necessary. However, deleting the language in the FRA insulating Sprint from cost responsibility does not imply that Sprint is presumptively responsible for costs attributable to vendor failure. We believe that a licensee's claim that Sprint should pay such costs must be supported by clear evidence of the licensee's due diligence in selecting the vendor and evidence that the vendor's failure was not reasonably foreseeable.<sup>81</sup> We further clarify that deleting the language that insulates the TA as requested by the County does not render the TA liable for relocation costs.

## 3. Testing and certification that new facilities are comparable

46. Montgomery County wants language added to the FRA that would state it need not make its determination that Sprint has satisfied its obligation to provide comparable facilities until the County's system has been tested.<sup>82</sup> The County also wants language specifying that it need not file a certification, or "closing," document until it is satisfied that the new facilities are comparable.<sup>83</sup> We find that the County is entitled to language in the FRA stating that it need not determine whether its new facilities are comparable until after the system is tested. We note, however, that this testing must occur within a reasonable time and the County must promptly issue any necessary certification.

47. Sprint claims that the County's proposed language gives the County too much discretion over the manner and timing of the comparable facilities determination. Sprint proposes alternative language stating that it will be deemed to have provided comparable facilities if it pays all amounts and takes all actions required by the agreement.<sup>84</sup> As for language stating that the County need not file a certification

<sup>77</sup> Supp. RR at 11-12; MC PS at 14.

<sup>78</sup> Supp. RR at 12.

<sup>79</sup> *Id.* at 20.

<sup>80</sup> *800 MHz Supplemental Order*, 19 FCC Rcd at 25129 ¶ 15; *800 MHz R&O*, 19 FCC Rcd at 15074 ¶ 198.

<sup>81</sup> *See, e.g., Communications Vending Corp. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) (a party can waive its right to a legal claim by failing to act with due diligence).

<sup>82</sup> Supp. RR at 5.

<sup>83</sup> *Id.* at 11.

<sup>84</sup> *Id.* at 5-6.

document until it is satisfied the facilities are comparable, Sprint argues this language is not necessary because the FRA already permits the County to file a change order if the reconfigured system is not comparable.<sup>85</sup> The mediator agrees with Sprint that the County's proposed language gives the County too much discretion. The mediator recommends the Commission adopt Sprint's proposed language because it more specifically describes the events that must occur before the County's system can be deemed comparable.<sup>86</sup> With regard to the timing of the County filing a certification, or "closing," document, the mediator finds the County's language confusing and unnecessary.<sup>87</sup>

48. We find in favor of the County. Our rebanding orders entitle relocating licensees to comparable facilities "that will provide the same level of service as the incumbent's existing facilities."<sup>88</sup> Therefore, the County is entitled to take reasonable measures to determine if the new facilities are comparable, and can withhold certification until such measures have occurred. Our rebanding orders do not, however, provide that a relocating licensee can withhold certification for an unreasonable period of time. Therefore, we also clarify that the County must perform testing within a reasonable time and issue its certification promptly if the testing shows the facilities to be comparable.

#### 4. Verification of actual reconfiguration costs

49. We find that the FRA can contain language that Sprint is responsible for cost overruns, provided such language does not conflict with the TA's procedures.

50. Montgomery County wants language added to the payment terms section and cost estimate form (Schedule C) of the FRA that would clarify Sprint is responsible for cost overruns that may not be enumerated in the Cost Estimate.<sup>89</sup> In addition, the County wants language added to the change notice section of the FRA that would specify that it need not submit change notification of any additional costs unless they are "more than minimal."<sup>90</sup> The County also wants language deleted that, it claims, would seem to prohibit it from seeking actual costs that may exceed costs claimed in the estimate.<sup>91</sup> Sprint contends that the County's proposed clarifying language is unnecessary because the FRA contains a provision that would allow the County to receive additional payments if its actual reconfiguration costs exceed the estimates. Sprint also objects to the County's assertion that it need not file a change notice for minimal cost increases because the TA's procedures require a change notice for even minimal changes.<sup>92</sup>

51. The mediator recommends that the Commission agree to the County's proposed edits that would provide that the cost of the work may exceed the Cost Estimate, because Sprint does not appear to object to the principle underlying the proposed edits.<sup>93</sup> The mediator recommends, however, that the Commission reject the County's proposed edits to the change notice sections because they are inconsistent with the TA's procedures and appear to undercut the TA's oversight of cost changes.<sup>94</sup>

52. Our *800 MHz R&O* makes clear that the Commission has "assign[ed] financial responsibility to [Sprint] for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz

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<sup>85</sup> *Id.* at 11.

<sup>86</sup> *Id.* at 17.

<sup>87</sup> *Id.* at 20.

<sup>88</sup> *800 MHz R&O*, 19 FCC Rcd at 15077 ¶ 201.

<sup>89</sup> Supp. RR at 6-7, 9-10.

<sup>90</sup> *Id.* at 7, 10, 14.

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 7, 11, 14.

<sup>93</sup> *Id.* at 17-18.

<sup>94</sup> *Id.* at 18, 19, 21.

band incumbents to their new spectrum assignments with comparable facilities.”<sup>95</sup> Consistent with that principle, Sprint must pay for reasonable and documented cost overruns. The *800 MHz R&O* also provides, however, that the County’s claims for cost overruns are subject to the TA’s approval.<sup>96</sup> Therefore, the County must comply with the TA’s procedures for notification and documenting of such overruns.

## 5. Prepayment of estimated costs

53. Montgomery County wants language added to the FRA that would specify that Sprint will prepay 100 percent of the County’s estimated reconfiguration costs once the parties agree to the FRA. We find that while the FRA need not require Sprint to prepay all of the County’s estimated costs, the payment schedule must ensure that the County need not use its own funds to pay for relocation expenses.

54. The County argues that the *800 MHz Supplemental Order* gives incumbents the right to prepayment of their costs. The County concedes, however, that the TA Reconfiguration Handbook states that incumbents are to be paid according to contractually agreed milestones.<sup>97</sup> Sprint contends that the TA Reconfiguration Handbook only gives incumbents the right to reimbursement of costs incurred. Sprint reasons that prepayment before relocation efforts begin is not reimbursement because, at that point, the incumbent has not incurred expenses for which it needs to be reimbursed.<sup>98</sup> The mediator recommends that the Commission reject the County’s claim because the TA Reconfiguration Handbook does not require 100 percent prepayment of the reconfiguration costs.<sup>99</sup>

55. We find that the Commission’s rebanding orders do not specifically require Sprint to prepay a relocating licensee upon signing an FRA. Our orders do specify, however, that Sprint will bear full financial responsibility for the relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments.<sup>100</sup> Therefore, the payment schedule must ensure that the licensee need not use its own funds to pay for any relocation expenses.

## 6. Language permitting the parties to reserve certain rights

56. The County seeks certain changes to the FRA language to explicitly reserve the right to terminate or limit the scope of the FRA based on the Commission’s orders or an adverse administrative or judicial decision. We find the proposed FRA revisions to be outside the scope of the *de novo* review process, but clarify that the FRA is inherently subject to the Commission’s orders and applicable decisions by other agencies or courts.

57. The County seeks to include language in the FRA that would state that the *800 MHz R&O* supersedes any portion of the FRA inconsistent with, or beyond the scope of, that order.<sup>101</sup> The County also wants language stating that it reserves the right to challenge the FRA as invalid and not required by the *800 MHz R&O*.<sup>102</sup> In addition, the County seeks to delete FRA language proposed by Sprint that would give Sprint the right to terminate the FRA if a court or other governmental entity issues an adverse

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<sup>95</sup> *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

<sup>96</sup> *Id.* at 15074 ¶ 198.

<sup>97</sup> Supp. RR at 15.

<sup>98</sup> Supp. RR at 16.

<sup>99</sup> *Id.* at 22.

<sup>100</sup> *Supplemental Order*, 19 FCC Rcd at 25129 ¶ 15; *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

<sup>101</sup> Supp. RR at 4; MC Supp. PS at 4.

<sup>102</sup> Supp. RR. at 4; MC Supp. PS at 5.

decision against the Commission's rebanding orders.<sup>103</sup>

58. Sprint argues it is unnecessary to add language specifying that the *800 MHz R&O* supersedes any FRA language inconsistent with the order. Sprint further claims it would be inappropriate for the FRA to contain language stating that Montgomery County reserves the right to challenge the agreement, because this would be inconsistent with the County deciding to enter into the agreement.<sup>104</sup> Sprint is also opposed to deletion of the language that gives it a right to terminate the FRA if a government entity issues an adverse decision against the rebanding orders.<sup>105</sup>

59. The mediator recommends rejecting the County's proposed language reserving the right to challenge the FRA. The mediator takes the position that if the County believes the FRA is a product of duress, it should pursue this allegation in another forum.<sup>106</sup> The mediator also agrees with Sprint that the FRA should contain language giving Sprint the right to terminate in the event of an adverse decision against the rebanding orders.<sup>107</sup>

60. We find that these issues relating to the legal effect of the FRA are outside the scope of the *de novo* review process. We clarify, however, that the FRA must be interpreted in a manner consistent with the Commission's orders. The same principle would apply in the event of an adverse decision by a court that modifies or revokes any of the Commission's orders.

## 7. Identification of FRA drafters

61. Montgomery County seeks to add language to the FRA that would state "the Parties acknowledge that this document was drafted by [Sprint] and the TA."<sup>108</sup> Sprint counters with language providing that, except for the County's proposed amendments, the FRA was drafted by the TA and Sprint.<sup>109</sup> The mediator recommends that the FRA incorporate Sprint's proposed language except for language indicating that the TA was a drafter of the FRA.<sup>110</sup>

62. We find that this issue relating to the legal effect of the FRA is outside the scope of the *de novo* review process. The requested language apparently is directed to the principle of contract interpretation that holds that ambiguities should be resolved against the drafter of the document, particularly in contracts of adhesion.<sup>111</sup> In this case, however, both parties have had the benefit of counsel in an arms-length contract negotiation and have had the opportunity to identify and resolve ambiguities. We therefore regard the County's suggested language as unnecessary and further clarify that the TA is an independent entity that is not a party to this or any other FRA.

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<sup>103</sup> Supp. RR. at 12-13; MC Supp. PS at 15-16.

<sup>104</sup> Supp. RR at 4-5.

<sup>105</sup> *Id.* at 13.

<sup>106</sup> *Id.* at 16-17.

<sup>107</sup> *Id.* at 20-21.

<sup>108</sup> *Id.* at 13-14.

<sup>109</sup> *Id.* at 14.

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Smith, Bucklin & Assoc., Inc. v. Sonntag*, 83 F.3d 476, 478 (D.C. Cir. 1996) (explaining that a contract of adhesion is one in which the parties have "vastly unequal bargaining positions"); *American Postal Workers Union, AFL-CIO, Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 665 F.2d 1096, 1111 (D.C. Cir. 1981) (in a contract of adhesion, ambiguities are resolved against the party who drafted the contract).

**IV. ORDERING CLAUSE**

63. Accordingly, pursuant to the authority of Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 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 C.F.R. § 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

FEDERAL COMMUNICATIONS COMMISSION

David L. Furth  
Associate Bureau Chief  
Public Safety and Homeland Security Bureau