

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

In the Matter of)
City of Virginia Beach, Virginia) WT Docket No. 02-55
and)
Sprint Nextel Corporation)
Mediation No. TAM-50053)

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2010

Released: August 13, 2010

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

I. INTRODUCTION

1. Before us is a case referred for de novo review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the City of Virginia Beach, Virginia (Virginia Beach) and Sprint Nextel Corporation (Sprint).1 The dispute involves three change notices totaling \$479,427.17.2

2. Virginia Beach presented Sprint with: (1) a \$291,786.70 change notice request for technical services from its primary vendor, Motorola, Inc., (the "Motorola Change Notice"); (2) a \$164,956 change notice request for management services from its engineering consultant, Federal Engineering, Inc. (the "Federal Engineering Change Notice"); and (3) a \$22,684.47 change notice request for legal fees in connection with the preparation, negotiation, and mediation of the Motorola and Federal Engineering Change Notices (the "Legal Fees Change Notice").3 Sprint rejected each of these change notice requests.4

3. Based on our de novo review of the mediation record, the Recommended Resolution submitted by the TA-appointed mediator (TA Mediator or Mediator) in this case, and the Parties' position statements,5 we approve the Federal Engineering Change Notice and the Legal Fees Change Notice - subject to the submission of documentation - and disallow the Motorola Change Notice.

II. BACKGROUND

4. Virginia Beach's 800 MHz system consists of one 20 channel, five site, trunked simulcast system; one five channel, single site conventional NPSPEC system; and one secure, conventional

1 See Recommended Resolution filed by the TA Mediator, September 21, 2009 (RR).

2 Id. at 3.

3 Id.

4 Id.

5 See Statement of Position of Virginia Beach, Virginia, TAM-50053 (October 5, 2009) (Virginia Beach SOP); Statement of Position of Sprint Nextel Corp., TAM-50053 (October 5, 2009) (Sprint SOP).

channel, two site repeater system. Virginia Beach has 5,509 subscriber units.⁶ The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a frequency relocation agreement (FRA) with each 800 MHz licensee that is subject to rebanding.⁷ Sprint and Virginia Beach entered into an FRA on October 29, 2007 and Virginia Beach commenced reconfiguration.⁸

5. On March 10, 2009, Virginia Beach submitted the Motorola Change Notice.⁹ The parties could not reach agreement on this change notice and entered into formal mediation, during which, Virginia Beach submitted the Federal Engineering Change Notice and the Legal Fees Change Notice.¹⁰ Because the three change notices involved overlapping issues, the parties and the TA mediator agreed to include all three in the mediation.¹¹ During mediation, the Parties were unable to resolve their dispute, and the TA Mediator directed them to submit Proposed Resolution Memoranda.¹²

6. On September 21, 2009, the TA Mediator submitted a Recommended Resolution and forwarded it, with the mediation record, to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.¹³ Virginia Beach and Sprint filed their Statements of Position on October 5, 2009.¹⁴

III. DISCUSSION

A. Standard of Review

7. The Commission's orders in this docket assign Virginia Beach the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use" (Minimum Cost Standard).¹⁵ The Commission subsequently 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."¹⁶ The Minimum Cost Standard thus takes into account not only cost, but all of the

⁶ RR at 2.

⁷ See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (*800 MHz Report and Order*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007).

⁸ RR at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Supra* n.5.

¹⁵ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71 (2004).

¹⁶ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007) (*Rebanding Cost Clarification Order*).

objectives of the proceeding, including completing the rebanding process in a timely and efficient manner and a seamless transition that preserves public safety's ability to operate during the transition.¹⁷

8. In addition to the Minimum Cost Standard, our review of the Parties' positions is informed by the TA Metrics, which are derived from the rebanding costs of licensees that have reached FRAs with Sprint.¹⁸ At this stage in the rebanding program, the TA Metrics are accorded substantial, although not dispositive, weight in the assessment of rebanding cost proposals.¹⁹ At the close of mediation, the metrics reflected data derived from nearly 700 executed Stage 2 public safety licensee FRAs including those for systems larger and more complex than Virginia Beach's.²⁰ The TA Metrics provide a useful measure of cost reasonableness, because they are based on increasingly large amounts of historical information regarding the cost of rebanding public safety systems.²¹ The further a licensee's costs exceed the TA Metrics, the less likely they are to be deemed reasonable, and the higher the burden on the licensee to justify its costs with record evidence.²²

B. Issues in Dispute

9. In their FRA, the parties agreed to a total rebanding cost of \$2,239,246.33.²³ Through its change notice requests, Virginia Beach seeks an additional \$479,410.17, which would bring the total rebanding cost to \$2,718,656.50.²⁴ Virginia Beach argues that these increased costs are due to three unanticipated changes in cost, scope, or schedule that occurred during rebanding implementation.²⁵

- The level of effort (LOE) assumed in Motorola's statement of work (SOW) was based on a small sample (5 %) of Virginia Beach's radios, with consequent inaccuracy in the types of radios and the LOE necessary to retune them.
- Virginia Beach's contract with the Virginia Beach Motorola Service Shop (MSS) that was to reconfigure its system expired and it was therefore required to use an MSS located in another city, with a consequent increase in travel time and expense.

¹⁷ *Id.* at 9820 ¶¶ 6, 8.

¹⁸ The TA has made the Metrics available on its website.
http://www.800ta.org/content/resources/FRA_Statistics.pdf (TA Metrics).

¹⁹ See County of Charles, MD, WT Docket No. 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 12749, 12751 ¶ 5 (PSHSB 2009) (*Charles County MO&O*).

²⁰ More specifically, the cost metrics for the case at hand derive from an analysis of 78 executed Stage 2 Public Safety FRAs which have between 4001-10,000 subscriber units. TA Metrics at Table 1.

²¹ We note that, as of September 30, 2009, the TA has seen 99 percent of the Stage 1 non-border FRAs and 92 percent of the Stage 2 non-border FRAs. See 800 MHz Transition Administrator, LLC Quarterly Progress Report for the Quarter Ended September 30, 2009 at 5 (December 28, 2009). Available at <http://www.800ta.org/content/reporting/quarterlyreports.asp>.

²² See *Charles County MO&O*, 24 FCC Rcd at 12751 ¶ 5.

²³ Sprint PRM at 28 (The FRA provided a total of \$2,011,614.83 and Sprint approved three post-FRA change notices, thus increasing the total amount approved by Sprint to \$2,239,246.33).

²⁴ Virginia Beach however argues that the TA inadvertently added \$172,069.75 for regional planning. Virginia Beach Reply to Cost Metrics Reports Prepared by the Transition Administrator dated September 9, 2009 at 2.

²⁵ Virginia Beach PRM at 9.

- The templates used in Virginia Beach's radios proved more complex than anticipated during planning.

10. Sprint, however, argues that the changes sought should have been anticipated by Virginia Beach during FRA negotiations. Sprint cites the Commission's 2007 *Supplemental Guidance PN*,²⁶ for the proposition that change notices are appropriate only when licensees are faced with unanticipated changes in cost, scope, or schedule which occur during implementation or in the case of an emergency.²⁷ Sprint argues that Virginia Beach impermissibly is using the change notice process as a tool to renegotiate the FRA, after the fact, on issues that were raised, or should have been raised, during negotiations.²⁸

1. The Motorola Change Notice

11. The FRA approved \$1,131,648.50 for Motorola subscriber reconfiguration activities, Virginia Beach requested an additional \$291,786.70 in the Motorola Change Notice, resulting in a proposed cost of \$1,423,435.20.²⁹ Sprint rejected the Motorola Change Notice in its entirety.³⁰ We find in favor of Sprint.

a. Virginia Beach Position.

12. Virginia Beach submits that the Motorola Change Notice is justified because the projected LOE used as the basis for the FRA proved inaccurate in practice and resulted in unanticipated costs.³¹ It contends that the costs and LOE proposed in the Motorola Change Notice are consistent with the *September 12, 2007 Guidance Public Notice* and that the costs also are consistent with the TA's Change Notice Process Fact Sheet.³² It argues that the costs in the Motorola Change Notice are the minimum necessary for Motorola to continue to manage and complete all of Virginia Beach's reconfiguration activities.

13. Level of Effort. The Motorola Statement of Work was premised on a per-unit cost for retuning Virginia Beach's portable, mobile and fixed radios. Virginia Beach submits, however, that experience has shown that the retuning cost is greater than anticipated and that the per-radio retuning cost

²⁶ See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, *Public Notice*, 22 FCC Rcd 17227, 17229 (2007) (*Supplemental Guidance PN*).

²⁷ See *id.*

²⁸ *Id.* The Commission clarified that change notices are appropriate to allow licensees to recover costs that are the result of "unanticipated changes in cost, scope or schedule that occur during implementation or in the case of emergency," but "it is not reasonable for licensees to use the change notice process to attempt to re-negotiate their agreements after the fact based on issues that should have been or actually were raised earlier." See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512, 18522 ¶ 31 (2008).

²⁹ Virginia Beach PRM, Appendix 1. Prior to the change notice, Virginia Beach's rebanding costs fell into the 56th percentile of the TA Metrics for systems of comparable size. The Motorola Change Notice would increase the ranking to the 67th percentile. RR at 36.

³⁰ Virginia Beach PRM at Appendix 1.

³¹ Virginia Beach PRM at 7-8.

³² *Id.* at 8. In its September 12, 2007 Public Notice, the Commission provided guidance about, and established timeframes for, the change notice process. The TA then established a process for change notice submission and TA review. http://www.800ta.org/content/resources/Change_Notice_Process_Fact_Sheet.pdf. We note that the September 12, 2007 Guidance Public Notice was issued before the Parties executed the FRA.

is better defined by the level of effort described in the TA's Subscriber Early Deployment Form (SED Form).³³ Its change notice request is based on the SED form.

14. Subscriber Equipment Inventory. Virginia Beach claims that, in developing its Statement of Work, "Motorola assumed the subscriber equipment inventory were (sic) accurate."³⁴ It attributes the inaccuracy to the fact that "Sprint funded only a 5% sample audit of the Licensee's subscriber inventory information."³⁵ Given the "constraints of available resources and limited sample audit," Virginia Beach maintains that "the cost estimates developed in late 2006 and negotiated in 2007 were as accurate as possible."³⁶ It contends that "[t]he additional work and costs associated with the inaccurate inventory were not reasonably foreseeable given fixed installations, additional travel time and different mounting configurations."³⁷

15. In its Supplemental PRM, Virginia Beach describes the differences between what was expected from the original subscriber equipment inventory and what has been discovered and documented by its vendors:³⁸

Expected versus actual	Number of Variations	Impact
Dash mount radio expected/trunk mount radio discovered	74	Additional time needed to reband as unit is more difficult to access and records must be updated
Trunk mount radio expected/dash mount radio discovered	22	Records must be updated
Trunk mount radio expected/dual control head configuration discovered	37	Additional time needed to reband as unit is more difficult to access and records must be updated
Dash mount radio expected/fixed control station radio discovered	134	Additional time needed to reband as unit is more difficult to access, requires additional travel and records must be updated
Standard trunk mount expected/specialized vehicle discovered	15	Additional time needed to reband as unit is more difficult to access,

³³ The SED Form was developed to estimate the costs of retuning radios in advance of retuning the system infrastructure, *i.e.*, "early deployment." See http://www.800ta.org/content/resources/SED_Instructions.pdf.

³⁴ Virginia Beach PRM at 9. The Motorola SOW provides that the proposal for quotation to provide rebanding services is based upon information supplied by Virginia Beach and inaccurate information could alter the quote. *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Virginia Beach states that [s]ome radios were described in the inventory as "mobiles" but have proven to be located at fixed installations at various locations across the Virginia Beach area." *Id.* According to Virginia Beach, "[t]his adds an incremental time charged by technicians for travel to the fixed equipment sites to work on the radios, rather than having the radios in vehicles coming to the technicians' shop as originally assumed." *Id.* at 9-10. Further, Virginia Beach states that "[s]ome mobile radios have a different mounting configuration than described in the inventory report adding original LOE. *Id.*

³⁸ Virginia Beach Supplemental PRM at 3-4.

(Boats/ATVs)		requires additional travel and records must be updated
Location data unknown but found during rebanding	1740	Records must be updated
Original location specified but found in new or different location during rebanding	879	Records must be updated

16. Change in MSS. Virginia Beach states that Motorola’s SOW and original pricing assumed that the subscriber reconfiguration work would be completed by Tidewater Communications (Tidewater), an MSS located in Virginia Beach, Virginia, and the contractor then responsible for the maintenance of Virginia Beach’s system.³⁹ Before the FRA was executed, however, the Tidewater contract with Virginia Beach expired.⁴⁰ Thereafter, Virginia Beach submits that, as required by Virginia law, it solicited competitive bids for the reconfiguration work. Tidewater did not submit a bid. Consequently, the contract was awarded to the sole responsive bidder, Gately Communications (Gately),⁴¹ an MSS located in Chesapeake, Virginia, an approximate 30-minute drive from Virginia Beach.⁴²

17. Virginia Beach states in its Supplemental PRM that “[a]s of August 10, 2009, the last subscriber equipment inventory update available to the Licensee, 3487 radios have been replaced, rebanded or reprogrammed under the FRA.”⁴³ Of those 3487 radios, “750 were completed by Tidewater Communications, the MSS that developed the original estimates for Motorola and the Licensee in late 2006.”⁴⁴ The remaining “radios are being reconfigured by Gately Communications, the Licensee’s new MSS that the Licensee contracted with prior to execution of the FRA.”⁴⁵

18. The Virginia Beach Schools also have radios that are covered by Virginia Beach’s FRA.⁴⁶ The schools, however, “have chosen to continue to use Tidewater Communications for radio maintenance as the Schools, not the Licensee [Virginia Beach], chose the MMS for the School’s radios.”⁴⁷ Virginia Beach argues that it was not reasonably foreseeable, in late 2006 when Motorola’s cost estimate was generated, that Tidewater would not continue as Virginia Beach’s MSS radio services contractor and that this “unforeseeable change has contributed to Motorola’s increased costs to perform the work.”⁴⁸

³⁹ Virginia Beach PRM at 10.

⁴⁰ *Id.*

⁴¹ *Id.* Virginia Beach states that Gately was the only responsive bidder. *Id.*

⁴² *Id.* Virginia Beach alleges that “not all of these reprogrammed radios have necessarily made it back into the Licensee’s fleet.” *Id.*

⁴³ Virginia Beach Supplemental PRM at 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2-3.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.*

⁴⁸ Virginia Beach PRM at 11.

19. As part of its Statement of Position, Virginia Beach presents and adopts material provided by Motorola relative to the change of MSS. Motorola states that Virginia Beach “disqualified” Tidewater as a Motorola subcontractor and that, as a consequence:

Gately is stuck performing rebanding subscriber work at a price quoted years ago by another now disqualified MSS who, because of proximity to Virginia Beach has lower costs. In addition . . . the actual scope of the subscriber work performed by Gately is greater than the scope of the subscriber work quoted by Tidewater, which makes the unfairness even more egregious.⁴⁹

Motorola, however, represents it “will withdraw its requested Change Notice for these subscriber services which is the subject of the ‘Motorola Change Notice.’”⁵⁰

20. Complexity of Templates. Virginia Beach asserts that “[g]reater subscriber template complexity has caused Motorola's FRA cost estimate to be short of what is actually needed.”⁵¹ It concedes, however, that Motorola does not perform the template modification; Virginia Beach provides the post-rebanding templates to Motorola.⁵² The additional cost, Virginia Beach claims, arises because the templates prepared by Virginia Beach do not work in some of the radios, and that Motorola, through its subcontractor, Gately, must spend additional time obtaining and installing the correct template. Thus, Virginia Beach states:

the unanticipated variation in feature sets, age and specific template types needed even within each radio family has dramatically increased the number of templates required to reconfigure radios [and] having the correct template for the rebanding of each individual radio has caused logistical challenges during radio reconfiguration, resulting in additional time and costs as multiple trips are often required to complete specific radios.⁵³

21. Virginia Beach also claims that “[i]n order to verify and track proper template and individual radio ID programming, additional steps were added to the program and retune process.”⁵⁴ “Each radio is assigned a new radio ID, this radio ID is verified on system management terminals with the Licensee after rebanding and a new radio ID sticker is affixed to each radio.”⁵⁵ Virginia Beach submits that, when the FRA was executed, it could not have reasonably anticipated the additional cost of dealing with greater subscriber template complexity and the increase in the number of templates.⁵⁶

⁴⁹ Virginia Beach SOP at 5.

⁵⁰ *Id.* at 7-8.

⁵¹ Virginia Beach PRM at 11.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 11-12.

22. In its Supplemental PRM, Virginia Beach sets out the variation between the expected number of templates, and those encountered during the rebanding process.⁵⁷

Department	Expected # of templates	Templates developed to date	Variance between expected and actual
EMS	9	26	188%
Fire Department	9	32	255%
Police	9	14	55%
Public Utilities	10	18	80%
Schools Transportation	5	14	180%
Sheriff's Office	8	10	25%
Summary	50	114	128%

b. Sprint Position

23. Level of Effort. Sprint argues in the first instance that there has been no unanticipated material change in the scope of Motorola's work contemplated in the FRA, but – even if the scope of work had changed – that Virginia Beach has failed to demonstrate that the amounts claimed in its change notice are reasonable, prudent and the minimum necessary to effect rebanding.⁵⁸ Sprint resists Virginia Beach's reliance on the SED Form as a basis for the increased costs requested in the Motorola Change Notice, claiming that Virginia Beach is attempting to renegotiate the pricing agreed upon in the FRA.⁵⁹

24. Subscriber Equipment Inventory. Sprint claims that Virginia Beach's claimed inaccuracies in the subscriber equipment inventory are belied by information in the Motorola SOW. Thus, while the Motorola Change Notice identifies 146 fixed units – which, by Virginia Beach's analysis are more costly to retune than mobile or portable units – the Motorola SOW provided for the retuning of 327 fixed units, 181 more than identified in the Motorola Change Notice. This discrepancy, Sprint argues, indicates that less effort was required to retune the fixed units than was contemplated in the FRA, such that the overall cost of retuning Virginia Beach's radios "should be lower than anticipated, not higher."⁶⁰ Sprint also submits that "even if the explanation that the inventory lead (sic) some units to be priced as mobiles rather than fixed units withstood scrutiny . . . Virginia Beach and Motorola have not provided any breakdown of the additional time necessary to travel to the locations of fixed units. Instead, they have simply requested the LOEs set forth in the TA's SED Form, and offered travel time as one possible explanation, with no specific costs associated with that factor."⁶¹

⁵⁷ Virginia Beach Supplemental PRM at 5.

⁵⁸ Sprint SOP at 3, 6, 8, 13

⁵⁹ *Id.* at 9.

⁶⁰ *Id.* at 7 n.15.

⁶¹ *Id.* at 13. Sprint makes similar arguments relative to the other inventory discrepancies claimed by Virginia Beach, *i.e.*, higher level of effort to reprogram radios and record updating. *Id.* at 13-16.

25. Change in MSS. Sprint argues that the Change of MSS does not justify the Motorola Change Notice.⁶² It notes that Motorola – not any given MSS – is the vendor specified in the FRA and, therefore, that Motorola should bear any cost increase arising from the MSS change.⁶³ It also faults Virginia Beach for not stating the costs associated with its claim that the new MSS, Gately, is located 30 minutes from Virginia Beach.⁶⁴

26. Sprint also posits a contradiction between Virginia Beach’s explanation that state law essentially “prohibits the City from using the old MSS” and its later assertion that “the Virginia Beach Schools . . . have chosen to continue to use Tidewater Communications (the old MSS) for radio maintenance . . .”⁶⁵ Finally, Sprint argues that the change in MSS was foreseeable because Tidewater’s contract expired in June 2007, well before the FRA was executed in November 2007.

27. Template Complexity. Sprint concedes that some of Virginia Beach’s templates may be more complex than contemplated in the FRA, but observes that the templates are provided by Virginia Beach – not Motorola – and, therefore, that the added complexity of the templates should have no effect on Motorola’s costs. Sprint adds, however, that it is willing to consider a change notice to account for any increased costs encountered by Virginia Beach in developing the more complex templates.⁶⁶ Sprint also claims that only “a handful of templates” are more complex “in a reconfiguration involving several thousand subscriber units” and, therefore, denies that the more complex templates had “any material effect on the scope of work.”⁶⁷

28. Countering Virginia Beach’s assertion that, “[i]n order to verify and track proper template and individual radio ID programming, additional steps were added to the program and retune process,” Sprint contends that the need to track retuned radios is entirely foreseeable and should have been covered by the FRA. It also argues that some of the tasks Motorola performs are unnecessary and unrelated to rebanding. For example, Sprint cites Virginia Beach’s statement that “each radio is assigned a new radio ID, the radio ID is verified on system management terminals with the Licensee after rebanding and a new radio ID sticker is affixed to each radio.” Sprint asserts that Virginia Beach has failed to explain how this identification exercise is necessary to track the reprogramming of radios. Specifically, Sprint notes that the FRA “provides \$39,500 for Motorola to update Virginia Beach’s subscriber unit database.” Given this updated information, Sprint argues, there is no reason to assign radios a new ID in order to track reconfiguration. Sprint thus contends that the radio identification exercise is an unnecessary additional step in the rebanding process and represents an upgrade to Virginia Beach’s system. Finally, Sprint urges that the cost of these additional steps should be disallowed because Virginia Beach has not provided a breakdown of the time necessary to implement them.⁶⁸

⁶² *Id.* at 6, 18.

⁶³ *Id.* at 18.

⁶⁴ *Id.*

⁶⁵ *Id.* at 19.

⁶⁶ *Id.* at 8.

⁶⁷ *Id.*

⁶⁸ Sprint Nextel asserts that Virginia Beach’s Supplemental PRM provides limited information regarding the template issue, listing the “expected number of templates” at 50 and the “templates developed to date” to be 114. Sprint further asserts that Virginia Beach, not Motorola, is “responsible for collecting, modifying and verifying the programming templates.” Sprint states that it is willing to review and consider a change notice by the Licensee for the Licensee’s actual work in developing 64 additional templates. *Id.*

c. Mediator's Position

29. Level of Effort. In discussing Virginia Beach's reliance on the SED Form for its increased costs due to inventory discrepancies, the change in MSS and template complexity, the TA mediator observes that it was not possible to reconcile the LOE listed in the TA's SED form with the cost increases claimed by Virginia Beach. Finding no connection between the alleged changes in scope and the LOE specified in the SED Form, the TA Mediator is persuaded by Sprint's argument that Virginia Beach's reliance on the SED Form is "an impermissible attempt to renegotiate the FRA and retroactively apply the subsequently approved SED models to a pre-existing FRA."⁶⁹

30. Subscriber Equipment Inventory. The TA Mediator notes that both the Motorola and Federal Engineering SOWs expressly provide that, if the inventory of equipment – based on the five percent sample – were to prove inaccurate, then the project cost might change.⁷⁰ The TA Mediator thus concludes that the parties contemplated that an amendment to the FRA might be required "by the unsurprising fact that a five percent sample might not yield a perfect inventory count, and that the Licensee, therefore, should not be precluded from seeking a change notice."⁷¹ Nonetheless, the TA mediator concludes that Sprint has shown that there is an un rebutted inconsistency between the Motorola Change Notice and the Motorola SOW such that the Motorola Change Notice identifies 181 fewer fixed units than described in the Motorola SOW. Therefore, the TA Mediator concludes "the inventory discrepancy associated with the number of fixed and mobile units is not a basis on which to provide Motorola with additional funds due to increased travel time."⁷² Moreover, the TA Mediator finds that – even assuming there are additional costs associated with the inventory discrepancy – Virginia Beach has not quantified those costs and, therefore, "has failed to meet its burden of satisfying the Minimum Cost Standard."⁷³

31. Change in MSS. The TA Mediator recommends that the Motorola Change Notice, to the extent it seeks costs due to the replacement of the MSS, be disallowed.⁷⁴ The TA Mediator finds that Virginia Beach knew of the need to replace its MSS before the FRA was executed, but waited 21 months thereafter before seeking a change notice. Citing the *County of Flagler* case,⁷⁵ the TA Mediator concludes that Virginia Beach's hiring the replacement MSS, but waiting 21 months before filing the Motorola Change Notice, deprived Sprint of the opportunity to address the issue of MSS replacement. The TA Mediator also finds that the unilateral change of MSS was inconsistent with the FRA which requires a party to promptly notify the other party whenever there is a change to the work contemplated in the cost estimate.⁷⁶ The TA Mediator also notes that the Virginia Schools – whose subscriber units are being retuned under the Virginia Beach FRA – found the means to continue using the original MSS,

⁶⁹ RR at 37.

⁷⁰ *Id.* at 35.

⁷¹ *Id.*

⁷² *Id.* at 38.

⁷³ *Id.*

⁷⁴ *Id.* at 36.

⁷⁵ See *County of Flagler, Memorandum Opinion and Order*, 24 FCC Rcd 8235 (PSHSB 2009).

⁷⁶ RR at 36.

Tidewater, as its service contractor.⁷⁷ This, in the TA Mediator's view, calls into question Virginia Beach's representation that state law made a change of MSS necessary.

32. Finally, the TA Mediator notes that Virginia Beach failed to quantify the costs it allegedly incurred as a consequence of the MSS change, stating that "the Licensee either has been unwilling or unable to quantify the dollar amounts associated with any of these changes," *i.e.*, the greater travel time and alleged expanded services provided by the replacement MSS. This, the TA Mediator finds, is an independent basis for disallowance of the cost increase allegedly caused by the MSS change.⁷⁸

33. Template Complexity. The TA Mediator finds that the increased number of radio templates that Virginia Beach was required to produce is the proper subject of a change notice. Citing Sprint's willingness to consider a change notice for Virginia Beach's added expense associated with template complexity, the TA Mediator concludes that the need for additional templates was not foreseeable at the time the FRA was negotiated.⁷⁹ The TA Mediator, however, also finds that Virginia Beach failed to quantify the alleged additional costs associated with the more complex templates, and, on that basis, that Virginia Beach failed to carry its burden under the Commission's Minimum Cost Standard.⁸⁰ Accordingly, to the extent that the Motorola Change Notice seeks costs related to template complexity, the TA Mediator recommends it be disallowed.

d. Decision - Motorola Change Notice

34. As an initial matter, the question of whether the Motorola Change Notice should be allowed is moot. Motorola represents it "will withdraw its requested Change Notice for these subscriber services [by the Gately MSS] which is the subject of the 'Motorola Change Notice.'" Thus, because Virginia Beach will not incur charges from Motorola for the Gately-related services, such charges cannot be assessed against Sprint consistent with the Commission's Minimum Cost Standard.

35. Were we to reach Virginia Beach's arguments on the merits, however, we would find them unpersuasive. First, and most importantly, Virginia Beach makes no attempt to quantify most of the services for which it sought \$291,786.70 in the Motorola Change Notice. Thus, for example, in claiming that its substitution of a new MSS had resulted in increased travel time, it did not specify the number of trips, the pay rate of the technician or the vehicle mileage – all of which were necessary to assign a cost to the increased travel time. Second, Virginia Beach's only attempt to quantify costs was its reliance on the SED Form LOE. However, Virginia Beach did not establish a relationship between the LOE and the \$291,786.70 claimed in the Motorola Change Notice. Even had it established such a relationship, the LOE in the SED Form would not have been dispositive of Virginia Beach's entitlement to additional funds from Sprint. As the instructions to the SED Form explain, "[t]he standards suggested here may be lower or higher than what is actually required by the licensee for a particular vehicle or other situation. *Each licensee should request only the minimum hours required to complete a task based on their*

⁷⁷ *Id.*

⁷⁸ *Id.* at 37. The TA Mediator notes that Virginia Beach was given the opportunity to file a supplemental proposed resolution memorandum in which it could detail and quantify the additional work it claims was required as a consequence of the MSS change, the inventory discrepancies and the template complexity. Despite this opportunity to do so, Virginia Beach and its vendor did not demonstrate that its requested costs satisfy the Commission's Minimum Cost Standard. *Id.*

⁷⁹ *Id.* at 35.

⁸⁰ *Id.* at 39.

network”⁸¹ Virginia Beach determined the minimum hours required to complete rebanding when it negotiated the FRA. It cannot use the change notice process to renegotiate the FRA merely because the SED Form contains Level of Effort guidelines more to Virginia Beach’s liking.

36. The Commission has assigned 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”⁸² That evidentiary burden is not met when, as here, a licensee merely asserts entitlement to payment and provides no documentation to substantiate its claim. Even after the Proposed Resolution Memoranda had been submitted, the TA Mediator gave Virginia Beach another opportunity to document its claimed costs. It declined to do so. Accordingly, even if the Motorola Change Notice were not moot, we would disallow it in its entirety.

2. The Federal Engineering Change Notice

37. Virginia Beach sought an additional \$164,956.00 for Federal Engineering’s services.⁸³ Sprint rejected the Federal Engineering Change Notice in its entirety. We find in favor of Virginia Beach.

a. Virginia Beach Position

38. Virginia Beach represents that, in the course of FRA negotiations, Federal Engineering agreed to reduce its original LOE estimate for project management to 1280 hours, but “with the understanding that Federal Engineering would have recourse through the Change Notice process to recover costs associated with prolonged and unanticipated schedule delays.”⁸⁴ Virginia submits that the Federal Engineering Change Notice is justified due to unanticipated changes in cost, scope or schedule that occurred during implementation of rebanding. It claims that the final negotiated Federal Engineering SOW was based on Motorola’s reconfiguration schedule “which includes 300 working days to complete the primary and secondary reconfiguration of subscriber radio units.” Virginia Beach also notes that the Federal Engineering SOW provided that delays in program schedule “due to ... protracted contract negotiations ... will impact the program schedule, will result in additional costs, and will be brought to the attention of the City of Virginia Beach for recovery from Sprint Nextel...”⁸⁵

39. Virginia Beach submits that it and Federal Engineering have been engaged in first touch subscriber-related activities for approximately 22 months (since December 2007) and Motorola has been involved in these activities for 20 months (since February 2008).⁸⁶ It claims that “[n]umerous issues have caused the prolonged schedule duration associated with the first touch of subscribers,” and that these

⁸¹ <http://www.800ta.org/content/resources/forms.asp> (Subscriber Equipment Deployment (SED) Request Form Instructions) at 2 (emphasis in original).

⁸² *Supra* n.7.

⁸³ Prior to the Federal Engineering Change Notice, the FRA, as most recently amended, fell in the 92nd percentile of the TA Metrics for project management services. The Federal Engineering Change Notice would increase the project management services cost to the 98th percentile. RR at 40.

⁸⁴ Virginia Beach PRM at 12.

⁸⁵ *Id.* at 13-14. Virginia Beach further claims that Federal Engineering stated that it was reported during regional coordination planning efforts, that “the slow pace of negotiations and mediations in the Hampton Roads region overall has prevented many adjacent entities from even beginning reconfiguration planning which may impact the City’s ability to begin subscriber radio reconfiguration.” *Id.*

⁸⁶ *Id.* at 14.

issues were not readily apparent when the original reconfiguration plans were developed.⁸⁷ Virginia Beach also claims that Federal Engineering and Motorola had to update the original reconfiguration plans to “reflect revised Licensee requirements for subscriber reprogramming and replacement activities as well as operational needs.”⁸⁸ Further delays in the program schedule were incurred, Virginia Beach asserts, because of the unanticipated complexity of radio templates – which required additional management services from Federal Engineering.⁸⁹ It contends that it and Federal Engineering have attempted to mitigate the effects of the extended project schedule by, *e.g.*, conducting onsite meetings only when needed or required, conducting some meetings remotely, and reducing resource hours spent on the project during slower periods of activity.

40. In sum, Virginia Beach argues that unanticipated lengthening of the project schedule has required Federal Engineering to devote more resources than were contemplated when the FRA was negotiated, and that neither Virginia Beach nor Federal Engineering was responsible for the delay. It also contends that it has mitigated the effects of delay to the extent possible.

b. Sprint Position

41. Sprint submits that, delay in rebanding notwithstanding, the scope of work contemplated for Federal Engineering has not changed from that contemplated in the FRA, and that “[m]erely stretching the work over a longer period of time should not result in nearly *twice* the project management costs.”⁹⁰ Sprint argues that allowing the Federal Engineering Change Notice would only create “perverse incentives” for vendors to delay projects in the anticipation that they would receive additional compensation.⁹¹ It counters Virginia Beach’s claim that the need to coordinate its activities with other projects was a source of delay by stating that, if Virginia Beach had timely completed rebanding, those later projects would have had no effect on the rebanding schedule. It also submits that discrepancies between Virginia Beach’s preliminary inventory and the number of radios eventually encountered in the field did not entail additional effort on Federal Engineering’s part because the Motorola SOW included more fixed units than Virginia Beach claims in its Change Notice.⁹² Sprint also asserts that it should not be held financially responsible for Virginia Beach’s decision to change its MSS.⁹³ Sprint acknowledges that regional interoperability coordination could account for the delay in rebanding Virginia Beach’s system, but submits that, in a prior FRA amendment, it agreed to pay an additional \$197,794 for Federal Engineering’s management of the interoperability effort.⁹⁴ Finally, Sprint questions why it should

⁸⁷ *Id.*

⁸⁸ *Id.* For example, Virginia Beach notes that “plans for reconfiguring public safety subscribers were modified to accommodate other communications related projects such as microwave system upgrades, mobile data system replacement, in vehicle mapping and regional overlay radio system upgrades that were now occurring simultaneously with 800 MHz rebanding”, projects which were not anticipated to occur simultaneously with rebanding. *Id.*

⁸⁹ *Id.*

⁹⁰ Sprint SOP at 12-13 (emphasis in original).

⁹¹ *Id.* at 14.

⁹² *Id.* at 16.

⁹³ *Id.* at 17.

⁹⁴ *Id.*

reward Federal Engineering, financially, for its role in not properly managing a project that has fallen so far behind schedule.⁹⁵

c. Mediator Position

42. The TA Mediator deems the delays encountered in Virginia Beach's rebanding efforts unforeseeable because both parties initially expected the project to last only 16 months.⁹⁶ The TA Mediator finds that the anticipated duration of the project was a material factor in determining Federal Engineering's project management costs,⁹⁷ and that Sprint has not identified an action, or failure to act, by Virginia Beach or Federal Engineering that would account for the project being delayed.⁹⁸ Analyzing the record against the Commission's Minimum Cost Standard, the TA Mediator finds that Virginia Beach has supported its claim for \$ 164,956 by submitting detailed information on the status of the project, as of the date the Change Notice was filed, and by providing a detailed projection of the level of effort necessary to complete the project, which Virginia Beach estimates will require 39 months instead of 16 months as the parties first thought.⁹⁹ The TA Mediator also finds that Sprint has not shown that Virginia Beach's projections are unreasonable and that Sprint has offered no alternative to Virginia Beach's cost estimates other than to assert that the Federal Engineering Change Notice should be rejected in its entirety.¹⁰⁰

43. The TA Mediator shares Sprint's concern about vendors delaying project completion in the hope of realizing additional payment, but concludes that Sprint has presented no evidence that Federal Engineering is responsible for the delays incurred in the rebanding of Virginia Beach's system.¹⁰¹ The TA Mediator notes Sprint's argument that it has already agreed to pay for Federal Engineering's services related to regional coordination, but finds that the earlier agreement did not contemplate the additional rebanding costs that Virginia Beach has encountered because the actual time required to reband Virginia Beach's system is longer than the parties first contemplated.¹⁰² Finally, the TA Mediator finds it significant that Virginia Beach has acted to mitigate the consequences of the delay in project completion by, *e.g.*, limiting the number of meetings with Federal Engineering, and revising project procedures to avoid unnecessary expenditure of management time.¹⁰³

d. Decision - Federal Engineering Change Notice

44. We agree with the TA Mediator that the additional time required for Virginia Beach to reband its system was unforeseeable and that Sprint has not shown that either Virginia Beach or Federal Engineering is responsible for the delay. It is our experience – and Sprint's – that its projection for the

⁹⁵ *Id.* at 19.

⁹⁶ RR at 39.

⁹⁷ *Id.* at 39-40.

⁹⁸ *Id.*

⁹⁹ *Id.* at 40.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 41.

¹⁰² *Id.*

¹⁰³ *Id.*

completion of rebanding, nationwide, by June 2008 proved overly optimistic, because, *inter alia*, licensees such as Virginia Beach have encountered unforeseen rebanding complexities.¹⁰⁴ While some rebanding delays undoubtedly have been the fault of dilatory vendors or licensees, Sprint has not shown that to be the case here.

45. It is unrealistic to assume, as Sprint urges, that Federal Engineering's costs for a project – now estimated to require 39 months for completion – would be the same as for the originally estimated 16 month project. Indeed, Federal Engineering's Statement of Work, included in the FRA, explicitly stated that project delays would result in additional costs.¹⁰⁵ We agree with Virginia Beach that, in order for rebanding to be completed, Federal Engineering must perform work that was neither contemplated nor foreseeable when the FRA was negotiated, including the time associated with determining which radios had different feature sets, and thus required different programming templates, and the time expended in finding radios that were in locations different than those reflected in Virginia Beach's records.¹⁰⁶

46. Finally, we note, as the TA Mediator points out, that Sprint provides no estimate of what it regards as a reasonable cost for Federal Engineering's services beyond 16 months, whereas Virginia Beach has provided a detailed schedule and cost estimate for Federal Engineering's management services going forward. What is more, Virginia Beach has acted to mitigate the additional costs occasioned by the delay in rebanding completion. For those reasons, we find that Virginia Beach has carried its burden of showing that the costs for Federal Engineering's management services comport with the Commission's Minimum Cost Standard.

¹⁰⁴ In the *Third Memorandum Opinion and Order*, WT Docket No. 02-55, 22 FCC Rcd 17209, 17217 ¶¶ 29-30 (2007), the Commission affirmed that Sprint was required to vacate the Mid-Band in non-border NPSPAC regions by the end of the 36-month rebanding transition period, *i.e.*, by June 26, 2008, regardless of whether other elements of the rebanding transition were complete. On October 30, 2008, the Commission ordered Sprint to relinquish this Mid-Band spectrum in six stages, tied to the progress towards completion of rebanding achieved by 800 MHz NPSPAC licensees in each NPSPAC region. *See* Improving Public Safety Communications in the 800 MHz Band, Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, WT Docket No. 02-55, *Order*, 23 FCC Rcd 15966 (2008). In a request for waiver of the March 31, 2010 deadline for relinquishing non-border Interleaved Band channels in 21 of 46 non-border NPSPAC Regions, Sprint noted that in those regions, Sprint is precluded from transitioning its operations to the old NPSPAC channels because these channels continue to be heavily occupied by public safety licensees that have not yet completed rebanding. *See* Improving Public Safety Communications in the 800 MHz Band, Relinquishment by Sprint Nextel of Channels in the Interleaved, Expansion, and Guard Bands, WT Docket No. 02-55, *Order, Order*, DA 10-576 at ¶ 6 (PSHSB rel. March 31, 2010).

¹⁰⁵ Virginia Beach PRM at 13-14

¹⁰⁶ Virginia Beach claims that “[d]uring the first touch of subscribers, Licensee and Federal Engineering continue to find units that have been moved from their original locations and departments and/or that have been modified to work in their present locations.” *Id.* at 16-17. As an example of the additional time required, Virginia Beach notes the delay incurred when “a mobile radio is listed as being installed in one type of fire apparatus but is in fact installed in a different apparatus. This scenario requires either modified installation accessories for replacement radios (mounting or face plates for consoles, intercom accessories, sire interfaces) or takes longer to flash and reprogram due to mounting locations (radio was thought to be installed in a sedan but is actually installed in an ambulance.)” *Id.* at 17.

3. Legal Fees Change Notice.

47. Virginia Beach sought an additional \$22,684.47 for legal fees incurred in pursuing the Motorola and Federal Engineering Change Notices.¹⁰⁷ Sprint rejected the Legal Fees Change Notice request in its entirety. We find in favor of Virginia Beach.

a. Virginia Beach Position

48. Virginia Beach submits that it used outside legal counsel, Moss & Barnett, and an Associate City Attorney, to negotiate and mediate the Motorola and Federal Engineering Change Notices.¹⁰⁸ It contends that the negotiation and mediation of these change notices, including the preparation of PRMs, and the preparation of the prior change notices, which Sprint approved without challenge, would result in a total of \$22,684.47 by the time the TA Mediator's RR issued.¹⁰⁹

b. Sprint Position

49. Sprint argues that the Motorola and Federal Engineering Change Notices are without merit and, therefore, that Virginia Beach's legal costs may not be reimbursed unless the Motorola and Federal Engineering Change Notices are approved.¹¹⁰

c. TA Mediator Recommendation

50. The TA Mediator recommends approving Virginia Beach's claim for additional legal fees.¹¹¹ The TA Mediator notes that Sprint did not challenge the reasonableness of Virginia Beach's estimate of the legal fees for preparing and negotiating the change notices.¹¹² Moreover, the TA Mediator notes that Sprint cites no authority for the proposition that Virginia Beach's legal fees are allowable only if the Commission approves the change notices, which, the TA Mediator finds, are a necessary part of rebanding.¹¹³ Therefore, the TA Mediator concludes that Virginia Beach has met its burden under the Minimum Cost Standard.¹¹⁴

d. Decision - Legal Fees Change Notice

51. We agree with the TA Mediator's recommendation. Although the Commission may disallow legal fees incurred in pursuing patently frivolous change notices, that is not the case here. Virginia Beach, although it has not prevailed on the Motorola Change Notice, did make an arguable case for allowing it. Furthermore, Virginia Beach has met its burden with respect to the Federal Engineering

¹⁰⁷ The FRA provided \$62,812.23 for legal costs, Virginia Beach seeks an additional \$22,684.47, resulting in proposed legal costs of \$85,496.70. *Id.* at Appendix 3.

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *Id.* at 19-20.

¹¹⁰ Sprint PRM at 27.

¹¹¹ RR at 42.

¹¹² *Id.* at 41.

¹¹³ *Id.* at 42.

¹¹⁴ *Id.*

Change Notice. Consequently, we see no merit in Sprint's contention that Virginia Beach's legal fees for preparing and prosecuting its change notices should be disallowed. We approve the Legal Fees Change Notice.

IV. CONCLUSION

52. Virginia Beach has not satisfied its burden of showing that the costs associated with the Motorola Change Notice comport with the Commission's Minimum Cost Standard and we therefore disallow the \$291,786.70 Virginia Beach has claimed for Motorola's services. In any event, Motorola has agreed to forego those costs, making the Motorola Change Notice moot. We approve, however, the Federal Engineering Change Notice in the amount of \$164,956 and the Legal Fees Change Notice in the amount of \$22,684.47, for a total of \$187,640.47.

V. ORDERING CLAUSE

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

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

FEDERAL COMMUNICATIONS COMMISSION

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