

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

In the Matter of)
City of Hartford, CT)
and) WT Docket No. 02-55
Sprint Nextel Corporation)
Mediation No. TAM-50049)

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 2010

Released: August 23, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Before us is a case referred to us for de novo review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute over \$34,080 in legal fees between the City of Hartford, Connecticut (Hartford) and Sprint Nextel Corporation (Sprint). For the reasons discussed herein, we find that Hartford is entitled to reimbursement of \$14,720 in legal fees.

2. This dispute stems from a change notice request filed by Hartford on March 16, 2009 in which Hartford sought \$92,025 in fees for Hartford's two external legal counsel. This amount consisted of (1) \$67,905 in fees for Schwaninger & Associates, P.C. (Schwaninger) for work already performed; (2) \$16,120 in fees for Marjorie K. Conner, P.L.L.C. (Conner) for work already performed; and (3) \$8,000 in contingency fees for Conner's future work. Sprint paid \$57,945 leaving \$34,080 in dispute.

3. Specifically, Hartford seeks payment for the following legal services:

- Rebanding Contract. \$10,440 in Conner's and Schwaninger's fees for negotiating a Rebanding Contract with M/A COM.
• Future Legal Costs. \$8,000 for 20 hours of future legal services from external legal counsel for assistance "during implementation, reconciliation and closing."

1 See Recommended Resolution filed by the TA Mediator, June 11, 2009 (RR) at 2-3. On June 25, 2009, both Sprint and Hartford timely filed their Statements of Position. See City of Hartford, Connecticut, Statement of Position and Statement of Position of Nextel Communications, Inc.

2 RR at 3.

3 Id.

4 We note Sprint that has offered to pay an additional \$8,280. Id.

5 See Licensee Proposed Resolution Memorandum, dated May 12, 2009 (Hartford PRM) at Ex. 1.

6 Id. at 2.

- Implementation Costs. \$3,680 for 9.2 hours incurred by Conner for weekly conference calls and implementation tasks.⁷
- Additional Untimely Billed Legal Fees. \$7,680 for legal fees from Schwaninger between October 2007 and December 31, 2008 but not incorporated into the FRA.⁸
- FCC Matters. \$600 for 1.5 hours of Conner's services for working with a licensing consultant to complete an application for additional replacement frequencies and to update Hartford's request for waiver of the June 26, 2008 deadline for completing reconfiguration.⁹
- Change Notice Request. \$3,680 for 9.2 hours incurred by Conner and associated with preparation of Hartford's March 12, 2009 change notice.¹⁰

II. DISCUSSION

4. We evaluate Hartford's claims against two facets of Commission guidance in this area. First, as a general matter, change orders 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.¹¹ Second, a licensee may not use the Change Notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations but were not raised in negotiations, or that were considered and rejected.¹²

5. *Rebanding Contract.* Hartford claims that it initially believed that it could reband its system under an existing maintenance contract with M/A-COM.¹³ When it began rebanding discussions with M/A-COM in December 2008, however, M/A-COM required Hartford to negotiate a separate Rebanding Contract.¹⁴ Hartford argues that negotiations were protracted by M/A-COM's insistence that the Rebanding Contract contain a provision permitting M/A-COM to stop work if Sprint failed to pay M/A-COM.¹⁵ Hartford states that M/A-COM sought the stop-work provision because it had doubts about

⁷ *Id.* at Ex. 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, WT Docket 02-55, *Public Notice*, 22 FCC Rcd 17227, 17229 (2007) (*Guidance PN*).

¹² *Id.* The Commission subsequently 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).

¹³ Hartford PRM at 6 n.8.

¹⁴ *Id.*; Reply to Nextel Communications, Inc., filed by the City of Hartford, May 18, 2009 at 2 (Hartford Reply).

¹⁵ Hartford PRM at 4.

the financial stability of the banks underwriting the Sprint letter of credit¹⁶ and was concerned about the economy, generally.¹⁷ Hartford contends it notified Sprint on February 3, 2009 that Hartford would incur legal fees in connection with negotiating the M/A-COM Rebanding Contract but that Sprint was unresponsive.¹⁸ Notwithstanding Sprint's unresponsiveness, however, Hartford began negotiations with M/A-COM.¹⁹

6. Sprint contends that the costs associated with the negotiation of the Rebanding Contract are not recoverable because they should have been foreseeable, and included in the FRA, particularly since Hartford "had the benefit of both experienced counsel and a technical consultant during negotiations."²⁰ Sprint further argues that Hartford acknowledges that it erred in not foreseeing these costs.²¹

7. The TA Mediator found that Hartford was entitled to reimbursement of the entire \$10,440 in legal fees associated with negotiating the Rebanding Contract.²² The TA Mediator accepted Hartford's argument that the costs associated with the negotiation of the Rebanding Contract were not reasonably foreseeable.²³ The TA Mediator was persuaded by Hartford's explanation for the delay between the accrual of the costs and the submission of the change notice and found that Hartford's failure to include the costs of negotiating the Rebanding Contract in the FRA did not stem from a lack of diligence on Hartford's part.²⁴ Instead, the TA Mediator attributed the delay to M/A-COM's lack of clarity on whether the preexisting maintenance contract with Hartford would be adequate for reconfiguration of Hartford's system.²⁵ The TA also found Hartford's legal fees high relative to similarly sized systems, but, nevertheless, found Hartford had met its burden under the Minimum Cost standard²⁶ and thus was due payment for the legal fees associated with negotiation of the Rebanding Contract.²⁷

8. We concur with the TA's Mediator's recommendation but for a different reason, *i.e.*, we find that the need for Hartford to negotiate a Rebanding Contract with M/A-COM was not foreseeable. M/A-COM insisted on the Rebanding Contract to protect its own financial interests. Whether justified or

¹⁶ Sprint is required to maintain a letter of credit, in the initial amount of \$2.5 billion to insure that sufficient funds will be available to complete rebanding in the event of a Sprint default. *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, 14988 ¶ 30 (2004).

¹⁷ Hartford PRM at 7.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 6-8.

²⁰ Sprint PRM at 9.

²¹ Sprint SOP at 6 *citing* Hartford Reply at 2.

²² RR at 11.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ The Commission clarified the standard that it had developed in the *800 MHz Report and Order*, stating that minimum cost does not mean the absolute lowest cost, but rather "the minimum cost necessary to accomplish rebanding in a reasonable, prudent and timely manner." *See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 6 (2007).

²⁷ RR at 11.

not, M/A-COM doubted the financial stability of the banks underwriting Sprint's letter of credit and had concern about the general state of the economy. We find that Hartford could not reasonably have predicted M/A-COM's financial concerns, thus making the need to negotiate the Rebanding Contract unforeseeable within the meaning of that term in the *Guidance PN*. We agree with the TA Mediator that, although the legal fees associated with the negotiation are higher than those for similar sized systems, Hartford met its burden under the Minimum Cost standard and, therefore, is entitled to reimbursement of the entire \$10,440 associated with the negotiation of the Rebanding Contract.

9. *Future Legal Costs.* Hartford seeks \$8,000 (representing 20 hours) for future legal fees to its external counsel for services "during implementation, reconciliation and closing."²⁸ Hartford argues that the rebanding process is dynamic and requires the constant input of counsel and that budgeting future legal costs is prudent because it would avoid the change notice process.²⁹

10. Sprint contends that the \$8,000 represents generalized costs that were foreseeable and that Hartford should have included them in the FRA.³⁰ Sprint notes that the FRA includes legal fees for tasks including "participate in negotiations planning sessions," and "provide legal counsel as required."³¹ Sprint also contends that, because Hartford's external counsel have worked on a number of rebanding projects, they should be sufficiently familiar with the rebanding process to have anticipated the claimed fees.³²

11. The TA Mediator finds that Hartford does not explain why these future fees were not included in the FRA or, specifically, what they would cover.³³ TA Mediator thus concludes that Hartford had not met the threshold requirement for consideration of any portion of the \$8,000 in legal fees for services during implementation, reconciliation and closing, and recommends that the Commission disallow the \$8,000 in future legal fees.³⁴

12. We agree. Change orders 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.³⁵ Hartford does not allocate the \$8,000 to discrete legal tasks, but rather provides only a range of legal tasks that might need to be undertaken in the future. We find both that the fees sought were foreseeable and that they already were comprehended by the "provide legal counsel as required" provision in the FRA. We therefore disallow the \$ 8000 in future legal fees sought by Hartford. We also discount Hartford's premise that the rebanding process requires the constant input of counsel.³⁶ There

²⁸ Hartford PRM at 2.

²⁹ Hartford SOP at 6-7.

³⁰ Sprint PRM at 10.

³¹ *Id.*

³² *Id.*

³³ RR at 11.

³⁴ *Id.* at 12.

³⁵ See ¶ 4 *supra*.

³⁶ Hartford SOP at 6-7.

comes a point during the reconfiguration process at which most required tasks are technical and ministerial and the assistance of counsel is necessary only in the most extraordinary of circumstances.

13. *Implementation Costs.* Hartford seeks \$3,680 (representing 9.2 hours) in Conner’s legal fees for six weekly conference calls (6.0 hours) and related implementation tasks (3.2 hours), *i.e.*, finding solutions to software and battery malfunction problems and preparing a Channel Clearing Request Form.³⁷ Hartford asserts that the tasks were necessary, the costs are reasonable, and were incurred in good faith and in furtherance of Hartford’s rebanding efforts.³⁸

14. Sprint argues that the claimed costs were subsumed under the “provide legal counsel as required” provision in the FRA and that some of the tasks did not require an attorney’s assistance.³⁹ In particular, Sprint claims that issues involving software and batteries “were technical issues that were resolved directly with M/A-COM, and neither should have required legal input.”⁴⁰

15. The TA Mediator recommends that the Commission disallow the \$3,680 for implementation costs as a change notice to the FRA.⁴¹ The TA Mediator found that regular conference calls to discuss general issues related to rebanding were entirely foreseeable during the FRA negotiations and should have been included in the FRA.⁴² However, the TA Mediator is silent on the implementation tasks.

16. We agree with the TA Mediator that the conference calls were foreseeable and should have been included in the FRA or, alternatively, are subsumed under the “provide legal counsel as required” provision in the FRA. We also find that Hartford has not established that the implementation tasks cited required the services of an attorney. Therefore we disallow the claimed \$3,680 in fees.

17. *Untimely Billed Legal Fees.* Hartford requests reimbursement of \$7,680 in legal services rendered between October 2007 and December 31, 2008, but which were not incorporated into the FRA.⁴³ Hartford claims that a review of the last four months of Schwaninger’s representation of Hartford revealed that, after the legal budget had been finalized in the FRA, counsel spent an additional 19.2 hours (not including the 5.7 hours spent on negotiating the Rebanding Contract) on various tasks necessary to the execution of the FRA.⁴⁴ Schwaninger, however, had neither performed nor billed these services by

³⁷ Hartford PRM at 2, 8, Ex 1.

³⁸ Hartford SOP at 5.

³⁹ Sprint PRM at 10-11.

⁴⁰ *Id.* at 11.

⁴¹ RR at 12.

⁴² *Id.*

⁴³ RR at 13. Hartford actually requests reimbursement of \$9,960 for legal services, but it incurred \$2,280 of them while negotiating the Rebanding Contract discussed *supra*. *Id.*; Hartford PRM at 2; Hartford SOP at 6. This leaves a balance of \$7,680. RR at 13.

⁴⁴ Hartford SOP at 5-6.

the time the FRA was executed.⁴⁵ Hartford offers no explanation why these costs were not foreseeable or why Sprint should be responsible for such costs beyond those agreed to in the FRA.⁴⁶

18. The TA Mediator finds that Hartford has not shown that the fees were not foreseeable and recommends that the Commission disallow the \$7,680 in untimely billed legal fees.⁴⁷

19. We agree and find Hartford is not entitled to reimbursement for the \$7,680 in legal fees it incurred prior to the execution of the FRA but which were not included in the FRA. Payment of these fees would be inconsistent with the Commission's rebanding Orders and TA policy, which require licensees to present a complete cost estimate to Sprint and diligently review the costs in the FRA before execution.⁴⁸

20. *FCC Matters.* Hartford seeks reimbursement of the \$600 (1.5 hours) in legal fees billed by its external counsel for working "with the licensing consultant to complete the application for addition of the Replacement Frequencies" and filing "an update to [Hartford's] waiver of the June 26, 2008 deadline for completing reconfiguration."⁴⁹ Hartford claims these services were necessary to reconfiguration and the fees reasonable.⁵⁰ The TA Mediator noted that Sprint does not dispute the fees or argue they were foreseeable.⁵¹ The TA Mediator recommended we find that Hartford met its burden with regard to the \$600.⁵² Based on the record, we adopt the TA Mediator's recommendation.

21. *Change Notice Request.* Hartford seeks reimbursement of \$3,680 for legal fees incurred in the preparation and negotiation of its change notice request.⁵³ Sprint argues that because most of the legal fees that were the subject of the Change Notice were reasonably foreseeable and, as such, clearly prohibited by the Commission's standards regarding the change notice process, the costs associated with the pursuit of these legal fees should themselves not be recoverable.⁵⁴

22. The TA Mediator recommends that the Commission find that Hartford is eligible for reimbursement of \$3,680 in legal fees.⁵⁵ The TA Mediator cites the necessity of the change notice

⁴⁵ *Id.* at 6.

⁴⁶ RR at 13.

⁴⁷ *Id.*

⁴⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198.

⁴⁹ Hartford PRM at 9.

⁵⁰ *Id.*

⁵¹ RR at 13.

⁵² *Id.*

⁵³ Hartford PRM at 2.

⁵⁴ Sprint SOP at 12.

⁵⁵ RR at 12.

process to the rebanding process as acknowledged in the *Guidance PN*⁵⁶ and the TA's Reconfiguration Handbook.⁵⁷

23. We agree with the TA Mediator's recommendation, but for somewhat different reasons. Hartford has prevailed on some of its claims, and the record does not contain a per-claim breakdown of legal fees. Moreover, we cannot say that Hartford's claims, though lacking merit, are frivolous or advanced in bad faith. Thus, for the latter reason, and because we have no basis for apportioning legal fees among the claims, we have no alternative but to find that the \$3,680 in legal fees are reimbursable.

III. CONCLUSION

24. Our decision today follows the Commission's mandate that the 800 MHz reconfiguration change notice process should be limited to allowing licensees to recover costs due to unanticipated changes in cost, scope, or schedule which occur during implementation or in the case of an emergency.⁵⁸ In sum, we find the following legal costs that Hartford has requested meet the criteria for change notice requests:

- \$10,440 for negotiation of the Rebanding Contract;
- \$600 for services involving FCC matters; and
- \$3,680 for services relating to the change notice process.

All other claimed costs are disallowed as being inconsistent with the *Guidance PN* and Bureau precedent.

IV. ORDERING CLAUSE

25. 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.

26. 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

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⁵⁶ *Id.* citing *Guidance PN*, 22 FCC Rcd at 17229.

⁵⁷ *Id.* citing Reconfiguration Handbook at 88-90. The Reconfiguration Handbook can be found at http://www.800ta.org/content/resources/Handbook_v3.pdf.

⁵⁸ *Guidance PN*, 22 FCC Rcd at 17229.