

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

In the Matter of	)	
	)	
Illinois Public Safety Agency Network	)	WT Docket 02-55
	)	Mediation No. TAM-12389
and	)	
	)	
Nextel Communications, Inc.	)	

**ORDER**

**Adopted:** July 29, 2011

**Released:** July 29, 2011

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

1. By this *Order*, we direct the Illinois Public Safety Agency Network (IPSAN) to negotiate, agree upon, and execute a Frequency Reconfiguration Agreement (FRA) with Nextel Communications, Inc., a wholly owned subsidiary of Sprint Nextel Corp (Sprint)<sup>1</sup> within 20 business days of the release date hereof. We hold in abeyance a ruling on whether or not IPSAN has, to date, breached its obligation of utmost good faith in rebanding negotiations when it disregarded the directives of the *Memorandum Opinion and Order (Bureau Order)* released on March 32, 2011 by the Public Safety and Homeland Security Bureau (Bureau).<sup>2</sup>

**I. BACKGROUND**

2. In the *800 MHz Report and Order*, the Commission stated that “[a]ll parties are charged with the obligation of utmost good faith in the negotiation process. If any licensee fails to negotiate in good faith, its facilities may be involuntarily relocated and its license modified accordingly by the Commission.<sup>3</sup> The Commission noted that “[a]mong the factors relevant to a good-faith determination are: (1) whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably

<sup>1</sup> For purposes of uniformity in the orders issued in this proceeding, we refer to Nextel Communications, Inc. herein as Sprint Nextel Corp., its parent.

<sup>2</sup> Illinois Public Service Agency Network and Nextel Communications Inc., *Memorandum Opinion and Order*, 26 FCC Rcd 4061 (PSHSB 2011).

<sup>3</sup> 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, 15076-15077 ¶ 201 (2004) (*800 MHz Report and Order*). (Footnotes omitted.)

withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party.”<sup>4</sup>

3. On March 23, 2011, the Bureau issued the *Bureau Order* resolving a dispute between IPSAN and Sprint over the need to give IPSAN’s mobile data radios a “second touch”<sup>5</sup> to remove pre-rebanding channels. The Bureau determined that any data reception delay introduced by leaving the pre-rebanding channels in the radio would be transient and *de minimis*.<sup>6</sup> Accordingly, the Bureau denied IPSAN’s request for a second touch and ordered “that the Transition Administrator SHALL CONVENE a meeting of the Parties, no later than 10 business days from the release date of this *Memorandum Opinion and Order* to conclude a Frequency Reconfiguration Agreement consistent herewith.”<sup>7</sup>

4. The 800 MHz Transition Administrator (TA) Mediator convened a meeting on March 28, 2011, as ordered by the Bureau.<sup>8</sup> During the meeting, counsel for IPSAN contended that the Motorola Statement of Work for rebanding IPSAN’s system had become “stale” and would need updating to reflect changes in labor rates.<sup>9</sup> Counsel also requested that he be given additional time to negotiate with Motorola to determine whether IPSAN’s system could be given a second touch for the same price that Motorola and IPSAN had negotiated for a first touch.<sup>10</sup> The parties did not, as required by the *Bureau Order*, conclude an FRA. In a subsequent conference call on April 4, 2011, IPSAN’s counsel announced he was withdrawing the cost estimate that IPSAN had submitted on September 8, 2009 and that he was continuing to pursue obtaining a second touch at the same cost as a first touch.<sup>11</sup> On April 7, 2011, IPSAN’s counsel sent a letter to Sprint and the TA Mediator stating:

Notwithstanding the Bureau’s recent *Memorandum Opinion and Order*, in the above-captioned matter, due to the extreme passage of time and the licensee’s desire to determine a means of resolving outstanding issues between the parties, IPSAN hereby withdraws its earlier, now obsolete estimates presented in this matter. IPSAN has begun the process of updating and modifying its estimates and expects to be able to present new estimates to Sprint Nextel by May 3, 2011.<sup>12</sup>

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<sup>4</sup> *Id.* at 15076 n.524.

<sup>5</sup> In industry usage, a “touch” refers to the modification of a mobile or portable radio as part of the rebanding process, typically through installation of software to change the radio’s channel configuration. With few exceptions, 800 MHz radios require at least one “touch” in order to be capable of operating on their new channel assignments under the revised 800 MHz band plan.

<sup>6</sup> *Bureau Order*, 26 FCC Rcd at 4069 ¶ 12.

<sup>7</sup> *Id.* at 4072 ¶ 33.

<sup>8</sup> TA Mediator Submission of Record, July 14, 2011, at 3. The predicate of the instant *Order* is the mediation record submitted by the TA. At the Bureau’s direction, the TA submitted the record without a Recommended Resolution. Accordingly, the instant *Order* is an *ab initio* review of the record for which no Statements of Position are required or will be accepted.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *Id.* at 4, quoting the IPSAN pleading “Withdrawal of Estimates” dated April 7, 2011.

5. On April 19, 2011, Sprint provided IPSAN with a draft FRA. The draft FRA reflected what the *Bureau Order* contemplated: the cost estimate previously developed by Sprint and IPSAN, but with the costs of a second touch removed from the estimate.<sup>13</sup> When asked by the TA Mediator whether IPSAN would execute the FRA presented by Sprint, IPSAN's counsel responded that the FRA was out of date and had been withdrawn by IPSAN.<sup>14</sup> IPSAN's counsel also represented that IPSAN had decided to replace Motorola as a vendor, was soliciting a new vendor, and thus could not execute an FRA that involved Motorola.<sup>15</sup> Later, IPSAN contended that it had decided to replace Motorola because Motorola had been engaged in activities "adverse to IPSAN," *i.e.*, "attempting to woo IPSAN's end users away from the IPSAN system to alternative systems, thereby reducing IPSAN's revenue source."<sup>16</sup> IPSAN provided no additional information on, or documentation of, this claim.

6. On May 5, 2011, having not received the revised estimate promised by IPSAN, the TA Mediator directed the parties to finalize and execute the draft FRA that Sprint had provided on April 19, 2011.<sup>17</sup> IPSAN's counsel refused to do so because Motorola was no longer IPSAN's vendor of choice.<sup>18</sup> Consequently, on May 26, 2011, the TA Mediator issued a show cause order requiring IPSAN to explain (1) why IPSAN's refusal to conclude an FRA with Sprint as ordered in the *Bureau Order* was consistent with IPSAN's rebanding obligations; and (2) whether any of IPSAN's costs associated with responding to the show cause order should be reimbursed as a reasonable and prudent rebanding expense.<sup>19</sup>

7. On June 3, 2011, IPSAN provided what it characterized as a "transition plan" whereby Advance Technology Consulting (ATC) would replace Motorola as vendor, at a cost of \$987,860, an amount \$139,625 greater than the \$873,770.50 allocated for Motorola in the April 19, 2011 Motorola-based cost estimate. Two weeks later, IPSAN presented what it characterized as a "corrected, revised cost estimate"<sup>20</sup> which reduced the amount allocated to ATC from \$987,860 to \$848,235. With that reduction, IPSAN represents that it's overall project cost estimate fell to \$1,342,258, an amount \$89,251.75 more than the April 19 Motorola-based overall project cost of \$1,261,756.50. Thus, IPSAN calculates that the overall project cost, using ATC as a vendor, is \$89,251.75 more than the April 19 Motorola-based estimate, *supra*, for completing the project without giving IPSAN's mobile data radios a second touch.<sup>21</sup> IPSAN notes that "nearly all of [the \$89,251.75] . . . is recovery of costs for legal services and consulting services expended on the duration of this project."<sup>22</sup>

8. On July 13, 2011, the TA Mediator forwarded the case record to the Bureau, making the following four observations. First, IPSAN submitted the original Motorola-based cost estimate on

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<sup>13</sup> *Id.* citing Sprint Response to Order to Show Cause, June 14, 2011.

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

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at Attachment A, A-3.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 5.

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

<sup>20</sup> IPSAN's Reply to Nextel's Response to Order to Show Cause at 18.

<sup>21</sup> *Id.* at Appendix, last page. (IPSAN failed to number the pages in the Appendix.)

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

September 8, 2009 and the parties thereafter negotiated the cost, reaching agreement on all but one item – the second touch. Second, IPSAN, in the course of negotiations, did not express doubt about whether the cost estimate it presented was “reasonable, prudent or compliant with the Commission’s minimum cost standard.”<sup>23</sup> Third, only after the Bureau ruled against IPSAN on the second touch issue did IPSAN assert that its cost estimate was obsolete and attempted to withdraw it. Fourth, IPSAN’s substitution of vendors is based on “generalized and undocumented claims of a conflict of interest on the part of Motorola.” In forwarding the record, the TA Mediator suggested that the Commission determine whether IPSAN’s actions conformed to the *Bureau Order*, and whether IPSAN had exhibited the “utmost good faith in transactions with Nextel, its designee, the Transition Administrator, other licensees or the Commission.”<sup>24</sup> The TA Mediator also suggested that the Bureau consider whether Sprint is liable for payment of any of IPSAN’s expenses incurred after release of the *Bureau Order*.<sup>25</sup>

## II. IPSAN’S POSITION

9. IPSAN contends that it has complied with the *Bureau Order* as evidenced by the fact that it did not file a petition for reconsideration. It submits that its only obligation under the order was to refrain from seeking a second touch to its radios and to attend a meeting with the TA mediator within 10 business days of the order’s release.<sup>26</sup> It claims that it was not obliged to timely enter into an FRA because the *Bureau Order* “did not order IPSAN to enter into a contract within ten days or twenty days or one year.”<sup>27</sup>

10. IPSAN questions the TA Mediator’s jurisdiction to issue the show cause order.<sup>28</sup> To the extent that the TA Mediator issued the show cause order because IPSAN has delayed the rebanding process, IPSAN argues that delay is endemic to the rebanding process, citing the fact that the Bureau took more than a year to issue the *Bureau Order*.<sup>29</sup> IPSAN also accuses the TA Mediator of threatening and coercing IPSAN when he advised IPSAN that the show cause order would issue unless it timely concluded an FRA with Sprint.<sup>30</sup>

11. IPSAN avers that it proceeded in good faith and in conformity to the *Bureau Order* when it revised its cost estimate and substituted vendors. It contends that if IPSAN were “found to have breached its obligation of bad faith (sic),” and was required to reband at its own expense, that the “rebanding effort would take years” because it would have to be accomplished using IPSAN’s limited internal staff resources.<sup>31</sup>

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<sup>23</sup> TA Mediation Submission of Record at 8.

<sup>24</sup> *Id.* quoting *800 MHz Report and Order*, 19 FCC Rcd at 15076 ¶ 201.

<sup>25</sup> *Id.*

<sup>26</sup> IPSAN’s Reply to Nextel’s Response to Order to Show Cause at 10-11.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.* at 14.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 16.

12. IPSAN denies that it acted in bad faith by withholding information from Sprint during the negotiations that occurred before this case initially was submitted to the Bureau for *de novo* review, and also denies that it withheld from Sprint, IPSAN's decision to change vendors.<sup>32</sup> It argues that Sprint should have known it would be necessary to replace Motorola because – with respect to IPSAN's efforts “to complete two touches for the price of one” – “[t]here is no way Motorola would have gone for that deal.”<sup>33</sup>

13. IPSAN asserts that the TA Mediator's issuance of the show cause order was premature because IPSAN acted in good faith following the issuance of the *Bureau Order*, *i.e.*, that it attempted to find a means whereby a second touch could be obtained at the same cost as a first touch, that it had to change vendors because Motorola had a conflict of interest, that its new vendor required time to assess the project and secure the services of subcontractors, and IPSAN required additional time to develop a revised cost estimate.<sup>34</sup>

14. IPSAN contends that the draft FRA submitted by Sprint – an FRA that did not include a second touch – was not a “significant event”<sup>35</sup> because Sprint “did not concurrently provide a PRW [Project Review Workbook] to explain the basis for the amounts within the draft FRA.”<sup>36</sup> It claims, therefore, that Sprint advanced the draft FRA to “gain a tactical advantage,”<sup>37</sup> and that the document “is wholly symbolic, not substantive.”<sup>38</sup>

15. Finally, IPSAN asserts that, with cooperation of the parties, an FRA could be concluded based on negotiation of IPSAN's latest cost estimate, which, IPSAN claims, does not include giving its mobile data radios a second touch.<sup>39</sup> It contends that the parties could “run through these numbers in no time since the LOE [Level of Effort] and methodology mirrors the original proposal approved by Sprint Nextel,”<sup>40</sup> and because there is “little difference between the original estimates and the revised estimates.”<sup>41</sup>

### III. SPRINT'S POSITION

16. Sprint contends that “IPSAN's conduct, including its refusal to execute the FRA and its injection of a new cost estimate with a new reconfiguration vendor at this stage warrants a finding of bad faith.”<sup>42</sup> Sprint claims that its draft FRA “that reflected the parties' extensive negotiations, but, in

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<sup>32</sup> *Id.* at 2-4.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 9-10.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Reply to IPSAN Order to Show Cause Reply Finding, filed June 27, 2011, at 8.

keeping with the directives of the *Bureau Order*, did not include funding for a second touch<sup>43</sup> should have been accepted and executed by IPSAN. Instead, Sprint asserts, IPSAN committed to revise its cost estimate and deliver a new draft by May 3, 2011.<sup>44</sup> When IPSAN failed to deliver the promised draft, the TA Mediator issued the show cause order.<sup>45</sup> Then, before the responses to the show cause order were due, IPSAN submitted another cost estimate which Sprint asserts was incomplete. In its response to the show cause order, IPSAN included yet another cost estimate, which Sprint claims is also incomplete because “it consists solely of broad categories of tasks and costs with no supporting detail or explanation regarding what IPSAN’s vendors actually intend to be doing.”<sup>46</sup>

17. Sprint submits that, if IPSAN’s cost estimate is accepted, IPSAN should be held to the estimate, barred from submitting change notice requests, and obligated to complete rebanding by a date certain.<sup>47</sup> Additionally, Sprint submits, IPSAN should not be reimbursed for any expenses incurred after issuance of the TA Mediator’s initial Recommended Resolution.<sup>48</sup> If IPSAN is allowed to substitute vendors, Sprint claims, all risks of the vendor’s inability to perform should reside with IPSAN.<sup>49</sup>

18. Sprint denies IPSAN’s claim that the Sprint cost estimate is incomplete because it was not accompanied by a PRW. Sprint asserts that it provided IPSAN with a PRW on April 16, 2010 with its Proposed Resolution Memorandum.<sup>50</sup> Sprint characterizes as “absurd” IPSAN’s contention that the TA Mediator exceeded his authority in issuing the show cause order.<sup>51</sup> Thereby, Sprint argues, the TA Mediator did not create a disputed issue, as IPSAN claims; he simply directed IPSAN to explain why it refused to execute an FRA as directed by the *Bureau Order*.<sup>52</sup> Sprint also denies that it is seeking a “windfall” in its relationship with IPSAN, such that Sprint would benefit were IPSAN required to reband at its own expense.<sup>53</sup>

19. Sprint represents that it is prepared to execute an FRA that is consistent with the *Bureau Order* and to pay the reasonable and prudent amounts necessary to reband IPSAN’s system. It submits, however, that it “is not willing to sit idly by while a licensee abuses the processes, wastes years of effort, and flaunts program rules and requirements, as well as orders of the Bureau, all because the licensee has determined that it would be more convenient simply to restart the entire process with a vendor unknown to the program.”<sup>54</sup>

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<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 6.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 7.

<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* at 5.

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

<sup>53</sup> *Id.* at 5-6.

<sup>54</sup> *Id.* at 5.

#### IV. DISCUSSION

20. The *Bureau Order* held that IPSAN was not entitled to a second touch of its mobile data radios and directed the TA to convene “a meeting of the Parties, no later than 10 business days from the release date of this *Memorandum Opinion and Order* to conclude a Frequency Reconfiguration Agreement consistent herewith.”<sup>55</sup> IPSAN argues that all the *Bureau Order* required of IPSAN was to attend a meeting, and that the *Bureau Order* did not impose a requirement on IPSAN to conclude an FRA, “within ten days or twenty days or one year.”<sup>56</sup>

21. We reject IPSAN’s argument as sophistry. The only rational construction of the Bureau’s order is that IPSAN was to meet with Sprint and timely conclude an FRA by deleting from the Motorola-based cost estimate, the cost of providing a second touch to IPSAN’s mobile data radios. That was an exercise in arithmetic which did not include “updating” the cost estimate, attempting to get a second touch for the same estimated cost as a first touch, soliciting a new vendor, or IPSAN’s other machinations since the *Bureau Order* was released on March 31, 2011.

22. We reject IPSAN’s challenge to the jurisdiction of the TA Mediator to issue a show cause order to IPSAN.<sup>57</sup> IPSAN has cited no authority for its challenge. In the *800 MHz Report and Order* the Commission analogized the role of the TA to that of a special master in judicial proceedings.<sup>58</sup> It is routine for special masters to issue orders to show cause,<sup>59</sup> and we find the TA’s issuance of such an order to be appropriate in light of IPSAN’s disregard of the *Bureau Order*.

23. We likewise reject IPSAN’s assertion that it was justified in changing vendors because Motorola allegedly had a conflict of interest by trying to “woo” IPSAN’s users to other systems, thereby diminishing IPSAN’s revenues.<sup>60</sup> The assertion is lacking in detail, undocumented and uncorroborated. In any event, we do not require IPSAN to employ any particular vendor for reconfiguration of its system.<sup>61</sup> IPSAN, however, is only entitled to be paid the minimum reasonable cost of rebanding.<sup>62</sup> The record here establishes that the Motorola-based April 19, 2011 cost estimate is the lowest minimum reasonable cost proposal. Should IPSAN elect to employ another, more costly vendor, it may do so.

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<sup>55</sup> *Bureau Order*, 26 FCC Rcd at 4072 ¶ 33.

<sup>56</sup> IPSAN’s Reply to Nextel’s Response to Order to Show Cause at 11.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *800 MHz Report and Order*, 19 FCC Rcd at 14976, 15071 ¶¶ 8, 194; *see also*, Manassas City Public Schools and Sprint Nextel, *Memorandum Opinion and Order*, 21 F.C.C.R. 11930, 11937 n.59 (PSHSB 2006).

<sup>59</sup> *See, e.g., Simanski v. Secretary of Health and Human Services*, 96 Fed.Cl. 588, 589 n.1 (2010); *Staley v. State*, 12 So.3d 778 (1<sup>st</sup> DCA, 2009); *Rodriguez v. Secretary of Health and Human Services*, 91 Fed.Cl. 453, 458 (2010); *Boley v. Secretary of Health and Human Services*, 82 Fed.Cl. 407, 410 (2008).

<sup>60</sup> TA Mediator Submission of Record, July 14, 2011, at Attachment A, A-3.

<sup>61</sup> *See State of Indiana and Sprint Nextel Corp., Memorandum Opinion and Order*, 26 FCC Rcd 1023, 1032 ¶ 33 (PSHSB 2011).

<sup>62</sup> *Id.*

Sprint's obligation, however, is limited to paying only the minimum reasonable cost of rebanding IPSAN's system – a cost established by the Motorola-based April 19, 2011 cost estimate.<sup>63</sup>

24. It would be unreasonable, however, to foreclose IPSAN from submitting change notice requests, as Sprint proposes.<sup>64</sup> Sprint has failed to show why the Commission's change notice policy is not adequate to protect against potential abuse by IPSAN. That said, however, IPSAN is placed on notice that the change notice policy will strictly be adhered to.<sup>65</sup> Moreover, the filing of change notice requests not in accord with the Commission's change notice policy may be considered as evidence of bad faith.

25. Sprint contends that "all costs accrued by IPSAN following the issuance of the Mediator's prior Recommended Resolution should not be reimbursable by Nextel."<sup>66</sup> We agree, but only to the extent that costs incurred by IPSAN in mediation following release of the *Bureau Order*, including, without limitation, costs of pleadings responsive to the TA Mediator's show cause order, and costs associated with any pleadings filed subsequent to the release of the instant *Order*, and directed to the instant *Order*, are not reimbursable. To hold otherwise would be to award IPSAN for its failure to adhere to the directives of the *Bureau Order*.

26. Sprint also asks that it be made clear that costs associated with "vendor failure or mismanagement" are not the proper subject of change order requests and that IPSAN be required to conform to the rebanding schedule set out in the Motorola Statement of Work.<sup>67</sup> We agree with Sprint that, because licensees are free to choose their own vendors, they should be responsible if the chosen vendor is not qualified and competent. Indeed, if a licensee chooses a vendor without exercising due diligence in vetting the vendor's qualifications, it is reasonably foreseeable that the vendor may not perform adequately.<sup>68</sup> We decline, however, to hold IPSAN to the rebanding schedule in the Motorola Statement of Work and, instead, require that IPSAN complete rebanding of its system no later than July 31, 2012. If rebanding is not completed by that date, IPSAN may request a waiver of the deadline. Any such request for waiver shall conform strictly to the requirements of Section 1.925 of the Commission's

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<sup>63</sup> See Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9821 (2007) ("Sprint should not propose to pay and the TA should not approve payment of higher costs when a lower-cost alternative is clearly available that would provide the licensee with comparable facilities.")

<sup>64</sup> Reply to IPSAN Order to Show Cause Reply Filing at 6.

<sup>65</sup> The Bureau recently re-articulated the change notice policy in Broward County, Florida and Sprint Nextel, *Memorandum Opinion and Order*, 26 FCC Rcd 7635, 7637 ¶6 (PSHSB 2011): "First, as a general matter, 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. Second, costs incurred by a licensee in excess of those authorized in a Planning Funding Agreement (PFA) or FRA are at the licensee's risk until a Change Notice is submitted and approved. Third, a licensee may not use the Change Notice process to recover costs that were reasonably foreseeable during PFA or FRA negotiations but were not raised in negotiations, or that were considered and rejected. Fourth, costs sought in a Change Notice must meet the Commission's Minimum Necessary Cost standard." (Footnotes omitted.) See also 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).

<sup>66</sup> Reply to IPSAN Order to Show Cause Reply Filing at 6.

<sup>67</sup> *Id.* at 7-8.

<sup>68</sup> Costs requested in a change order, which costs were "reasonably foreseeable during PFA or FRA negotiations" will not be approved. See *supra* n.65.



rules,<sup>69</sup> and will be granted if, and only if, failure to meet the deadline is due to factors beyond IPSAN's control. Vendor failure will not be deemed a factor beyond IPSAN's control.

27. Sprint submits that IPSAN's disregard of the *Bureau Order* and its actions subsequent to release of the *Bureau Order* warrant a finding of bad faith.<sup>70</sup> We hold any determination of IPSAN's conformance to its good faith obligations in abeyance for 20 business days from the release date of the instant *Order*. If, by that date, IPSAN has not executed an FRA with Sprint, for reasons not attributable to delay by Sprint, we will issue an order addressing the good faith issue.

## V. DECISION

28. IPSAN has advanced no credible reason for not conforming to the *Bureau Order's* directive that it timely conclude an FRA with Sprint for the rebanding of IPSAN's mobile data system. IPSAN's temporizing has delayed the Commission's rebanding initiative such that, as Sprint points out, IPSAN "is the only public safety entity in NPSPAC Region 13 which has yet to execute an FRA."<sup>71</sup> We will not tolerate further delay. Unless IPSAN concludes an FRA within 20 business days of the release date of this *Order*, it risks our finding that IPSAN has breached its duty of "utmost good faith"<sup>72</sup> with the concomitant finding that IPSAN must reband its system, at its own expense, by July 31, 2012, or be subject to the penalties specified in the *800 MHz Report and Order*, including, but not limited to, loss of license and enforcement action.<sup>73</sup>

29. To facilitate compliance with the instant *Order*, we are requiring Sprint and IPSAN, under the auspices of the TA Mediator, to negotiate each business day, for a minimum period of 3 hours per day, to reach agreement on, and execute, an FRA.<sup>74</sup> A party's agent with the authority to bind his or her principal shall be present during each negotiation session. The cost of rebanding, as reflected in the FRA, shall not exceed the overall cost of rebanding IPSAN's system, as contained in the Motorola-based April 19, 2011 cost estimate.

## VI. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, pursuant to the authority of 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, that within 5 business days of the release date hereof, Sprint Nextel Corp. and the Illinois Public Safety Agency Network SHALL MEET, under the auspices of the 800 MHz Transition Administrator Mediator, a minimum of 3 hours per business day for a maximum of 20 business days

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<sup>69</sup> 47 C.F.R. § 1.925.

<sup>70</sup> Reply to IPSAN Order to Show Cause Reply Filing at 8.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *800 MHz Report and Order*, 19 FCC Rcd at 15077 and n.254.

<sup>73</sup> See Wireless Telecommunications Bureau Announces Procedures for *De Novo* Review in the 800 MHz Public Safety Proceeding, *Public Notice*, 21 FCC Rcd 758 (WTB 2006) ("Parties are cautioned that breach of the good faith requirements imposed on all parties by the *800 MHz Report & Order* may subject them to involuntary modification of their license, relegation to secondary status, monetary forfeiture and other enforcement action including, but not limited to, loss of license.") *Id.* citing *800 MHz Report and Order*, 19 FCC Rcd at 15077.

<sup>74</sup> The negotiation shall begin no later than 5 business days following the release date of this *Order*.

from the release date hereof, to negotiate, conclude and execute a Frequency Reconfiguration Agreement consistent with the instant *Order*.

31. IT IS FURTHER ORDERED, that the overall cost contained in the Frequency Reconfiguration Agreement, *supra*, SHALL NOT EXCEED the cost of the Motorola-based April 19, 2011 cost estimate.

32. IT IS FURTHER ORDERED, that all negotiations shall be conducted by, or in the presence of, agents of, respectively, Sprint Nextel Corporation and the Illinois Public Safety Agency Network, which agents must have the authority to bind their principals.

33. 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  
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