

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

In the Matter of	)	
	)	
State of Indiana	)	WT Docket No. 02-55
and	)	
Sprint Nextel Corporation	)	
	)	
Mediation No. TAM-50047	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 2, 2011**

**Released: February 2, 2011**

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

**I. INTRODUCTION**

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 between the State of Indiana (Indiana or the State) and Sprint Nextel Corporation (Sprint) (collectively “Parties”) regarding a Change Notice submitted by the State.<sup>1</sup> For the reasons discussed below, we resolve the dispute in Sprint’s favor.

**II. BACKGROUND**

2. Indiana operates a trunked public safety radio system with approximately 145 sites and more than 49,000 mobile and portable radios serving over 1,500 agencies.<sup>2</sup> The *800 MHz R&O* 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.<sup>3</sup> The FRA must provide for retuning of the licensee’s system to its new channel assignments at Sprint’s expense, including the expense of retuning or replacing the licensee’s radio units as required.<sup>4</sup> Sprint must provide the rebanding licensee with “comparable facilities” on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.<sup>5</sup> If the parties cannot reach agreement on a FRA, the case is referred to mediation, and issues that cannot be resolved in mediation are, in turn, referred to the Public Safety and Homeland Security Bureau for *de novo* review.<sup>6</sup>

3. After a mediation that began in 2006, the Parties executed an FRA which the TA approved on June 16, 2009.<sup>7</sup> The FRA covers the State’s agreed-upon rebanding costs of approximately

<sup>1</sup> Recommended Resolution, Mediation No. TAM-50047 at 3-4 (March 6, 2009) (RR).

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

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

<sup>4</sup> *800 MHz Report and Order*, 19 FCC Rcd at 14977 ¶ 11.

<sup>5</sup> *Id.* at 14986 ¶ 26.

<sup>6</sup> *Id.* at 15077 ¶ 201.

<sup>7</sup> RR at 3.

\$27 million. After the FRA was executed, however, the State claimed that Sprint was responsible for paying additional costs, *i.e.*,

- a \$164,907.13 Change Notice for retuning 1,073 new radios that the State deployed without adding replacement frequencies;<sup>8</sup>
- \$100,000 for its vendor to file license applications for the State's reconfigured system.<sup>9</sup>

### III. DISCUSSION

4. We evaluate the State's Change Notice claims against two facets of Commission guidance in this area. 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.<sup>10</sup> 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 were considered and rejected.<sup>11</sup>

5. We evaluate the licensing fee dispute against the Commission's *Memorandum Opinion and Order* that assigns to licensees, the burden of establishing that the funding they request from Sprint is for equipment and services that are reasonable and prudent<sup>12</sup> in light of the overall goals of band reconfiguration, nationwide<sup>13</sup>

#### A. Radio retuning

6. The Parties executed a "Subscriber Early Deployment/Frequency Reconfiguration Agreement" (FRA)<sup>14</sup> on June 16, 2009. Between June 17, 2009 and July 30, 2009, Indiana placed 1073 radios into service without programming the post-rebanding frequencies into the radios.<sup>15</sup> On April 8, 2010, the State submitted a Change Notice requesting that the FRA be amended to add the cost of giving the already-deployed radios a "first touch," *i.e.*, retrieving the radios from their users and adding the post-rebanding frequencies.<sup>16</sup> Sprint declined the Change Notice, contending that the post-rebanding

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* The State seeks \$100,000, while Sprint has offered \$51,590, resulting in a disputed amount of \$48,410.

<sup>10</sup> 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*).

<sup>11</sup> *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." 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>12</sup> *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198 (2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 at 25152 ¶ 71 (2004).

<sup>13</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 ¶ 8 (2007). See also, City of Hartford, CT and Sprint Nextel Corporation, *Memorandum Opinion and Order*, WT Docket No. 02-55, 25 FCC Rcd 12329 (2010); County of Hinds, MS and Sprint Nextel Corporation, *Memorandum Opinion and Order*, WT Docket No. 02-55, 25 FCC Rcd 12336 (2010).

<sup>14</sup> Subscriber Early Deployment agreements are often concluded between Sprint and rebanding licensees in order to accelerate rebanding by retuning or replacing radios while negotiations are ongoing for retuning of licensees' infrastructure.

<sup>15</sup> RR at 4.

frequencies should have been added to the radios before they were deployed, and that Indiana had long been on notice of the need to do so.<sup>17</sup>

7. *Indiana's Position.* Indiana relies on contract theory to excuse its not adding post-rebanding frequencies to the radios before they were deployed. First, it argues that the FRA is the only document that may be considered in evaluating Indiana's obligation to program the post-rebanding frequencies into the radios before they were deployed. Extrinsic documents cannot be considered, Indiana argues, because they are barred by the parol evidence rule<sup>18</sup> and by the merger clause in the FRA which states that the FRA reflects the entire understanding of the Parties.<sup>19</sup> Second, relying only on the FRA, Indiana claims that the document contains no binding undertaking by Indiana to begin deploying radios equipped with the post-rebanding frequencies at any particular time. It notes that the FRA states that "as of the Effective Date, the Incumbent may begin the reconfiguration of its subscriber units."<sup>20</sup> Focusing on the word "may," Indiana argues that the quoted sentence is merely precatory, and thus did not require Indiana to begin programming post-rebanding frequencies into its radios as of the effective date of the FRA, *i.e.*, it did not constitute a "warranty"<sup>21</sup> by the State that it would furnish radios equipped with the post-rebanding frequencies at any particular time.

8. Indiana also submits that, even if documents extrinsic to the FRA are considered, they establish no duty on the State's part to begin furnishing radios equipped with the post-rebanding frequencies as of the effective date of the FRA. Specifically, Indiana argues that one extrinsic document – the Transition Plan – contains only an aspirational provision relating to furnishing radios with post-rebanding frequencies.<sup>22</sup> The Transition Plan – which is referenced in the FRA, but may or may not have been attached to Indiana's signature copy of the FRA<sup>23</sup> – states:

What the State anticipates is that following the State's entrance into an agreement with Sprint Nextel, all additional radios to be operated on the IPSC system will be programmed both with the existing channels and the replacement channels, therefore avoiding the need to retune these devices until the second touch.<sup>24</sup>

Focusing on the words "anticipates" and "following," Indiana argues that "anticipates" creates no duty to perform, and that "following" should be construed to mean "at any time after," *i.e.*, that Indiana's

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<sup>16</sup> See Letter dated June 17, 2010 from R. Schwaninger, Esq. to M. Sherman.

<sup>17</sup> Proposed Resolution Memorandum of Nextel Communications, Inc., filed August 6, 2010 at 12-16 (Sprint PRM)

<sup>18</sup> See, e.g., 13 Indiana Law Encyclopedia, Evidence, § 106 (2001).

<sup>19</sup> See Proposed Resolution Memorandum of the State of Indiana, filed July 30, 2010, Appendix at 16, ¶ 28 (Indiana PRM).

<sup>20</sup> Indiana PRM at 7 (emphasis in original).

<sup>21</sup> *Id.* at 9.

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

<sup>23</sup> There is an unresolved conflict between the Parties as to whether the Transition Plan – listed in the FRA as an attachment – was physically appended to the FRA that Indiana signed. See RR at 5 n.23. Given our disposition of this case, the question of whether the Transition Plan was physically attached to the FRA is not decisionally significant. See State of Indiana's Reply to Nextel's Proposed Resolution Memorandum at 6-7 (Indiana Reply PRM).

<sup>24</sup> Indiana PRM, Appendix at 48 (emphasis supplied).

obligation to furnish post-rebanding equipped radios did not arise immediately after the FRA was executed.<sup>25</sup>

9. Indiana urges that the FRA be interpreted to give the State a reasonable time – six weeks after the effective date of the FRA – to “turn the ship,” *i.e.*, to convey the need for a first touch to the State’s independent radio shops and the over 1,000 end user agencies it must coordinate.<sup>26</sup> Finally, the State claims that its willingness to lessen the period covered by the Change Notice from ten weeks to six weeks is evidence that it “has been entirely reasonable.”<sup>27</sup>

10. *Sprint Position.* Sprint contends that it informed the State as early as June, 2007, and again, in May, 2008,<sup>28</sup> that the post-rebanding frequencies should be programmed into the radios before they were placed in service and, therefore, that Sprint is not responsible for giving the already-deployed radios a first touch.<sup>29</sup> Sprint argues that the Transition Plan, *supra*, is further evidence that Indiana was aware of – and should have foreseen – the need to program the post-rebanding frequencies into the radios before they were deployed.

11. Sprint also points to a supplement to the Transition Plan – a supplement prepared by Indiana<sup>30</sup> – which states that “[t]he State will commence installation of both sets of frequencies, replaced and replacement, based on the date that the parties materially agree on the terms of the FRA.” Sprint claims that the Parties materially agreed on the terms of an FRA on February 25, 2009 and, thus, that any radios deployed after that date should have had the post-rebanding frequencies programmed into them.<sup>31</sup>

12. Sprint also notes that the parties specifically negotiated which radios would be provided with a first touch, and at what cost, and provided for them in the FRA.<sup>32</sup> Sprint also contends that the factors cited by Indiana for its delay in ensuring that deployed radios had the post-rebanding frequencies installed – including the State’s interpretation of its obligations under the FRA – are irrelevant to the dispositive question of whether the State should have foreseen the need to provide the radios programmed with the post-rebanding frequencies before it deployed them.<sup>33</sup> Addressing the State’s reasonableness claim, Sprint claims that it was unreasonable for the State to delay, until July, 2009 – five months after the Parties reached material agreement on the FRA.<sup>34</sup> – to begin programming post-rebanding frequencies into radios before they were deployed.<sup>35</sup> To the extent that the delay was attributable to the State’s vendor, Sprint argues that the vendor was chosen by the State which is derivatively liable for the vendor’s inaction.<sup>36</sup> Sprint dismisses the State’s merger clause and parol evidence arguments because the

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<sup>25</sup> Indiana PRM at 9-10 *citing* Webster’s New World Dictionary (for the definition of “following”).

<sup>26</sup> Indiana PRM at 16.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> Sprint PRM at 21.

<sup>29</sup> *Id.* at 18.

<sup>30</sup> Indiana “place[d] [the supplement to the Transition Plan] in the record to assist both Sprint Nextel and the Transition Administrator in any future inquiry regarding the estimates.” Sprint PRM at 14, n.24.

<sup>31</sup> *Id.* At 14, n.23.

<sup>32</sup> Sprint PRM at 13-14.

<sup>33</sup> Statement of Position of Nextel Communications, Inc., filed September 27, 2019 at 5. (Sprint SOP).

<sup>34</sup> Sprint PRM at 17, 21.

<sup>35</sup> RR at 11.

<sup>36</sup> Sprint PRM at 21-22.

Transition Plan was part of the FRA, and because the Transition Plan supplement was provided by the State, which cannot now be heard to disclaim its provisions.<sup>37</sup>

13. *Mediator Position.* The TA Mediator recommends that Commission find that the need to program post-rebanding frequencies into the radios was foreseeable and, therefore, that Sprint is not liable for payment of the services included in the Change Notice request.<sup>38</sup>

14. The TA Mediator finds that the need to program post-rebanding frequencies into the radios was discussed during the negotiations that led up to the FRA, and that the State clearly knew that the execution of the FRA and the commencement of programming radios with post-rebanding frequencies were linked.<sup>39</sup> That position is reinforced, the TA Mediator finds, by the fact that – before the FRA was finalized – Sprint asked the State to begin deploying radios with the post-rebanding frequencies included.<sup>40</sup> The State refused, insisting that it would not deploy radios programmed with the post-rebanding channels until the FRA was executed by both Parties.<sup>41</sup> Thus, at the time of the Sprint request, the State knew it was foreseeable that radios deployed after execution of the FRA would have to be programmed with the post-rebanding channels included.

15. The TA Mediator also notes that the State-prepared Supplement to the Transition Plan (Supplement) states that “[a]s soon as the parties enter into an FRA, the State will load both sets of channels . . . into all radios entering upon the network.” The Supplement also contained a commitment to provide radios with the post-rebanding frequencies installed even before the FRA was executed, *i.e.*, “[t]he State will commence installation of both sets of frequencies . . . based on the date that the parties materially agree in the terms of the FRA.”<sup>42</sup> The TA Mediator dismisses the State’s claim that the consideration of the Supplement was barred by the parol evidence rule and the merger provisions of the FRA, finding that the State submitted the Supplement intending that Sprint rely on it, and because the State’s counsel “explicitly stated that the Supplement ‘is placed in the record to assist both Sprint Nextel and the Transition Administrator in any future inquiry regarding the estimates.’”<sup>43</sup>

16. The TA Mediator discounts the State’s argument that six weeks was a reasonable time – after execution of the FRA – for the State to inform user agencies that radios should be deployed with the post-rebanding frequencies installed.<sup>44</sup> Because the Parties reached pre-contract agreement in February, 2009, the TA Mediator found that the State had almost four months to prepare before the FRA was executed – ample time within which to notify user agencies.<sup>45</sup>

17. In sum, the TA Mediator concludes that the time when radios were to be deployed programmed with post-rebanding channels was specifically negotiated by the Parties and memorialized in the Transition Plan and the Supplement and that the State did not comply with the schedule which it,

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<sup>37</sup> Sprint PRM at 19.

<sup>38</sup> RR at 11.

<sup>39</sup> *Id.* at 12.

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

<sup>41</sup> RR at 12. *See* Indiana PRM at 8-9.

<sup>42</sup> RR at 12.

<sup>43</sup> RR at 13 *citing* Nextel Communications Reply to State of Indiana’s Proposed Resolution Memorandum, Appendix H at 55 (Sprint Reply).

<sup>44</sup> RR at 13.

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

itself, established.<sup>46</sup> Accordingly, and in reliance on the Bureau's *Public Notice Providing Guidance*, the TA Mediator recommends we find that Sprint is not obligated to pay for a first touch to the radios that the State deployed – after the execution of the FRA – without the post-rebanding channels installed.<sup>47</sup>

**B. Licensing Fees:**

18. The second dispute is over the cost of services for filing license modification applications once rebanding of Indiana's system is completed. Sprint claims it routinely offers to perform this service for licensees at no cost.<sup>48</sup> Indiana declined Sprint's offer and requested \$200,200 for its vendor, EMR, to file the modification applications.<sup>49</sup> After Sprint protested the \$200,200 as excessive for what is characterized as a clerical task of data entry, Sprint offered \$100,000 for EMR's services.<sup>50</sup> Indiana declined Sprint's counteroffer.<sup>51</sup> Sprint then obtained a quotation from the Enterprise Wireless Association (EWA) to perform the work for \$51,590.<sup>52</sup>

19. *Indiana Position:* Indiana now argues that \$100,000 is reasonable for the license modification work because EMR was selected as the general contractor for the rebanding project using a competitive state bidding process.<sup>53</sup> It notes that it has paid EMR a comparable fee for the same work in connection with other, non-rebanding, projects.<sup>54</sup> It contends that allowing Sprint to set a price for the work would be a *de facto* usurpation of the State's right to choose a vendor which it trusts.<sup>55</sup> Indiana argues that its new offer should be deemed reasonable because it is the same as Sprint's original counteroffer of \$100,000.<sup>56</sup> Indiana also claims that EMR is being treated unfairly compared to Motorola.<sup>57</sup>

20. *Sprint Position.* Sprint acknowledges that the State has the right to choose its own vendor. It points out, however, that under the Commission's Minimum Cost Standard,<sup>58</sup> the State has the burden of demonstrating that claimed costs are reasonable under the circumstances.<sup>59</sup> Sprint emphasizes that filing license modification applications is a clerical task requiring no engineering or other specialized

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

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

<sup>48</sup> Sprint SOP at 9.

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

<sup>50</sup> RR at 9.

<sup>51</sup> Sprint PRM at 7.

<sup>52</sup> RR at 9-10.

<sup>53</sup> Indiana PRM at 17. It is unclear from the record whether the license modification services were included in EMR's bid, or whether EMR later submitted a no-bid quotation for the work.

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

<sup>55</sup> *Id.* at 20.

<sup>56</sup> *Id.* at 22.

<sup>57</sup> *Id.* at 23 (claiming that Motorola is paid differently, not required to give discounts and not required to publish costs by "secret" agreement with Sprint Nextel).

<sup>58</sup> Improving Public Safety Communications in the 800 MHz Band, *Memorandum Order and Opinion*, 22 FCC Rcd 9818, 9820, ¶11 (2007)(*Rebanding Cost Clarification Order*).

<sup>59</sup> Sprint PRM at 10.

expertise<sup>60</sup> and that EMR brings no particular skill to the process.<sup>61</sup> Sprint argues that Indiana has not met its burden of showing that the data entry task would be accomplished at minimum cost.<sup>62</sup> It submits that the State has neither disputed that EWA is just as qualified to perform the license modification work, nor demonstrated why EMR's performance of the same task should cost nearly twice as much.<sup>63</sup> Sprint submits that EWA's price is a fair market rate.<sup>64</sup> It insists that it is not forcing the State to accept the lowest offer for performing the work inasmuch as the lowest offer is Sprint's undertaking to input the license modification data into the Commission's database at no cost to the State.<sup>65</sup> Sprint concedes that there have been instances in the past in which it has paid a licensee for EMR's services at rates comparable to that sought by the State here. It avers, however, that it did so only under protest and because fewer licenses were involved, making EMR's services a *de minimis* part of the overall project cost.<sup>66</sup>

21. *TA Mediator's Position.* The TA Mediator recommends that the Commission find that the State has failed to demonstrate that its request satisfies the Commission's Minimum Cost Standard and, therefore, recommends that that the State be allowed only \$51,590 for license modification work – the amount quoted by EWA.<sup>67</sup>

22. The TA Mediator concludes that “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>68</sup> The TA Mediator notes that the State has neither disputed that filing license modification applications is a clerical task, nor demonstrated that EWA is not competent to do the work.<sup>69</sup> The TA Mediator asserts that Indiana's right to choose its own vendor does not excuse it from complying with the Commission's Minimum Cost Standard.<sup>70</sup> The State's “trust” in EMR and the State's payment of EMR's fees in the past, the TA Mediator finds, do not excuse the State from meeting its burden to show that vendors' fees are reasonable.<sup>71</sup>

#### IV. DECISION

23. We agree with the TA Mediator's analysis and recommendations. Indiana has failed to meet its burden of proof to show that its rebanding project is being carried out at the minimum reasonable cost.

24. *Equipping Radios with the Post-Rebanding Frequencies.* It is clear from this record that Indiana foresaw, or should have foreseen, as early as June, 2007, that all radios deployed after execution

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<sup>60</sup> *Id.* at 6.

<sup>61</sup> *Id.* at 7-8.

<sup>62</sup> *Id.* at 10.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 8 n. 18.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> *Id.* at 5.

<sup>67</sup> RR at 15.

<sup>68</sup> *Id.* at 14 quoting *Rebanding Cost Clarification Order*, 22 FCC Rcd 9818, 9820, ¶ 6.

<sup>69</sup> RR at 15.

<sup>70</sup> *Id.*

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

of the FRA on June 26, 2009 would have to be equipped with both the pre-rebanding and post-rebanding frequencies programmed into them, and that failure to do so would have serious cost consequences for Indiana's rebanding project.<sup>72</sup> Indiana had ample time – almost four months – to prepare itself and its users to so deploy the radios.<sup>73</sup> Having failed to do so, it incurred a cost inconsistent with the Commission's Minimum Cost Standard, *i.e.*, the unnecessary and foreseeable cost of retrieving the radios from the users to give the radios an otherwise-unneeded first touch.<sup>74</sup>

25. The State's argument that the FRA did not require it to provide radios with the post-rebanding frequencies installed once the FRA was executed is unavailing. The State knew it was required to do so. Indeed, it had agreed to provide radios with the post-rebanding frequencies installed once the Parties had reached material agreement on the FRA – an event that occurred well before the FRA was executed.<sup>75</sup> In short, the State should have been, but was not, prepared to deploy only radios with the post-reconfiguration frequencies installed immediately after execution of the FRA. Instead, it continued to deploy radios without those frequencies installed for six weeks following the execution of the FRA.<sup>76</sup>

26. Equally unavailing is the legal argument that we are foreclosed from looking beyond the four corners of the FRA in deciding this case. The Commission's standard for the allowance of costs requested in a Change Notice request goes to an objective issue of record fact: should, or should not, a licensee have foreseen the need for the change in project cost? In answering that pivotal question, we are not deciding the enforceability of the FRA as a contract. That function is committed to other fora wherein the parol evidence rule, invoked by the State, arguably might come into play. Instead, in deciding the instant foreseeability issue, we look to the entire record, where we find evidence that the Parties contemplated that radios deployed after the FRA was signed (or, earlier, after the parties reached material agreement on the FRA) would be programmed with the post-rebanding channels. The record includes the Transition Plan and the Supplement thereto which both confirm our conclusion.<sup>77</sup> These documents were prepared by, and, therefore, are chargeable to, the State. Indiana's argument that Indiana contract law bars us from considering these documents is vitiated by the fact that Indiana's counsel explicitly entered the Supplement into the record for the stated purpose of "further inquiry."<sup>78</sup>

27. In sum, the record evidence shows that:

- as early as June, 2007, Indiana was aware that newly-deployed radios should be equipped with the post-rebanding frequencies installed.
- Indiana committed to deploy radios equipped with the post-rebanding channels installed once the FRA was executed.
- Indiana had ample time before execution of the FRA to plan and arrange for the deployment of radios with the post-rebanding frequencies installed.

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<sup>72</sup> Sprint PRM at 18.

<sup>73</sup> RR at 12.

<sup>74</sup> The Commission has stated that "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).

<sup>75</sup> RR at 2.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> RR at 13.

<sup>78</sup> *Id.* at 12-13.



- for 43 days following execution of the FRA the State deployed at least 1,073 radios without the post-rebanding frequencies installed.
- it was foreseeable at the time that the 1,073 radios would later have to be retrieved from their users and reprogrammed to add the post-rebanding frequencies at a cost of \$164,907.13.
- Sprint was in no way responsible for the State's failure to deploy radios equipped with the post-rebanding channels.

28. It may be, as Sprint speculates, that Indiana's failure to supply the radios with the post-rebanding frequencies installed was attributable to EMR, Indiana's "general contractor" for the rebanding project.<sup>79</sup> We agree with Sprint, that, because Indiana chose EMR as its vendor, Indiana is responsible for EMR's action or inaction, in deploying radios without the post-rebanding frequencies installed.<sup>80</sup>

29. The record forces the conclusion that the need to furnish new radios with the post-rebanding channels installed in them was foreseeable by Indiana on more than one occasion, and that Indiana - on clear notice of its obligation to deploy radios programmed with the post-rebanding frequencies - nonetheless failed to do so in the case of 1,073 radios. Accordingly, we find for Sprint on this issue and disallow the State's claim for \$164,907.13 to provide the radios with a first touch that otherwise would have been unnecessary had the State deployed the radios with the post-rebanding frequencies installed, as it agreed to do.

30. *Filing License Modification Applications.* Once an 800 MHz system is rebanded, the licensee must file applications for modification of license to delete the originally authorized frequencies and add the post-rebanding frequencies.<sup>81</sup> The application process involves accessing the Commission's Universal Licensing System and entering data. Typically, only the new frequency information need be entered - and the old frequency information deleted - although some few rebanded facilities have changes in other parameters that must be included. The task is entirely ministerial - no calculations or technical judgment are required to enter the data. Many rebanding licensees have elected to have the modification applications filed by Sprint at no charge to the licensee - a service offered by Sprint but declined by Indiana.<sup>82</sup> Others have performed the work themselves or retained an outside company. Here, Indiana elected to engage EMR to perform the work at a cost of \$200,200.<sup>83</sup> When Sprint objected to EMR's \$200,200 charge, the State reduced it to \$100,000.<sup>84</sup> Sprint, however, obtained a quote from the Enterprise Wireless Alliance (EWA) to do the work for \$51,590 and agrees to pay that amount.<sup>85</sup>

31. The Commission requires the State to certify that "the funds requested for reconfiguration are the minimum necessary to provide facilities comparable to those presently in use."<sup>86</sup> The Commission has clarified this standard, saying that "Sprint should not propose to pay and the TA

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<sup>79</sup> Sprint PRM at 14.

<sup>80</sup> *Id.* at 15.

<sup>81</sup> *See* 47 C.F.R. § 1.929.

<sup>82</sup> Sprint SOP at 9.

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

<sup>84</sup> *Id.*

<sup>85</sup> RR at 9-10.

<sup>86</sup> *800 MHz Order*, 19 FCC Rcd at 15074 (¶ 198).

should not approve payment of higher costs when a lower-cost alternative is clearly available that would provide the licensee with comparable facilities.”<sup>87</sup>

32. The Commission’s 800 MHz orders also place the burden on licensees to establish that the funding they request from Sprint is for equipment and services that are reasonable and prudent<sup>88</sup> in light of the overall goals of band reconfiguration, nationwide.<sup>89</sup> Thus, Indiana has the burden of proof to show that \$100,000 is necessary for the license modification work. It has not questioned EWA’s ability to perform the work, or the reasonableness of EWA’s quotation, but argues that it is entitled to use the contractor of its choice – EMR – at nearly twice the price quoted by EWA because it has employed EMR previously for similar work at a similar cost and trusts the company.<sup>90</sup>

33. In this case, we find that Indiana has not met its burden of proof under the Commission’s Minimum Cost Standard because a “lower cost alternative is clearly available” that would provide Indiana with service comparable to that which would be provided by EMR. It is significant to our decision that the required work is ministerial and clerical and that the providers of such services are essentially fungible. We do not, however, require Indiana to use EWA or any similar provider. We hold only that EMR’s initial \$200,200 quote and its later \$100,000 quote are excessive as evidenced by the fact that EWA would do the work for a little more than one-half the price quoted by EMR.<sup>91</sup> The fact that the State may previously have paid EMR a comparable price does not establish that EMR’s quotes are reasonable. Indiana has stated that it “trusts” EMR,<sup>92</sup> but has neither stated the basis of that trust nor established that other – lower cost – providers are untrustworthy. If the State wishes to use EMR to enter the data necessary to modify its licenses, it may do so. We hold only that Sprint’s responsibility for that work is limited to \$51,590.

## V. ORDERING CLAUSES

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

35. IT IS FURTHER ORDERED, that within fifteen working days of the release date of this *Memorandum Opinion and Order*, the Parties shall meet and negotiate a Frequency Reconfiguration Agreement consistent herewith.

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<sup>87</sup> *Rebanding Cost Clarification Order*, 22 FCC Rcd 9818, 9820 ¶ 11 (2007).

<sup>88</sup> *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd at 25152 ¶ 71 (2004).

<sup>89</sup> *Rebanding Cost Clarification Order*, 22 FCC Rcd 9818, 9820 ¶ 8 (2007).

<sup>90</sup> Indiana PRM at 17.

<sup>91</sup> Sprint PRM at 7-8.

<sup>92</sup> Indiana PRM at 20.

36. 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