

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

In the Matter of
Town of Wethersfield, Connecticut
and
Nextel Communications, Inc.
Mediation No. TAM-50050
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2011

Released: February 7, 2011

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between the Town of Wethersfield, Connecticut (Wethersfield) and Nextel Communications, Inc., a subsidiary of Sprint Nextel Corporation (Sprint) (collectively, the Parties). For the reasons discussed herein, we approve, in part, Wethersfield's change notice request seeking reimbursement of additional fees attributable to its consultant, Trott Communications, Inc. (Trott), and its outside counsel, Shulman Rogers Gandal Pordy & Ecker, P.A. (SRGPE).

II. BACKGROUND

2. In its change notice request, Wethersfield claims that Sprint should pay for additional services performed by Trott in connection with the negotiation and performance of Wethersfield's Planning Funding Agreement (PFA) with Sprint. The PFA, however, did not cover Trott's additional services and costs. Wethersfield also submits that Sprint should pay SRGPE's legal fees for negotiating the change notice request and representing Wethersfield in the resultant mediation.

3. The Parties executed the PFA on May 2, 2007. Wethersfield completed its planning on July 17, 2008 and submitted its retuning cost estimate to Sprint. It was not until November 30, 2008 that Wethersfield submitted its change notice request alleging that Trott had incurred \$20,870 in planning-

1 Recommended Resolution, Mediation No. TAM-50050, June 5, 2009 (RR).

2 Proposed Resolution Memorandum of Town of Wethersfield, TAM-12352 at 2, May 7, 2009, (Wethersfield PRM).

3 Wethersfield PRM at 4.

4 RR at 2. With regard to change notices, the PFA stated in relevant part: "[i]f either Party believes that a change to the planning activities contemplated by the Planning Cost Estimate is required (including changes by Planning Vendors), such Party will promptly notify the other Party in writing." Wethersfield PRM at Ex. 18.

5 RR at 2.

6 Id. at 3.

related fees not covered in the PFA.<sup>7</sup> During mediation, Wethersfield claimed that Sprint should also pay \$8,700 for SRGPE's additional legal services associated with the change notice request and preparation of the Proposed Resolution Memorandum (PRM).<sup>8</sup>

4. *Wethersfield Position:* Wethersfield cites the Washoe County, Nevada, *Memorandum Opinion and Order*<sup>9</sup> for the proposition that we should take an "holistic" approach to the additional fees, *i.e.*, that we should focus on whether the fees were reasonable, prudent and necessary<sup>10</sup> to keep Wethersfield's rebanding project on task<sup>11</sup> – and disregard the fact that the fees were presented in a post-PFA change notice. Under that rationale, Wethersfield deems the following costs reimbursable, none of which were covered by the PFA:

- Negotiation Support Fees. Wethersfield claims that Trott expended 12 hours of time, at a fee of \$1,620, to prepare Wethersfield's Request for Planning Funding including conference calls, reviewing drafts and preparing responses to Sprint and the TA Mediator.<sup>12</sup>
- Internal Cost Estimate. Wethersfield claims that Trott expended 59 hours of time, at a fee of \$10,325 to prepare the cost estimate, for internal costs, that Wethersfield used to initiate Frequency Reconfiguration Agreement (FRA) negotiations.<sup>13</sup>
- Planning Support Fees. Wethersfield claims that Trott expended 51 hours of time, at a fee of \$8,925, to review six revisions of the Motorola, Inc. Statement of Work (SOW).<sup>14</sup>
- Legal Services. Wethersfield claims that SRGPE expended 20 hours of time, at a fee of \$8,700, to prepare the change notice request, PRM, Reply PRM and Supplemental PRM.<sup>15</sup>

5. *Sprint Position.* Sprint argues that Wethersfield is attempting to use a change notice to renegotiate the settled terms of the PFA, in violation of the Commission's policies on change notices.<sup>16</sup>

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

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

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* See also Reply to Nextel Proposed Resolution Memorandum, May 19, 2009, at 3-4 (Wethersfield Reply).

<sup>11</sup> Wethersfield PRM at 5-8.

<sup>12</sup> *Id.* at 4, 8-9.

<sup>13</sup> *Id.* The PFA allocated 48 hours (at \$38 per hour) and 150 hours (at \$48 per hour) to Wethersfield for project management and planning support, including preparation of the internal cost estimate (198 hours at a total cost of \$ 9,024). *Id.* at 10. Wethersfield seeks 59 hours at \$175 per hour to pay Trott for preparing the internal cost estimate (\$10,325). *Id.* at 11. Alternatively, Wethersfield requests to transfer \$2,382 for 59 hours (at \$48 per hour) of its internal planning support time to Trott. *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 11; Wethersfield Reply at 8; RR at 13.

<sup>16</sup> Proposed Resolution Memorandum of Nextel Communications, Inc., TAM-12352, May 14, 2009, (Sprint PRM) at 2-5 *citing* 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) (*Change Notice Public Notice*).

Sprint contends that all of the services for which Wethersfield seeks reimbursement should have been the subject of the PFA or FRA negotiations because they were reasonably foreseeable during those negotiations.<sup>17</sup> In addition, Sprint submits that the planning costs that it agreed to in the PFA were ample to complete planning, and, therefore, that the additional fees Wethersfield seeks in the change notice request are neither reasonable nor necessary.<sup>18</sup>

6. *Mediator's Position.* The TA Mediator recommends that Sprint should not be required to pay Trott's fees. However, because Trott undertook cost estimate work that, under the PFA, was originally to be performed by Wethersfield, the Mediator recommends allowing Wethersfield to shift to Trott, the \$2,382 initially allocated to Wethersfield for project management tasks, including preparation of the cost estimate. The TA Mediator recommends that Trott's other negotiation support fees be disallowed as foreseeable. The fees were incurred prior to the execution of the PFA,<sup>19</sup> and Wethersfield did not comply with the Commission's change notice procedures<sup>20</sup> or the terms of the PFA which required notice to Sprint if Wethersfield was deviating from the agreed-upon planning cost.<sup>21</sup> The TA Mediator also recommends that Trott's other fees for planning support be disallowed as foreseeable because it is common practice for revisions to be made to SOWs before arriving at a final version.<sup>22</sup> The Mediator concludes that Sprint should pay all of SRGPE's legal fees because Sprint did not specifically challenge them and failed to cite any authority for disallowing the fees.<sup>23</sup>

### III. DISCUSSION

7. Wethersfield seeks an additional \$20,870 in Trott's fees<sup>24</sup> and an additional \$8,700 in SRGPE's legal fees<sup>25</sup> for a total of \$29,570. For the reasons set out below, we allow \$2,382 of Trott's fees and \$8,700 of SRGPE's legal fees.

8. Negotiation Support Fees. Wethersfield claims that the TA Mediator stated in one of the PFA meditation sessions that Trott should be compensated for the "actual hours" spent in negotiating the PFA and preparing the cost estimate regardless of when Wethersfield presented its claim for Trott's services.<sup>26</sup> Assuming, *arguendo*, that the TA mediator made such a statement; we do not find it dispositive of Wethersfield's entitlement to payment of Trott's additional fees by using a change notice request.

9. 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>27</sup> The change

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

<sup>18</sup> *Id.* Sprint also argues that the proposed costs are excessive under the TA's Cost Metrics. *Id.*

<sup>19</sup> RR at 8.

<sup>20</sup> *Id.* at 10-13.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Id.* at 14.

<sup>24</sup> *Id.* at 3.

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

<sup>26</sup> *Id.* at 8-9; Wethersfield Reply at 6.

<sup>27</sup> See *Change Notice Public Notice*, 22 FCC Rcd at 17229.

notice process may not be used as a tool to renegotiate agreements, after the fact, on issues that were raised, or should have been raised, during negotiations.<sup>28</sup> The record shows that Trott's additional negotiation support fees were incurred before the PFA was executed. They were, therefore, reasonably foreseeable, and should have been claimed in the PFA negotiations. Wethersfield has failed to satisfactorily explain why it omitted those additional fees during the PFA negotiations, and it has not identified any changes in cost, scope or schedule, or any emergency, that precluded including the additional fees during PFA negotiations. We therefore agree with Sprint that Trott's additional negotiation support fees, being foreseeable, should be disallowed as inconsistent with the Commission's change notice policy.

10. Internal Cost Estimate. Wethersfield claims that "due to the impending cost estimate submittal deadline and pressure from the TA Mediator, Trott performed this task at the request of Wethersfield."<sup>29</sup> Wethersfield states that it had requested several extensions of the deadline and was reluctant to request another delay.<sup>30</sup> It contends that Trott should not be penalized by denying his fees for performing necessary and reasonable services at the request of Wethersfield to keep the rebanding project on task.<sup>31</sup>

11. We note, as an initial matter, that contractors such as Trott are not penalized as a consequence of our decisions in this proceeding. An adverse decision merely shifts the cost responsibility from Sprint to the licensee. Here, the record establishes that Wethersfield unilaterally deviated from the PFA when it directed Trott to perform work not included in the PFA. It neither notified Sprint of the need for additional services, as the PFA required, nor sought a change notice before the work was performed.<sup>32</sup> Instead, Wethersfield sought a change notice well after Trott had prepared the cost estimate, depriving Sprint of the opportunity to challenge the need for the services or negotiate the associated cost.

12. Wethersfield's argument that it was reluctant to seek a change notice, or notify Sprint, in advance of the work, because of "pressure" from the Mediator is both undocumented and unpersuasive. Wethersfield knew, prior to the FRA negotiations, that it was required to submit a cost estimate. The need for the associated services, whether performed by Wethersfield or Trott, was, therefore, foreseeable. Wethersfield should have included Trott's fees for the additional services in the course of PFA negotiations with Sprint. It has failed to satisfactorily explain its failure to do so. The alleged "pressure" by the TA Mediator and the deadline for cost estimates did not constitute an emergency warranting deviation from the PFA and the Commission's change notice procedures. Moreover, Wethersfield has not demonstrated that Trott's additional services were reasonably necessary to the preparation of the cost estimate.<sup>33</sup> We therefore agree with Sprint and the TA Mediator that Trott's \$10,325 fee for additional cost estimate services should be disallowed.

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<sup>28</sup> *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, Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512, 18522 ¶ 31 (2008).

<sup>29</sup> Wethersfield PRM at 10.

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

<sup>31</sup> *Id.* at 11.

<sup>32</sup> RR at 10.

<sup>33</sup> *Id.* at 11.

13. We find, however, that, as the TA Mediator recommended, Sprint should compensate Wethersfield for \$2,832 of Trott's fees. Wethersfield had allocated \$ 2,832 as its cost for preparing an estimate of the internal services necessary to prepare the cost estimate. Then, it shifted that responsibility from itself to Trott, which provided a portion of the internal services cost estimate. Therefore - because Wethersfield is no longer claiming the \$2,832 for its services - the reallocation of the \$2,832 to Trott will not increase the overall project management cost agreed to by the Parties in the PFA.<sup>34</sup>

14. Planning Support Fees. Wethersfield claims that a significant portion of the additional planning support time was attributable to Trott's review, analysis and advice to Wethersfield relative to six revisions of Motorola's SOW,<sup>35</sup> and that it did not anticipate that multiple SOW revisions would be required. Wethersfield argues that the need to evaluate these multiple SOWs was unforeseeable at the time of the PFA, and thus was a circumstance beyond its control, *i.e.*, that Wethersfield, should not be expected to have anticipated that Motorola's SOW would be revised six times.<sup>36</sup>

15. We agree with Sprint that it is not unusual for revisions to be made to documents such as the SOW before a final version is arrived at.<sup>37</sup> Additionally, Wethersfield has not explained why it did not notify Sprint as these allegedly "unforeseeable" expenses were being incurred, as the PFA required. Instead, it waited over a year after the last of the fees accrued before it sent the change notice request to Sprint.<sup>38</sup> There is no evidence that an emergency caused this delay.<sup>39</sup> Accordingly, because Wethersfield failed to follow the change notice provisions in the PFA and did not follow the Commission's change notice procedures,<sup>40</sup> we conclude that Sprint is not responsible for Trott's additional planning support fees.

16. Legal Fees. Wethersfield seeks reimbursement for legal fees related to negotiation of the change notice request and preparation of the PRM, Reply PRM and Supplemental PRM related to the change notice request. It argues that denial of such fees would create a "chilling effect" on other licensees seeking to avail themselves of the mediation process.<sup>41</sup>

17. As established above, Wethersfield's change notice request lacked merit for Wethersfield's failure to show that any of the costs requested in the change notice request were unforeseeable, timely, necessary, or reasonable.<sup>42</sup> The Commission has established 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."<sup>43</sup> Although Sprint must pay "any reasonable and

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<sup>34</sup> Sprint does not object to this reallocation, assuming it is not asked to pay for additional fees to effectuate this change. Statement of Position of Nextel Communication, Inc., TAM 50050, June 19, 2009, at 10-11.

<sup>35</sup> Wethersfield PRM at 9; Wethersfield Reply at 6.

<sup>36</sup> Wethersfield PRM at 10; Wethersfield Reply at 6-7.

<sup>37</sup> RR at 10; Sprint Nextel PRM at 11.

<sup>38</sup> *Id.*; Sprint Nextel PRM at 11.

<sup>39</sup> RR at 12.

<sup>40</sup> *See Change Notice Public Notice*, 22 FCC Rcd at 17229.

<sup>41</sup> Wethersfield Reply at 8.

<sup>42</sup> *See supra* n.28.

<sup>43</sup> Improving Public Safety Communications in the 800 MHz Band, *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512, 18521 (2008).

prudent expense directly related to the retuning of a specific 800 MHz system,”<sup>44</sup> it is not required to pay for activities the Commission has deemed *per se* unreasonable, *e.g.*, using the change notice process to renegotiate PFAs or FRAs.

18. Nonetheless, we allow reimbursement of Wethersfield’s legal fees in connection with the change notice request because the request, although unmeritorious, was not patently so and does not appear frivolous or advanced in bad faith, *i.e.*, Wethersfield’s failure to follow the change notice procedures appears more negligent than intentional.<sup>45</sup> Moreover, the legal fees incurred were necessary to bring the matter before the mediator and, ultimately, before the Bureau, thus avoiding a stalemate between the parties with a consequent delay in the rebanding of Wethersfield’s system.<sup>46</sup>

19. Our decision herein is faithful to the policy 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.<sup>47</sup> We thus caution licensees to restrict change notice requests to those that are timely and address matters that could not reasonably have been foreseen at the time the licensee negotiated its PFA or FRA.

#### IV. ORDERING CLAUSE

20. 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.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>44</sup> Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order on Reconsideration*, 19 FCC Rcd 25120, 25152 (2004).

<sup>45</sup> See, *e.g.*, Sprint Nextel Corp. and Dallas Fort Worth International Airport Board, *Memorandum Opinion and Order*, DA 11-219 (PSHSB released February 7, 2011), ¶ 39.

<sup>46</sup> Cf. Improving Public Safety Communications in the 800 MHz Band, *Second Report and Order*, 22 FCC Rcd 10467, 10485 (2007). We previously have cautioned that “using extended negotiations, mediations, and requests for *de novo* review to litigate disputes over small differences is counterproductive and imposes unnecessary delay and expense on the rebanding process. Accordingly, we strongly urge parties currently in negotiations to resolve such minor differences outside of the mediation and *de novo* review processes.” City of High Point, North Carolina and Sprint Nextel Corp., *Memorandum Opinion and Order*, 24 FCC Rcd 3918, 3923 ¶ 18 (PSHSB 2009).

<sup>47</sup> See *Change Notice Public Notice*, 22 FCC Rcd at 17229. We previously have emphasized the importance of abiding by the terms of an FRA and the Commission’s change notice procedures, noting that adherence to such terms and procedures “is essential to the orderly and cost-effective reconfiguration of the 800 MHz band.” County of Flagler, Florida and Sprint Nextel Corp., *Memorandum Opinion and Order*, 24 FCC Rcd 8235, 8237 ¶¶ 8-9 (PSHSB 2009).