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

In the Matter of	)	
	)	
City of Suffolk, Virginia	)	WT Docket No. 02-55
and	)	
Nextel Communications, Inc.	)	
	)	
Mediation No. TAM-50068	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2011 **Released: February 22, 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 Mediator (TA Mediator) involving a dispute between the City of Suffolk, Virginia (Suffolk) and Nextel Communications (Sprint)[1] over a change order request.[2] For the reasons discussed below, we grant Suffolk partial relief.

2. Suffolk seeks to recover $30,712.50 in legal fees from Sprint for: (a) preparation of a revised cost estimate for the rebanding of its 800 MHz communications system, (b) responding to a Request for Information (RFI) from the 800 MHz Transition Administrator (TA)[3] and (c) preparation of mediation documents.[4]

3. More specifically, Suffolk seeks payment for the following legal services:

- Cost Estimate and RFI. $15,575 for 44.5 hours to prepare a revised cost estimate and a response to the TA's RFI.[5]

- Mediation. $15,137.50 for 43.25 hours to prepare a Proposed Resolution Memorandum (PRM), a Reply Proposed Resolution Memorandum (Reply PRM), and Comments on the TA's Cost Metrics Report.[6]

[1] Nextel Communications, Inc. is a wholly owned subsidiary of Sprint Nextel Corp. It is hereinafter referred to as Sprint.

[2] Recommended Resolution, Mediation No. TAM-50068 at 3 (September 2, 2010) (RR).

[3] Proposed Resolution Memorandum of City of Suffolk, Virginia at app.3-8 (July 23, 2010) (Suffolk PRM).

[4] Statement of Position of City of Suffolk, Virginia at 3-4 (September 17, 2010) (Suffolk SOP).

[5] Suffolk PRM at 2-3.

[6] Suffolk SOP at 3-4. Statement of Position of Nextel Communications, Inc. at 17 (September 17, 2010) (Sprint SOP). At the conclusion of mediation the TA prepares a report comparing a licensee's requested costs with the approved costs of similarly situated other licensees, *i.e.,* those with a similar number of subscribers, base stations, etc. *See* Public Safety and Homeland Security Bureau Announces Enhancements to the Metric Data Used in 800 MHz Rebanding Negotiations and Mediations, *Public Notice,* 25 FCC Rcd 8151 (PSHSB 2010) (*Metrics Public Notice*).

II. BACKGROUND

4. This case raises four issues, all related to the Change Order Request submitted by Suffolk and declined by Sprint: (1) whether the legal fees claimed by Suffolk for preparation of a revised cost estimate and a response to a RFI from the TA were reasonably foreseeable, (2) whether such fees met the Commission's minimum reasonable cost standard, (2) whether untimely submission of the change notice request bars Suffolk from recovering its additional legal fees, and (3) whether Suffolk's additional legal fees for preparing a Proposed Resolution Memorandum (PRM), Reply PRM, and reviewing a Cost Metrics Report are properly before the Bureau on *de novo* review.

5. In a 2008 Planning Funding Agreement (PFA), the parties allocated $68,702 for planning-related legal fees.[7] Thereafter, Sprint approved a Change Order Request for an additional $12,600 in planning-related legal fees, bringing the total to $81,302.[8] After planning was complete, Suffolk furnished a $1,103,169 rebanding cost estimate[9] to Sprint which included, *inter alia*, an intermodulation study, and the "sweeping" of Suffolk's repeater antenna systems.[10] Sprint rejected the cost estimate, noting that an intermodulation study already had been completed as part of the planning process and questioning the need for "sweeping" the antenna systems.[11] In late 2008, the parties submitted a PFA amendment to the TA, which subsequently sent a request for information (RFI) to Suffolk seeking additional information concerning the amendment.

6. In 2009, Suffolk submitted another Change Notice Request to Sprint seeking an additional $15,575 in legal fees. Suffolk claimed these fees already had been incurred by its counsel, Matthew Plache (Plache), for his assistance in preparation of the revised cost estimate and a response to the RFI. This Change Notice Request brought the total legal fees to $96,877. In its Statement of Position, Suffolk requests the Bureau to approve an additional $15,127.50 in legal fees[12] for counsel's preparation of Suffolk's PRM, Reply PRM and analysis of the TA's Cost Metrics Report, which request would bring the total legal fees, to date, to $112,004.50.

7. We evaluate Suffolk's claims against four 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.[13] Second, costs incurred by a licensee in excess of those authorized in a PFA or Frequency Reconfiguration

[7] At the time the PFA was entered into, Suffolk was represented by Shulman, Rogers, Gandal, Pordy & Ecker, P.A. (SRGPE).

[8] When the additional $12,600 was approved, Suffolk had discharged SRGPE and retained Matthew Plache, Esq., of the firm of Catalano & Plache PLLC.

[9] *See* City of Suffolk Statement of Work and Cost Estimate at 36 (Dec. 4, 2008) (Cost Estimate). Motorola's contingency price of $84,000 brings the total reconfiguration price with contingency to $1,187,169. *Id.*

[10] *See* Proposed Recommendation Memorandum of Nextel Communications, Inc. at 8 (July 29, 2010) (Sprint PRM). (Antennas are "swept" to determine whether their electrical characteristics (*e.g.,* resonant frequency, return loss) at their rebanded frequency are comparable to those achieved at the antennas' original frequency.)

[11] Sprint PRM at 8.

[12] Suffolk SOP - Exhibit (Catalano & Plache "800 MHz Rebanding Invoice" for July and Aug., 2010).

[13] *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).*

Agreement (FRA) are at the licensee's risk until a Change Notice Request is submitted and approved.[14] 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.[15] Fourth, costs sought in a Change Notice Request must meet the Commission's minimum necessary cost standard.[16]

III. POSITION OF THE PARTIES

8. Suffolk Position. Suffolk argues that the need for the legal fees associated with preparation of a revised cost estimate and a response to the TA's RFI was unforeseeable at the time it entered into the PFA[17] because it reasonably believed its initial cost estimate would be complete and acceptable to Sprint and thus did not anticipate that it would have to respond to a RFI from the TA.[18] It defends its request for an additional intermodulation study because the intermodulation study conducted as part of the planning process was incomplete and identified some potential third-order intermodulation "hits" that could have caused interference in Suffolk's rebanded system. The additional study was required, Suffolk argues, to refine the results of the initial study.[19] It submits that its inclusion of the cost for sweeping its base station antennas was not so uncommon or demonstrably unnecessary that Suffolk should have anticipated the need to prepare a revised cost estimate.[20]

9. Suffolk concedes that it did not timely notify Sprint that Suffolk was incurring additional legal fees but makes three arguments discounting the effect of not giving timely notice. First, it argues that it believed that the additional legal fees should be attributable to the FRA – not the PFA – and, since the FRA had not yet been negotiated, that providing notice of the fees to Sprint was unnecessary.[21]

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[14] *See* 800 MHz Transition Administrator, LLC, 800 MHz Band Reconfiguration: Reconfiguration Handbook, 100, R 3.0 (2008).

[15] *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).

[16] The Commission's orders in this docket assign Suffolk the burden of proving that the funding it has requested is reasonable, prudent, and the "minimum necessary to provide facilities comparable to those presently in use." *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 14969,15074 ¶ 198 (2004) (*800 MHz Report and Order*); Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Supplemental Order and Order on Reconsideration,* 19 FCC Rcd 25120, 25152 ¶ 71 (2004) (*800 MHz Supplemental Order*). The Commission has clarified that the term "minimum necessary cost" does not mean the absolute lowest cost under any circumstances, but the "minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner." *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) (*Rebanding Cost Clarification Order*).

[17] Suffolk PRM at 8.

[18] *Id.*

[19] *See* Reply Proposed Resolution Memorandum of City of Suffolk, Virginia at 4 (July 23, 2010) (Suffolk Reply PRM).

[20] Sprint SOP at 10.

[21] Suffolk Reply PRM at 7-8. Suffolk's theory rests on the PFA language: "If either party *believes* that a change to the *planning activities*. . . is required . . . such party shall notify the other party in writing." *Id.* (Emphasis added).

Second, Suffolk argues that other work associated with rebanding kept it so occupied that it did not have the time to give notice to Sprint,[22] and that, in any event, it was free to incur the additional legal fees at its own risk so long as it later was able to demonstrate that the fees conformed to the Commission's minimum necessary cost standard.[23] Third, Suffolk argues that Sprint had actual notice that the fees were being incurred because Sprint itself had initiated the request for a revised cost estimate and because Sprint was aware that the TA had issued the RFI.[24] Therefore, Suffolk argues, Sprint should have known that additional legal work would be necessary to prepare the revised estimate and the response to the RFI.[25]

10. Suffolk also contends that the Bureau should evaluate and approve Plache's invoice – included with its Statement of Position – for his fees to prepare the PRM and Reply PRM and evaluate the TA Cost Metrics Report.[26] It concedes that the invoice is not part of the record, but requests the Bureau to waive its policy of confining *de novo* review to the record forwarded by the TA Mediator.[27] Suffolk submits that it would be more administratively efficient for the Commission to address Plache's additional mediation-related fees in the context of this *de novo* review. Otherwise, Suffolk observes, Sprint could contest the fees, the matter could go into mediation and, ultimately, come to the Bureau again for *de novo* review, thereby incurring additional cost and delay. [28]

11. Sprint Position. Sprint contends that Suffolk's additional legal fees were in fact foreseeable because Suffolk's initial cost estimate failed to provide the basic information necessary to allow the parties to negotiate a FRA.[29] Therefore, Sprint submits, Suffolk knew, or should have known, that the deficient cost estimate would have to be supplemented.[30] Sprint also contends that RFIs from the TA "are not at all uncommon" especially in the case of "unusually expensive projects."[31] Therefore, Sprint argues, it is reasonable to assume that the legal fees Suffolk budgeted for in its PFA contemplated "some level of forward-looking support," *e.g.,* legal fees for revising Suffolk's cost estimate and responding to an RFI.[32]

12. Sprint also argues that, from a policy standpoint, allowing licensees to submit deficient cost estimates and then accrue additional legal fees to perfect the estimates would amount to the Commission rewarding an attorney's "strategic incompetence."[33] It cites precedent for the proposition that, when licensees fail to conform to the change notice provisions of a PFA or FRA, they deprive Sprint of the

[22] *Id.* at 9-10.

[23] Suffolk PRM at 9-10.

[24] Suffolk SOP at 7.

[25] *Id.*

[26] *Id*. at 3-4.

[27] *Id*. at 4 (*citing* Wireless Telecommunications Bureau Announces Procedures for De Novo Review in the 800 MHz Public Safety Proceeding, *Public Notice,* 21 FCC Rcd 758 (WTB 2006) (*De Novo Review PN*)).

[28] Suffolk Reply PRM at 12-13.

[29] Sprint PRM at 8.

[30] *Id.*

[31] Sprint SOP at 9.

[32] *Id.*

[33] Sprint PRM at 9.

opportunity to negotiate or avoid costs. In such a case, Sprint argues, "the licensee's costs may not be recoverable.[34]

13. Sprint denies it had actual notice that Suffolk was incurring additional legal fees in connection with the revised cost estimate and the RFI response. It concedes that it knew of the need for the revised estimate and that the RFI had been issued, but thought that the associated legal fees would be covered by the amount allocated for legal fees in the PFA.[35] Sprint suggests that Plache's legal fees are so high because Suffolk – or Plache himself – decided that Plache would perform tasks that were primarily technical rather than legal.[36] It queries "why Suffolk could have required so much legal effort – or, truly, any legal effort – to respond to largely technical inquiries."[37] Sprint argues that, had it been aware that Plache was performing non-legal work, it could have insisted that the non-legal work be assigned to different, and less costly, personnel.[38] It concedes, however, that it has failed to challenge any specific "line item" in Plache's invoices as being unreasonable or unnecessary, but contends that some of the legal work Plache performed could have been avoided had Suffolk consulted Sprint or enlisted Sprint's assistance in responding to the RFI.[39]

14. Sprint points out that over a year elapsed between the time Plache began work and the time Plache's invoice for services was presented to Sprint, despite Sprint's – and the TA Mediator's – frequent requests for Suffolk to submit its change notice request.[40] Sprint urges the Bureau to declare that, if a licensee fails to submit a change notice request within a reasonable time, that Sprint is free to assume that the licensee is not pursuing cost reimbursement.[41] Sprint also accuses Suffolk of submitting "serial" change notice requests for legal fees in an effort to convince the Bureau that the fees in each discrete change notice request were *de minimis*.[42]

15. Sprint claims that, because the change notice request for additional legal fees was "unreasonable and violated both the terms of the parties' contract and the Commission's orders regarding change notices procedures,"[43] the Bureau should reject any attempt by Suffolk to claim reimbursement for costs associated with Plache's preparation of a PRM, Reply PRM and analysis of the TA's Cost Metrics Report.[44] Sprint notes, in its SOP, that the TA Mediator did not address Sprint's "contractual obligation" argument in the RR.[45] Had Suffolk followed the PFA's contractual provisions, Sprint argues, notice would have been provided and mediation – and the legal fees associated with it – would have been

[34] *Id*. at 11 (*citing* Liberty Communications, Inc. and Sprint Nextel Corp., *Memorandum Opinion and Order*, WT Docket No. 02-55, 25 FCC Rcd 9197, 9211 ¶ 44 (PSHSB 2010) and County of Flagler, Florida and Sprint Nextel Corp., *Memorandum Opinion and Order*, WT Docket No. 02-55, 24 FCC Rcd 8235 (PSHSB 2009)).

[35] Sprint PRM at 13.

[36] *Id.* at 14.

[37] *Id.*

[38] *Id.* (*citing* City of Hartford, Connecticut and Sprint Nextel, *Memorandum Opinion and Order*, 25 FCC Rcd 12329, 12332-12333 (PSHSB 2010)).

[39] Sprint SOP at 14.

[40] *Id.* at 15.

[41] Sprint PRM at 12-13.

[42] Sprint SOP at 15-16.

[43] *Id.* at 17.

[44] *Id.*

[45] *Id.*

unnecessary.[46] Sprint urges the Bureau to use the instant *de novo* review to address Suffolk's claim for Plache's fees to prepare the PRM, the Reply PRM and the TA Cost Metrics analysis, lest Suffolk submit yet another change order request for reimbursement of Plache's fees for these tasks.[47]

16. Sprint notes that the Cost Metric Report prepared by the TA shows that Suffolk's legal fees – not including those attributable to the change notice request – exceed the 100th percentile for systems of Suffolk's size (between 1001-2000 subscriber units).[48] It asserts, therefore, that Bureau precedent requires that Suffolk's additional legal fees be subjected to "careful scrutiny."[49] It contends that, during mediation, it challenged the "aggregate level of costs proposed by Suffolk" because they reflected Suffolk's lack of "meaningful or effective supervision over its outside legal vendors."[50] Sprint cites two instances which, it alleges, show that Suffolk's legal fees were not prudently incurred. First, Sprint claims that Plache incurred unnecessary fees when he expended mediation time arguing about whether correspondence and information exchanged during mediation should be included in the record. Second, Sprint contends that Plache expended unnecessary mediation time arguing that the TA Metrics should not be used to evaluate Suffolk's costs.[51] These two contentions, Sprint argues, were meritless and at odds with settled precedent and practice, and should not have been raised in mediation.[52]

17. Sprint concedes that it did not challenge Plache's fees by "line item" on his invoices, but submits that "[t]he mere act of entering time on an invoice does not compel the conclusion that the associated costs are reasonable."[53] It urges the Bureau to consider that the 100th percentile licensee in the Cost Metrics Report had legal fees for planning that were "just over half the amount Suffolk requests."[54] Moreover, Sprint argues, Suffolk's legal fees represent 25.65 percent of Suffolk's planning costs whereas legal fees associated with planning typically are 8.7 percent of the planning costs for public safety systems.[55] This confirms, Sprint claims, that Suffolk has demonstrated an "extraordinary appetite for legal activity" and may not have adequately supervised its outside counsel.[56]

18. TA Mediator Position. The TA Mediator recommends that the Commission find that Sprint is responsible for paying Suffolk the fees it incurred in the preparation of a revised cost estimate and for responding to the TA's RFI.[57] The TA Mediator concludes that these costs were not reasonably

[46] *Id.* at 17-18.

[47] *Id.*

[48] *Id.* at 4.

[49] *Id.* (*citing* County of Charles, Maryland and Sprint Nextel, *Memorandum Opinion and Order*, 24 FCC Rcd 12749, 12751 (PSHSB 2009) (*Charles County 2nd MO&O)* and City of Manassas, Virginia and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 8526, 8527-8528 (PSHSB 2007)(*Manassas MO&O*)).

[50] Sprint SOP at 5.

[51] *Id.* at 6.

[52] *Id.* Sprint also contends that, in connection with a previous PFA change notice, Plache engaged in time-consuming "stonewalling and evasion" after Sprint reasonably had requested information on software used by Suffolk. We do not consider Sprint's contention about the software-related change notice since that change notice is not before us on *de novo* review.

[53] *Id.* at 8.

[54] *Id.*

[55] Comments of Sprint Communications, Inc. on the TA Metrics Analysis at 3 (Aug. 23, 2010).

[56] *Id.* at 2.

[57] RR at 25-26.

foreseeable because Suffolk could not have anticipated that Sprint would request a revised cost estimate or that the TA would request additional information.[58]

19. More specifically, the TA Mediator states that, although Suffolk's cost estimate was "not sufficiently complete to commence FRA negotiations . . . additional information requested by Sprint [concerning the intermodulation study and antenna "sweeps"] was not an appropriate basis for rejecting the cost estimate."[59] Nonetheless, the TA Mediator issued an order rejecting the cost estimate.[60] The need for the additional intermodulation study, the TA Mediator concludes, was not foreseeable because Suffolk could not reasonably have anticipated that the first intermodulation study would identify problems that required further analysis.[61] The need to supplement the cost estimate to provide additional information on the antenna sweeps, however, "did not render the cost estimate so fundamentally lacking that the Licensee should have known that the cost estimate would be rejected."[62] Thus, even though the TA Mediator found it necessary to issue an order rejecting the cost estimate, he nonetheless recommends that the Bureau find that Suffolk has met its burden of showing that it was unforeseeable that Suffolk "would be required to incur legal fees responding to Sprint's concerns about the cost estimate."[63]

20. The TA Mediator finds that Suffolk could not reasonably have anticipated the need to respond to a RFI because there is no record evidence that RFIs are so routine that licensees should allocate funds in their PFAs to cover the legal fees associated with responding to RFIs.[64] The TA Mediator was not persuaded by Sprint's argument that licensees must tailor their PFAs "so as not to trigger an RFI."[65] Because the PFA was a joint document, the TA Mediator concludes that Sprint would have identified and remedied any lack of support that made a RFI inevitable.[66]

21. The TA Mediator concludes that, while Suffolk did not provide Sprint timely notice of the additional legal fees it had incurred, untimeliness, alone, is an insufficient reason for Sprint to reject a licensee's request for payment of legal fees.[67] The TA Mediator points out that the Commission's guidance on change orders establishes that a licensee's work in advance of submission of a change notice request is not an absolute bar to recovery if the licensee shows that the costs incurred meet the Commission's "minimum necessary cost" standard.[68]

22. The TA Mediator rejects Sprint's argument that Suffolk's untimely notice prejudiced Sprint because it was unable to negotiate lower legal fees. The TA Mediator points out that Sprint has not identified any specific task in Plache's invoices where Sprint could have argued that the task was unnecessary or the fee excessive. The TA Mediator also notes that, although Sprint arguably could help

[58] *Id.* at 21-22.

[59] *Id.* at 21.

[60] *Id.* at 22.

[61] *Id.*.

[62] *Id.*

[63] *Id.* at 21.

[64] *Id.* at 20.

[65] *Id.*

[66] *Id.* at 21.

[67] *Id.* at 24-25.

[68] *Id.* at 23.

"streamline" engineering and project management tasks, it has failed to explain how it could have helped to reduce Suffolk's need for legal services.[69]

23. The TA Mediator also rejects Sprint's position that it was unaware that Suffolk was incurring legal fees in connection with revising its cost estimate and responding to the TA's RFI. Sprint, the TA Mediator finds, had "ongoing communications" with Plache, and with Plache and the TA Mediator, regarding the cost estimate revisions and the response to the RFI.[70] According to the TA Mediator, Sprint thus had to be aware that Plache was spending substantial amounts of time on those matters and cannot reasonably claim surprise that Plache would bill Suffolk for his services.[71] Nonetheless, the TA Mediator states that Sprint did not necessarily know that Suffolk would be seeking additional money for Plache's legal fees, *i.e.,* Sprint could have assumed that the fees were covered by the PFA.[72]

24. The TA Mediator finds "troubling" the fact that Suffolk did not submit its change notice request until over a year after Plache began work, especially in the face of "unwavering insistence" by Sprint that the change notice request be timely submitted, and the TA Mediator's repeated requests for Suffolk to submit the change notice request.[73] Nonetheless, the TA Mediator does not find Suffolk's lack of diligence in submitting the request to be a reason for its rejection.[74]

25. The TA Mediator observes that, although Suffolk's legal fees rise above the 100th percentile on the TA's Cost Metrics report, that does not make them *per se* unreasonable, but only triggers the need for careful scrutiny.[75] The TA Mediator deems it significant that, despite ample opportunity to do so, Sprint never challenged Plache's specific time entries for his services. Instead, it took the position that none of Plache's fees should be allowed.[76] The TA Mediator undertook an independent survey of Plache's invoices, and on that basis, recommends that the Bureau conclude that Suffolk has satisfied its burden under the minimum necessary cost standard.[77]

26. Finally, the TA Mediator rejects Suffolk's claim that Sprint failed to negotiate in good faith when it declined to make a counteroffer. The TA Mediator reasons that requiring Sprint to make a reasonable counteroffer in a dispute about an unmeritorious change notice request would force Sprint to be responsible for legal fees even when the need for the underlying legal services was entirely foreseeable.[78]

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 24.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 25.

[78] *Id.*

IV. DECISION

27. In the *800 MHz Report and Order* the Commission stated that it did not anticipate that "transactional costs" associated with rebanding would exceed 2 percent of the overall project cost.[79] Experience has shown, however, that legal fees, alone, have amounted to, as Sprint points out, 8.7 percent of planning costs for systems comparable to Suffolk's.[80] Here, however, Suffolk seeks legal fees that are 25.65 percent of its overall planning costs. We agree with Sprint that Suffolk has acquired an "extraordinary appetite for legal activity," to the extent that it has involved its lawyer in every detail of the planning process – even in matters that conventionally are handled by technicians or project managers.

28. Although Suffolk's claimed legal fees are well-documented, we also agree with Sprint that "[t]he mere act of entering time on an invoice does not compel the conclusion that the associated costs are reasonable."[81] That said, however, we are limited to the record in deciding this matter and the record contains nothing that allows us to look behind Plache's invoices to determine, for example, that all of the claimed work was performed and that performing it required the time claimed.

29. Sprint urges us to apply a kind of *res ipsa loquitur* theory to Plache's legal fees*, i.e*. that the total amount of legal fees, measured against the TA Metrics, is so large as to be *per se* unreasonable.[82] We decline to do so for a number of reasons.

30. First, Sprint has not pointed to a particular task detailed in Plache's invoices that is unreasonable on its face. If a particular task was unnecessary or the time devoted to that task was excessive, that is not apparent from the invoices. The TA Mediator likewise examined the invoices and found nothing therein that was unreasonable.[83] Second, we disagree with Sprint that certain arguments that Plache made during mediation were demonstrably a waste of mediation time and designed only to increase his billable hours.[84] Sprint has cited to only two such instances: (1) Plache disputing whether certain materials produced in mediation should be included in the mediation record, and (2) his arguing that the TA Metrics should not be applied to Suffolk's rebanding.[85] Sprint alleges that both issues are well-settled and were disingenuously raised in mediation only to expand Plache's billable hours at Sprint's expense.[86] Its allegations lack record support, *i.e.,* we are unable to determine from the record whether Plache was furthering his client's interests by raising these issues or whether he was advancing his own financial self-interest at Sprint's expense. Arguably, Plache could have believed his position on these issues was relevant to the case and advanced in good faith.

[79] *800 MHz Supplemental Order*, 19 FCC Rcd at 25151 ¶ 70.

[80] RR at 18.

[81] Sprint SOP at 8.

[82] RR at 24.

[83] *Id.* at 25.

[84] Sprint PRM at 18.

[85] *Id.* at 17-18.

[86] *Id.*

31. Third, we have subjected Plache's exceptionally high legal fees to the close scrutiny that our precedent demands.[87] We recognize that it is unusual, and perhaps unprecedented, that legal fees should amount to one-quarter of a licensee's planning expenses. Legal fees, however, can be highly variable – the time required to perform a given legal task can hinge on the experience and competence of the lawyer involved. We also recognize that, in an adversarial setting, accumulating legal fees can be strategic, *e.g.*, a party that "stonewalls" against every issue in a case can increase the other party's expenses – and the strategizing lawyer's billable hours. The incentive to indulge such a strategy can be particularly strong when, as here, the other party – Sprint – is responsible for paying all of the licensee's reasonable and prudent legal fees in negotiation and mediation.

32. We cannot, however, rely on assumptions and extra-record inferences as a basis for decision. We must look to the record and to the strength of the allegations and arguments that Sprint has advanced in challenging Plache's fees. As did the TA Mediator, we have examined Plache's invoices and cannot identify any given task which we can say with certainty was unnecessary. We have given full consideration to Sprint's generalized allegations that Plache unnecessarily inflated the cost of legal services, but find those allegations speculative and lacking in record support. We have reviewed the cases that Sprint has cited for the proposition that Plache's fees are unreasonable, and found them distinguishable.[88] In the *Charles County 2nd MO&O* the Bureau affirmed the utility of the TA Metrics and explained that a licensee's burden of proof increases when its costs deviate significantly from the TA Metrics. The ultimate holding in the case, however, was that the licensee could not prevail because many of the tasks assigned to the licensee, the licensee's consultant, and the licensee's contractor were unnecessarily duplicative.[89] Similarly, in the *Manassas MO&O*, while the Bureau stated that large deviation from the TA Metrics "warrants careful scrutiny,"[90] it ultimately decided the matter based on unnecessary duplication of functions grounds.[91]

33. We have given Plache's legal fees the "close scrutiny" that the *Manassas MO&O* and subsequent cases demand, but, as discussed above, the record is insufficient for us to conclude that the fees are so egregious that the Commission's minimum necessary cost standard requires that we disallow them. *Charles County 2nd MO&O* and *Manassas MO&O* are not to the contrary because, here, Sprint has failed to show that the functions performed by Plache were duplicated by others. Accordingly, although it is a disturbingly close question, we are constrained to conclude that Suffolk has met its burden of showing that Plache's legal fees meet the Commission's minimum necessary cost standard.

34. We find, therefore, that Suffolk is entitled to payment of the $15,575 in legal fees it incurred to prepare a revised cost estimate and to respond to the RFI. The revision to the initial cost estimate was required because Sprint contended that Suffolk had included, in the estimate, tasks that Sprint deemed unnecessary, *i.e.,* an intermodulation study and antenna sweeps.[92] We need not decide whether these two tasks were necessary. It is sufficient that Suffolk's requesting them was neither *per se* unreasonable nor frivolous. There are instances in rebanding of 800 MHz systems where intermodulation studies are

[87] County of Calvert, Maryland and Sprint Nextel Corp., *Memorandum Opinion and Order*, 22 FCC Rcd 16779, 16781 ¶ 6 (PSHSB 2007); County of Charles, Maryland and Sprint Nextel Corp., *Memorandum Opinion and Order*, 22 FCC Rcd 16769, 16771 ¶ 6 (PSHSB 2007).

[88] *See* Sprint SOP at 5, n.7, *citing Charles County 2nd MO&O*, 24 FCC Rcd 12749, 12751 and *Manassas MO &O*, 22 FCC Rcd 8526.

[89] *Charles County 2nd MO&O*, 24 FCC Rcd 12749, at 12762.

[90] *Manassas MO &O*, 22 FCC Rcd at 8528.

[91] *Id.* at 8532-33.

[92] Suffolk Reply PRM at 4-5.

appropriate, *e.g.,* because of the presence of a large number of nearby stations which, in combination, can result in intermodulation products that fall on a public safety frequency. Similarly, it can be advisable to "sweep" antennas to determine whether their electrical characteristics change as a function of the change in frequency that occurs with rebanding. Whether these tasks are necessary in a particular retuning is a legitimate subject of negotiation and mediation and their inclusion in a cost estimate is not, therefore, unreasonable.

35. The Commission's 800 MHz orders place the burden on licensees to establish that the funding they request from Sprint is for equipment and services that are reasonable and prudent[93] in light of the overall goals of band reconfiguration, nationwide.[94] Given Suffolk's belief that its initial cost estimate was adequate and that the intermodulation study and "sweeping" of its antennas were legitimate rebanding expenses, we find it reasonable that Suffolk did not anticipate that it would be required to submit a revised cost estimate or that the TA would send an RFI requiring a detailed response. We also find that it was reasonable and prudent for Suffolk to retain counsel once the need to supply a revised cost estimate and a response to the TA's RFI became evident.[95] While it is true that the Change Notice process cannot be used to renegotiate agreements after the fact on issues that were raised or should have been raised during negotiations,[96] the record here does not establish that the issues of an intermodulation study and antenna sweep were the subjects of PFA negotiations[97]

36. Having decided that Suffolk is entitled to its legal fees for preparing the revised cost estimate and responding to the TA's RFI, it does not necessarily follow that Suffolk is entitled to the $15,137.50 in legal fees it incurred in connection with mediation, preparation of its PRM and Reply PRM and analysis of the TA Cost Metrics Report (the Additional Fees). These Additional Fees were identified, for the first time, in Suffolk's SOP, and Sprint thus has not been afforded adequate opportunity to contest them in a mediation context. Moreover, the Additional Fees are not properly before us. Our *de novo* review is limited to the record forwarded to us by the TA Mediator, unless we request supplementation of the record. Accordingly, we are denying Suffolk's request that we waive the requirement that parties mediate rebanding issues before bringing them to the Bureau.[98]

37. We are therefore remanding this matter to the TA Mediator for the limited purpose of mediating any dispute between the parties on whether the Additional Fees claimed by Suffolk meet the Commission's minimum necessary cost standard. The mediation shall commence within five business days of the release date of this *Memorandum Opinion and Order*, and shall extend a maximum of three business days thereafter. Each mediation session shall be for one hour. Sprint shall compensate Suffolk for its attorney's three-hour participation in mediation at the attorney's established hourly rate. Suffolk shall not be entitled to any further compensation for legal services related to the Additional Fees. If the parties are unable to agree in mediation, the TA Mediator shall file a supplementary RR with the Bureau

[93] *See 800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198; *800 MHz Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71.

[94] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Memorandum Opinion and Order*, WT Docket No. 02-55, 22 FCC Rcd 9818, 9820 ¶ 8 (2007).

[95] RR at 19.

[96] *See Fourth Memorandum Opinion and Order,* 23 FCC Rcd at 18521 ¶ 31.

[97] Suffolk PRM at 2.

[98] "Statements must be strictly limited to issues raised in the course of mediation and facts contained in the record. Parties may not introduce facts not contained in the record or introduce arguments on issues that were not presented to the mediator for consideration during mediation. Any material not conforming to the foregoing restrictions will be stricken." *De Novo Review PN*, 21 FCC Rcd at 759.

without requiring the parties to submit PRMs or comments on a TA Metrics Report, should the TA Mediator decide one should be provided. The parties shall file SOPs (at their own expense) with the Bureau within five business days of the date the TA Mediator files the supplementary RR. The SOPs shall be comprehensive, but strictly limited to the issue of Suffolk's entitlement to the Additional Fees. No additional pleadings will be accepted.

38. In summary, the Commission has stated that the reasonable and prudent expenses of licensees incurred up to the point of *de novo* review are recoverable. Suffolk has shown that it incurred legal fees in connection with revision of its cost estimate, and responding to the TA's RFI, and that it did not reasonably foresee, during PFA negotiations, that those legal fees would be necessary.

39. The overall legal fees in this case are exceptionally high. Neither Sprint's, the TA's, nor our own review of those fees, however, has identified a particular task that can be characterized as unnecessary. The billed time devoted to discrete legal tasks is lengthy in some instances, but we have nothing in the record or in our case law to serve as a standard for determining whether the time devoted to a particular task was excessive. Accordingly, we find that Suffolk is entitled to its claimed $15,575 in legal fees associated with preparation of a revised cost estimate and a response to the RFI. We make no similar determination, however, concerning Suffolk's claim for $15,137.50 in legal fees for preparation of its PRM, Reply PRM and TA Metrics Report analysis. That issue is not yet ripe for *de novo* review. We have allowed for a reasonable, but cost-contained, mediation period for these Additional Fees and expect that the parties will come to a good-faith compromise. Failing that, we will address the issue in an expedited *de novo* review.[99]

V. ORDERING CLAUSES

40. 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.

41. IT IS FURTHER ORDERED, that this matter IS REMANDED to the Transition Administrator Mediator to mediate any dispute between the Parties concerning the Additional Fees.

42. IT IS FURTHER ORDERED, that, within five business days of the release date hereof, the parties shall enter into mediation over the Additional Fees, said mediation to occupy no more than one-hour per day for three business days.

43. IT IS FURTHER ORDERED, that, within five business days of the date that the TA Mediator files a supplementary Recommended Resolution, the parties shall file Statements of Position with the Bureau. No further pleadings shall be filed.

[99] We recognize, that, unless Suffolk's future legal fees are limited in some fashion, this proceeding could continue, with each Suffolk pleading being accompanied by a demand for compensation for preparation of that pleading, which in turn would require mediation of the demand, followed by another *de novo* review, *ad infinitum*.

44. IT IS FURTHER ORDERED, that, should the parties agree on the Additional Fees in mediation, they shall, within five business days, execute a Frequency Reconfiguration Agreement, or amendment thereto, consistent with this *Memorandum Opinion and Order*.

45. 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