

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

In the Matter of: )  
 )  
Improving Public Safety Communications in ) WT Docket No. 02-55  
the 800 MHz Band )

**ORDER**

**Adopted: February 24, 2011**

**Released: February 24, 2011**

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

**I. INTRODUCTION**

1. In this *Order*, we address a petition for declaratory ruling (Petition) filed by the New Jersey Transit Corporation, the City of Philadelphia, Pennsylvania; Montgomery County, Maryland, and RCC Consultants, Inc. (collectively, Petitioners) on January 20, 2010 in response to the October 19, 2009 *Charles County Order*<sup>1</sup> adopted by the Public Safety and Homeland Security Bureau (Bureau). That order, *inter alia*, found Charles County, Maryland’s (County) claim for certain vendor and consultant costs excessive, not supported by the record, and at variance with the 800 MHz Transition Administrator’s cost metrics (TA Metrics).<sup>2</sup> The Petition requests the Commission to “restore” and “limit” the use of the TA Metrics to their original “informational” purpose, and to make the data underlying the TA Metrics available to licensees upon request.<sup>3</sup> For the reasons set out below, we dismiss the Petition.

**II. BACKGROUND**

2. On January 8, 2007, we instructed the 800 MHz Transition Administrator (TA) to publish aggregated data on retuning costs for systems approved by the TA - the TA Metrics.<sup>4</sup> We

<sup>1</sup> County of Charles, Maryland and Sprint Nextel Corporation, Mediation No. TAM-12003, WT Docket No. 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 12749 (PSHSB 2009) (*Charles County Order*).

<sup>2</sup> Improving Public Safety Communications in the 800 MHz Band, Use of TA Cost Metrics, WT Docket No. 02-55, Petition for Declaratory Ruling, filed by the New Jersey Transit Corporation, City of Philadelphia, Pennsylvania; Montgomery County, Maryland, and RCC Consultants, Inc. (Jan. 20, 2010) .

<sup>3</sup> The following licensees filed comments in support of the Petition: State of Connecticut Statement of Support (filed Feb. 25, 2010); The State of Michigan (filed Feb. 4, 2010); The County of Chesterfield, Virginia (filed Jan. 25, 2010); The City of Livonia, Michigan (filed Feb. 4, 2010); Ford Communications, Inc. (filed Jan. 29, 2010); The County of Lapeer, Michigan (filed Jan. 29, 2010); and Central Maryland Area Radio Communications (filed Apr. 20, 2010).

<sup>4</sup> Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, 22 FCC Rcd 172 (PSHSB 2007). The data are classified by function, e.g., legal, engineering, and internal costs, consultant and (continued...)

anticipated the TA Metrics would benefit public safety licensees by serving as guidelines in their preparation of estimates for their Frequency Reconfiguration Agreements (FRA) and would expedite FRA negotiations.<sup>5</sup> The TA Metrics also serve as benchmarks for the reasonableness of particular costs when parties are in mediation or seek *de novo* review of mediators' recommended resolutions.<sup>6</sup>

3. Petitioners argue that the TA Metrics have strayed from their original purpose and become "quasi-outcome-determinative" in our decisions on *de novo* review. Petitioners request that the TA Metrics be returned to what Petitioners describe as their "original informational purpose."<sup>7</sup> They ask the Commission to reconsider the degree of reliance placed on the TA cost metrics in evaluating 800 MHz rebanding proposals and associated cost estimates.<sup>8</sup> They question whether the TA Metrics provide a valid benchmark to which all rebanding proposals should be compared,<sup>9</sup> and ask the Commission to declare that:

- the cost metrics do not provide a reliable and proper basis from which inferences can be drawn about the reconfiguration costs proposed by a licensee;
- the cost metrics do not provide a sound basis for raising the burden of proof on the licensee to establish the reasonableness of its estimated reconfiguration costs, where those costs purportedly exceed the TA Metrics; and
- it is improper to rely upon the TA Metrics unless the a licensee has been accorded full and free access to all information necessary or useful in assessing whether the licensee's 800 MHz radio system is different than the 800 MHz systems included in the metrics.<sup>10</sup>

### III. DISCUSSION

4. The Petition, although captioned a petition for a declaratory ruling is, in substance, an untimely<sup>11</sup> petition for reconsideration of the *Charles County Order*.<sup>12</sup> Although Petitioners

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management fees, vendor costs, etc. and by system size. Cost information is presented for the 25th percentile, 50th percentile (median) and 75th percentile of approved systems. *See* [http://www.800ta.org/content/resources/FRA\\_Metrics.pdf](http://www.800ta.org/content/resources/FRA_Metrics.pdf) (Apr. 15, 2010) v. 8.

<sup>5</sup> The TA Metrics are derived from the most recent executed Stage 2 FRAs involving public safety systems.

<sup>6</sup> 47 C.F.R. § 90.677(d).

<sup>7</sup> Petition at 21.

<sup>8</sup> *Id.*; State of Michigan Comments at 2; State of Connecticut Statement at 1.

<sup>9</sup> Petition at 5-6, 10, 12; Chesterfield County Comments at 1; City of Lapeer, Michigan Comments at 1.

<sup>10</sup> *See, e.g.*, Petition at 1; Chesterfield County Comments at 1; City of Lapeer, Michigan Comments at 1; and Ford Communications Comments at 1.

<sup>11</sup> Section 1.106(f) of the Commission's Rules requires petitions for reconsideration to be filed within 30 days from the date of public notice of the final Commission action.

<sup>12</sup> James A. Kay, Jr., *Second Memorandum Opinion and Order*, 25 FCC Rcd 7639 ¶4 (2010), *citing* Minnesota PCS Ltd. Partnership, *Order*, 17 FCC Rcd 126, 127 ¶ 4 (CWD 2002) ("The Commission ... is not bound by the title that a filing party gives a pleading.")

assert they do “not reiterate or incorporate arguments made in the review of the *Charles County Order*,” their pleading proceeds to do just that,<sup>13</sup> e.g., Petitioners allege that the *Charles County Order* erroneously presumes the FRA cost metrics are valid and based on “actual system retuning costs,” and that it improperly “increases the burden of proof upon the licensee ....”<sup>14</sup>

5. By characterizing its pleading as a petition for declaratory ruling, Petitioners attempt to evade the fact that they lack standing to file a petition for reconsideration<sup>15</sup> and that their pleading, considered as a petition for reconsideration, is untimely.<sup>16</sup>

6. Standing. Petitioner RCC Communications, Inc. claims that its consulting fees are affected by the TA Metrics.<sup>17</sup> Petitioners New Jersey Transit Corporation, City of Philadelphia, Pennsylvania; and Montgomery County, Maryland, claim that their negotiations with Sprint and disposition of their cases on *de novo* review could be affected by the TA Metrics:

The continued use of the FRA cost metrics in the manner practiced by the TA and the PSHSB is clearly a source of substantial potential injustice to the Petitioners and other 800 MHz public safety licensees that have not reached FRAs with Nextel or have been or could be influenced by the effect of the current pattern of use of the FRA cost metrics in their negotiation of FRAs with Nextel upon terms and conditions less favorable to those licensees than could have been obtained if the FRA cost metrics had not been improperly employed.<sup>18</sup>

7. RCC - a contractor advancing its private interest in recouping its disallowed fees in the Charles County proceeding - lacks standing to seek reconsideration of the *Charles County Order*. RCC’s private interests are subordinate to the public’s interest in the timely completion of 800 MHz band reconfiguration.<sup>19</sup> Petitioners New Jersey Transit Corporation, the City of Philadelphia, Pennsylvania and Montgomery County, Maryland lack standing under our decision in *City of Boston*.<sup>20</sup> There, as here, some licensees involved in the 800 MHz band reconfiguration process sought reconsideration of a decision involving another licensee, alleging

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<sup>13</sup> Petition at 4, 16.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> 47 C.F.R. § 1.106(f) (30 day limit on filing petitions for reconsideration); 47 C.F.R. § 1.106(b)(1) (person not a party to a proceeding must state manner in which interests affected). See David Ryder, Receiver, *Letter*, 24 FCC Rcd 10874 (MB 2009).

<sup>16</sup> Improving Public Safety Communications in the 800 MHz Band, Petitions for Waiver of Bethlehem, Pennsylvania and Reading, Pennsylvania; Petitions for Waiver of Rockdale County, Newton County, City of Covington, Walton County, and Spalding County, Georgia, WT Docket 02-55, *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209, 17212 ¶ 9 (2007).

<sup>17</sup> 47 C.F.R. § 1.106(b)(1).

<sup>18</sup> Petition at 20 (emphasis supplied).

<sup>19</sup> *Cf.* Hertz Broadcasting of Birmingham, Inc., *Memorandum Opinion and Order*, 46 FCC 2d 350 (Rev. Bd. 1974) (financial interests of major creditor of applicant do not constitute adequate basis to qualify petitioner as a “person aggrieved”).

<sup>20</sup> City of Boston, Mass. and Sprint Nextel, Mediation No, TAM-11155, *Order*, 22 FCC Rcd 2361 (PSHSB 2007).

that the petitioning licensees' interests potentially were affected by the decision. We found that the petitioning licensees lacked standing because our findings in *City of Boston* were "limited to the specific facts presented to the Bureau in the record before it," and that the holding in *City of Boston* did not preclude licensees in other cases from asserting that the specific facts in their cases warrant a different result.<sup>21</sup> So too here. For example, in their cases, Petitioners are free to distinguish their systems from those from which the TA Metrics were derived and to make a better record in that regard than did Charles County in its proceeding.<sup>22</sup>

8. We also find that Petitioners lack standing because they have failed to show they have been adversely affected by the *Charles County Order*. When evaluating whether a petitioner is "adversely affected," the Commission has "applied the same test that courts employ in determining whether a person has standing under Article III to appeal a court order: the person must show (1) a personal injury 'in fact'; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, not merely speculative, that the requested relief will redress the injury."<sup>23</sup> Moreover, Courts have consistently held that "the mere precedential effect of an adjudicatory order within an agency is not enough to confer standing."<sup>24</sup> Here, Petitioners have suffered no injury in fact. They are only apprehensive that the *Charles County Order* may affect them in a future adjudication of their cases – an adjudication that may never take place if they successfully negotiate an agreement with Sprint or resolve their differences with Sprint in mediation. Thus, Petitioners' concerns about the future effects of the *Charles County Order* are too remote and speculative to confer standing.

9. Timeliness. Section 405 of the Communications Act of 1934, as amended (the Act)<sup>25</sup> provides the Commission with a 30 day period of jurisdiction in which to consider petitions for reconsideration. Section 1.106(f) of the Commission's rules<sup>26</sup> implements that section of the Act. The *Charles County Order* was released on October 19, 2009. Petitioners filed their Petition on January 20, 2010, three months after the release of the *Charles County Order*. Section 1.106(f) of the Rules would be meaningless if entities were allowed to circumvent it merely by captioning petitions for reconsideration as petitions for a declaratory

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<sup>21</sup> *Id.* at 2364.

<sup>22</sup> One item of relief sought by Petitioners is that we declare that the TA Metrics cannot be relied upon unless a licensee is given access to the underlying data. The record in the *Charles County* case, however, does not indicate that the licensee ever requested the TA Metrics data, which the TA makes available to any licensee upon request.

<sup>23</sup> *AT&T Corp. v. Business Telecom, Inc., Order on Reconsideration*, 16 FCC Rcd 21750, 21751-52 ¶ 5 (2001).

<sup>24</sup> *Id. citing, inter alia, Airtouch Paging v. FCC*, 234 F.3d 815, 818 (2d Cir. 2000); *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 648 (D.C. Cir. 1998); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994); *Telecommunications Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990).

<sup>25</sup> 47 U.S.C. § 405.

<sup>26</sup> 47 C.F.R. § 1.106.

ruling, as Petitioners have done here to launch a collateral attack on the *Charles County Order*. The untimeliness of the Petition is an independent ground for dismissal of the Petition.<sup>27</sup>

10. Were we to consider Petitioners' pleading as a legitimate petition for a declaratory ruling we would not exercise our discretion to reach it on the merits.<sup>28</sup> Pursuant to Section 1.2 of the Commission's rules,<sup>29</sup> we will consider a request for declaratory ruling only if a controversy or uncertainty exists that will be terminated by the issuance of a declaratory ruling.<sup>30</sup> Petitioners are not "uncertain" about the findings in the *Charles County Order* - they merely disagree with them. Whatever controversy Petitioners perceive in the *Charles County Order* is one of Petitioners' own making. That third parties may disagree with a Bureau decision does not render it a "controversy" within the meaning of Section 1.2. Were it otherwise, virtually every Commission order would be subject to collateral attack by entities – whether or not they have standing – filing petitions for declaratory rulings.

#### IV. DECISION

11. The Commission's procedural rules protect against the filing of untimely and unmeritorious pleadings by entities that lack standing and are not parties to a proceeding.<sup>31</sup> We are, therefore, dismissing the Petition.

#### V. ORDERING CLAUSE

12. Accordingly, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i); and Sections 1.2 and 1.106 of the Commission's rules, 47 C.F.R. §§ 1.2, 1.106, the Petition for Declaratory Ruling filed by the New Jersey Transit Corporation, *et al*, IS DISMISSED.

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<sup>27</sup> Motions for Declaratory Ruling Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services, *Memorandum Opinion and Order*, 14 FCC Rcd 12752, 12757 (1990), *citing* MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., *Memorandum Opinion and Order*, 5 FCC Rcd 216, 221 n.38 (1990), *recon. denied*, 5 FCC Rcd 3462 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

<sup>28</sup> It is well-established that the Commission has broad discretion whether to issue such a ruling. *See* 47 C.F.R. § 1.2; *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission did not abuse its discretion by declining to grant a declaratory ruling.).

<sup>29</sup> 47 C.F.R. § 1.2.

<sup>30</sup> *See e.g.*, Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, 3311 n.24 (2004) (declaratory ruling issued to resolve "controversy or uncertainty").

<sup>31</sup> *Supra*, nn.16, 17.

13. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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