

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

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| In the matter of |) | |
| |) | |
| Port Authority of New York and New Jersey |) | WT Docket No. 02-55 |
| and |) | |
| Nextel Communications, Inc. |) | Mediation No. TAM-50077 |

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 2012

Released: March 6, 2012

By the Deputy Chief, Policy and Licensing 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 the 800 MHz Transition Administrator, LLC (TA) involving a dispute between the Port Authority of New York and New Jersey (Port Authority) and Nextel Communications, Inc. (Sprint)¹ (collectively the Parties).² The dispute involves a Change Notice submitted by Port Authority totaling \$955,865.43 for the services of M/A COM Technology Solutions (M/A-COM), Booz Allen Hamilton (BAH), and Port Authority's internal staff, in addition to internal legal and administrative costs.³ Based on our *de novo* review of the mediation record, the Recommended Resolution submitted by the TA-appointed mediator in this case, and the Parties' statements of position,⁴ we disapprove the Change Notice in part and approve Port Authority's legal and administrative costs associated with mediation and preparation of pleadings.

II. EXECUTIVE SUMMARY

2. After completing rebanding of its system, Port Authority submitted a Change Notice to Sprint for \$955,865.43 for services rendered by its vendor, M/A-COM, its consultant, BAH, and Port Authority internal staff. Sprint disputes most of the claimed \$955,865.43, arguing that Port Authority submitted the Change Notice after the charges were incurred instead of submitting the Change Notice prior to incurring the charges as required by the Parties' Frequency Reconfiguration Agreement (FRA) and the TA's Change Notice guidelines.⁵

¹ For purposes of uniformity in *de novo* review decisions, we refer to Nextel Communications, Inc. herein as its parent, Sprint Nextel Corp. (Sprint).

² TA Recommended Resolution, TAM No. 50077 filed August 25, 2011 (RR).

³ Proposed Resolution Memorandum filed by the Port Authority of New York and New Jersey, TAM No. 50077 at 1 (dated July 13, 2011) (Port Authority PRM); Reply of the Port Authority of New York and New Jersey to the Proposed Resolution Memorandum of Nextel Communications, Inc., TAM No. 50077 at 1 (dated Aug. 5, 2011) (Port Authority Reply).

⁴ Statement of Position of Nextel Communications, Inc., dated Sept. 9, 2011 (Sprint SOP); Statement of Position of the Port Authority of New York and New Jersey, dated Sept. 9, 2011 (Port Authority SOP).

⁵ See *infra* para. 67.

3. Sprint also disputes whether the services provided by BAH, MA-COM, and Port Authority personnel conform to the Commission's "Minimum Necessary Cost Standard."⁶ Sprint submits that with respect to BAH, neither Sprint nor the Commission can assess whether the Minimum Necessary Cost Standard has been met because BAH refuses to itemize the services performed and the time taken to perform them. Sprint also claims that Port Authority's records for services performed by its own personnel are insufficiently specific to permit a determination of whether they conform to the Minimum Necessary Cost Standard. With respect to M/A-COM, Sprint submits that while some of the vendor's invoices are sufficiently specific to determine whether the Minimum Necessary Cost Standard has been met, many of the services that Port Authority authorized M/A-COM to perform were neither reasonable nor necessary. Sprint has offered \$205,394.89 for the services that it contends are adequately documented and meet the Commission's standard. It also offers to pay Port Authority \$12,076.16 for legal and administrative expenses associated with mediation and the preparation of pleadings.

4. Port Authority submits that the Parties contemplated that Port Authority would incur, and Sprint would pay, expenses in excess of those specified in the FRA, and that Sprint now is attempting to renege on that understanding. Port Authority also claims that the FRA does not require it to itemize work performed to the level of detail that Sprint asserts is required. Port Authority submits that Sprint was on notice of the additional work that Port Authority was performing and did not object, and that Sprint therefore cannot now claim that the work was unnecessary.

5. The post-FRA expenses claimed by Port Authority place it in the 99th percentile for costs associated with similar-sized rebandings.⁷ Our precedent requires that we give careful scrutiny to such claims. Applying that scrutiny to the record before us, we conclude that: (a) Port Authority should have submitted its Change Notice in advance of incurring the claimed \$955,865.43 in expenses; (b) Port Authority's claim for reimbursement is inadequately documented in most instances, and many of the claimed expenses that are adequately documented do not comport with the Commission's Minimum Necessary Cost Standard; and (c) many of the claimed costs are for services that were foreseeable and should have been included in the FRA. Accordingly, we find in favor of Sprint and direct it to pay Port Authority \$242,092.98 in full satisfaction of the costs Port Authority incurred after it signed its FRA, including administrative and legal costs associated with mediation and preparation of pleadings. We find no merit in Port Authority's claim that Sprint acted in bad faith in refusing to pay the amount demanded by Port Authority.

III. BACKGROUND

6. Port Authority operates a seven-channel regional simulcast trunked public safety radio system and a five-channel trunked system operated as part of the National Mutual Aid system.⁸ Port Authority also holds licenses for and operates campus-based 800 MHz public safety radio channels at several facilities.⁹ These latter channels serve the Port Authority police department, known as the Public Safety Division, and two AirTrain in-car passenger emergency communications systems.¹⁰ Port Authority has 11 sites and more than 2,000 mobile and portable radios.¹¹

⁶ See *infra* para. 60.

⁷ See *infra* para. 61.

⁸ RR at 3. The Port Authority, a bi-state agency created between the States of New York and New Jersey, uses the M/A-COM Enhanced Digital Access Communication System (EDACS) in the 800 MHz band under call signs WNNM887, WNNM888, WPDS601, WPFN315, WPGV310, WPWQ420, WPXP445, WQAE549, and WQCZ732.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

7. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee that is subject to rebanding.¹² The Parties negotiated an FRA for \$2,265,031.75, which the TA approved on December 24, 2007.¹³ After it completed rebanding, however, Port Authority submitted a Change Notice for an additional \$955,865.43. The nature and cost of the services in the Change Notice had not been negotiated with or authorized by Sprint or the TA and were presented to Sprint after they had been incurred.

8. The Change Notice identifies \$74,425.22 in “hard costs” and \$903,034.66 in “soft costs” for various engineering and project management tasks.¹⁴ These tasks include: (a) “splitting” Port Authority’s Enhanced Digital Access Communication System (EDACS) facilities; (b) incorporating dual personality programming in Port Authority radios to accommodate the EDACS split; (c) a temporary back-to-back system; (d) remedying problems encountered with Port Authority AirTrain radios; (e) Mobile Data Terminal (MDT) rack redesign; (f) logistics associated with additional equipment; (g) testing; and (h) BAH technical support.¹⁵

9. Sprint does not contest the hard cost amount claimed by Port Authority for these tasks but disputes the claimed soft costs, which break down as follows: \$190,044.42 for services performed by M/A-COM, \$429,481.20 for services performed by BAH, and \$333,312.33 for work by Port Authority’s own personnel.¹⁶ Sprint contends that Port Authority’s billing records lack sufficient detail to determine whether these claimed amounts comply with the Commission’s Minimum Necessary Cost Standard. Port Authority responds that the degree of detail requested by Sprint is not required by the FRA,¹⁷ and also contends that Sprint has not acted in good faith because Sprint refuses to pay the full cost of tasks that Sprint has conceded were necessary.¹⁸ In addition to the amounts claimed in the Change Notice, Port Authority requests \$12,076.16 in legal and administrative costs for participating in mediation over the Change Notice and preparing Port Authority’s Proposed Resolution Memorandum (PRM) and Reply PRM.¹⁹

10. Mediation of the disputed amounts was unsuccessful. Accordingly, on August 25, 2011, the TA Mediator submitted a Recommended Resolution (RR) and forwarded it with the mediation record, to

¹² See Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) (800 MHz R&O); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007).

¹³ Port Authority PRM at Exhibit B.

¹⁴ RR at 3. Herein, and as used by the Parties, “hard costs” refer to the acquisition and installation or modification of radio equipment; “soft costs” refer to project supervision and management, planning, and engineering. The sum of the hard costs and soft costs reported by the TA Mediator is \$977,459.99, whereas Port Authority states that it is requesting \$955,865.43 in its Change Notice. The record is insufficiently complete to allow reconciliation of the \$21,584.45 difference. The difference, however, is not material to our decision herein to allow only the costs proposed by Sprint plus Port Authority’s costs associated with preparation of its PRM and reply PRM.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.²⁰ The Parties filed statements of position on September 9, 2011.

IV. DISCUSSION

A. Port Authority Proposal and Sprint's Response

11. *Port Authority's Contentions.* Port Authority advances six arguments in support of its Change Notice. First, it claims that it reasonably relied on Sprint's oral representations that Sprint would fully reimburse Port Authority for the additional costs claimed in the Change Notice once rebanding was complete.²¹ Port Authority submits that "representatives of Nextel assured the Port Authority's Project Manager, James Buchanan, that the additional Schedule C²² costs would be reconciled at the end of the rebanding project, since to incorporate the additional Schedule C costs before the project started would have delayed this rebanding substantially."²³ Port Authority states that "Section 3(c)(ii) [of the FRA] provides for reconciliation of Schedule C cost later in the rebanding project."²⁴

12. Second, Port Authority contends that Sprint delayed relinquishing frequencies to Port Authority, which precluded Port Authority from revising the FRA to reflect additional costs.

Obviously, the Port Authority would have preferred to have a fully settled FRA at the time it was signed, and have had time to work through any changes so that the Port Authority would not have to proceed with the new work necessitated by the two-phased approach^[25] while facing the burden of proof when it came to reconciliation and reimbursement. However, Nextel unilaterally took it upon itself to refuse dates to turn over frequencies for the FRA in order to more conveniently continue commercial service in the New York area. In so doing, Nextel delayed the process more than a year, and thus, took away the Port Authority's ability to revise the FRA to reflect these changes brought about by Nextel's delay and ultimate insistence on a two-phased approach while also adhering to the FCC-mandated Wave 1 rebanding deadline.²⁶

²⁰ *Id.*

²¹ Port Authority PRM at 6.

²² Schedule C of the FRA lists "soft costs" for management, project supervision, engineering, and related activities.

²³ Port Authority PRM at 6. Port Authority adds that "new estimates would have had to be made by BAH and the FRA itself would have had to be renegotiated, all events that would have delayed this transition which is contrary to the Commission's goals that the rebanding process be completed in a timely and efficient manner without compromising the public agency's ability to safely operate its emergency communication system during the transition." *Id.* The costs in Schedule C of the FRA include vendor cost estimates.

²⁴ *Id.* Section 3(c)(ii) of the FRA provides that "[t]he Incumbent's Reconfiguration implementation may result in unknown additional Reconfiguration Costs incurred by Incumbent that may vary from the amounts set forth in the Cost Estimate, including but not limited to additional costs and expenses incurred as the result of required 'second touches' of equipment and any other work necessary to assure that Incumbent receives Comparable Facilities." *Id.* at Exhibit B.

²⁵ The "two-phased approach" refers to Sprint surrendering spectrum to Port Authority in two tranches, rather than, as is more usual, making all of the replacement spectrum available at one time. The two-phased approach was proposed by Sprint, and approved by Port Authority, before the FRA was signed. *Id.* at Exhibit 1 -- Affidavit of James Buchanan, P.E. at 4-5 ¶¶13-18.

²⁶ Port Authority Reply at 3.

13. Third, Port Authority alleges that it “continued to proceed with performing the work that was necessary to reband its emergency public safety frequencies so that the work could be completed in a timely and cost-efficient manner while not jeopardizing the public safety.”²⁷

14. Fourth, Port Authority claims it “was constantly checking its vendors’ work to make sure their vendors did the work in an efficient manner at the lowest possible cost without jeopardizing the safety of the users of the Port Authority’s facilities.”²⁸

15. Fifth, Port Authority claims that “[m]any of these additional costs were incurred due to events that occurred after the FRA was executed or due to conditions that could only be discovered after the work was commenced.”²⁹

16. Sixth, Port Authority argues that the EDACS split and associated tasks were necessary to ensure that “comparable facilities” would exist during rebanding.³⁰

17. *Sprint’s Contentions.* Sprint argues that Port Authority cannot ignore its FRA and other rebanding program obligations.³¹ Sprint first contends that “simply because [Sprint] agreed to execute the FRA with an agreement that the parties would later review the two-phased approach costs, once developed, does not make the Port [Authority’s] broad over-assumption, that any and all costs the Port already had and thereafter continued to accrue should be held indefinitely, valid.”³²

18. Second, Sprint concedes that “[g]iven the urgency with which the Port [Authority] wanted to complete the project, and given that the two-phased approach did need development, it was understandable that Nextel agreed to review the *anticipated, future* proposed costs of the two-phased approach in a Change Notice, while moving forward to sign the FRA so that the implementation of the reconfiguration could commence.”³³

19. Third, Sprint argues that “[i]t was the Port that never presented these costs (and all the other costs still in dispute) for review until it completed its project, even while assuring Nextel that its FRA cost estimates were valid except for the need to account for the two-phased approach.”³⁴

²⁷ Port Authority PRM at 6.

²⁸ Port Authority Reply PRM at iii.

²⁹ Port Authority PRM at 5.

³⁰ Port Authority Reply at 8-11.

³¹ Proposed Resolution of Nextel Communications, Inc., TAM-50077 at 11-12 (Sprint PRM).

³² Reply of Nextel Communications, Inc., to the Proposed Resolution Memorandum of Port Authority of New York and New Jersey, TAM-50077 at 9 (Sprint Reply). Sprint concurs with Port Authority’s assertion that Sprint “agreed to pay the reasonable additional costs of the two phased frequency approach, but it is plain that only a relatively small portion of the additional costs relate to what the parties acknowledge was a necessary change in project implementation due to spectrum constraints in the New York City area — specifically the need for two rather than one touch to the Port’s infrastructure.” Sprint PRM at i. Sprint adds that Port Authority’s Change Notice “relates only tangentially to a known and agreed upon deviation from the original single phase frequency approach to a two phased frequency approach.” Sprint PRM at ii. Sprint contends that the “disputed costs for which the Port seeks recovery represent unaccountably excessive Project Management and Engineering hours that Nextel would never have agreed to if they had been presented for review prior to the work having been done.” *Id.* at ii-iii.

³³ Sprint Reply at 10 (emphasis in original).

³⁴ *Id.*

20. Fourth, Sprint submits that “[h]ow Nextel’s decision to cooperate with the Port and sign the FRA while knowing it would later see proposed additional costs for the two-phased approach in a Change Notice could be turned into an argument in favor of Nextel providing the Port with a blank check for every other cost, both those already accrued and those the Port incurred later, is not at all obvious.”³⁵

21. Fifth, Sprint alleges that Port Authority did not carefully supervise its vendors but instead allowed them to invoice Port Authority for expensive, unneeded, and unreasonable services.³⁶

22. Sixth, Sprint argues that many of the costs claimed by Port Authority should not be approved because Port Authority and its vendors did not maintain sufficient records to allow an evaluation of what tasks were done and the time expended on such tasks.³⁷ Sprint claims that despite repeated requests over many months, it was not furnished the information necessary to understand what additional engineering and project management work was actually performed and why.³⁸ Sprint states that BAH invoices and Port Authority’s internal records are particularly deficient and that “none of the disputed costs records presented would pass muster in a typical TA reconciliation process.”³⁹ We now turn to the specific issues in dispute.

B. Disputed Tasks

1. Splitting the EDACS System

23. *Port Authority Position.* After the FRA was executed, Port Authority decided to “split” the EDACS system for rebanding purposes so that the split subsystems could be rebanded sequentially.⁴⁰ Port Authority contends that splitting its system was necessary so that the system would operate safely during rebanding.⁴¹ It claims that when it expanded its system – a concurrent⁴² project independent of rebanding – it “discovered” that systems can fail “when parts of the system are taken offline and worked on, such as was to occur in the process of this rebanding project.”⁴³

24. Port Authority adds that “the PAPD [Port Authority Public Safety Division] required a solution that demanded certain core parts of the main simulcast system, in particular mobile data communications, be operational at all times to ensure that a backup to the emergency communications system would exist continuously throughout the rebanding project.”⁴⁴ “Therefore, the Port Authority had

³⁵ *Id.*

³⁶ *Id.* at 10-11.

³⁷ Sprint PRM at iii-iv.

³⁸ *Id.* at iii.

³⁹ *Id.* at iv.

⁴⁰ Port Authority PRM at 9 (“The split system was created by splitting the whole system into two parts, one part was turned off to be rebanded while the second part continued to operate with a temporary backup system. After the rebanding of the first part was completed and placed back online, the second part was turned off to be rebanded. After the rebanding of both parts of the emergency communication system was completed, the two parts of the system were consolidated into one uniform operational system.” *Id.* at Ex. 1 (Affidavit of James Buchanan) at 8.)

⁴¹ Port Authority PRM at 9..

⁴² Port Authority embarked on an independent “major expansion of its 800 MHz emergency communication system” after the FRA was signed. *Id.* at Ex. 1 (Affidavit of James Buchanan) at 7. The expansion project began in 2006 and, as of the date Port Authority filed its PRM, was not yet complete. Port Authority PRM at 4.

⁴³ Port Authority PRM at 9.

⁴⁴ *Id.*

to split apart the existing Enhanced Digital Access Communication System ('EDACS') into two separate and independent systems, a process known as the split-system transition, a necessary solution that could not be foreseen at the time the FRA was executed.⁴⁵ Further, Port Authority states that splitting the system required a 163-page Task Plan⁴⁶ prepared by BAH with M/A-COM's assistance, to ensure that the system would continue to function while operated in split mode.⁴⁷ Port Authority also claims that M/A-COM provided on-site support to address any EDACS system issues that arose as the split system was implemented.⁴⁸

25. *Sprint Position.* Sprint claims that M/A-COM spent excessive time in assisting BAH with preparing the Task Plan. M/A-COM billed 46 hours for documenting material to be included in the Task Plan and another 80 hours reviewing the plan that BAH produced.⁴⁹ Sprint offers to pay for 16 hours of M/A-COM's documentation effort and 32 hours of its review process.⁵⁰ Sprint contends that it should not be required to pay any of BAH's costs associated with preparation of the Task Plan because Port Authority did not adequately document the time expended and the tasks performed by BAH. Sprint claims that BAH "simply had multiple persons billing 8 hour days for weeks and months at a time without keeping the expected detailed records as to what specific tasks these people were accomplishing."⁵¹

26. Although Sprint questions whether splitting the EDACS system was unforeseeable,⁵² it acknowledges that during mediation it agreed to pay part of the cost "to try to move the review process along and not because Nextel believed that the Port had provided any justification for having undertaken a massive and very likely avoidable rework of the EDACS system without any prior consultation with Nextel."⁵³ Sprint claims that even had it agreed that splitting the system was necessary, the services provided by BAH and M/A-COM were excessive.⁵⁴ Sprint notes that Port Authority's PRM offers no specific rationale for M/A-COM and BAH spending hundreds of hours to produce a Task Plan for a temporary split system.⁵⁵

2. Dual Personality Programming to Accommodate the EDACS Split

27. *Port Authority Position.* The split system required that Port Authority's radios operate on both pre-rebanding and post-rebanding channels.⁵⁶ Therefore Port Authority had M/A-COM determine which Port Authority radios could be retuned on these channels and which older radios had to be re-flashed to accommodate them.⁵⁷ Port Authority claims that it was necessary for BAH to develop "special

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 17-18.

⁵² *Id.* at 18. Sprint adds that Port Authority should have brought the PAPD's concerns to Sprint immediately so that Sprint "could have demonstrated that the rework was not necessary." *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Port Authority PRM at 10.

⁵⁷ *Id.*

dual radio personalities” to implement a “Wide Area System Scan” (WASS).⁵⁸ In sum, Port Authority submits that the split system “solution” required development of the Task Plan, *supra*, the re-flashing of radios, and implementation of the WASS.⁵⁹ It also claims that its internal staff performed coordination and oversight functions in connection with the split system.⁶⁰

28. *Sprint Position.* Sprint states that M/A-COM apparently spent 32 hours on radio personality work and 46 hours responding to concerns that arose from BAH’s dual-personality programming.⁶¹ Sprint notes that “[t]his aspect of the project management task should have been a simple summary of the issues faced and decisions already made that determined the solution adopted.”⁶² Sprint claims that “it is patently unreasonable for this sub-task to have taken more than a full week of labor to relay already known information to other parties.”⁶³ Sprint offers to compensate M/A-COM for 24 hours of effort.⁶⁴

3. Temporary Back-to-Back Systems

29. *Port Authority Position.* Port Authority contends that it did not foresee the need to provide a temporary system to back up its auxiliary system, which was used at the John F. Kennedy Airport, Newark Airport, and Teterboro Airport while the primary system was rebanded.⁶⁵ Port Authority claims that Sprint provided it with equipment for the temporary backup system but refused to pay for the transportation and installation of the equipment.⁶⁶ Port Authority also argues that (1) BAH charged additional fees because it had to modify its plan to include the temporary backup system and (2) M/A-COM generated additional project management costs to coordinate transportation and installation of the equipment necessary to make the backup system operational.⁶⁷

30. After the FRA was executed, the Region 8 Regional Planning Committee (RPC) asked Port Authority to provide a mutual aid back-to-back facility.⁶⁸ Port Authority claims that this request was made during meetings that Sprint attended, and that Sprint was therefore on notice that it would be responsible for the consequent cost.⁶⁹

31. BAH and M/A-COM made three unsuccessful attempts to implement the back-to-back system. Finally, Sprint supplied Port Authority with the equipment necessary to render the back-to-back system operational.⁷⁰ Thus, Port Authority contends that Sprint, having been involved in rendering the back-to-back system operational, was on notice of its complexity and should pay for BAH and M/A-

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sprint PRM at 19.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 20.

⁶⁵ Port Authority PRM at 10.

⁶⁶ *Id.* at 10-11.

⁶⁷ *Id.* at 11.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

COM's implementation efforts and for a maintenance manual that BAH and M/A-COM produced.⁷¹ Port Authority also argues that Sprint should bear the financial responsibility for the back-to-back system because Sprint "reaped the [cost-saving] benefits in that many Region 8 public safety entities had access to this Mutual Aid back-to-back solution."⁷²

32. *Sprint Position.* Sprint questions whether the need for a back-up system to preserve mutual aid capability was unforeseeable at the time the FRA was negotiated.⁷³ Sprint concedes that it has paid other incumbent licensees to implement back-to-back capability.⁷⁴ It argues, however, that BAH and M/A-COM spent excessive time and "wasted many hundreds of hours exploring 'solutions' that did not work."⁷⁵ Thereafter, Port Authority sought Sprint's guidance and Sprint provided "a workable solution."⁷⁶ Sprint contends that had it been consulted earlier, it "could have offered a viable solution and the Port could have avoided incurring entirely unnecessary costs associated with its choice of vendor and apparently lax oversight."⁷⁷ Finally, Sprint disputes that the cost savings of providing Region 8 licensees with access to the back-to-back solution justify paying BAH and M/A-COM "for work that could have been avoided or at the very least been done far more efficiently."⁷⁸ Sprint offers to pay \$8,400 for 48 hours of M/A-COM's engineering effort and nothing for BAH's involvement.

4. AirTrain Radio Difficulties

33. *Port Authority Position.* Port Authority states that while the FRA allotted \$257,908 to Bombardier Transportation (U.S) for rebanding the Kennedy Airport AirTrain radios, the actual cost was only \$206,125, resulting in a savings of \$51,782 to Sprint.⁷⁹ Port Authority asserts that it paid M/A-COM \$28,700 to "coordinate" rebanding of the AirTrain radios⁸⁰ and that Sprint should reimburse Port Authority for that amount. Port Authority adds that "had an alternative method to make the Kennedy Airport AirTrain MDRs functionally rebandable not occurred, it probably would have cost Nextel approximately \$1,000,000 additionally to supply alternate hardware that would operate on the emergency communication system for the Kennedy Airport AirTrain."⁸¹

34. With respect to AirTrain's emergency communications system at Newark Airport, Port Authority submits that only half of the radios could be rebanded and the other half required replacement.⁸² The replacement radios, however, required a software change so that they could provide audio and control signals through the radio "backplane."⁸³ Port Authority concedes that Sprint did not have to expend

⁷¹ *Id.*

⁷² *Id.*; Port Authority Reply at 15.

⁷³ Sprint PRM at 20.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Sprint PRM at 21.

⁷⁸ *Id.*

⁷⁹ Port Authority PRM at 12.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

additional funds for the replacement radios,⁸⁴ but claims that BAH and M/A-COM incurred costs in rendering the Newark Air Train system compatible with the new radios, *i.e.*, “re-engineering and reprogramming” of the existing system.⁸⁵ Port Authority submits that the need for these engineering and programming changes was not foreseeable until the work commenced.⁸⁶

35. *Sprint Position.* Addressing the Kennedy Airport project, Sprint notes that M/A-COM logged 164 hours for coordinating 42 radio deliveries, programming, and field work. Sprint contends that, although “the first radio or two may have required some additional or unique efforts due to logistics and the nature of the installation, the rest should have followed an established process that should have required little or no oversight from the engineering or project management teams.”⁸⁷ Yet, Sprint notes, M/A-COM spent 4 hours of “project management” time per radio. Sprint offers 16 hours for M/A-COM’s project management effort and makes no separate allocation for BAH.⁸⁸

36. With regard to the technical issues at Newark Airport, Sprint denies that it has refused to reimburse Port Authority for resolving the issues.⁸⁹ However, it submits that there is no breakdown or detail of costs for the “various tasks” Port Authority claims M/A-COM and BAH performed.⁹⁰ Sprint claims that M/A-COM logged 72 hours just overseeing the certification and reprogramming of the new Newark Airport radios and accessories⁹¹ at a cost for project management that exceeded the actual cost of resolving the technical issues.⁹² Sprint therefore offers 24 hours for M/A-COM’s effort and nothing for BAH’s undocumented services.

5. MDT Rack Redesign.

37. *Port Authority Position.* Port Authority assumed that the police Mobile Data Terminals (MDT) could be replaced without need to change their mounting racks.⁹³ It later discovered, however, that the racks had to be redesigned and replaced. This discovery was not made, Port Authority asserts, until after the FRA had been signed and the work started.⁹⁴

38. *Sprint Position.* Sprint questions the amount of vendor resources expended on the redesign and replacement of the MDT rack and suggests that Port Authority “exercised no restraint on the vendor’s staffing and level of effort in oversight or project management.”⁹⁵ Sprint asserts that Port Authority failed to provide a cost breakdown for the MDT redesign.⁹⁶ It notes that M/A-COM claims to have expended 36 hours overseeing the billing, programming and delivery/installation of the new MDT racks and 42 hours

⁸⁴ *Id.*

⁸⁵ *Id.* at 12-13.

⁸⁶ *Id.*

⁸⁷ Sprint PRM at 22.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 22-23.

⁹³ Port Authority PRM at 13.

⁹⁴ *Id.* Exhibit 1 (Affidavit of James Buchanan) at 19.

⁹⁵ Sprint PRM at 23.

⁹⁶ *Id.*

for coordination of service documentation/maintenance manuals both for the new MDT racks and for installation of back-to-back equipment at the Todt Hill repeater site.”⁹⁷ Sprint offers 16 hours for each task. Although Port Authority claims that BAH participated in this effort, Sprint claims that “neither the scope of its efforts nor the specific hours are provided,”⁹⁸ and declines to offer anything to BAH for its role in the MDT rack redesign.

6. Logistics Associated with Additional Equipment

39. *Port Authority Position.* Port Authority submits that where Sprint has provided equipment or paid for new equipment, it has refused to fully pay Port Authority for its associated costs such as engineering, technical and logistical coordination, and documentation support.⁹⁹ For example, Port Authority claims that Sprint approved changes to the radio feature sets¹⁰⁰ and knew there would be associated project management costs, but refused to pay them.¹⁰¹ Port Authority also complains that Sprint provided it with defective equipment but refused to fully pay M/A-COM for coordinating the return of the defective equipment and overseeing delivery, distribution, and installation of replacement equipment.¹⁰² Port Authority argues that these “additional project management costs were not included in the FRA since it was reasonable for the Port Authority to believe that it would be provided with proper equipment from Nextel in the first instance.”¹⁰³

40. *Sprint Position.* Sprint again argues that Port Authority has not detailed the tasks it claims for project management.¹⁰⁴ It submits that “it is not obvious which costs the Port [Authority] believes fall in this specific category as opposed to overlapping with the other task categories discussed only very generally in its PRM.”¹⁰⁵ Sprint submits that M/A-COM appears to request an excessive “56 additional project management hours for its feature code work, and 36 additional hours for handling equipment shipments.”¹⁰⁶ Sprint offers 16 hours and 8 hours, respectively, for these tasks. With regard to M/A-COM’s project management oversight of delivery and installation of hardware at three sites, Sprint suggests that the work itself was performed by the Port Authority’s vendor, Eastern Communications, and that the 48 hours logged by M/A-COM for overseeing the vendor were unnecessary and excessive.¹⁰⁷ Sprint offers 16 hours for M/A-COM’s oversight of Port Authority’s vendor.¹⁰⁸

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Port Authority PRM at 13.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 13-14.

¹⁰⁴ Sprint PRM at 24.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 24-25.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ *Id.*

7. Testing

41. *Port Authority Position.* Port Authority claims that it determined after the FRA was signed that outdoor coverage testing was insufficient and that indoor coverage testing of all Port Authority facilities by BAH was required.¹⁰⁹

42. *Sprint Position.* Sprint contends that Port Authority fails to explain why it did not foresee the need for indoor testing when it negotiated the FRA and notes that Port Authority did not seek or obtain Sprint's prior consent to additional testing.¹¹⁰ Sprint claims that had Port Authority sought such consent, Sprint would not have approved the "vastly overbroad" testing described in the Port Authority PRM.¹¹¹ Therefore, Sprint argues, it was "deprived of the opportunity to review the plan for reasonableness of scale and scope of effort, [and] has not been presented with any cost detail for the additional [BAH] hours and expenses associated with this additional testing."¹¹²

8. BAH Technical Support of Other Vendors

43. *Port Authority Position.* Port Authority contends that it:

incurred additional costs since it had to pay BAH to provide technical engineering support and oversight to vendors that, contrary to what was reasonable to assume, did not have the equipment nor the expertise concerning how to replace the equipment already installed at the various Port Authority facilities with equipment in the new frequency band, as well as vendors who did not possess the technical knowledge regarding the new equipment interfaces and installation conditions at the facilities.¹¹³

44. *Sprint Position.* Sprint contends that it should not be held financially responsible for BAH providing technical support to unqualified vendors that Port Authority itself selected.¹¹⁴ Further, Sprint observes that Port Authority stated during project review that "it cannot provide any quantification or documentation of this [BAH] engineering and technical support function."¹¹⁵ Therefore, Sprint argues, "it is impossible to credit this vast, undifferentiated lump of tech support nominally provided by [BAH] to make up for the purported shortcomings of other vendors."¹¹⁶

C. Bad Faith Allegations

45. *Port Authority Position.* Port Authority alleges that Sprint failed to negotiate in good faith.¹¹⁷ For example, Port Authority contends that Sprint did not make a good faith effort to support its claim that M/A-COM and BAH expended unreasonable amounts of time in producing the Detailed Task Plan. Port

¹⁰⁹ Port Authority PRM at 14.

¹¹⁰ Sprint PRM at 25.

¹¹¹ *Id.*

¹¹² *Id.* at 25-26.

¹¹³ Port Authority PRM at 15.

¹¹⁴ Sprint PRM at 26.

¹¹⁵ *Id.* at 27.

¹¹⁶ *Id.*

¹¹⁷ Port Authority Reply at 12-13.

Authority also accuses Sprint of bad faith in demanding a greater level of specificity to document BAH's work in support of the Detailed Task Plan than is required by the FRA.¹¹⁸ Further, it claims that Sprint has offered no support for the claim that work associated with the Kennedy Airport radios and MDT racks could have been accomplished more efficiently.¹¹⁹

46. *Sprint Position.* Sprint asserts that it negotiated in good faith. It characterizes Port Authority's bad faith claim as "groundless" and contends that Port Authority misunderstands the elements of proving bad faith in negotiations.¹²⁰

D. Legal and Administrative Fees

47. Port Authority requests \$12,076.16 in legal and administrative fees for participating in the Change Notice mediation and in preparing its PRM and Reply PRM.¹²¹ Port Authority has provided affidavits containing detailed time and cost figures from the people that participated in the process.¹²² Sprint does not object to Port Authority's costs associated with mediation and the preparation of related pleadings.

E. TA Mediator Recommendation

48. The TA Mediator recommends finding that (1) Port Authority has failed to demonstrate that its Change Notice satisfies the Commission's Minimum Necessary Cost Standard, and (2) Sprint's payment obligation should be limited to the amounts it offered for M/A-COM and BAH's services and Port Authority's internal costs.¹²³

49. Cost Metrics Analysis. In conducting its analysis, the TA Mediator compares the cost of the Port Authority rebanding project against cost metrics that the TA has derived from the rebanding costs of other licensees that have reached FRAs with Sprint (TA Metrics).¹²⁴ The TA Mediator observes that Port Authority's total rebanding cost as reflected in the FRA is \$2,265,031.76, which places Port Authority in the TA Metrics' 92nd percentile relative to similarly sized systems.¹²⁵ The additional amount requested by Port Authority in its Change Notice increases the total cost to \$3,220,897.18, which would place Port Authority in the 99th percentile of similarly sized systems.¹²⁶ Based on the high cost of the Port Authority project compared to other systems, the TA Mediator concludes that under the Commission's standards and precedent, Port Authority's Change Notice warrants "careful scrutiny" and Port Authority bears a very high burden "to justify its costs with record evidence."¹²⁷

¹¹⁸ *Id.* at 12.

¹¹⁹ *Id.* at 13.

¹²⁰ Sprint Reply at 11, *citing* 800 MHz Transition Administrator, LLC, *Alternative Dispute Resolution Plan*, 5 (V. 1.8, Aug. 20, 2010); 47 C.F.R. § 90.677(c).

¹²¹ Port Authority Reply at 17.

¹²² *Id.* at Ex. 1-2.

¹²³ RR at 24.

¹²⁴ The TA has made the Metrics available on its website. http://www.800ta.org/content/resources/FRA_Metrics.pdf (TA Metrics) (Oct. 31, 2011 - v.9.2).

¹²⁵ RR at 20.

¹²⁶ *Id.*

¹²⁷ *Id.* at 20-21.

50. Minimum Necessary Cost Analysis. Applying the high level of scrutiny noted above, the TA Mediator finds that Port Authority has failed to meet its burden relative to the additional services of BAH, M/A-COM, and its internal staff, but that Port Authority has met its burden relative to requested costs for legal and administrative fees.¹²⁸

51. First, the TA Mediator concludes that Port Authority has not provided sufficient information to evaluate the reasonableness of the costs claimed for the discrete tasks listed in its Change Notice.¹²⁹ The TA Mediator states that Port Authority “makes no attempt” in its PRM and Reply PRM “to identify the time or cost attached to a particular matter in dispute.”¹³⁰ Instead, the TA Mediator notes, Port Authority “identifies the entire amount that is in dispute and then discusses the individual items without any breakout of the costs.”¹³¹ The TA Mediator notes “[t]hat approach is consistent with the information that was provided by the [Port Authority] during the mediation which, particularly in the case of BAH and the [Port Authority’s] internal costs was extremely general with no specifics as to the tasks performed or the time spent on the tasks.”¹³² The TA Mediator states that “Sprint Nextel repeatedly asked for greater detail and the TA Mediator made similar requests during several informal mediation calls.”¹³³ The TA Mediator acknowledges that Port Authority provided some additional information, but notes that “all of it was general with no specifics concerning the work performed.”¹³⁴ The TA Mediator thus finds that Port Authority’s “failure to provide details concerning the cost of each task and the reasonableness of such cost is a serious flaw in the [Port Authority’s] submissions.”¹³⁵ The TA Mediator observes that “Sprint Nextel attempted to identify M/A-COM’s costs for each task because the M/A COM invoices did have some detail, but, as stated in the Sprint Nextel PRM, in many cases that has been an estimate.”¹³⁶ The TA Mediator therefore concludes that he “does not have sufficient information to evaluate the costs requested by the [Port Authority] for individual tasks.”¹³⁷

52. Second, the TA Mediator finds that Port Authority provided inadequate information on BAH’s activities.¹³⁸ With respect to the largest portion of the Change Notice, the TA Mediator notes that Port Authority “provided no invoices or other billing information as to the tasks that BAH undertook.”¹³⁹ The TA Mediator notes that time was billed without reference to the specific tasks performed.¹⁴⁰ The TA Mediator states that Port Authority appears to have “continued to increase BAH’s cap on fees as soon as BAH’s invoices were about to reach the cap without regard to the amounts in the FRA and without any consultation or notice to Sprint Nextel.”¹⁴¹ “In fact,” the TA Mediator states, “by the time the FRA was

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

executed, BAH's invoices had exceeded the total amount approved in the FRA."¹⁴² The TA Mediator finds that despite Port Authority's claim that it carefully oversaw BAH's work, "there is no documentary evidence that would permit Sprint Nextel or the Commission to review that claim."¹⁴³

53. Third, the TA Mediator finds that Port Authority violated the terms of the FRA by undertaking significant tasks without discussing them with Sprint to determine whether such major changes were necessary or whether there were more efficient ways to accomplish the same results.¹⁴⁴ The TA Mediator notes the following examples of such changes: (a) implementing a split EDACS system which required several related costly changes; (b) installing a backup system at three airports; (c) installing a back-to-back system for mutual aid channels; and (d) implementing an extensive testing regime for the interiors of Port Authority's facilities.¹⁴⁵ The TA Mediator finds that such "unilateral changes clearly violated the terms of the FRA and failed to provide [Sprint] with an opportunity to negotiate the costs before they were incurred and perhaps to find more cost-effective solutions."¹⁴⁶

54. Fourth, the TA Mediator finds that Port Authority failed to demonstrate that M/A-COM's project management activities were reasonable. In many cases, the TA Mediator notes, the cost of M/A-COM's project management services greatly exceeded the cost of the work M/A-COM was supervising.¹⁴⁷

55. Fifth, the TA Mediator finds that some of the increased costs claimed by Port Authority were due to vendor errors or lack of expertise.¹⁴⁸ For example, the TA Mediator cites Port Authority's statement "that BAH had to provide support to unnamed vendors that did not have the necessary equipment or expertise to do the jobs that they were expected to do."¹⁴⁹ The TA Mediator finds that Port Authority did not demonstrate "why such costs, attributable to the capabilities of the vendors it [Port Authority] selected, satisfy the Commission's Minimum Necessary Cost Standard."¹⁵⁰ Therefore the TA Mediator concludes that Port Authority failed to satisfy its burden and recommends that any cost increase above the amount allocated in the FRA be limited to the amount offered by Sprint.¹⁵¹

56. Foreseeability. The TA Mediator rejects Port Authority's contention that several of the disputed tasks covered by the Change Notice were not foreseeable at the time the FRA was negotiated.¹⁵² First, the TA Mediator concludes that it was foreseeable that there would be a need to maintain communications at Kennedy, Newark, and Teterboro Airports during rebanding, so that if a temporary backup system was the only means to maintain such communications, as Port Authority contends, that those issues should have been negotiated in the FRA.¹⁵³ Similarly, the TA Mediator finds that the need for coverage testing of Port Authority's facilities was foreseeable and therefore should have been

¹⁴² *Id.*

¹⁴³ *Id.* at 21-22.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 23.

¹⁵³ *Id.*

negotiated and included in the FRA.¹⁵⁴ In the case of the claim for additional compensation for BAH, the TA mediator notes that even before the FRA was executed, BAH's invoices exceeded the \$324,655.86 allocated to BAH in the FRA.¹⁵⁵ Because the amount authorized under the FRA for BAH was exhausted, the TA Mediator reasons, the additional amount claimed by BAH in Port Authority's Change Notice was foreseeable.¹⁵⁶

57. Legal and Administrative Fees. The TA Mediator recommends finding in favor of Port Authority and directing Sprint to pay Port Authority's mediation and PRM costs.¹⁵⁷ The TA Mediator notes that Port Authority provided documentary evidence supporting those costs, that they meet the Minimum Necessary Cost Standard, and that they were not objected to by Sprint.¹⁵⁸

58. Good Faith. The TA Mediator recommends finding that Sprint did not negotiate in bad faith.¹⁵⁹ The TA Mediator states that the inability of the Parties to reach agreement on the Change Notice, standing alone, is not evidence of lack of good faith.¹⁶⁰

V. DECISION

A. Standard of Review

59. We evaluate Port Authority's Change Notice 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 that occur during implementation or in the case of an emergency.¹⁶¹ Second, costs incurred by a licensee in excess of those authorized in a FRA are at the licensee's risk until a Change Notice is submitted and approved.¹⁶² Third, a licensee may not use the Change Notice process to recover costs that were reasonably foreseeable during FRA negotiations but were not raised in negotiations, or that were considered and rejected.¹⁶³ Fourth, costs sought in a Change Notice must meet the Commission's Minimum Necessary Cost Standard.¹⁶⁴

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebidding, WT Docket 02-55, *Public Notice*, 22 FCC Rcd 17227, 17229 (2007) (*Guidance PN*).

¹⁶² See, e.g., County of Broward, Florida, WT Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 7635, 7637 ¶6 (PSHSB 2011) (*Broward*).

¹⁶³ 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) (*Fourth MO&O*).

¹⁶⁴ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶198.

60. The Commission's orders in this docket assign Port Authority 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" (Minimum Necessary Cost Standard).¹⁶⁵ The Commission subsequently 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."¹⁶⁶ The Minimum Necessary Cost Standard thus takes into account not only cost, but all of the objectives of the proceeding, including completing the rebanding process in a timely and efficient manner and a seamless transition that preserves public safety's ability to operate during the transition.¹⁶⁷

61. In addition to the Minimum Necessary Cost Standard, our review of the Parties' positions is informed by the TA Metrics, which are derived from the rebanding costs of licensees that have reached FRAs with Sprint. At this stage in the rebanding program, the TA Metrics are accorded substantial, although not dispositive, weight in the assessment of rebanding cost proposals.¹⁶⁸ The TA Metrics provide a useful measure of cost reasonableness, because they are based on increasingly large amounts of historical information regarding the cost of rebanding public safety systems. The further a licensee's costs exceed the TA Metrics, the less likely they are to be deemed reasonable, and the higher the burden on the licensee to justify its costs with record evidence.¹⁶⁹ Here, the Parties agreed to a total rebanding cost of \$2,265,031.75 in their FRA, which at the close of mediation placed Port Authority's reconfiguration in the 92nd percentile of similarly sized systems. Through its Change Notice, Port Authority seeks an additional \$955,865.43, which would bring the total rebanding cost to \$3,220,897.18, placing Port Authority's rebanding in the 99th percentile. Such a large deviation warrants careful scrutiny of these disputed costs.¹⁷⁰

B. Minimum Necessary Cost

62. Port Authority agrees with Sprint that incumbent licensees may seek reimbursement only of the minimum necessary costs for comparable facilities¹⁷¹ and that only unforeseeable costs may be recovered through the Change Notice process.¹⁷² However, Port Authority claims that the need to "split" its EDACS system was unforeseeable because, after the FRA was executed, the "Port Authority Public Safety Division ('PAPD') required that the EDACS system be split in order to provide 'comparable facilities' in that the operational half of the split system would function continuously with the support of a temporary backup system while the disabled half was being rebanded."¹⁷³ Port Authority claims that "this

¹⁶⁵ *Id.*; 800 MHz Supplemental Order, 19 FCC Rcd at 25152 ¶71.

¹⁶⁶ 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*).

¹⁶⁷ *Id.* at 9820 ¶¶6, 8.

¹⁶⁸ See County of Charles, Maryland, WT Docket No. 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 12749, 12751 ¶5 (PSHSB 2009) (*Charles County MO&O*).

¹⁶⁹ See *id.*, 24 FCC Rcd at 12751 ¶5.

¹⁷⁰ City of Manassas, Virginia, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 8526, 8527-28 (PSHSB 2007).

¹⁷¹ Port Authority Reply at 7 citing Dallas Fort Worth International Airport Board, WT Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 1116, 1117 (PSHSB 2011).

¹⁷² Port Authority Reply at 6-8.

¹⁷³ *Id.* at 8. Port Authority observes that "[t]his process was then repeated for the initially functioning, non-rebanded half of the EDACS system while the now rebanded portion was placed in service with the support of the temporary backup system." *Id.*

unforeseen yet necessary adjustment to the planned rebanding of the Port Authority's simulcast radio broadcast system was nevertheless required in order to ensure comparable facilities be provided continuously throughout the rebanding project.¹⁷⁴ Therefore, Port Authority contends that the EDACS split and the associated tasks (*e.g.* detailed task list, dual programming, and reflashing of radios) stemming from the EDACS split were required so that comparable facilities would be provided continuously throughout the rebanding project.¹⁷⁵

63. We disagree with Port Authority's argument that it was entitled to comparable facilities throughout the transition period while its systems were rebanded. In our *Houston* decision, we held that "the Commission has not used the comparable facilities standard to evaluate temporary facilities while the licensee at issue is in transition, but rather has used the standard to define the replacement facilities that the licensee is entitled to at the end of the transition."¹⁷⁶ Thus, applying the comparable facilities standard to transitional issues as Port Authority proposes would be inconsistent with precedent.

64. Although we decline to adopt Port Authority's interpretation of the comparable facilities standard, we find that Sprint was obligated to provide reasonable means for Port Authority to maintain "continuity of service" during the transition as required by the *800 MHz Report and Order*.¹⁷⁷ We explained in our *Houston* decision that "[t]his standard requires Sprint to take necessary and reasonable steps to protect licensees from disruption of service during the transition, and to take swift remedial action if any disruption occurs."¹⁷⁸ In that case, we also found that "the mere assertion of increased risk does not demonstrate . . . that continuity of service cannot be ensured by less expensive means [than those the licensee proposes]."¹⁷⁹

65. Here, we find that Port Authority has not met its burden of justifying the substantial additional expense associated with splitting the EDACS system. Port Authority offers no specific information on how rebanding its system without splitting it would result in service disruption. Its only justification for splitting the system is that it may have experienced unspecified service outages when its system was expanded – a project that Port Authority undertook independently of rebanding.¹⁸⁰ Although we are sensitive to any licensee's concerns about service interruption during rebanding, the mere assertion of increased risk, without more, does not persuade us that splitting the system was the least costly reasonable means of avoiding the potential for interrupted service while Port Authority's system was rebanded.

66. Port Authority's position here is similar to the position taken by the licensee in the *County of Henry, Georgia* case. There, the licensee proposed to add three temporary "swing" channels to its

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 9 *citing* Dallas Fort Worth International Airport Board, *Memorandum Opinion and Order*, 26 FCC Rcd 1116, 1117 ¶3 (PSPWD 2011).

¹⁷⁶ City of Houston, Texas, WT Docket 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 4655 ¶17 (PSHSB 2009) (*Houston*).

¹⁷⁷ *800 MHz Report and Order*, 19 FCC Rcd at 14986 ¶26, 15048 ¶48.

¹⁷⁸ *Houston*, 24 FCC Rcd at 4659-60 ¶17.

¹⁷⁹ *Id.*

¹⁸⁰ The record is equivocal on whether Port Authority actually encountered outages when it expanded its system or merely came to the realization that such outages could potentially occur. *See, e.g.*, Port Authority PRM at Exhibit 1 (Affidavit of James Buchanan) at 7: "the Port Authority became more aware of the issues that could arise in the emergency communications systems, in particular protracted outages, when parts of the system are taken offline and worked on, such as in this case, to be rebanded." *But see*, Sprint Reply at 16 n.21 (reciting that the Port Authority system may have "crashed" while it was being expanded, independent of rebanding).

EDACS system to preserve capacity during the rebanding process.¹⁸¹ We found that “[b]ecause . . . Sprint has taken ‘necessary and reasonable steps’ to protect Henry’s system from disruption, . . . Henry’s proposed temporary build-out is unnecessary to preserve ‘continuity of service’ during reconfiguration of its system.”¹⁸² Here, we conclude that, had Sprint been informed in advance of Port Authority’s proposal – as the Parties’ FRA required – the Parties could have developed a reasonable, and likely more cost-effective approach that would have supported continuity of service in Port Authority’s system while it was being reconfigured.

67. Unlike other rebanding efforts in which parties typically negotiate all reconfiguration methodologies as part of the FRA, Port Authority unilaterally undertook major changes to its system, *i.e.*, (a) splitting the EDACS facilities; (b) installing a backup system at three airports; (c) installing a back-to-back system for mutual aid channels; and (d) implementing testing in the interior of its facilities) *after* it executed its FRA and *before* it submitted its Change Notice to Sprint. Port Authority argues that Sprint orally represented that it would reimburse all of these costs.¹⁸³ We cannot accept such a claim as sufficient to bind Sprint, however, when there is no confirmation of such an oral commitment in the record. Moreover, Port authority’s claim is contradicted by the Parties’ FRA, which provides that all monies spent under the FRA, including amendments and Change Notices, must be approved and validated by the TA in advance of the expenditures and consistent with program standards.¹⁸⁴ Port Authority failed to follow this contractual procedure.

68. In addition, to determine whether a licensee has met its burden under the Minimum Necessary Cost Standard, it is essential to know the nature of the discrete services provided to the licensee, the time expended and the related expense. In this case, however, we cannot discern the nature of the services that provide the basis for Port Authority’s claim for an additional \$955,865.43, because Port Authority has failed to provide the requisite information in sufficient detail. Although Port Authority identifies disputed tasks in the Change Notice, it fails to associate any specific time or cost with any of these tasks.¹⁸⁵ Instead, it merely asserts that the disputed tasks were reasonable and necessary and that Sprint should therefore pay the entire amount requested – nearly \$1 million more than was provided in the executed FRA.¹⁸⁶ More is necessary for a licensee to meet its evidentiary burden to show that the Minimum Necessary Cost Standard has been met.

69. Similarly, while Port Authority claims to have provided records of work performed by M/A-COM, BAH, and Port Authority internal staff,¹⁸⁷ those records lack the requisite detail. Even after the Parties submitted PRMs, the TA Mediator gave Port Authority another opportunity to explain its claimed costs. It declined to do so. Instead, Port Authority submitted invoices and receipts from its vendors as well as the Detailed Task Plan.¹⁸⁸ Nothing in this volume of documentation, however, contains information specific enough to support a finding that Port Authority has met its minimum necessary cost burden. The documentation submitted in support of BAH’s services consists, for the most part, of staff’s receipts for food, lodging and travel. Invoices from BAH are included, but without detail, *i.e.*, only “for

¹⁸¹ County of Henry, Georgia, WT Docket 02-55, *Memorandum Opinion and Order*, 25 FCC Rcd 10962 (PSHSB 2010).

¹⁸² *Id.* at 10966 ¶14.

¹⁸³ Port Authority PRM at 6.

¹⁸⁴ *Id.* Exhibit B at Section 7.

¹⁸⁵ *See* RR at n.45.

¹⁸⁶ *See id.*

¹⁸⁷ *See* Port Authority PRM at Exhibits F, G and H.

¹⁸⁸ Port Authority Reply at 5.

professional services rendered.” BAH staff hours are listed, but with no indication of what staff services were provided, *e.g.*, multiple hours of staff time are billed for “agency wide 800 MHz radio conf” without further identification of what the individual staff member did during those hours.¹⁸⁹ Moreover, we are unpersuaded by Port Authority’s argument that the FRA does not require Port Authority to provide documentation of services provided to the level of detail requested by Sprint. Even assuming *arguendo* that the FRA did not so provide,¹⁹⁰ the Commission’s Minimum Necessary Cost Standard demands that the licensee provide sufficient documentation to carry its evidentiary burden. That, at minimum, requires a description of specific services performed and the costs incurred. Otherwise, it is not possible to determine whether the services were necessary and performed at minimum cost, *e.g.*, whether a service was performed in support of a disallowed task such as the “split” of the EDACS system.

1. BAH Technical Support to Vendors

70. Port Authority claims that BAH provided technical support to unnamed vendors that lacked the expertise and equipment to provide the services they were retained to provide.¹⁹¹ BAH’s invoices, however, lack sufficient detail for us to determine what costs are attributable to BAH providing such technical support. Moreover, to the extent that BAH had to perform extra work because Port Authority retained unqualified vendors, the responsibility for such excess costs rests with Port Authority, not Sprint.¹⁹²

2. Internal Costs

71. Port Authority’s claim for \$283,509.04 for internal staff oversight of the rebanding process shares the same infirmity as BAH’s submissions. We cannot tell from the information submitted what Port Authority’s staff specifically did in support of the rebanding effort, thus rendering it impossible to ascertain whether the funds requested meet the Minimum Necessary Cost Standard.

3. M/A-COM Costs

72. M/A-COM has provided more detailed documentation than BAH in connection with its services performed under the Change Notice.¹⁹³ However, M/A-COM’s invoices for “Project Management” indicate that M/A-COM often charged far more for management of project tasks than the cost of performing the task itself. For example, M/A-COM invoiced \$32,800 for management of \$12,600 of work at the Newark Airport.¹⁹⁴ In order for us to accept such disproportionate charges as reasonable, the burden falls on the licensee to explain how they are necessary to the rebanding effort and not excessive. Port Authority has provided no such explanation. Indeed, Port Authority has provided little or

¹⁸⁹ Port Authority PRM at Exhibit F.

¹⁹⁰ The FRA requires Change Notices to “be accompanied by reasonable documentation supporting the need for and scope of the change(s) and any proposed increase or decrease in the Cost Estimate.” Port Authority PRM, Exhibit B (FRA) at 8. The FRA also includes a form for recording internal time. The form includes columns for entering, *inter alia*, name of the individual performing services, the “description of activities,” and “actual hours worked.” *Id.* at 42. There is no record evidence that Port Authority provided that form or its equivalent.

¹⁹¹ Port Authority PRM at 15.

¹⁹² See, *e.g.*, State of Oklahoma and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 15457 ¶12 (PSHSB 2011); State of Indiana and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 26 FCC Rcd 1023, 1028 (PSHSB 2011). (“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.”)

¹⁹³ See Port Authority PRM at Exhibit G.

¹⁹⁴ Sprint PRM at 22-23.

no explanation for the inflation of costs in the Change Notice relative to costs agreed upon in the FRA for the same tasks. For example, the Change Notice seeks three times the amount allotted for “escort time” in the FRA, with no explanation of why that increase is reasonable and necessary.¹⁹⁵ We therefore find that Port Authority has not met its burden to show that M/A-COM’s claimed costs meet the Minimum Necessary Cost Standard.

C. Foreseeability

73. The record demonstrates that Port Authority unilaterally deviated from the terms of the FRA in undertaking the disputed tasks without submitting a Change Notice to Sprint in advance as required by the FRA.¹⁹⁶ Further, the Parties agreed that Port Authority would be responsible for all proposed cost changes until such changes were approved and validated by the TA.¹⁹⁷ Instead of following this procedure, Port Authority presented its Change Notice after the disputed tasks had already been completed. Port Authority also deviated from the procedures for Change Notices established in the Bureau’s 2007 *Supplemental Guidance PN*.¹⁹⁸ There, the Bureau stated that if licensees encounter unanticipated changes in cost, scope, or schedule during implementation – or in the case of an emergency – they may recover the resultant costs through the Change Notice process.¹⁹⁹ It cautioned licensees, however, 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.²⁰⁰

74. We are not persuaded by Port Authority’s argument that it should be compensated for the disputed tasks because they were not foreseeable. Port Authority contends that the need to split the EDACS system was unforeseeable because it was only during the expansion of its system, and after the FRA was signed, that it “discovered” a risk of system failure that required splitting the system.²⁰¹ We do not find this explanation credible or persuasive. Port Authority has failed to show that it faced any unusual or unforeseeable risk, as opposed to the normal risks associated with any system modification if it is not performed properly. We also note that other 800 MHz licensees with EDACS systems have successfully rebanded or are in the process of rebanding without splitting their systems.²⁰²

¹⁹⁵ *Id.* at 35.

¹⁹⁶ Section 7(ii) of the FRA provides: “If any Party believes that a change to the work contemplated by the Cost Estimate set forth in Schedule C is required (including changes by Vendors), and regardless of whether the need for a change becomes known during Reconfiguration or as a result of the reconciliation process, such Party will promptly notify the other Party in writing.” Port Authority PRM at Exhibit B.

¹⁹⁷ Section 7(v) provides: “Transition Administrator Approval: Nextel shall be required to submit to the Transition Administrator a copy of the proposed Amendment together with a written request for its approval within five (5) days of the Amendment completion. Such request shall be accompanied by reasonable documentation supporting the need for and scope of the change(s) and any proposed increase or decrease in the Cost Estimate and/or in the time required to reconfigure Incumbent’s existing facilities to operate on the Replacement Frequencies. Nextel shall be solely responsible for the cost of any change(s) agreed upon by the Parties. Incumbent is responsible for all unauthorized changes relating to work performed by a Vendor on behalf of Incumbent. No change to the Cost Estimate set forth in Schedule C, as now or hereafter amended, or the time required to reconfigure Incumbent’s existing facilities to operate on the Replacement Frequencies shall become effective until the Transition Administrator has approved the change(s) in writing.”

¹⁹⁸ *See Guidance PN*, 22 FCC Rcd at 17227.

¹⁹⁹ *Id.*

²⁰⁰ *Fourth MO&O*, 23 FCC Rcd at 18521 ¶31.

²⁰¹ *See supra* n.180.

²⁰² *See, e.g., City of Parma, Ohio and Sprint Nextel Corp.*, WT Docket 02-55, *Memorandum Opinion and Order*, 25 FCC Rcd 13485 (PSHSB 2010); *County of Henry Georgia and Sprint Nextel Corp.*, WT Docket 02-55,

75. We reach the same conclusion regarding foreseeability of the need to implement a temporary system that would back up the existing auxiliary system at Kennedy, Newark and Teterboro Airports while the primary system was rebanded. Port Authority has not explained why the need for such a temporary system was not foreseeable during negotiations and incorporated into the FRA.²⁰³ Similarly, Port Authority has not explained why need for testing of Port Authority's police force's radios to insure in-building coverage was not foreseeable.

76. Port Authority claims that after the FRA was executed, the Region 8 Regional Planning Committee "required" Port Authority to maintain a mutual aid back-to-back system.²⁰⁴ As an initial matter, we note that a regional planning committee lacks the authority to impose such a requirement. Moreover, Port Authority cannot claim that the need to plan for mutual aid capability was not foreseeable prior to the planning committee's action. To the contrary, the Commission has encouraged licensees that use mutual aid channels to have "a plan in place to maintain mutual aid operations during reconfiguration" and "[c]oordinate efforts to ensure continuity of mutual aid interoperability arrangements with neighboring licensees."²⁰⁵ We conclude, therefore, that if there was a need to implement a back-to-back system, it was foreseeable during negotiations and should have been reflected in the FRA.

77. Port Authority attempts to distinguish the facts of this case from those in the *Flagler County, Florida* case, in which we disallowed additional costs that were incurred unilaterally by the licensee in violation of the FRA and the Commission's Change Notice procedures.²⁰⁶ Port Authority claims that the disputed tasks in this case were not part of negotiations and that the tasks were necessary to ensure comparable facilities during rebanding.²⁰⁷ As noted *supra*, Port Authority's reliance on the comparable facilities standard in this context is misplaced, because the standard applies to the licensee's facilities after rebanding is complete, not to transitional issues that arise in the course of rebanding.²⁰⁸ Additionally, Port Authority misinterprets the Commission's Change Notice procedures as being limited to matters specifically discussed in negotiations. The *Supplemental Guidance PN* makes it clear that licensees may not recover costs that were *reasonably foreseeable* during negotiations – regardless of whether they were the subject of negotiation.²⁰⁹ Furthermore, Port Authority does not claim that these excess costs were incurred as a result of an emergency such that it precluded Port Authority from giving Sprint the opportunity to address these tasks in the Change Notice process contemplated in the Parties' FRA.

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Memorandum Opinion and Order, 25 FCC Rcd 10962 (PSSB 2010); City of Irving, Texas and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 16708 (PSSB 2007); County of Tazewell, Illinois and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 8675 (PSSB 2007).

²⁰³ Port Authority SOP at 5-6 (Port Authority claimed it became aware of potential vulnerabilities after it executed its FRA).

²⁰⁴ Port Authority Reply at 14.

²⁰⁵ *Guidance PN*, 22 FCC Rcd at 17230.

²⁰⁶ Port Authority Reply at 11-12 *citing* County of Flagler, Florida and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 24 FCC Rcd 8235, 8237 ¶9 (PSSB 2009) (disallowing costs incurred unilaterally by licensee in violation of FRA and Commission's Change Notice procedures).

²⁰⁷ Port Authority Reply at 11.

²⁰⁸ *See supra* paras. 62-63.

²⁰⁹ *Guidance PN*, 22 FCC Rcd at 17230.

78. We deem it significant that the sums allocated to BAH in the FRA had already been exceeded before the FRA was executed. In light of this fact, it was foreseeable at the time that additional BAH services would be required in the implementation phase of rebanding Port Authority's system. It appears that Sprint and Port Authority contemplated that some tasks not included in the FRA, would be necessary after execution of the FRA and were to be accomplished by Change Notice.²¹⁰ What the Parties did not contemplate, however, is that Port Authority would complete those tasks and obligate funds before the Change Notice was submitted. It is well established that licensees that expend funds before a Change Notice is submitted to and approved by the TA do so at their own risk.²¹¹

79. Finally, we are not persuaded by Port Authority's claim that it did not submit a Change Notice before having the disputed work performed because it was under pressure to complete Wave 1 rebanding as a result of Sprint's alleged delays in turning in its frequencies.²¹² The record shows that Port Authority did not inform Sprint that the disputed work was being conducted, much less advise Sprint of the methodology and cost. Regardless of whether Port Authority felt "under pressure," it was obligated to provide a Change Notice and receive approval before commencing the work.

D. Mediation Costs

80. We agree with the TA Mediator's recommendation. Although Port Authority has not prevailed on the Change Notice issue, it has presented colorable arguments in support of its position. Moreover, Sprint does not dispute Port Authority's claim for legal fees. We find that the legal fees are adequately documented and we approve them.

E. Good Faith

81. Port Authority argues that Sprint has not negotiated the Change Notice in good faith.²¹³ The Commission has emphasized in this proceeding that good faith negotiation by all parties is essential to achieving the Commission's rebanding objectives.²¹⁴ Among the indicia of good faith negotiation are (a) the steps a party has taken to determine the actual cost of relocation to comparable facilities; (b) whether a party has unreasonably withheld from the other party information, essential to the accurate estimation of relocation costs and procedures, requested by the other party and (c) whether a party has made a counteroffer when presented an offer by the other party.²¹⁵

82. Port Authority has not claimed that Sprint failed to conform to any of the above indicia of good faith; it has only alleged that Sprint acted in bad faith because it refused to assume all of Port Authority's claimed costs. We do not find that Sprint's offer to reimburse only a portion of Port Authority's claimed costs is evidence of bad faith. Although negotiations were at times contentious and

²¹⁰ Sprint PRM at i-ii.

²¹¹ See *supra* para. 59.

²¹² See *supra* para. 12.

²¹³ See *supra* para. 45.

²¹⁴ See 47 C.F.R. § 90.677(c). See also *800 MHz Report & Order*, 19 FCC Rcd at 15076-77 ¶201. See also, e.g., *Reminder to 800 MHz Wave Three Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations, Public Notice*, WT Docket No. 02-55, 21 FCC Rcd 7122 (WTB 2006).

²¹⁵ See *800 MHz Report and Order*, 19 FCC Rcd at 15076-77 n.524.

prolonged, we find that Sprint has not breached its obligation to negotiate with Port Authority in good faith.²¹⁶

VI. CONCLUSION

83. Based on this record, we allow Port Authority to recover from Sprint \$205,394.89 of its Change Notice “soft” costs and \$12,076.16 for legal fees and associated expenses incurred in mediation and preparing a PRM and reply PRM, for a total of \$217,471.05.

III. ORDERING CLAUSES

84. Accordingly, pursuant to the authority of Sections 0.131 and 0.331 of the Commission’s rules, 47 C.F.R. §§ 0.131, 0.331; 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.

85. This action is taken under delegated authority pursuant to Sections 0.191(f) and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191(f) and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief
Policy and Licensing Division
Public Safety and Homeland Security Bureau

²¹⁶ Manassas City Public Schools and Sprint Nextel Corp., WT Docket 02-55, *Memorandum Opinion and Order*, 21 FCC Rcd 11930, 11936 (PSHSB 2006) (“While the negotiations and mediation between the parties reflect significant differences and have clearly been contentious, we find no evidence in the record that Sprint engaged in bad faith tactics.”).