Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
County of Charles, Maryland	)	WT Docket No. 02-55
And Sprint Nextel Corporation	)	
	)	
Mediation No. TAM-12003	)	

OPPOSITION OF NEXTEL COMMUNICATIONS, INC. TO THE APPLICATION FOR REVIEW OF THE COUNTY OF CHARLES, MARYLAND

Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)

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This proceeding follows *de novo* review by the Public Safety and Homeland Security Bureau ("Bureau") of the mediation between Charles County, Maryland ("Charles" or the "County") and Nextel Communications, Inc. ("Nextel") concerning the costs necessary to reconfigure the County's system. Despite the sound reasoning of the Bureau's Order resolving the outstanding issues, Charles has filed an Application for Review seeking review of that Order by the full Commission and reinstatement of the mediator's recommendations. Charles provides no basis for reversal however, and on review, the Commission should affirm the Bureau's Order in its entirety.

Charles spends a great deal of its Application for Review castigating the Bureau for its use of aggregate reconfiguration project cost information published by the 800 MHz Transition Administrator ("TA"). The County's ire in this regard is misplaced for two reasons. First, the Bureau has consistently applied the TA Cost Metrics as one factor in evaluating the reasonableness of proposed costs. This reflects a sound, longstanding policy that information concerning what reconfiguration has cost public safety licensees in the past may provide evidence concerning the reasonableness of proposed costs going forward. Second, the County's assertion that the Bureau limited Charles to costs established by the TA Cost Metrics is simply wrong as a matter of fact – the costs the Bureau actually approved significantly exceed the Metrics and reflect a careful and thorough evaluation of those specific factors Charles chose to articulate during mediation concerning the unique challenges associated with the reconfiguration of the County's system.

Charles also mistakenly argues that the Bureau ignored the mediation record on a number of significant issues. Perhaps predictably, Charles argues that every instance where the Bureau

disagreed with Charles' arguments represents a failure by the Bureau to examine the record. Charles has no quibble with the many instances where the Bureau agreed with Charles. Of course, disagreement with the arguments Charles presented does not necessarily reflect a failure to examine the record. Charles simply discounts the possibility that the Bureau examined the record and reached a conclusion that Charles did not persuasively support its proposed reconfiguration costs. Any fault in that regard is solely the County's, not the Bureau's.

Finally, and contrary to the County's assertions, the *Charles Order* does not represent an impermissible departure from the Bureau's earlier order addressing the parties' previous planning funding dispute. In fact, that earlier order specifically prohibited unreasonable duplication of effort, and the Order here disallows such duplication, while recognizing that implementation of an already-created plan for reconfiguration should require less overlapping effort.

In short, any objective reading of the Bureau's Order demonstrates that the Order represents a well-reasoned, fact-based decision that is securely founded on the facts presented in the record of the mediation between the parties and correctly applies the Commission's standards. On review, the Commission should affirm the *Charles Order* in its entirety.

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Pursuant to Section 1.115(d) of the Commission's rules,[1] Nextel Communications, Inc. ("Nextel"), a wholly owned subsidiary of Sprint Nextel Corporation, by its attorneys, submits this Opposition to the Application for Review ("Application") submitted by the County of Charles, Maryland ("Charles" or the "County") with respect to the Public Safety and Homeland Security Bureau's (the "Bureau's") Order on *de novo* review of the Charles County, Maryland mediation.[2] Charles provides no basis for the Commission to reverse the *Charles Order*. In particular, there are two fundamental flaws with the Application. First, Charles' assertions regarding the Bureau's use of aggregate reconfiguration project cost information published by the 800 MHz Transition Administrator ("TA") are wrong as a matter of law and policy. In any event, the Bureau's order plainly does not limit Charles' costs pursuant to that aggregate cost

[1] 47 C.F.R. § 1.115(d).

[2] *See* County of Charles, Maryland and Sprint Nextel, *Memorandum Opinion and Order*, WT Docket No. 02-55, DA 09-2252, (PSHSB Oct. 19, 2009) ("*Charles Order*").

information as Charles alleges, instead approving an amount in excess of those metrics representing a diligent effort to account for what evidence the County chose to advance regarding the unique or special challenges its reconfiguration will pose. Second, the County has failed to show that the *Charles Order* does not represent well-reasoned, fact-based decision-making that resolves the issues before the Bureau based on the Commission's well-established standards. Rather, Charles chooses to ignore the Bureau's reasoning, arguing that every instance where the Bureau disagreed with Charles' arguments represents a failure by the Bureau to examine the mediation record. This is consistent with the County's posture during negotiations and mediation that its mere assertions concerning its proposed costs were to be taken at face value. Finally, contrary to the County's assertions, the *Charles Order* does not represent an impermissible departure from the Bureau's earlier order resolving the parties' prior planning funding dispute, but instead clearly and carefully explains its reasoning and conclusions in a manner fully consistent with the prior order.[3] On review, the Commission should affirm the *Charles Order* in its entirety.

I. THE *CHARLES ORDER* DOES NOT REFLECT UNDUE RELIANCE ON THE TA COST METRICS OR A DEPARTURE FROM THE COMMISSION'S STANDARDS REGARDING REIMBURSABLE COSTS.

Charles' primary challenge to the *Charles Order* appears to be its claim that the order impermissibly grants dispositive weight to the aggregate cost information compiled and published by the TA pursuant to the Bureau's directives.[4] According to the County, the *Charles Order* "unlawfully grants decisional weight" to the TA Cost Metrics, and improperly establishes

[3] *See* County of Charles, Maryland and Sprint Nextel Corporation, *Memorandum Opinion and Order*, 22 FCC Rcd 16769 (PSHSB 2007) ("*Charles PFA Order*").

[4] 800 MHz Transition Administrator, LLC, Cost Metrics for Frequency Reconfiguration Agreements (v. 5, Nov. 10, 2009) ("TA Cost Metrics").

a higher burden of proof for those licensees proposing costs that significantly exceed the TA Cost Metrics.[5] In fact, the *Charles Order* simply follows the Bureau's longstanding and widely publicized policy of using the TA's Cost Metrics to evaluate the reasonableness of a licensee's proposed costs where those costs fall far outside a reasonable range broadly bounded by available data. Most damning to Charles' assertions is the fact that the *Charles Order* does not actually confine the County's costs in accordance with the TA Cost Metrics, but rather uses the Metrics as one factor in evaluating the reasonableness of the County's proposed costs.

A. The Bureau Has Long Used the TA Cost Metrics to Evaluate Proposed Costs.

As an initial matter, there is nothing new about the Bureau's intention to use the TA's Cost Metrics as one means of evaluating the reasonableness of a particular licensee's proposed reconfiguration costs – that has been a part of this process for several years and this aspect of the *Charles Order* reflects the longstanding and well publicized practice of both the Commission and the Bureau.

Well over two years ago, the Commission itself endorsed the use of the TA's Cost Metrics, noting that these Metrics would provide "an important set of benchmarks for assessing the reasonability of costs in ongoing and future negotiations."[6] The Bureau first applied the TA Cost Metrics in evaluating a licensee's proposed costs more than two and a half years ago, and

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[5] Application for Review of Charles County, Maryland, WT Docket No. 02-55, 4-6 (Nov. 18, 2009) ("Application").

[6] Improving Public Safety in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, ¶ 12 (May 18, 2007) ("Similarly, Sprint and other licensees may consider cost metrics that have been derived from the TA from aggregated PFA and FRA data. At this point in the process, Sprint has entered into numerous PFAs and FRAs with 800 MHz licensees. These agreements have been reached through vigorous arms-length negotiations and (in many cases) mediation, and have been approved by the TA as meeting the Commission's cost standards. As a result, the cost data from these agreements provides an important set of benchmarks for assessing the reasonability of costs in ongoing and future negotiations.")

stated that it would subject proposed reconfiguration costs falling far outside the Metrics to greater scrutiny.[7] The Bureau initially directed the TA to assemble and publish information regarding median costs for PFAs and FRAs nearly *three* years ago, specifically describing its intent "[t]o provide further guidance to public safety licensees in upcoming negotiations...."[8]

Moreover, the Bureau's and the Commission's longstanding practice of using available facts, including the TA's Cost Metrics, to evaluate proposed reconfiguration costs is entirely consistent with the Commission's standard that reconfiguration costs must be reasonable, prudent and the minimum necessary. The whole idea of assembling aggregate data on what it costs a range of licensees to perform their reconfigurations was meant to assist later-in-time licensees, so they could be informed generally of what vendors charged for various reconfiguration tasks. This data does not in any way preclude a licensee from making its case that its particular costs are reasonable. Rather, the data provides important general information to all parties.

The TA's Cost Metrics consist solely of objective and impartial data which the Commission may ultimately use as a tool to assist in evaluating a licensee's proposed costs for reconfiguration. Licensees remain free to present evidence justifying their proposed costs, and

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[7] City of Manassas, Virginia and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 8526, ¶¶ 6-7 (PSHSB 2007) ("Our review of costs is influenced by our experience in reviewing costs incurred by similarly situated 800 MHz licensees in the planning process. In this regard, we have the benefit of data from the TA that can provide us with cost metrics for approved planning funding agreements [for] systems of varying size and complexity ... Manassas requests almost three times the median amount of funding and over twice as much as the 75th percentile compared to licensees of similarly sized systems. Such a large deviation warrants careful scrutiny of these disputed costs") (emphasis added) ("*Manassas Order*"). *See also* City of Irving, Texas and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 16708, ¶ 47 (PSHSB 2007) ("*Irving Order*") ("As previously determined, the TA planning statistics are relevant to the mediation process as well as our *de novo* review").

[8] Improving Public Safety Communications in the 800 MHz Band, *Order*, 22 FCC Rcd 172, ¶ 9 (PSHSB 2007).

the Commission retains the ability to consider and weigh that evidence in determining whether a departure from the costs experienced by other licensees may be warranted in a particular case.

Certainly Charles was free to present its own evidence in the mediation record. As described above, it was entirely unsurprising that the Bureau looked to the TA Cost Metrics as a tool to evaluate the County's proposed costs, as that has been the Bureau's practice for years. Further, it was certainly plain during mediation that Nextel was using the TA Cost Metrics as a factor in judging the reasonableness of the County's proposed costs. In short, Charles had ample notice during mediation both that the TA Cost Metrics were one accepted benchmark for gauging the reasonableness of proposed costs and that the County's proposed costs dramatically exceeded the reasonable range suggested by the Metrics. Charles had every opportunity during mediation to present evidence justifying its extraordinarily high proposed costs. It failed to do so and instead tries to poke holes in the data generally, despite the significant amount of reconfiguration experience the TA Cost Metrics represent at this stage in the process.

Charles contends that it knows "almost nothing about the derivation of the TA's metrics," and that it cannot evaluate the Metrics as "logically or statistically sound unless we see the ingredients making up the aggregates." This assertion entirely misses the point of the TA's publishing aggregated information.[9] The logic of generating and applying the Metrics as a benchmark is that, with a sufficient pool of data as to what different public safety systems paid vendors for reconfiguration, and agreed to as compensation for their internal costs, individual differences between licensees will be "smoothed out." The inclusion of more and more data from additional licensees over time means that the TA's Cost Metrics include more "unusual" licensees – that is, more licensees with different circumstances that reflect different levels of

[9] Application at 7.

complexity.[10] As the Commission and Bureau have recognized, the public availability of the TA's Cost Metrics can both help inform the preparation of a licensee's cost estimate and speed the evaluation of that cost estimate, and thus assisting the public safety community, Nextel and the Commission in achieving the rapid completion of 800 MHz reconfiguration. Charles' attempt to defeat the aggregate information by picking it apart proves nothing at all about the purported deficiencies of this data or the reasonableness of the costs Charles proposed to reconfigure its system.

B. The Bureau Appropriately Used the TA Cost Metrics As One Factor In Evaluating the County's Proposed Costs.

Charles asserts that, "Although the Order claims that so-called TA 'cost metrics' have not been afforded dispositive weight, the decision relies too often and too heavily on this data to make the claim credible."[11] Further, Charles argues that, "It is difficult to accept the assertion that the metrics comparisons are anything less than dispositive,"[12] and criticizes what it terms the Bureau's "apparent zeal to apply the TA metrics."[13] According to Charles, the Bureau uncritically applied the TA Cost Metrics to the County's proposed costs, thereby forcing the County to accept costs in line with those Metrics. These are unsupportable assertions that are flatly contradicted by even a cursory examination of the conclusions of the *Charles Order*.

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[10] *See Charles Order* ¶ 5 (PSHSB Oct. 19, 2009) ("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").

[11] Application at 1.

[12] *Id.* at 6.

[13] *Id.* at 12.

Charles proposed total reconfiguration costs of $2,948,002.10.[14] As the *Charles Order* notes, as of December 31, 2008, "the median FRA funding requested by public safety licensees for total costs of a system of Charles County's size (2001-4000 subscriber units) was $884,004 and the 75th percentile amount was $1,400,528.[15] Yet, Nextel's last counteroffer was for a total of $1,942,206.70.[16] Far from attempting to force Charles into a specific set of costs based solely on the TA Cost Metrics, Nextel's counteroffer proposed reconfiguration costs that *significantly exceed the metrics*, and the *Charles Order* actually approved reconfiguration costs for Charles that further exceed the Metrics. How Charles can represent this result as slavish application of cost metrics is a mystery.

Charles has 2,329 subscriber units, meaning that it falls on the very low end of the relevant size range (2001-4000 subscriber units). Given this, if the Bureau were truly affording the TA Cost Metrics dispositive weight, it would have restricted the County's proposed costs to the median of $884,004 or, at most, the 75th percentile of $1,400,528. Instead, the Bureau recommended a total that was more than *a million dollars* more than the median, and more than $540,000 more than the 75th percentile. Stated another way, Nextel's counteroffer was more than double the median, and roughly 38 percent higher than the 75th percentile. The argument that the Bureau's order somehow rendered Charles a prisoner of an inflexible application of TA Cost Metrics is simply untrue. Rather, the Bureau appropriately used the TA Cost Metrics as substantial evidence in its evaluation of the reasonableness of the County's proposed costs. As discussed below, the *Charles Order* reflects a careful sifting of the record evidence presented.

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[14] *Charles Order* at ¶ 6.

[15] *Id.*

[16] *Id.*

Far from demonstrating blind adherence to the TA Cost Metrics as the County claims, the *Charles Order* demonstrates that the Bureau made every effort to consider the very limited number of arguments the County presented concerning special circumstances surrounding its reconfiguration, and to account for those circumstances.[17] Both Nextel's counteroffer and the amount determined by the Bureau to be reasonable, prudent and the minimum necessary in the *Charles Order* represent significant increases above and beyond a level of funding that would have been offered had the Metrics, in fact, been the sole factor in either Nextel's offers to Charles or in the Bureau's *de novo* review process. Charles chooses to ignore this fact and persist in its preferred, but baseless, narrative that the *Charles Order* represents the blind application of the TA Cost Metrics.

II. THE *CHARLES ORDER* REPRESENTS A FAIR AND REASONED REVIEW OF THE RECORD.

Beyond its generalized and flatly incorrect contention that the Bureau improperly elevated the importance of the TA Cost Metrics and forced adherence to those Metrics, Charles also argues that the *Charles Order* represents an unfair reading of the record and the application of an improper standard to that record. First, Charles argues that the Bureau ignores or neglects the record in virtually every instance where the Bureau reached a conclusion different from that which the County would have preferred. Second, Charles argues that the *Charles Order* is

[17] By way of example, Charles had argued that its infrastructure costs were justified, in part, by the need for a "travel premium" to account for the difficulty of traveling within the County. The Bureau considered this argument, but rejected it, finding "no rational basis for such a premium, since Charles County is not more distant from Washington, D.C. than other NCR jurisdictions for which no premium has been required," and there was "no record support for the County's contention that the premium is justified because travel within the County is 'arduous.'" *Charles Order* at ¶ 23. Thus, the Bureau carefully considered the arguments the County presented on this issue, but rejected them. This does not represent rigid application of the TA Cost Metrics. Rather, it represents diligent examination of the evidence the County presented, but ultimately a conclusion that this evidence was insufficient and unpersuasive.

insufficiently deferential to the County's stated preferences. Third, Charles argues that the Bureau impermissibly departed from its conclusions in the prior *Charles PFA Order*, which were generally more favorable to the County. None of these statements can be supported by any objective reference to the mediation record or the *Charles Order* itself.

A. The *Charles Order* Is Based on A Thorough Review of the Record Presented.

Charles repeatedly asserts that the *Charles Order* ignored the record or ignored the County's arguments. The County essentially asserts that every instance where the Bureau disagreed with or rejected the County's arguments (or the TA mediator's Recommended Resolution) represents a failure to examine the mediation record. While it may be difficult for Charles to accept, the Bureau has a responsibility to review the arguments and evidence Charles presented *de novo*. The fact that the Bureau simply found the arguments and evidence Charles presented insufficient to justify the County's proposed costs does not mean the required review did not take place. In this sense, the Application perfectly reflects the County's posture throughout negotiation and mediation. Charles has consistently provided little more than unsupported assertions in defense of its proposed costs, and then argued that any remaining disagreement was the result of a failure to properly credit the County's bald assertions.

For example, with respect to its proposed costs for the involvement of its technical consultant, RCC, in the County's subscriber reconfiguration efforts, Charles states that the Bureau "neglects the record" and "chooses not to credit the record support for the County proposal in the documents [presented by Charles]."[18] In fact, the Bureau summarized and reviewed the County's arguments in support of the County's request for extensive and apparently

[18] Application at 12.

duplicative efforts by RCC in the subscriber unit reconfiguration process.[19] The Bureau, however, concluded that certain of the County's proposed tasks, including "gather[ing] information about system users," and "ensur[ing] that the radios and spare parts are made available on schedule for reconfiguration," duplicated efforts already performed and paid for during the planning phase.[20] Further, the Bureau concluded that the hundreds of hours of oversight and overlapping supervision the County proposed, "whereby two County employees and an RCC employee would each spend substantial periods of time simultaneously monitoring the activities of the Motorola subcontractor technician assigned to retune the County's radios," represented a duplication of effort and should thus be reduced.[21]

Similarly, with respect to its proposed infrastructure costs, Charles claims that the Bureau, "on the basis of its misunderstandings and misreadings...without further explanation, accepts Nextel's draconian offer of less than 25% of RCC's estimate for its critical task of on-going technical oversight."[22] According to Charles, this is because the Bureau adopts "Nextel's perjorative and inaccurate term, 'shadow,' to mischaracterize a valuable oversight process that is no more duplicative than an architect's on-site monitoring of construction proceeding under the architect's plans."[23] In fact, the Bureau correctly noted Nextel's position that "the 280 hours requested for RCC for infrastructure reconfiguration are identical to the hours requested for the

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[19] *Charles Order* at ¶¶ 42-43.

[20] *Id.* at ¶ 46.

[21] *Id.* at ¶¶ 49-50

[22] Application at 13.

[23] *Id.*

County's internal staff for this same category."[24] With all due respect to the County's analogy, the Bureau appears to have concluded that a competent architect's plans should not require two identical layers of extensive supervision. While plainly the County disagrees with the Bureau's conclusions, this does not mean the Bureau's conclusions are the result of any "misreading" of the record.

With respect to the County's testing proposal, the Bureau concluded that: "The only material factor distinguishing the County's system from comparable systems is the 'RF-based fire station alerting' feature. The record, however, contains no more than an assertion that this fire station alerting feature requires additional functional testing. The County has not described the extent of such additional testing, much less the associated time and cost required."[25] Charles disputes this conclusion, quoting an extensive passage from the County's Proposed Resolution Memorandum and concluding that this passage "is far more than the mere assertion the Order makes it out to be."[26] In fact, the material Charles quotes is precisely a "mere assertion," stating in relevant part only that other licensees do not employ RF based fire station alerting and that the level of testing effort proposed by Nextel is inadequate.[27] The fact that Charles makes this assertion in the middle of an extremely long paragraph discussing unrelated points adds no evidentiary weight to the assertion itself. While Charles had the opportunity to put evidence in the mediation record, it did not do so. Charles can cite to nothing in the record now that would contradict the Bureau's conclusion that, "Given the County's failure to document the additional

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[24] *Charles Order* at ¶ 27.

[25] *Id.* at ¶ 59.

[26] Application at 15.

[27] *Id.*

testing time required for the fire station alerting feature, we concur with Sprint that no basis exists to allocate more than $1,520 to cover Motorola's 4-test proposal."[28]

With respect to the County's requested costs for documentation of the temporary deployment that will be used to support the County's mutual aid operations during reconfiguration, the Bureau concluded that it was "unreasonable for the County to request drafting of new documentation for the temporary overlay system and separate, newly-drafted documentation when rebanding is complete and the temporary overlay system is discontinued." Charles states that, "for the reasons given on the record and reviewed above, merely updating system documentation will not do."[29] The problem is that the "reasons given on the record and reviewed above" to which Charles can cite are, once again, nothing more than unsupported assertions that documentation is important and the costs proposed by Nextel are inadequate. For example, Charles cites to its statement during mediation that "Documentation can be a major contributor to whether a technician can quickly restore a compromised system or whether it takes excessive time to acquire an understanding of the system before...troubleshooting..."[30] This is merely a statement that documentation is important – it entirely fails to address Nextel's point, made during mediation, and the Bureau's conclusion, that drafting new documentation for a temporary deployment and separate new documentation following the removal of the temporary deployment is unreasonable, and that a more reasonable approach is simply to update existing documentation.

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[28] *Charles Order* at ¶ 59.

[29] Application at 14.

[30] *Id.*

Finally, with respect to the question of RCC's efforts for interoperability coordination, Charles takes issue with the Bureau's decision to ignore evidence Charles submitted in the County's Statement of Position after the close of mediation. Charles contends that this "mischaracterizes the County's Statement of Position," because Charles was responding to a point made by the TA Mediator in his Recommended Resolution that was not explicitly discussed during mediation.[31] This argument misses the fundamental point that Charles bears the burden of demonstrating that its costs are reasonable, prudent and the minimum necessary. It was the County's burden to provide whatever evidence and arguments it had available in support of its costs during mediation. Here, the Mediator and the Bureau found persuasive evidence in the record that the County's proposed reconfiguration costs were excessive, and the Bureau correctly determined that "the County raised [its new argument] only after the RR had been filed, thus contravening the directive of Section 90.677(d), which requires a complete record be filed with the Bureau for *de novo* review, as well as depriving Sprint of an opportunity to respond."[32] This is no "mischaracterization," it is a simple fact – Charles failed to introduce an argument in mediation it now claims should be dispositive on review, thus giving Nextel no opportunity to respond and violating the Commission's rules. It was entirely correct for the Bureau to dismiss the argument. Charles was afforded every opportunity to present its case during mediation – it should not be permitted to raise new arguments in a post-Recommended Resolution filing.

B. Charles Is Not Due Unlimited Deference.

Charles asserts that the Bureau erred in affording the County insufficient deference with respect to its proposed costs, noting that the *Charles Order* is "strikingly less deferential than the

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[31] *Id.* at 17.

[32] *Charles Order* at ¶ 103.

2007 decision to the County's disposition of its resources."[33] As discussed in greater detail below, the *Charles Order* does not, in fact, represent any inappropriate or material inconsistency with the *Charles PFA Order*. The County's apparent view of the deference it is owed, however, runs deeper than the results and reasoning of the *Charles PFA Order*. It effectively represents a challenge to the Commission's well-established standard for reimbursable costs.

The County's defense of its costs largely centers around the proposition that the County's beliefs and judgments should be afforded decisive weight in evaluating the reasonableness of these proposed Costs. Thus, Charles criticizes the Bureau for discrediting "as duplicative a historic County approach to the installation, modification and maintenance of its 800 MHz systems," and for disregarding the "Recommended Resolution's reliance on the County's approved history of resource deployment."[34] Similarly, Charles defends its apparently duplicative costs by asserting that its approach is based on "its experience in system installation and in subsequent radio reprogramming," and that "that experience has produced a 'belt and suspenders' mentality of prudence and caution… ."[35] Charles goes on to assert that the Commission should apply its reasonable, prudent and minimum necessary cost standard "in the context of our historic use of resources to build, modify and maintain the 800 MHz public safety systems in our care." In short, Charles essentially suggests that the Commission owes expansive deference to the decisions Charles makes regarding its proposed costs, and that those proposed costs should be deemed reasonable and prudent if a licensee simply asserts they are based on "experience." This, as much as any other factor, appears to be the driving force behind the

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[33] Application at 9.

[34] *Id.* at 2, 9.

[35] *Id.* at 9.

County's overly dramatic descriptions that the *Charles Order* represents a "slashing of the County's carefully considered estimate," deals a "devastating blow to its plan for reconfiguration," and is "wrong-headed and imprudently perjorative."[36]

The problem with the County's position is that it seeks to rewrite the Commission's standard, turning an objective inquiry into whether a licensee's proposed costs are reasonable, prudent and the minimum necessary into a subjective inquiry into whether a licensee's proposed costs are consistent only with the licensee's past practice or even its stated preferences. The Bureau has established that reasonableness should be evaluated by objective, rather than subjective, standards.[37] In accordance with this principle, the Bureau has made plain that it will not hesitate to reject a licensee's particular method or approach to reconfiguration where that method or approach does not appear justified.[38] Whatever deference Charles may believe it is

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[36] *Id.* at 3, 16.

[37] *Manassas Order* at ¶¶ 6-7 ("Our review of costs is influenced by our experience in reviewing costs incurred by similarly situated 800 MHz licensees in the planning process. In this regard, we have the benefit of data from the TA that can provide us with cost metrics for approved planning funding agreements [for] systems of varying size and complexity ... Manassas requests almost three times the median amount of funding and over twice as much as the 75th percentile compared to licensees of similarly sized systems. Such a large deviation warrants careful scrutiny of these disputed costs."); *see Irving Order* at ¶ 47 ("As previously determined, the TA planning statistics are relevant to the mediation process as well as our *de novo* review."); *see also* Improving Public Safety Communications in the 800 MHz Band, *Order*, 22 FCC Rcd 172, ¶ 9 (PSHSB 2007) (stating that the goal of directing the TA to assemble and publish information regarding median costs for PFAs and FRAs was "[t]o provide further guidance to public safety licensees in upcoming negotiations....").

[38] County of Chester, Pennsylvania and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 13146, ¶ 14 (PSHSB 2007) ("Chester also cites its 'project-centric' management approach as justification for its high cost estimate, noting that we have stated in prior orders that the Commission will generally defer to licensee staffing choices. It is not our intent to second-guess Chester's choice as to how to staff this project. However, Chester describes its project-centric staffing approach as enabling its project management team to provide other rebanding-related services depending upon need. To the extent this occurs, we would expect other rebanding-related services to be accounted for in cost categories other than project management

(continued...)

due, that deference certainly does not extend to blanket approval of whatever reconfiguration costs the County proposes – if it did, there would be no need for Nextel, the TA, or, indeed, the Bureau to review a licensee's proposed costs and methodology at all. Rather, licensees would simply submit their cost estimates and rebanding plans, and Nextel would approve them without question. That plainly is not what the Commission's orders require.

In its *de novo* review, the Bureau found substantial evidence of duplication of effort in certain of the County's proposed costs. Based on that evidence, the Bureau appropriately concluded that this apparent duplication of effort was inconsistent with the requirement that reconfiguration costs be reasonable, prudent and the minimum necessary. Simply put, the fact that a particular practice is "historic" does not mean that it is not duplicative and thus unreasonable under the standards the Commission applies to 800 MHz reconfiguration reimbursement.

C. The *Charles Order* Does Not Represent an Impermissible Departure from the *Charles PFA Order.*

Charles repeatedly asserts that the Bureau's Order in impermissibly inconsistent with the earlier *Charles PFA Order*. Charles states that in the *Charles PFA Order*, "the FCC took favorable note of the use of a 'tripartite structure' including internal staff for its operational knowledge, Motorola as chief technical vendor and RCC as principal technical consultant," and thus "deferred to the County" with respect to a number of the County's proposed costs.[39]

(..continued)
and that costs for project management would be correspondingly lower. Alternatively, including such costs in project management should yield corresponding cost reductions in other categories. Yet Chester has not identified any potential cost savings resulting from its proposed approach.")

[39] Application at 8.

According to the County, "The FCC has changed course from 2007 to 2009 without an adequate explanation."

This claim is premised on two central misconceptions. First, it overstates the level of deference the *Charles PFA Order* afforded the County, ignoring the Bureau's warning to Charles in 2007 to avoid precisely the sort of duplication of effort it subsequently disallowed in the *Charles Order*. Second, it ignores the reasonable distinction articulated in the *Charles Order* between planning funding, which was the subject of the *Charles PFA Order*, and actual reconfiguration implementation as represented in the *Charles Order*.

With respect to the first point, it is true that the *Charles PFA Order* afforded the County a certain degree of discretion concerning the allocation of resources among the three parties directly participating in planning efforts (the County itself, Motorola and RCC). However, that discretion was not unbounded. In fact, the *Charles PFA Order* determined that "the County is entitled to decide how tasks will be apportioned between internal staff, RCC, and Motorola, *provided that it reasonably avoids duplication of effort*."[40] Thus, it may be reasonable to afford the County some level of discretion with respect to the allocation of effort involved in certain tasks, but the Bureau did not conclude that it was reasonable simply to double-staff those tasks.

In this case, the Bureau correctly rejected such apparent duplication. In reducing RCC's costs for reconfiguration of the County's infrastructure, the Bureau noted, "We do not, however, interpret the *Charles County PFA MO&O* as requiring an RCC employee and a County employee to 'shadow' Motorola's subcontractor's technicians at each stage of rebanding implementation at a cost of $59,511.60 – over $5,400 per site."[41] Similarly, in evaluating

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[40] *Charles PFA Order* at ¶ 11 (emphasis added).

[41] *Charles Order* at ¶ 30.

proposed subscriber costs, the Bureau stated, "We find nothing in the *Charles County PFA MO&O* that can be construed as approval of a 'management structure' whereby two County employees and an RCC employee would each spend substantial periods of time simultaneously monitoring the activities of the Motorola subcontractor technician assigned to retune the County's radios."[42] These conclusions do not represent any inconsistency with the *Charles PFA Order*. Rather, they represent instances where the Bureau correctly disallowed the very duplication of effort it previously had directed the County to avoid.

With respect to the second point, it was reasonable and appropriate for the Bureau to recognize a distinction between the planning funding dispute that was the center of the *Charles PFA Order* and the actual reconfiguration implementation work that is at issue here. Particularly at the outset of planning or early in the program, a public safety licensee might reasonably be expected to encounter some difficulty establishing the precise levels of effort and costs that will prove necessary. Under those circumstances, the *Charles PFA Order* gave "reasonable deference to a public safety licensee's decisions concerning internal staffing," noting that "[p]ublic safety licensees – particularly in smaller jurisdictions such as the County – typically have limited internal resources to address the multiple demands on their time imposed by the rebanding process."[43] However, the expenditure of hundreds of thousands of dollars designed to create a plan for reconfiguration should provide reliable clarity concerning the remaining tasks necessary to complete reconfiguration, including tasks to be performed by the primary

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[42] *Id.* at ¶ 49.

[43] *Charles PFA Order* at ¶ 22. The *Charles Order* is not unreasonably rigid in this regard, as it continues to afford the County some flexibility in the allocation of resources. *See Charles Order* at ¶ 50 ("We are not prepared to say which of these individuals overseeing the process is dispensable or not; only that the County has not shown that all of them are essential for retuning the County's radios consistent with the Minimum Necessary Cost standard.")

reconfiguration vendor, the technical consultant, and the County itself. The *Charles Order* explicitly makes this distinction, concluding that where "plans for reconfiguration have already been 'defined, refined and agreed upon," the implementation of those plans "should not require the duplication of effort the County proposes."[44] Far from changing course "without an adequate explanation," as Charles asserts, the Bureau has relied on a principled and reasonable distinction between planning funding, where the Bureau might have afforded a licensee greater flexibility in order to make sure reconfiguration planning began as soon as possible, and implementation, where there may reasonably be less flexibility given that a licensee has already developed a coherent implementation plan with defined tasks and assignments at Nextel's expense.

III. CONCLUSION

Notwithstanding the County's unfounded assertions, the *Charles Order* is securely grounded on the facts presented in the record of the mediation between the parties and correctly applies the Commission's standards. The Bureau's application of the TA Cost Metrics as one factor in evaluating the reasonableness of the County's proposed costs reflects a sound, longstanding and well articulated policy that information concerning what reconfiguration projects have cost in the past may provide some illumination concerning reconfiguration costs going forward. In any event, the assertion that the Bureau limited Charles to costs established by the TA Cost Metrics is simply wrong as a matter of fact – the costs the Bureau actually approved significantly exceed the Metrics. The Bureau performed its required *de novo* review, reflecting a careful and thorough evaluation of the specific factors Charles articulated concerning the unique challenges associated with the reconfiguration of the County's system. Charles continues to give great weight to its prior assertions and significantly overstates the degree of "deference" to which

[44] *Charles Order* at ¶ 30.

it is entitled, particularly given the Bureau's specific directive to avoid duplication of effort. For this reason, the County's reliance on the Bureau's earlier order regarding the parties' PFA is misplaced. In fact, that earlier order specifically prohibited unreasonable duplication of effort, and the Order here disallows such duplication, while recognizing that implementation of an already-created plan for reconfiguration should require less overlapping effort.

For the foregoing reasons, Nextel respectfully requests that the Commission affirm the Bureau's *Charles Order* in its entirety.

Respectfully Submitted,

NEXTEL COMMUNICATIONS, INC.

Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2009, a true copy of the foregoing Opposition was served electronically upon:

Charles County, Maryland
c/o James R. Hobson
jhobson@millervaneaton.com

Laura H. Phillips
Patrick McFadden
Drinker Biddle & Reath LLP
1500 K Street, N.W. Suite 1100
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Patrick.McFadden@dbr.com
202-842-8800
202-842-8465/66 (fax)