

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

In the Matter of
Illinois Public Safety Agency Network
and
Nextel Communications, Inc.
WT Docket No. 02-55
Mediation No. TAM-12389

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 2012

Released: September 20, 2012

By the Commission: Commissioner Pai issuing a statement.

1. By this Memorandum Opinion and Order, we deny the August 29, 2011 application for review filed by the Illinois Public Safety Agency Network (IPSAN) of an Order released July 29, 2011 by the Public Safety and Homeland Security Bureau (Bureau). We do so because we find that the expenses IPSAN seeks to recover were not "reasonable, prudent and necessary."

I. BACKGROUND

2. In its March 23, 2011 Memorandum Opinion and Order on de novo review of the Transition Administrator (TA) Mediator's Recommended Resolution in the captioned case, the Bureau disallowed IPSAN's costs associated with giving its mobile data radios a "second touch." The Bureau directed the parties to meet with the 800 MHz TA to conclude a Frequency Reconfiguration Agreement (FRA) consistent with the Memorandum Opinion and Order. Rendering the FRA consistent with the Memorandum Opinion and Order required only that the cost of the second touch be subtracted from the

1 Illinois Public Safety Agency Network Application for Review (filed Aug. 28, 2011). Sprint Nextel Corp. filed an Opposition to Application for Review on Sept. 13, 2011. The Illinois Public Safety Agency Network filed a Reply to Opposition to Application for Review on Sept.15, 2011.

2 Illinois Public Safety Agency Network and Nextel Communications, Inc., Order, 26 FCC Rcd 10668 (PSHSB 2011) (Bureau Order).

3 In industry usage, a "touch" refers to the modification of a mobile or portable radio as part of the rebanding process, typically through installation of software to change the radio's channel configuration. With few exceptions, 800 MHz radios require at least one "touch" in order to be capable of operating on their new channel assignments under the revised 800 MHz band plan.

4 Illinois Public Safety Agency Network and Nextel Communications, Inc., Memorandum Opinion and Order, 26 FCC Rcd 4061, 4072 (PSHSB 2011) (Memorandum Opinion and Order). The TA is the entity created by the Commission to oversee rebanding, nationwide, and consists of Deloitte, the law firm of Squire Sanders, and the consulting telecommunications engineering firm, Baseline Telecom. An FRA is the contract between Sprint Nextel Corp. and rebanding 800 MHz licensees setting out the cost, schedule and other details of the reconfiguration of licensees' systems. All FRAs must be approved by the TA.

Motorola cost estimate that IPSAN had submitted to Nextel Communications, Inc. (Sprint)⁵ and the TA.⁶

3. Instead of revising the cost estimate as directed by the *Memorandum Opinion and Order*, IPSAN alleged that its cost estimate from Motorola was out of date and therefore no longer valid.⁷ Further, despite the fact that the *Memorandum Opinion and Order* had disallowed a second touch for IPSAN's radios, IPSAN advised the TA and Sprint that IPSAN was soliciting a cost estimate from a new vendor that would provide IPSAN's radios with both a first and second touch for the same price that Motorola had quoted for a first touch.⁸ Then, on April 7, 2011, IPSAN sent a letter to the TA and Sprint, announcing that "[n]otwithstanding the Bureau's recent *Memorandum Opinion and Order*," it was formally withdrawing the Motorola cost estimate "and expects to present new estimates to Sprint Nextel by May 3, 2011."⁹ On April 19, 2011 Sprint sent IPSAN an FRA, in which the initial Motorola cost estimate was reduced by subtracting the amount previously included for giving IPSAN's radios a second touch. When the TA asked IPSAN to execute the Sprint-tendered FRA, IPSAN refused, stating that it had eliminated Motorola as a vendor because of an alleged conflict of interest on Motorola's part. IPSAN again committed to providing a revised cost estimate from a substitute vendor by May 3, 2011.¹⁰

4. When May 3, 2011 passed without IPSAN producing its promised revised cost estimate, the TA directed the parties to execute the FRA that Sprint had presented on April 19, 2011.¹¹ IPSAN again refused. Accordingly, on May 26, 2011, the TA issued an Order to Show Cause (Show Cause Order) directing IPSAN to explain (1) how IPSAN's refusal to execute an FRA in compliance with the *Memorandum Opinion and Order* was consistent with IPSAN's rebanding obligations, and (2) why Sprint should pay IPSAN's costs incurred in responding to the Show Cause Order.¹²

5. On June 3, 2011, IPSAN disclosed that it had selected Advanced Technology Consulting (ATC) as its new vendor and that the overall project cost was now \$139,625 greater than Motorola's cost estimate.¹³ IPSAN later corrected the overage to \$89,251.75, which IPSAN attributed primarily to additional legal and consulting fees associated with finding and retaining the new vendor.¹⁴

⁵ Sprint Nextel Corp. (Sprint) is the parent of Nextel Communications, Inc. For the purposes of uniformity in the Commission's 800 MHz orders, we refer herein to the parent, Sprint, rather than to the subsidiary, Nextel Communications, Inc.

⁶ Motorola is the vendor that IPSAN initially chose to reband its system and which produced a cost estimate for rebanding which included giving IPSAN's radios a "second touch" to remove channels that no longer would be used once rebanding was complete. Sprint is responsible for paying licensees the reasonable, prudent and necessary expense for rebanding their 800 MHz communications systems. Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004)(800 MHz Report and Order).

⁷ Application for Review at 3 n.5.

⁸ *Bureau Order*, 26 FCC Rcd at 10669, citing TA Submission of Record, July 14, 2011 at 3.

⁹ TA Submission of Record at 4.

¹⁰ *Id.* at Attachment A, A-3. See also *Bureau Order*, 26 FCC Rcd at 10670. (IPSAN alleged that Motorola had interfered with IPSAN's ability to obtain subscribers to the IPSAN system.)

¹¹ TA Submission of Record at 4.

¹² *Id.* at 5.

¹³ IPSAN Reply to Sprint's Response to Order to Show Cause, June 17, 2011, at Appendix, unnumbered last page. See also, Sprint Response to Order to Show Cause, June 14, 2011.

¹⁴ *Id.*

6. On July 13, 2011, the TA forwarded the case record to the Bureau, recommending that the Bureau determine: (a) whether IPSAN had conformed to the *Memorandum Opinion and Order's* directive to execute an FRA, (b) whether IPSAN had acted in good faith by refusing to conform to the *Memorandum Opinion and Order*, and (c) whether Sprint was liable for IPSAN's additional expenses incurred after issuance of the *Memorandum Opinion and Order*.¹⁵

7. On July 29, 2011, the Bureau issued the *Bureau Order* requiring IPSAN to execute an FRA consistent with the *Memorandum Opinion and Order* within 20 business days. It held in abeyance a determination of whether IPSAN had acted in good faith in refusing to comply with the *Memorandum Opinion and Order*.¹⁶ With respect to IPSAN's expenses – which are the subject of IPSAN's application for review – the *Bureau Order* stated:

costs incurred by IPSAN in mediation following release of the [*Memorandum Opinion and Order*], including, without limitation, costs of pleadings responsive to the TA Mediator's Show Cause order, and costs associated with any pleadings filed subsequent to the release of the instant *Order*, and directed to the instant *Order*, are not reimbursable. To hold otherwise would be to award IPSAN for its failure to adhere to the directives of the [*Memorandum Opinion and Order*].

IPSAN executed an FRA with Sprint within the allotted 20 business days. IPSAN represents that the FRA does not include providing IPSAN's radios with a second touch.¹⁷ It seeks review, however, of the *Bureau Order's* disallowance of IPSAN's costs incurred after release of the *Memorandum Opinion and Order*, *i.e.*, the costs associated with locating a new vendor and responding to the TA Mediator's show cause order.¹⁸ That is the sole issue before us.

II. DISCUSSION

A. IPSAN's Arguments

8. IPSAN attempts to justify its costs by disputing the Bureau's statement that developing a cost estimate consistent with the *Memorandum Opinion and Order* was a mere "exercise in arithmetic," *i.e.*, IPSAN contends that a revised cost estimate required more than reducing the Motorola cost estimate by deleting the cost of a second touch. Instead, IPSAN states, "it required meeting with a new vendor and assuring that the work performed would be in accord with the earlier methodology determined between Nextel and IPSAN, and that the new vendor's costs would be appropriate given expected comparisons with the costs reflected in the Motorola estimates."¹⁹ IPSAN claims it has raised a "novel" issue, *i.e.*, "a

¹⁵ TA Mediator Submission of Record at 8.

¹⁶ *Bureau Order* 26 FCC Rcd at 10668. IPSAN executed an FRA on August 5, 2011, 7 days after release of the *Bureau Order* and 4 months and 13 days after release of the *Memorandum Opinion and Order*.

¹⁷ IPSAN's Reply to Nextel's Response to Order to Show Cause at 19. While it is not totally clear from the record, the issue of providing IPSAN's radios with a second touch apparently ceased to be a factor when IPSAN was unsuccessful in locating a vendor that would provide a second touch to the radios at the same price as Motorola quoted for a single touch.

¹⁸ IPSAN phrases its question presented for review as "Whether the Bureau erred in denying IPSAN's ability to recover the costs incurred by IPSAN in mediation following release of the Bureau's earlier *Memorandum Opinion and Order* in this matter released March 23, 2011." Application for Review at 1.

¹⁹ *Id.* at 4.

question of law or policy which has not previously been resolved by the Commission.”²⁰

9. IPSAN submits that, because the TA Mediator’s *Order to Show Cause* arose in a mediation context, IPSAN’s associated costs, including the costs of preparing pleadings, are “fully recoverable under the terms of the FRA.”²¹ It also contends that Sprint unnecessarily increased IPSAN’s costs when Sprint failed to request that the TA Mediator withdraw the *Order to Show Cause* and, instead, filed a responsive pleading, thereby “creating a dispute in mediation which IPSAN is entitled to challenge.”²² Accordingly, IPSAN claims, Sprint should be responsible for paying IPSAN’s legal and consulting fees incurred in responding to the TA’s Show Cause order.²³

10. Noting that the *Bureau Order* deferred a determination of whether IPSAN had breached its good faith obligations, IPSAN submits that it has acted in good faith and has not violated any Commission rule, but, nonetheless, now “suffers from an economic punishment . . . which has the same effect as the issuance of a fine.”²⁴ IPSAN claims that the “Bureau seeks to punish [it] without the necessary underlying finding that IPSAN acted in bad faith.”²⁵ IPSAN also claims that denying it reimbursement for expenses incurred after the issuance of the *Memorandum Opinion and Order* creates a “windfall” for Sprint.²⁶ Finally, IPSAN argues that “[t]here can be no reconciling the Bureau’s recognition of IPSAN’s right to choose a vendor and file change notices [with its decision to] deprive IPSAN of the ability to seek reimbursement for same, which reimbursement is fully allowed via change notice procedures that the Bureau did not deny IPSAN.”²⁷

11. IPSAN contends that the requirement that the TA convene a meeting of the parties within 10 business days of the *Memorandum Opinion and Order*’s release to conclude the FRA²⁸ acted to “chill the parties’ due process rights” since it had 30 days, rather than 10, to file a petition for reconsideration of that same order.²⁹

B. Sprint’s Arguments

12. Sprint contends that once IPSAN received the *Memorandum Opinion and Order*, it was obligated to comply with it and conclude an FRA or file for reconsideration.³⁰ Instead, Sprint claims, IPSAN considered it appropriate to “reevaluate its options, change vendors and start the reconfiguration cost review process all over again.”³¹ Sprint contends that “it cannot be debated that IPSAN did not do

²⁰ *Id.* at 1, citing 47 C.F.R. § 1.115(b)(2)(ii).

²¹ *Id.* at 6. IPSAN does not cite to the FRA provisions it relies upon to deem its expenses “fully recoverable.”

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6-7.

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Memorandum Opinion and Order*, 26 FCC Rcd at 4071.

²⁹ Application for Review at 5.

³⁰ Sprint Opposition to Application for Review (Sprint Opposition) at 3.

³¹ *Id.*

what the Bureau directed it to do. It did something else entirely.”³² Sprint comments that it finds the reasons that IPSAN advanced for not complying with the *Memorandum Opinion and Order* “not remotely compelling as reasons for the Bureau or the Commission not to determine that IPSAN flouted the Bureau’s directions and [IPSAN] should be responsible for whatever costs it caused itself from its own erroneous decisions.”³³ Sprint counters IPSAN’s claim that its application for review raises “novel” issues respecting conformity with Bureau orders by citing several enforcement cases that stand for the proposition that licensees that fail to respond to Bureau orders are subject to sanctions.³⁴

13. Sprint also points out that, in a petition for reconsideration of the 800 MHz *Second Memorandum Opinion and Order*,³⁵ IPSAN’s counsel – who was not representing IPSAN at the time – had argued that Sprint should be responsible for post-mediation costs, and that the Commission had rejected counsel’s argument stating, *inter alia*, that requiring such payments would have exceeded its statutory authority.³⁶ Sprint thus claims that once IPSAN sought *de novo* review of the *Memorandum Opinion and Order* “its additional costs after that point are not reimbursed by [Sprint].”³⁷ Sprint rejects IPSAN’s claim that IPSAN was engaged in “mediation” after issuance of the *Memorandum Opinion and Order* and thus its costs are reimbursable.³⁸ Sprint claims that the TA’s role, after the *Memorandum Opinion and Order* was released, was not as a mediator but as a “Special Master to elicit information regarding the reasons for IPSAN’s non-compliance with the [*Memorandum Opinion and Order*].”³⁹ As to IPSAN’s argument that failing to pay IPSAN for its efforts after issuance of the *Memorandum Opinion and Order* was a “penalty,” Sprint counters by stating that IPSAN “never had any reasonable expectation of payment . . . in the first instance.”⁴⁰ Addressing IPSAN’s claim that it had to change vendors because Motorola was “wooing” IPSAN’s customers away, Sprint avers that IPSAN “never came close to credibly proving that the change in vendors was ‘necessary’ such that it might have been a valid excuse for IPSAN’s refusal to obey the instructions set forth in the [*Memorandum Opinion and Order*].”⁴¹

C. Decision

14. As a preliminary matter, we reject Sprint’s claim that the post-decision activities by the

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 5, citing Shenzhen Ruidian Communication Co. Ltd., *Notice of Apparent Liability for Forfeiture*, 20 FCC Rcd 18976 (EB 2005); RSDC of Michigan, LLC, *Notice of Apparent Liability for Forfeiture*, 22 FCC Rcd 6858 (EB 2007); General Growth Properties, *Notice of Apparent Liability for Forfeiture* (EB 2007).

³⁵ Improving Public Safety Communications in the 800 MHz Band, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007).

³⁶ *Id.* at 10484-10485 ¶¶ 43-50 (“We also decline to change the rules to require Sprint to pay licensees’ post-mediation litigation costs, to the extent that Petitioners ask us to do so. As a threshold matter, we lack the statutory authority to impose such a requirement. The Commission has consistently held that in the absence of specific statutory authorization, it lacks the authority to require one party to pay another party’s costs in litigation before it. The Commission has specifically found such authority to be lacking in the context of Section 208 complaints, and we find that no greater authority exists here.” (footnotes omitted).)

³⁷ Sprint Opposition at 7-8.

³⁸ *Id.* at 8.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 10.

TA mediator did not constitute mediation because the TA mediator was acting as the equivalent of a special master in a judicial proceeding. In the *800 MHz Report and Order*, the Commission analogized the role of the TA Mediator to that of a judicial special master, stating that, acting as such, the TA Mediator would “mediate any disputes that may arise in the course of band reconfiguration.”⁴² Thus, Sprint is incorrect in its claim that the role of a special master and that of a mediator are inconsistent, and that the TA mediator’s post-decisional role was only “to elicit information regarding IPSAN’s non-compliance” with the *Memorandum Opinion and Order*. The TA mediator’s post-decision role transcended “eliciting information” as evidenced by the TA mediator’s urging IPSAN to timely conclude an FRA with Sprint, and, ultimately, ordering it to do so. We therefore find that the TA mediator’s post-decision activities constituted mediation. However, licensees that enter mediation with Sprint are entitled only to the “reasonable, prudent and necessary expenses associated with reaching an FRA.”⁴³ The question presented by IPSAN’s Application for Review of the *Bureau Order* is thus whether the mediation costs incurred by IPSAN following the issuance of the *Memorandum Opinion and Order* were “reasonable,” “necessary” and the “minimum” amount required to reband IPSAN’s system.⁴⁴ We hold that the Bureau correctly found they were not, for the following reasons.

15. We agree with the Bureau that Sprint is not required to compensate IPSAN for the fees that IPSAN incurred in substituting ATC for Motorola as its vendor.⁴⁵ IPSAN’s stated reason for substitution of vendors – and incurring the related consultant and legal fees – was that its original vendor, Motorola, had a conflict of interest because it allegedly attempted to “woo IPSAN’s end users away from the IPSAN system to alternative systems thereby reducing IPSAN’s revenue source.”⁴⁶ The allegation is wholly lacking in record support. Thus, for example, IPSAN has not supplied the identity of the “end users,” how they were “wooed,” names of the parties involved, when the “wooing” took place or any other details that would lend credence to its allegation.

16. Substitution of vendors at the eleventh hour in a rebanding proceeding entails preparation and renegotiation of a new cost estimate, possible mandatory mediation and subsequent *de novo* review, all at considerable expense and delay. The Bureau was unwilling to sanction that expense and delay based only on the thinnest allegation of conflict of interest on Motorola’s part. We agree. While it is possible that a licensee could meet the minimum necessary cost standard by changing vendors late in a rebanding project under extenuating or unavoidable circumstances, *e.g.*, because of a vendor going out of business or being debarred as a contractor, no such factor is present here. Moreover, the record contains no evidence that Motorola was not prepared to go forward with its cost proposal, reduced by the amount of the “second touch.” Accordingly, the Bureau was correct in disallowing IPSAN’s claimed fees for arbitrarily locating and retaining a new vendor.

⁴² *800 MHz Report and Order*, 19 FCC Rcd at 15071.

⁴³ *Wave I Reminder PN*, 20 FCC Rcd 20561, 20562, citing *800 MHz Report and Order* at para. 194. Licensees that fail to reach a mediated agreement must bear their own costs associated [with] all further administrative or judicial appeals of band reconfiguration issues, including *de novo* review by [PSHSB] and appeal of any such review before an ALJ. *Id.*

⁴⁴ *Bureau Order*, 26 FCC Rcd at 10674 (“IPSAN, however, is only entitled to be paid the minimum reasonable cost of rebanding”). As noted in n.15 *supra*, IPSAN characterizes the issue on review as “[w]hether the Bureau erred in denying IPSAN’s ability to recover the costs incurred by IPSAN in mediation following release of the Bureau’s earlier *Memorandum Opinion and Order* in this matter released March 23, 2011.” Application for Review at 1.

⁴⁵ IPSAN asserts that it incurred costs of \$89,251.75 in connection with the change in vendors, primarily for legal and consulting fees. It provides no breakdown of the claimed costs.

⁴⁶ IPSAN Reply to Nextel’s Response to Order to Show Cause at 6.

17. As a separate and independent basis for denying IPSAN's Application for Review, we find that IPSAN's solicitation of a vendor that would provide a second touch to IPSAN's radios was expressly contrary to the *Memorandum Opinion and Order's* disallowance of a second touch to the radios⁴⁷ and, therefore, is not a "necessary" cost entitled to compensation from Sprint under the Commission's minimum necessary cost standard.⁴⁸ Although the Commission has stated that "Sprint is . . . responsible for the costs of all negotiation and TA-sponsored mediation, regardless of the outcome,"⁴⁹ it has also stated that all rebanding expenses, to be reimbursable, must be prudent, necessary, and accomplished at minimum cost. IPSAN's driving this case back into mediation by disregarding the dictates of the *Memorandum Opinion and Order* was unnecessary, imprudent, and took the overall project cost well outside the Commission's minimum necessary cost standard.⁵⁰ Had IPSAN been successful in its futile search for a vendor that would provide a second touch to its radios at the same cost as specified by Motorola for a single touch, that still would not have satisfied the *Memorandum Opinion and Order* which explicitly ruled out a second touch, regardless of its cost, because IPSAN had not met its burden of proof to show that a second touch was reasonable, prudent, and in conformity with the Commission's minimum necessary cost standard.⁵¹

18. We reject IPSAN's claim that Sprint's filing of a responsive pleading rather than requesting the TA mediator to withdraw his Show Cause Order created "a dispute in mediation which IPSAN is entitled to challenge" and, thereby, incur legal fees. We agree with the *Bureau Order* and find that the Show Cause Order was necessitated by IPSAN's refusal to follow the Bureau's directive that it conclude an FRA consistent with the *Memorandum Opinion and Order*.⁵² Sprint was under no legal obligation to request withdrawal of the Show Cause order. Thus, although IPSAN's legal fees associated with the Show Cause Order were incurred in the course of post-decision mediation, the mediation itself was not "necessary" within the meaning of that term in the Commission's minimum necessary cost standard, *i.e.*, the mediation could have been avoided had IPSAN complied with the *Memorandum Opinion and Order*. We therefore agree with the Bureau that requiring Sprint to compensate IPSAN for its legal fees in connection with the Show Cause Order "would be to award IPSAN for its failure to adhere to the directives of the [*Memorandum Opinion and Order*]." ⁵³ As with the other legal and consultant fees incurred by IPSAN after release of the *Memorandum Opinion and Order*, the fees,

⁴⁷ *Memorandum Opinion and Order*, 26 FCC Rcd at 4069, 4070 ¶¶ 24-27. ("We agree with the TA Mediator that avoiding the need for a second touch by retaining the pre-rebanding frequencies in the mobile data radios would provide IPSAN with comparable facilities. IPSAN has failed to meet its burden of showing that its more than \$1 million proposal for adding a second touch is the minimum necessary cost to provide it with comparable facilities.")

⁴⁸ IPSAN, in advance of soliciting a new vendor, could have obtained, but never sought, guidance from the TA as to whether the associated costs would be reimbursable.

⁴⁹ Improving Public Safety Communications in the 800 MHz Band, *Second Memorandum Opinion and Order* 22 FCC Rcd 10467, 10486 (2007).

⁵⁰ Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9820 (2007) ("the term 'minimum necessary' cost does not mean the absolute lowest cost in all circumstances. Rather, the term refers to the minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner.")

⁵¹ *Memorandum Opinion and Order* 26 FCC Rcd at 4070 ¶ 25 ("we find that IPSAN has not met its burden of showing that a second touch to its mobile data radios is reasonable, prudent, and the 'minimum necessary to provide facilities comparable to those presently in use.'").

⁵² *Bureau Order*, 26 FCC Rcd at 10674 ¶ 22.

⁵³ *Id.* at 10675 ¶ 25.

although incurred in connection with mediation, were not “necessary” within the meaning of that term in the Commission’s minimum necessary cost standard. The fees could have been avoided had IPSAN conformed to the directives in the *Memorandum Opinion and Order*.

19. We find that IPSAN was not denied due process by the *Memorandum Opinion and Order*’s requirement that the TA convene a meeting within 10 days to conclude an FRA. As IPSAN itself admits, it was the meeting, not the conclusion of the FRA, which was to be held within 10 days.⁵⁴ The fact the meeting was to be held within 10 days did not, as IPSAN claims, deprive it of the opportunity to file a petition for reconsideration of the *Memorandum Opinion and Order* within the 30 days allowed by Section 1.106 of the Commission’s rules.⁵⁵

20. We find no merit to IPSAN’s claim that denying it reimbursement of its legal fees incurred after release of the *Memorandum Opinion and Order* constitutes a “fine” or “punishment” against IPSAN, or a “windfall” for Sprint.⁵⁶ IPSAN’s incurrence of the fees is beyond the “minimum necessary cost” standard as explained above, and was a direct result of its failure to follow the directives of the *Memorandum Opinion and Order*. Thus, again applying the Commission’s minimum necessary cost standard, we find that Sprint is not required to compensate IPSAN for its legal fees.

21. Nor is there any merit in IPSAN’s argument that, because licensees have a right to file change notices, the Bureau was inconsistent in “depriv[ing] IPSAN of the ability to seek reimbursement for same, which reimbursement is fully allowed via change notice procedures that the Bureau did not deny IPSAN.”⁵⁷ The change notice procedures apply only to an FRA. IPSAN thus could not have requested a change notice from Sprint because, until the FRA specifying ATC as a vendor was executed, there was no FRA to be “changed.”⁵⁸ All of IPSAN’s claimed expenses associated with locating a new vendor were incurred prior to the time the FRA with ATC as a vendor was executed and hence are not recoverable from Sprint by change notice.

22. In sum, we affirm the *Bureau Order* as being consistent with the *800 MHz Report and Order*’s minimum necessary cost requirements. Having reached that decision, we find it unnecessary to address the question of whether, by action and inaction, IPSAN’s failure to conform to the requirements of the *Memorandum Opinion and Order* constituted bad faith.

⁵⁴ Application for Review at 5.

⁵⁵ 47 C.F.R. § 1.106 IPSAN could have requested a stay of the *Memorandum Opinion and Order*’s requirements, including the requirement that the TA convene a meeting within 10 days to conclude an FRA. We note that IPSAN did not file a petition for reconsideration or request a stay.

⁵⁶ *See supra* para. 9.

⁵⁷ Application for Review at 7.

⁵⁸ Nor did IPSAN make any attempt to file a change notice.

III. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the application for review filed by the Illinois Public Safety Agency Network IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Illinois Public Safety Agency Network and Nextel Communications, Inc.; WT Docket No. 02-55; Mediation No. TAM-12389

It is bad enough that the Illinois Public Safety Agency Network (IPSAN) failed to comply with the order issued by the Public Safety and Homeland Security Bureau on March 23, 2011. Even worse is IPSAN's request to be reimbursed for the costs it incurred during its attempt to evade its legal obligations, which represents an abuse of the Commission's processes and runs afoul of the "chutzpah doctrine." *See, e.g., In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Order on Reconsideration of the Second Report and Order, WT Docket No. 05-211, 21 FCC Rcd 6703, 6709, para. 13 (2006); *Caribbean Shippers Assoc., Inc. v. Surface Transp. Bd.*, 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998). As a result, I wholeheartedly support this item.