

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

In the Matter of
SM Leasing & Rental, Ltd.
and Sprint Nextel
Mediation No. TAM-31015
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 2007

Released: April 3, 2007

By the Associate Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Order, we address a case referred to us for de novo review from Wave 3, Stage 1 mediation by the 800 MHz Transition Administrator (TA) involving a rebanding dispute between SM Leasing & Rental, Ltd. (SM) on the one hand and Sprint Nextel Corporation (Sprint) and Southern Communications Services, Inc., d/b/a SouthernLINC Wireless (Southern) on the other.

II. BACKGROUND

A. Procedural History

2. SM is licensed under call sign WPXY504 for a single-site, conventional 800 MHz facility in Mobile, Alabama. In September 2005, prior to the start of the Wave 3, Stage 1 negotiation period, SM provided Sprint and SouthernLINC with an initial cost estimate of \$30,130 to retune 200 mobile units and EF Johnson MX800 repeaters at a cost of \$30,130.

3. On March 2, 2006, a representative of Southern visited the tower site identified on SM's license, accompanied by an engineer employed by the tower owner.

1 Southern is working cooperatively with Sprint on rebanding negotiations in Wave 3 regions where Southern and Sprint both operate ESMR systems. Pursuant to this arrangement, Southern has taken the lead on Sprint's behalf in negotiations with SM. Southern Communications Co., Inc. Proposed Resolution Memorandum, filed June 26, 2006 (PRM), at 1.

2 TA Mediator Recommended Resolution, filed August 10, 2006 (RR), at 2.

3 Id. at 2-3.

4 PRM at 2-3; PRM Attachment 1 (Declaration of James G. George) at 2 (George Declaration).

that SM had operating facilities at the site.⁵ Following this site visit, Southern and Sprint asked SM to explain its apparent non-operational status, as well as the inconsistent cost estimates it had previously provided. In a telephone call with Sprint on March 3, 2006, Thomas Kurian, a representative of SM, stated that he had changed the system and suggested a joint visit to the site (at Sprint's expense) to verify that WPXY504 was operational.⁶ Sprint accepted this offer and attempted to schedule the joint visit, at which point Mr. Kurian hung up the phone.⁷ Sprint and Southern made additional attempts to contact SM during the negotiation period, all of which were unsuccessful.

4. In June 2006, Sprint requested that the SM rebanding matter be placed into early mediation by the TA.⁸ The TA appointed a mediator and attempted to contact SM by telephone and by certified mail to participate in the mediation. Although receipt of the TA's certified letter was acknowledged, SM failed to respond to repeated telephone calls by the TA mediator.⁹ The mediator then issued a scheduling order directing Sprint and SM each to file a Proposed Resolution Memorandum (PRM) setting forth their respective positions in mediation.¹⁰ The mediator further directed SM to submit evidence in its PRM that WPXY504 was operational.¹¹ SM failed to submit a PRM as directed. Accordingly, Sprint was the only party to submit a PRM. The mediator then forwarded the mediation record, along with its Recommended Resolution, to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.

B. Parties' Positions and Mediator Recommendation

5. *Sprint Position.* Sprint contends that SM has breached its duty to negotiate in good faith by falsely representing that its station was operational, submitting inconsistent cost estimates, and refusing to respond to Sprint's repeated requests for information and attempts to negotiate.¹² Sprint contends that SM's license should be cancelled for non-operation and that SM has shown a lack of candor and good faith.¹³

6. *SM Position.* SM has not submitted a PRM or any other information regarding its position.

7. *Mediator Recommendation.* The mediator recommends finding that SM has exhibited a lack of good faith and candor throughout the mediation process. The mediator cites evidence that SM is not operating at its authorized location and may have submitted fraudulent price quotations for non-existent equipment.¹⁴ The mediator recommends that the Commission institute proceedings to determine whether SM's license should be cancelled for failure to operate, and suggests that Commission should examine SM's conduct for potential misrepresentation or fraud.¹⁵ If SM's license is not cancelled, the mediator recommends that any rebanding costs be borne exclusively by SM as a result of SM's failure to negotiate

⁵ PRM at 3; George Declaration at 2.

⁶ *Id.*

⁷ *Id.*

⁸ Request for Mediation, May 22, 2006 (RR Record Tab 1).

⁹ RR at 4. The mediator's only contact with SM was a telephone call with Richard R. Susainathan, who stated that Mr. Kurian was out of the country and would call back when he returned. Despite additional attempts, the mediator did not hear from Mr. Kurian and had no further contact with SM. *Id.* at 4-5.

¹⁰ TA Mediator Scheduling Order, June 20, 2006 (RR Record Tab 4).

¹¹ *Id.*

¹² PRM at 3-5.

¹³ *Id.* at 6.

¹⁴ RR at 10.

¹⁵ *Id.* at 11.

or participate in mediation in good faith.¹⁶

III. DISCUSSION

8. We find that SM has failed to negotiate in good faith as required by the Commission's orders in this proceeding. The record indicates that SM has consistently failed to respond to requests to provide information, has failed to respond to good faith attempts by Sprint and Southern to negotiate, and has failed to participate in the mediation process. This complete absence of cooperation and responsiveness is sufficient by itself to support a finding that SM is not entitled to recovery of any of its rebanding costs from Sprint.

9. In addition, we are concerned by the evidence in the mediation record that SM has no operational facilities at the site identified on its license, and by the discrepancies associated with the cost estimates it provided to Sprint and Southern. We note that in addition to the evidence contained in the mediation record, staff from the FCC's New Orleans field office conducted an inspection of the site in November 2006, and found no evidence of operation by SM or transmitting equipment belonging to SM. In light of these circumstances, we refer this matter to the Enforcement Bureau for further proceedings to determine whether SM's license should be cancelled and whether other enforcement action may be appropriate.

IV. ORDERING CLAUSE

10. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission's Rules, 47 C.F.R. § 90.677, IT IS ORDERED that the issue submitted for *de novo* review by the Transition Administrator is resolved in Sprint's favor in the manner discussed above.

FEDERAL COMMUNICATIONS COMMISSION

David L. Furth
Associate Bureau Chief
Public Safety and Homeland Security Bureau

¹⁶ *Id.*