

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

In the Matter of)	
Kang B. Lee)	WT Docket No. 02-55
and Sprint Nextel)	
)	
Mediation No. TAM-31018)	

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 2007

Released: April 26, 2007

By the Associate Chief, 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 Wave 3, Stage 1 mediation by the 800 MHz Transition Administrator (TA) involving disputed issues between Kang B. Lee (Lee) and Sprint Nextel Corporation (Sprint). The first issue concerns whether Lee is eligible to relocate his site-based 800 MHz system in Puerto Rico, licensed under call sign WPF663, to the Enhanced Specialized Mobile Radio (ESMR) band. The second issue is whether Lee fulfilled his obligation to negotiate and mediate with Sprint in good faith.

2. Based on our *de novo* review of the mediation record, we find that Lee is not eligible to relocate to the ESMR band. We also find that Lee violated the good faith requirements of Section 90.677(c) of the Commission’s rules¹ by, among other things, failing to provide sufficient information about his station to allow meaningful negotiation and mediation of its retuning costs and other details of retuning the station. We therefore hold that Lee, rather than Sprint, is responsible for the cost of retuning his station.

II. BACKGROUND

3. The *800 MHz R&O* and subsequent orders in this docket require Sprint to negotiate a Frequency Relocation Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.² The FRA must provide for relocation of the licensee’s system to its new channel assignment at Sprint’s expense, including the expense of retuning or replacing the licensee’s equipment as required.³ Sprint must provide the relocating licensee with “comparable facilities” on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the relocation process.⁴ The Commission established an obligation for parties to engage in good faith

¹ 47 C.F.R. § 90.677(c).

² See *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, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (*800 MHz Report and Order*); *Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*); *Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005) (*800 MHz MO&O*).

³ *800 MHz Report and Order*, 19 FCC Rcd at 14977 ¶ 11.

negotiation throughout the process to ensure rapid achievement of the Commission's goal of eliminating unacceptable interference to public safety communications by timely reconfiguring the 800 MHz band.⁵

4. Under the *800 MHz Report and Order* and subsequent orders, 800 MHz licensees are entitled to relocate to the ESMR band only if they are currently operating ESMR systems or if they hold Economic Area (EA) geographic licenses and elect to convert to ESMR operations.⁶ In addition, EA licensees that also held site-based licenses as part of an integrated system as of November 22, 2004 may move both their geographic and site-based channels into comparable spectrum in the ESMR band.⁷ However, 800 MHz licensees whose licenses are exclusively site-based and who do not operate ESMR systems are not eligible to move to the ESMR band.

5. In the present case, Lee holds a site-based SMR license for a single-site, one-channel conventional system in Puerto Rico. During negotiations, Sprint offered to relocate Lee's system to a channel in the Expansion Band.⁸ Lee rejected this offer and claimed to be eligible to relocate to the ESMR band based on his business relationship with Preferred Communications Systems, Inc. (Preferred), an EA licensee in Puerto Rico that has elected to relocate to the ESMR band and convert to ESMR operations.⁹ Sprint disputed Lee's claim to eligibility and questioned the underlying agreement between Lee and Preferred. Sprint also contends that during negotiations, Lee failed to provide required information about its system to Sprint from which a relocation cost estimate could be derived.¹⁰ These disputes were referred to early mediation under the procedures established in the *800 MHz Report and Order*.¹¹ When the parties failed to reach agreement in mediation, the mediator forwarded the mediation record to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.¹²

A. ESMR Band Eligibility—Parties' Positions and Mediator Recommendations

6. *Lee Position.* Lee contends that he is eligible to relocate his site-based facility to the ESMR band based on his relationship with Preferred.¹³ In support of this contention, Lee states that Preferred built his station in 1998 and that he entered into an Option and Purchase Agreement with Preferred on

⁴ *Id.* at 14986 ¶ 26.

⁵ See 47 C.F.R. § 90.677(c). See also 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). (Failure to negotiate in good faith is subject to Commission sanctions, including involuntary relocation and license modification to the extent necessary to implement band reconfiguration, with the cost of implementing such modification to be borne by the licensee).

⁶ *800 MHz Report and Order*, 19 FCC Rcd at 15056-15057 ¶ 162.

⁷ *800 MHz Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 78; *800 MHz MO&O*, 20 FCC Rcd at 16026-27 ¶ 25. The Commission established the November 22, 2004 cutoff date limiting the relocation of site-based licenses into the ESMR Band to discourage licensees from seeking to acquire and relocate large numbers of site-based licenses to the ESMR Band for speculative purposes. See *800 MHz MO&O*, 20 FCC Rcd at 16025 ¶ 20.

⁸ Proposed Resolution Memorandum of Sprint Nextel, filed August 1, 2006 (Sprint PRM), at 3.

⁹ Proposed Resolution Memorandum of Kang B. Lee., filed July 25, 2006 (Lee PRM) at 2-3.

¹⁰ Sprint PRM at 4-9.

¹¹ TA Mediator Recommended Resolution, filed August 24, 2006 (RR) at 2. The voluntary negotiation period for this wave began on January 3, 2006, and the mandatory negotiation period began on April 2, 2006. Due to the impasse in negotiations, Sprint requested that mediation begin in this case before the end of the mandatory negotiation period. The TA granted this request and initiated mediation on June 13, 2006.

¹² *Id.*

¹³ Lee PRM at 2-4.

July 5, 2006 that gave Preferred a one-year option to acquire Lee's license.¹⁴ Lee also claims that his station is co-located with facilities licensed to Preferred, and that his station was listed in Preferred's February 1, 2006 election to relocate to the ESMR band.¹⁵ Lee submits that further consideration of his case should be stayed pending resolution of Preferred's request for waiver of the Commission's construction deadlines for Preferred's EA licenses.¹⁶ In the alternative, Lee proffers a "draft" Request for Planning Funding for \$19,780.¹⁷

7. *Sprint Position.* Sprint contends that Lee is not entitled to relocate to the ESMR band.¹⁸ Sprint questions the relationship between Lee and Preferred, noting that their Option and Purchase Agreement was not entered into until after mediation had commenced. Sprint also states that Lee has not supplied documents, such as a management agreement or spectrum leasing agreement, that would establish that Preferred has the degree of control over Lee's station claimed by Lee.¹⁹ Sprint objects to Lee's stay request, noting that, pursuant to guidance from the Commission, the TA found a stay of the Lee mediation not to be warranted because relocation of Lee's station was a matter separate from Preferred's construction waiver request.²⁰ Sprint also objects to Lee's planning funding request as untimely and unsupported by any documentation regarding Lee's system.²¹

8. *Mediator Recommendation.* The mediator recommended finding that Lee is not eligible to relocate to the ESMR Band.²² The mediator rejected the claim that Lee's facility could be included in Preferred's election, because Preferred did not own the facility or otherwise exercise control over it as of November 22, 2004 cut-off date established by the Commission.²³ The mediator concluded that the Option and Purchase Agreement between Lee and Preferred did not establish that Preferred had an ownership interest in Lee's station.²⁴

B. Good Faith Negotiations—Parties' Position Statements and Mediator Recommendation

9. *Lee Position.* Lee contends that he has negotiated in good faith.²⁵

10. *Sprint Position.* Sprint contends that Lee failed to negotiate in good faith and as a result,

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3-4

¹⁶ *Id.* at 3-5. On December 14, 2005, Preferred filed construction deadline waiver requests for its thirty-eight Economic Area (EA) licenses. See FCC File No. 0002408877 *et al.* and Exhibit 1 "Justification for Grant of Requested Waiver" (Dec. 14, 2005). See also Letter from Paul C. Besozzi, Esq., Counsel for Preferred Acquisitions, Inc. to Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Dec. 19, 2005). These requests remain pending.

¹⁷ Lee PRM at 5, Appendix 7. Lee contends that a "large portion" of the requested funds is needed for "coordination and monitoring" of proceedings before the TA, the FCC, and the US. Circuit Court for the District of Columbia. *Id.* at 5.

¹⁸ Sprint PRM at 7.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 10.

²¹ *Id.* 10-13.

²² RR at 6-8.

²³ *Id.* at 7.

²⁴ *Id.*

²⁵ Lee PRM at 2.

should bear the entire cost of the mediation and the reconfiguration of its station. Specifically, Sprint alleges that:

- Lee refused to engage in negotiations during the negotiation period because of his insistence that Sprint should negotiate with Preferred instead,²⁶
- Lee failed to develop a cost estimate for the relocation of his station,²⁷
- Lee failed to provide Sprint with information necessary for it to make a meaningful offer, as directed by the mediator,²⁸
- Contrary to the mediator's direction, Lee failed to provide any reasons for his rejection of a \$4,850 settlement offer made by Sprint²⁹
- Lee failed to provide any counter-offer to Sprint's offer,³⁰ and
- Lee's PRM contains frivolous arguments and Lee's late draft planning funding request is inconsistent with good faith negotiations.³¹

11. *Mediator Recommendation.* The mediator recommended finding that Lee failed to negotiate in good faith.³² The mediator concluded that Lee failed to: (a) provide Sprint with any estimate of his relocation costs; (b) provide the technical information requested by Sprint in order to formulate a good faith offer, as directed by the mediator; (c) provide any reasons for rejecting Sprint's offer, as directed by the mediator; and (d) make any counter-offer to Sprint's offer.³³ The mediator notes that Lee belatedly provided some technical information about his system in his PRM, but found Lee's proposed cost estimate to be incomplete and unsubstantiated.³⁴ However, the mediator recommended finding that Lee's conduct was mitigated because Lee cooperated with the mediator in the scheduling of conference calls and timely participated in those telephone conferences. The mediator recommended that Sprint pay \$4,850—the amount of its settlement offer—towards Lee's relocation expenses, but that any relocation expenses in excess of that amount should be borne by Lee.³⁵

III. DISCUSSION

A. ESMR Band Eligibility

12. We find that Lee has failed to establish eligibility to relocate to the ESMR band. The record does not support Lee's contention that his site-based facility should be treated as part of Preferred's system for rebanding purposes. In the *800 MHz MO&O*, the Commission allowed relocating EA licensees to relocate "site-based stations that were part of the licensee's integrated communications system" as of November 22, 2004, and are located within or near the geographic boundaries of the

²⁶ Sprint PRM at 2.

²⁷ *Id.* at 3, 13.

²⁸ *Id.* at 3-4.

²⁹ *Id.* at 3, 8.

³⁰ *Id.* at 3.

³¹ *Id.* at 3-4, 7.

³² RR at 9.

³³ *Id.*.

³⁴ *Id.* at 9-10..

³⁵ *Id.* at 9.

relevant EA.³⁶ Lee has failed to show that his facility has ever been an integrated part of any system operated by Preferred, either on November 22, 2004 or since. The only evidence offered by Lee in support of his claim is his July 2006 Option and Purchase Agreement with Preferred. This option agreement does not establish that Preferred owned or controlled Lee's facility in November 2004. Indeed, Lee presents no evidence that Preferred has ever exercised this option.

13. Even if Lee had assigned his license to Preferred, this would not be sufficient to demonstrate that Lee's station was "an integral part of [Preferred's] communications system" as of November 22, 2004, as required by the Commission.³⁷ Although Lee claims that his facility is located at a site where Preferred operates other stations, this is not sufficient to show that Lee's facilities are part of Preferred's system. Indeed, there is nothing in the record establishing the nature of Preferred's communications system, much less that Lee's station is an integrated part of that system. Lee has also provided no documentation to support his claim in mediation that Preferred managed Lee's license, either as of November 22, 2004, or since. Hence, we find that the record fails to show that Preferred exercises either ownership or control of Lee's station.

14. Accordingly, we find that Lee has not satisfied the threshold requirements for relocating site based stations to the ESMR band. Moreover, there is no relationship between Lee and Preferred sufficient to establish that resolution of this case should be stayed pending Preferred's request for waiver of its EA license construction deadlines. Therefore, we decline to stay these proceedings, resolve the ESMR relocation issue in Sprint's favor, and direct Lee to relocate his station to the frequency specified by the TA without delay.

B. Good Faith Negotiations

15. The Commission has emphasized in this proceeding that good faith negotiation by all parties is essential to achieving the Commission's rebanding objectives.³⁸ We find that Lee has breached his good faith obligation. 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.³⁹ The record discloses that Lee did not determine the actual cost of relocating his station, did not provide Sprint with the information necessary to conclude an FRA with Lee, and did not respond to Sprint's *bona fide* offer by making a counter-offer.⁴⁰

16. We find that Lee's refusal to heed the Commission's rules and follow the mediator's direction to conform to those rules exhibits a lack of good faith. We also do not find Lee's lack of good faith to be mitigated by his conduct. Even assuming that Lee willingly participated in conference calls set up by the mediator, the record shows that he was unprepared to provide the information necessary to engage in

³⁶ *800 MHz MO&O*, 20 FCC Rcd at 16026-¶ 27.

³⁷ *Id.*

³⁸ See 47 C.F.R. § 90.677(c); *800 MHz Report and Order*, 19 FCC Rcd at 15076-77 ¶ 201. See also *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). (Failure to negotiate in good faith is subject to Commission sanctions, including involuntary relocation and license modification to the extent necessary to implement band reconfiguration and that the cost of implementing such modification must be borne by the licensee.)

³⁹ *Gemini International, Inc. and Sprint Nextel, Memorandum Opinion and Order*, DA 07-1580 (PSHSB, rel. April 3, 2007), at ¶ 15. See also *800 MHz Report and Order*, 19 FCC Rcd at 15076-77 n. 524.

⁴⁰ We agree with the mediator that Lee's late submission of a draft Request for Planning Funding in connection with its PRM was impermissibly untimely and irrelevant to the issues under mediation.

meaningful mediation. The mediator observed that Lee's participation in these calls was not meaningful because he professed ignorance of the technical and other details of his system.⁴¹ The Commission's good faith requirements are not satisfied by mere attendance at mediation conferences, but require licensees to participate substantively and provide information necessary to the resolution of issues. We likewise decline to follow the mediator's recommendation that Sprint pay \$4,850 towards Lee's relocation costs.⁴² There is insufficient record support for requiring Sprint to pay any amount to Lee. Moreover, because of his failure to negotiate and mediate in good faith, Lee has forfeited any right to payment for reconfiguration and must bear his own relocation costs or surrender his license.

IV. ORDERING CLAUSE

17. 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 disputes submitted for *de novo* review by the Transition Administrator are 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

⁴¹ RR at 8-9. During mediation, Lee said that he relied on "Preferred's cooperation" to provide information about the system, and that such cooperation was "not always forthcoming." *Id.* This is not sufficient to meet the good faith standard, and raises serious questions about whether Lee is exercising the degree of control required of a Commission licensee.

⁴² See RR at 9-10.