

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

In the Matter of
TeleBEEPER of New Mexico, Inc.
and
Nextel Communications, Inc.
Mediation No. TAM-50069
WT Docket No. 02-55

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2011

Released: February 8, 2011

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from Wave 1, Stage 1 mediation by the 800 MHz Transition Administrator (TA) involving disputed issues between TeleBEEPER of New Mexico, Inc. (TeleBEEPER) and Nextel Communications, Inc. At issue is whether TeleBEEPER fulfilled its obligation to negotiate and mediate the rebanding of its licenses in good faith. Based on our de novo review of the mediation record, and the Statements of Position of the parties, we find that TeleBEEPER violated the good faith requirements of Section 90.677(c) of the Commission's rules, that TeleBEEPER is therefore responsible for the cost of a "paper retune" of TeleBEEPER's licenses, and that TeleBEEPER must promptly file, at its own expense, applications for assignment of its pre-rebanding licenses to Sprint.

1 Nextel Communications, Inc. is a wholly owned subsidiary of Sprint Nextel Corp. It is hereinafter referred to as Sprint.

2 TA Mediator's Recommended Resolution, TAM-50069 (Oct. 4, 2010) (RR).

3 Statement of Position of TeleBEEPER of New Mexico, Inc. (Oct. 19, 2010) (TeleBEEPER SOP); Statement of Position of Nextel Communications, Inc., (Oct. 19, 2010) (Sprint SOP).

4 47 C.F.R. § 90.677(c).

5 The term denotes a rebanding in which no actual retuning or replacement of equipment is required.

6 TeleBEEPER has not constructed the facilities authorized by its licenses. RR at 4. Accordingly, the "retuning:" of TeleBEEPER's authorizations involves only the preparation and filing of applications for modification of its licenses to change the authorized frequencies from their current location, below 817/862 MHz to frequencies in the ESMR Band, 817-824/862-869 MHz, and the filing of applications assigning TeleBEEPER's pre-rebanding frequencies to Sprint.

II. BACKGROUND

2. The *800 MHz R&O* and subsequent orders in this docket require Sprint to negotiate a Frequency Reconfiguration Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.⁷ The FRA must provide for relocation of the licensee's system to its new channel assignment(s) at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required.⁸ In TeleBEEPER's case, however, no equipment retuning or replacement is required since TeleBEEPER has not yet constructed the facilities authorized by its licenses.⁹ Thus, all that was required to reband TeleBEEPER's licenses was (a) that the Transition Administrator (TA) specify replacement channels for TeleBEEPER, (b) that TeleBEEPER file applications for modification of license to reflect the specified channels, (c) that TeleBEEPER assign its previous channels to Sprint, and (d) that the parties close the FRA transaction. Despite the straightforward simplicity of this process, the parties have yet to complete it after over 5 years of negotiation and mediation and \$142,544.92 in legal and other fees in pursuing this "paper retune."¹⁰

3. The Commission established by rule, and has emphasized in its orders, the obligation for parties to engage in good faith negotiation throughout the rebanding 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.¹¹ In the instant case, Sprint contends that TeleBEEPER did not act in good faith when it advanced legally indefensible claims during negotiation and mediation.¹² TeleBEEPER counters that Sprint made unreasonable and duplicative requests of TeleBEEPER for information substantiating the costs it has incurred in negotiation and mediation.¹³

4. TeleBEEPER holds unconstructed Basic Economic Area (BEA) licenses in the Evansville-Henderson, Indiana, Kentucky, Illinois BEA - call signs WPUV450, WPUV451; the Tulsa, Oklahoma, Kansas BEA - call sign WPUV452; and the Pueblo, Colorado, New Mexico BEA, call sign WPUV453.¹⁴ The parties executed an FRA on July 24, 2006.¹⁵ They did not complete the tasks contemplated in the FRA and entered into mediation on August 3, 2010.¹⁶ During mediation, TeleBEEPER claimed that

⁷ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) (*800 MHz R&O*); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005); *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007); *Third Memorandum Opinion and Order*, 22 FCC Rcd 17209 (2007).

⁸ *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

⁹ See *supra* n.6.

¹⁰ RR at 4.

¹¹ See 47 C.F.R. § 90.677(c). See also *800 MHz R&O*, 19 FCC Rcd at 15076-77 ¶ 201.

¹² Proposed Resolution Memorandum of Nextel Communications at 10 (Sept. 14, 2010) (Sprint PRM).

¹³ Proposed Resolution Memorandum of TeleBEEPER of New Mexico, Inc., at 4-13 (Sept. 3, 2010) (TeleBEEPER PRM); Reply Proposed Resolution Memorandum of TeleBEEPER of New Mexico, Inc. (Sept. 20, 2010) (TeleBEEPER Reply PRM); TeleBEEPER SOP at 3-5.

¹⁴ RR at 3.

¹⁵ *Id.*

¹⁶ *Id.*

Sprint had breached the FRA and, therefore, that TeleBEEPER was no longer bound by its terms.¹⁷ TeleBEEPER also claimed that it was entitled to replacement channels free of encumbrances,¹⁸ and that it was entitled to sell its “pre-rebanded frequencies on the secondary market” rather than assign them to Sprint.¹⁹ It eventually abandoned its position that it was entitled to totally encumbrance-free replacement spectrum, but then contended that Sprint had violated the Commission’s rules by obtaining authorizations that diminished TeleBEEPER’s “white area.” TeleBEEPER also asserted an entitlement to “damages” from Sprint because of the prolonged negotiation and mediation.²⁰ When the parties were unable to resolve their differences in mediation,²¹ the TA Mediator forwarded the mediation record to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.

5. TeleBEEPER’s Position. TeleBEEPER contends that it has negotiated in good faith.²² It asserts that its claimed expenses are justified because:

- Sprint employees repeatedly approved certain of TeleBEEPER’s expenses and then reneged on the approval and required TeleBEEPER to provide excess amounts of documentation in support of its claimed expenses.²³
- Sprint took inordinately long to respond to TeleBEEPER’s submission of expense information.²⁴
- It was necessary for TeleBEEPER to commission a study to define its “white area.”²⁵
- It lost revenue as a consequence of not being able to construct its authorized facilities while it was in negotiation and mediation with Sprint.²⁶

¹⁷ TeleBEEPER PRM at 7. TeleBEEPER alleged that Sprint breached the FRA by its [Sprint’s] “delinquent cost reimbursement performance” and Sprint’s “failure to provide TeleBEEPER with notice that it [Sprint] had vacated the replacement frequencies or to otherwise cooperate with TeleBEEPER.” *Id.*

¹⁸ TeleBEEPER later clarified that it “would prefer” replacement spectrum free of Sprint encumbrances, not free of all encumbrances. TeleBEEPER Reply PRM at 3.

¹⁹ RR at 4.

²⁰ RR at 12.

²¹ TeleBEEPER claims \$142,544.92 in reimbursable expenses and Sprint submits that TeleBEEPER is entitled to be reimbursed for only \$55,412.68, an offer that is nearly identical to the amount already agreed to in the FRA. RR at 4, n.5. Thus, the amount in dispute is \$87,132.24. RR at 5. The TA Mediator recommends that Sprint reimburse TeleBEEPER for a total of \$13,051.39 of this disputed amount. *Id.*

²² TeleBEEPER Reply PRM at 1-2.

²³ TeleBEEPER PRM at 4-10.

²⁴ *Id.*

²⁵ *Id.* at 12-13. “White area,” as the term is used here, refers to the unencumbered area within TeleBEEPER’s licensed BEAs.

²⁶ RR at 24.

- It advanced its claim that it deserved encumbrance-free replacement spectrum only in response to the TA's invitation to present what TeleBEEPER would regard as a fair settlement of the parties' dispute had the FRA not been in effect.²⁷

6. Sprint's Position. Sprint contends that TeleBEEPER failed to negotiate and mediate in good faith and as a result, should bear the entire cost of the mediation and the "paper retune" of its station.²⁸ It alleges that:

- The delays in completing reconciliation, reimbursing TeleBEEPER, and closing the FRA occurred because "TeleBEEPER consistently failed to deliver requested documentation that was required by the TA's policies."²⁹
- TeleBEEPER was unreasonable, caused unnecessary delay, and acted in bad faith, by asserting that it did not have to supply certain documents because the requirement to do so had not been established by the TA until after TeleBEEPER had signed the FRA.³⁰
- TeleBEEPER, knowing that it was not entitled to unencumbered spectrum, nonetheless incurred unnecessary expense by making the bad faith claim that it was entitled to unencumbered replacement frequencies that would place it in a superior spectrum position following reconfiguration.³¹
- After abandoning its request for unencumbered spectrum, TeleBEEPER – knowing it had no right to do so – unreasonably, and in bad faith, claimed that it was entitled to resell its pre-banding frequencies on the secondary market rather than assign them to Sprint.
- TeleBEEPER incurred unnecessary expense by advancing the bad faith claim that it was entitled to \$225,000 in fees, expenses and "damages," including unspecified profits TeleBEEPER might have earned had it built out its network.³²
- TeleBEEPER is not entitled to expenses it incurred after the FRA was executed – but before the FRA amendment was executed – because those expenses should have been included in the FRA amendment.³³

²⁷ TeleBEEPER Reply PRM at 2-3; TeleBEEPER SOP at 7.

²⁸ In the alternative, Sprint argues that TeleBEEPER should be paid no more than \$55,412.68 of its claimed expenses. See Sprint PRM at 5.

²⁹ *Id.* at 3.

³⁰ *Id.* at 6.

³¹ *Id.* at 9.

³² *Id.*

³³ Sprint SOP at 12-13.

7. TA Mediator Recommendation. The TA Mediator recommends:
- that the Commission find that, “although the Licensee cooperated with Sprint Nextel in a reasonably sufficient manner in the development of its FRA and in the documentation of its expenses, [TeleBEEPER] did not act in good faith in the transfer of its pre-rebanding frequencies to Sprint Nextel, or in its participation in mediation.”³⁴
 - that the Commission direct Sprint Nextel to pay TeleBEEPER \$13,051.39 of its post-FRA internal expenses that were incurred before it stopped participating in good faith in the reconfiguration process.³⁵
 - “that the Commission find that [TeleBEEPER] is not entitled to reimbursement of \$73,560.85 of the disputed expenses, which include (1) [TeleBEEPER’s] pre-FRA expenses that were not disclosed during the negotiation of the FRA, and (2) [TeleBEEPER’s] outside counsel and internal expenses that were incurred after [TeleBEEPER] stopped participating in good faith in the reconfiguration process.”³⁶
 - “that the Commission effectuate the assignment of the [TeleBEEPER] pre-rebanding frequencies to Sprint Nextel.”³⁷ The TA Mediator states that “[t]his could be accomplished either directly by the Commission through the issuance of an order modifying [TeleBEEPER’s] authorizations, or pursuant to a Commission directive that the Parties prepare and file a new assignment application, the preparation and prosecution of which should be undertaken by [TeleBEEPER] at its own expense.”³⁸
 - That the Commission allow all expenses incurred by TeleBEEPER prior to the time it ceased negotiating in good faith, but not thereafter.³⁹

III. DISCUSSION.

8. The Commission has emphasized that utmost good faith negotiation by all parties is critical to achieving the Commission’s rebanding objectives.⁴⁰ 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

³⁴ RR at 17-18.

³⁵ *Id.* at 18.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 22-24.

⁴⁰ 47 C.F.R. § 90.677(c). *See also* 800 MHz R&O, 19 FCC Rcd at 15076-77 ¶ 201; 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.)

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.⁴¹

9. It is beyond reasonable belief that the tasks required to effect this “paper retune” legitimately required 5 years and \$142,544.92 in reimbursable expenses, much less TeleBEEPER’s demand for \$ 225,000 in undocumented legal fees and damages. TeleBEEPER’s unjustified pursuit of unencumbered replacement spectrum significantly delayed mediation and resulted in an accretion of additional, and unnecessary, expenses. We are not persuaded by TeleBEEPER’s excuse that its claim to unencumbered spectrum was only a preference expressed in response to the TA Mediator’s invitation to consider what TeleBEEPER would request if the FRA were not in effect. The TA Mediator instructed TeleBEEPER to keep its “preferences” in line with the Commission’s rules and 800 MHz orders, but notes that “[t]he licensee repeatedly refused to comply with this instruction.”⁴²

10. After TeleBEEPER ultimately abandoned its request for unencumbered spectrum, TeleBEEPER delayed the mediation process further – and added to its expenses – by posturing that it might keep its pre-rebanding frequencies and sell them on the secondary market. Even after the TA Mediator advised TeleBEEPER that selling the pre-rebanding frequencies was not permitted by the Commission’s rules, TeleBEEPER persisted in claiming that neither the TA Mediator nor Sprint could prevent it from doing so.⁴³ Notably, TeleBEEPER has failed to address, in either its PRM or SOP, this unwarranted threat to sell its pre-rebanding frequencies.

11. TeleBEEPER further delayed mediation – and incurred additional expense – by repeatedly advertng to supposed encumbrances that existed on its replacement channels that had not existed on its pre-rebanding channels. TeleBEEPER, however, never produced evidence of these alleged additional encumbrances even though it had invoiced Sprint for an engineering study comparing the pre- and post-rebanding frequencies from an encumbrance standpoint.⁴⁴ Indeed, even in its SOP, TeleBEEPER continues to insinuate that Sprint has improperly encumbered TeleBEEPER’s replacement spectrum. It says its claim is based on “investigations at that time [during the initial FRA negotiations] and since,” yet it neither documents those “investigations,” nor produces the results of the engineering study, *supra*.⁴⁵ Remarkably, TeleBEEPER argues that continuing to press its undocumented encumbrance claim somehow “does not constitute bad faith.”⁴⁶

12. TeleBEEPER refused to request an extension of time within which to consummate the assignment of its pre-rebanding frequencies to Sprint, thus allowing Commission approval of the assignment applications to lapse. It is inconsequential whether this refusal was in furtherance of TeleBEEPER’s threat to assign the frequencies to a third party or just a litigation tactic to induce Sprint to pay the \$ 225,000 demanded by TeleBEEPER.⁴⁷ Either way, TeleBEEPER’s refusal to request the

⁴¹ Gemini International, Inc. and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 6651 (PSHSB 2007), at ¶ 15. *See also 800 MHz Report and Order*, 19 FCC Rcd at 15076-77 n.524.

⁴² RR at 20.

⁴³ *Id.*

⁴⁴ *See* Sprint PRM, Appendix 2 at 6.

⁴⁵ TeleBEEPER SOP at 6.

⁴⁶ *Id.*

⁴⁷ TeleBEEPER claims that its refusal to submit a request for extension of time within which to consummate the assignment of the pre-rebanding frequencies to Sprint was in retaliation for “Sprint’s inability to assure

(continued....)

extension was not made in good faith and served only to further delay and increase the cost of this proceeding.

13. Finally, TeleBEEPER was aware that Sprint is liable only for the payment of the reasonable, prudent and necessary costs and expenses of rebanding.⁴⁸ Yet, it demanded \$225,000 as a condition of complying with the FRA which, even as amended, only requires Sprint to pay \$55,531.25 to TeleBEEPER. Sprint, as the TA Mediator notes, characterizes TeleBEEPER's demand as a "shakedown."⁴⁹ Without agreeing or disagreeing with that characterization, we find that TeleBEEPER's demand for \$225,000 for undocumented legal fees and unspecified "damages," and its delaying mediation with other non-meritorious claims, are inconsistent with the Commission's orders, which obligate Sprint to pay only the reasonable prudent and necessary costs and expenses of rebanding. We thus find that the \$ 225,000 demand, and TeleBEEPER's other non-meritorious claims constitute a breach of TeleBEEPER's obligation to negotiate in "utmost good faith."⁵⁰

14. Each time TeleBEEPER advanced a non-meritorious claim, the subsequent mediation over the claim delayed rebanding and had a cost which, in the normal course, would be Sprint's obligation. In our previous decisions, we have approved payment of legal fees and internal expenses to licensees that advanced claims which, although we ultimately found them unjustified, were, at least arguably, advanced in good faith.⁵¹ This case, however, falls so far beyond the pale of good faith that we cannot responsibly condone TeleBEEPER's actions or credit its arguments. Thus, for example, we deem it irrelevant that TeleBEEPER ultimately withdrew its demand for \$225,000.⁵² By the time it did so, the damage had been done, *i.e.*, the mediation time had been wasted and additional costs were incurred. Likewise, TeleBEEPER's receding from its position that it should receive unencumbered spectrum did not alter the fact that debating the claim occupied mediation time and caused additional and unnecessary expense. TeleBEEPER's explanation that it was not seeking wholly unencumbered spectrum – just spectrum unencumbered by Sprint⁵³ – does not change the fact that its unwarranted demand for unencumbered spectrum was patently frivolous and inconsistent with the Commission's rules and 800 MHz orders.⁵⁴ Moreover, TeleBEEPER's suffering "four years of frustration with Sprint Nextel and the reconfiguration process" does not justify TeleBEEPER venting its frustration by making non-meritorious claims for relief.

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TeleBEEPER that TeleBEEPER's many times revised reimbursement documentation would ever be accepted." TeleBEEPER PRM at 10.

⁴⁸ RR at 21.

⁴⁹ RR at 12.

⁵⁰ Reminder to 800 MHz "Wave Three" Channel 1-120 Licensees of Their Band Reconfiguration Negotiation and Mediation Obligations, *Public Notice*, 21 FCC Rcd 7122, 7123 (WTB 2006).

⁵¹ *See, e.g.*, County of Chester, Pennsylvania, WT Docket 02-55, *Memorandum Opinion and Order*, 22 FCC Rcd 13146 (PSHSB 2007).

⁵² RR at 16.

⁵³ TeleBEEPER SOP at 7 n.2.

⁵⁴ RR at 20-21.

15. We concur with TeleBEEPER that “it is not bad faith for a licensee to seek to recover the costs that it has in fact occurred (sic).”⁵⁵ When those costs, however, have been incurred by advancing non-meritorious claims as a litigation tactic intended to complicate the mediation process and increase the other party’s costs, then they are no longer recoverable because the good faith obligation has been breached. Thus, as the Bureau cautioned when stating Sprint’s obligation to pay rebanding costs, “[t]his does not preclude the Bureau or Commission from requiring a licensee to pay its own rebanding costs based on a determination that the licensee has caused unjustified delay or has otherwise failed to meet its obligation to implement rebanding in good faith.”⁵⁶ It is a telling point, as Sprint observes,⁵⁷ that after failing for years to provide documentation of its expenses, in the detail required by the TA, and thereby delaying mediation, TeleBEEPER, once ordered to do so by the TA Mediator, was able to produce responsive documentation within a few days. Had it done so, in good faith, at the negotiation stage, mediation would not have been required, and this matter would not have come to the Bureau on *de novo* review.

16. In the TA Mediator’s view, TeleBEEPER’s lack of good faith was not apparent until after the FRA was executed and TeleBEEPER disavowed its obligations under the FRA and made a series of non-meritorious claims that disrupted and lengthened the mediation process, thereby incurring additional expense. Therefore, the TA Mediator recommends that we credit TeleBEEPER for the “good faith” expenses it incurred in negotiating the FRA.⁵⁸ We decline that recommendation. Our precedent establishes that, when a party breaches its good faith obligation, it forfeits its right to have its rebanding expenses paid by Sprint.⁵⁹ Neither the 800 MHz rules nor the 800 MHz orders oblige us to partition rebanding expenses into “good faith” and “bad faith” components and apportion expenses accordingly. Here, TeleBEEPER has elevated a routine “paper retune” into a \$142,544.92 legal dispute that should never have required mediation, much less *de novo* review by the Bureau. In doing so, it has substantially burdened Sprint’s resources and those of the Commission, and has interfered with the progress of 800 MHz rebanding. It therefore must pay all of its own rebanding costs and, without delay, execute and file applications for assignment of its pre-rebanding channels to Sprint.

IV. ORDERING CLAUSES

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.

⁵⁵ TeleBEEPER SOP at 8.

⁵⁶ FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, *Public Notice*, 22 FCC Rcd 17227, 17232 n.14 (PSSB 2007).

⁵⁷ Sprint PRM at 7.

⁵⁸ RR at 17-18.

⁵⁹ See, e.g., Kang B. Lee and Sprint Nextel, *Memorandum Opinion and Order*, 22 FCC Rcd 7667 (PSSB 2007); Ron Gossett and Barbara Gossett and Sprint Nextel, *Order of Modification*, 22 FCC Rcd 17481 (PSSB 2007). (“We found that [licensees] failed to meet their obligation of good faith participation in the rebanding process and forfeited their right to retuning of their facility at Sprint’s expense.”)

18. IT IS FURTHER ORDERED that, within 10 business days of the release date of this *Memorandum Opinion and Order*, TeleBEEPER and Sprint SHALL FILE applications for assignment of TeleBEEPER's pre-rebanding frequencies from TeleBEEPER to Sprint.

FEDERAL COMMUNICATIONS COMMISSION

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