

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
TeleBEEPER of New Mexico, Inc.	)	WT Docket 02-55
And Sprint Nextel Corporation	)	
	)	
Mediation No. TAM 50069	)	

**MEMORANDUM OPINION AND ORDER ON RECONSIDERATION**

**Adopted: April 8, 2011**

**Released: April 8, 2011**

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

1. On March 10, 2001, TeleBEEPER of New Mexico, Inc. (TeleBEEPER) filed a Petition for Reconsideration (Petition) of the Public Safety and Homeland Security Bureau's *Memorandum Opinion and Order*<sup>1</sup> which found that TeleBEEPER failed to act in good faith in negotiating with Sprint Nextel Corporation (Sprint) for the rebanding of TeleBEEPER's 800 MHz licenses, call signs WPUV450 *et al.*<sup>2</sup> For the reasons set out below, we deny TeleBEEPER's Petition, in part, and dismiss it in part.

**I. BACKGROUND**

2. In the *TeleBEEPER Order*, the Bureau found that TeleBEEPER had failed to negotiate in good faith for the "paper retune"<sup>3</sup> of its 800 MHz licenses because, during mediation, TeleBEEPER had knowingly advanced claims which it knew were unmeritorious and inconsistent with the Commission's rules and 800 MHz Orders.<sup>4</sup> Specifically, TeleBEEPER claimed that:

- it was entitled to replacement channels free of encumbrances,
- it was entitled to sell its pre-rebanding frequencies to a third party,
- Sprint had illegally obtained authorizations that diminished TeleBEEPER's "white area," and
- TeleBEEPER was entitled to \$250,000 in "damages" from Sprint on account of the protracted negotiation and mediation process.<sup>5</sup>

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<sup>1</sup> TeleBEEPER of New Mexico, Inc. and Sprint Nextel Corp., *Memorandum Opinion and Order*, 26 FCC Rcd 1164 (PSHSB 2011) (TeleBEEPER Order).

<sup>2</sup> 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.

<sup>3</sup> So called because retuning TeleBEEPER's unbuilt system does not involve the modification of physical equipment, as in most other retunes, but requires only the conclusion of a Frequency Reconfiguration Agreement and the filing of license modification and assignment applications with the Commission.

<sup>4</sup> *TeleBEEPER Order* at 2, ¶ 4.

<sup>5</sup> *Id.*

3. In the Recommended Resolution, the Transition Administrator Mediator (TA Mediator) found that TeleBEEPER had negotiated in good faith in the initial stages of the negotiations with Sprint, but not thereafter. The TA Mediator proposed, therefore, that TeleBEEPER be paid some of its costs, *i.e.*, those that had been incurred before TeleBEEPER began negotiating in bad faith. Under the TA Mediator's analysis, TeleBEEPER was entitled to \$13,051.39 of its claimed \$142,544.92 in costs. The Bureau, however, disagreed, finding that it was not required to apportion costs into good faith and bad faith components, thereby to award TeleBEEPER its "good faith expenses." It held, therefore, that, TeleBEEPER, having failed to act in good faith, was entitled to none of its claimed costs.

4. TeleBEEPER advances four arguments in its Petition.

- The Bureau failed to consider that significant amounts of TeleBEEPER's expenses were incurred because of alleged delays by Sprint in handling TeleBEEPER's requests for payment of its expenses. According to TeleBEEPER, Sprint unreasonably required additional information when TeleBEEPER submitted a cost claim, even when Sprint previously had indicated that it would pay the claim.<sup>6</sup>
- TeleBEEPER incurred expense when Sprint delayed consummating disaggregation of TeleBEEPER's spectrum to Sprint.<sup>7</sup>
- It was not bad faith for it "to have declined to continue its efforts, or to have sought complete relief during the mediation process."
- The Bureau erred in "failing to acknowledge or credit TeleBEEPER's diligent attempts to comply with Sprint Nextel's requirements and complete the subject rebanding during that extended [two year] period of time."<sup>8</sup>

TeleBEEPER claims, therefore, that the Bureau "entirely failed to consider an important aspect of the problem," rendering its decision arbitrary and capricious under the Supreme Court's decision in *Motor Vehicles Manufacturers Association v. State Farm Mutual. Auto Insurance Co.*<sup>9</sup>

## II. DISCUSSION

5. Our analysis of TeleBEEPER's Petition proceeds according to a well-established, three-pronged standard. First, petitions for reconsideration must show a material error in the original order.<sup>10</sup> Second, they may not raise matters that the petitioner, with diligence, could have raised at its last opportunity to do so.<sup>11</sup> Third, a petition for reconsideration will not be considered if it merely repeats matters that have been raised before and considered, but rejected, in earlier decisions.<sup>12</sup>

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<sup>6</sup> Petition at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3. TeleBEEPER measures the two years as the time that expired between the date that TeleBEEPER signed the FRA and the date that the last deadline passed for the parties to consummate the disaggregation of TeleBEEPER's spectrum to Sprint. *Id.*

<sup>9</sup> *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 43 (1983) (Motor Vehicles).

<sup>10</sup> 47 C.F.R. § 1.106; WWIZ, Inc., *Memorandum Opinion and Order*, 37 FCC 685, 686 (1964), *aff'd sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

<sup>11</sup> *Id.*

<sup>12</sup> Kin Shaw Wong, *Memorandum Opinion and Order*, 12 FCC Rcd 6987, 6988 (1997) (Reconsideration petitions that merely parrot previously rejected claims are subject to summary dismissal).

6. As an initial matter, we find that the Petition raises nothing new – it merely repeats arguments and allegations made in TeleBEEPER’s Statement of Position. The Petition is thus subject to summary dismissal on that ground.<sup>13</sup> Nevertheless, we have considered TeleBEEPER’s claim that that the Bureau did not consider delay by Sprint as a mitigating factor when it analyzed whether TeleBEEPER acted in good faith in its negotiation and mediation with Sprint. We conclude the claim lacks factual basis.

7. The *TeleBEEPER Order* acknowledged TeleBEEPER’s claim of delay by Sprint.<sup>14</sup> It found, however, that “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.”<sup>15</sup> Thus, assuming *arguendo*, that delay by Sprint was “an important aspect of the problem,” we find that the Bureau fully considered TeleBEEPER’s claim of delay by Sprint but found that it did not excuse TeleBEEPER’s actions. We conclude, therefore, that TeleBEEPER’s reliance on *Motor Vehicles, supra*, is misplaced.

8. TeleBEEPER also faults the Bureau for not crediting “TeleBEEPER’s diligent attempts to comply with Sprint Nextel’s requirements and complete the subject rebanding during that extended period of time.”<sup>16</sup> Complying with Sprint’s reasonable requests for information and timely completion of rebanding are expected of all rebanding licensees and are, therefore, not exculpatory of TeleBEEPER’s actions. Thus, if TeleBEEPER is implying that partial compliance with its rebanding obligations justifies its failure to act in good faith, we adamantly reject the implication. The obligation to act in utmost good faith extends to all – not merely some – rebanding activities.<sup>17</sup>

### III. DECISION

9. The Petition fails to overcome the *TeleBEEPER Order*’s conclusion that TeleBEEPER failed to negotiate and mediate in good faith in multiple instances, thereby generating an unwarranted \$142,544.92, five-year legal dispute over a “paper retune.” Therefore, we affirm the *TeleBEEPER Order*’s determination that TeleBEEPER must bear its own rebanding expenses.

### IV. ORDERING CLAUSE

10. Accordingly, pursuant to the authority of Sections 0.191, 0.392 and 1.106 of the Commission’s rules, 47 C.F.R. §§ 0.191, 0.392, 1.106; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) IT IS ORDERED that the Petition for Reconsideration, submitted March 10, 2011, by TeleBEEPER of New Mexico, Inc. IS DENIED, to the extent indicated, and DISMISSED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm  
Deputy Chief - Policy Bureau  
Public Safety and Homeland Security Bureau

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<sup>13</sup> *Id.*

<sup>14</sup> *TeleBEEPER Order* at 3, ¶5, citing TeleBEEPER Proposed Resolution Memorandum at 4-10

<sup>15</sup> *TeleBEEPER Order* at 7, ¶14.

<sup>16</sup> Petition at 3.

<sup>17</sup> 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, 15077 (2004).