

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

In the Matter of)	
)	
R&M Repeater)	WT Docket No. 02-55
)	
and)	Mediation No. TAM-45186
)	
Nextel Communications, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2014

Released: September 12, 2014

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

I. INTRODUCTION

1. Under consideration is a Recommended Resolution,¹ filed June 23, 2014 by the 800 MHz Transition Administrator (TA) Mediator, of a dispute between R&M Repeater (R&M or Licensee) and Nextel Communications, Inc. (Sprint)² arising from the negotiation of a Frequency Reconfiguration Agreement (FRA) between R&M and Sprint. In this *Memorandum Opinion and Order*, we concur with the TA Mediator and find that Sprint must pay for rebanding the Licensee’s system.

II. BACKGROUND

2. The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a FRA with each 800 MHz licensee subject to rebanding.³ The FRA must provide for retuning of the licensee’s system to its replacement channel assignments at Sprint’s expense, including the expense of retuning or replacing the licensee’s radio units as required.⁴ If a licensee and Sprint are unable to negotiate a FRA, they enter mediation under the auspices of a TA-appointed mediator.⁵ If the parties do

¹ TA Recommended Resolution, Mediation No. TAM-45186, filed June 23, 2014 (RR).

² For uniformity in 800 MHz rebanding matters, we refer to wholly owned Sprint subsidiaries, such as Nextel Communications, Inc., by the name of their parent company, Sprint Corporation.

³ 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, 15075-77 (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).

⁴ *800 MHz Report and Order*, 19 FCC Rcd at 14977.

⁵ The 800 MHz Transition Administrator (TA) oversees negotiation and implementation of 800 MHz rebanding and provides mediation services when disputes arise between licensees and Sprint over the cost or other aspects of rebanding. *800 MHz Report and Order* 19 FCC Rcd at 14986 ¶ 27.

not reach an agreement in mediation, the mediator forwards the mediation record and a recommended resolution to the Public Safety and Homeland Security Bureau (Bureau) for *de novo* review.⁶

3. R&M owns and operates an 800 MHz trunked system in Arizona.⁷ In October 2013 the Licensee agreed to acquire four frequencies from Vulcan Materials Company⁸ (Vulcan) that were subject to the Commission's *800 MHz Report & Order*.⁹ On November 7, 2013, the Federal Communications Commission (Commission or FCC) authorized R&M to operate on the four frequencies using call signs WNWZ774 and WRE431.¹⁰ However, as detailed below, before R&M acquired its license for the four frequencies, it had programmed the four frequencies into its radios. It did so out of convenience as part of its May-August routine maintenance schedule.¹¹ The four frequencies programmed into the radios were "pre-rebanding" frequencies, *i.e.*, frequencies that would have to be changed to comply with the *800 MHz Report and Order*.

4. The *800 MHz Report and Order* requires R&M to relocate its system within the 800 MHz band at Sprint's expense.¹² The Licensee submitted a relocation cost estimate on January 21, 2014, and the TA Mediator issued a Notice of Commencement of Negotiations on January 28, 2014.¹³ The parties were unable to reach an agreement regarding the terms of the FRA and the Bureau extended the mediation period to June 12, 2014.¹⁴ Still unable to agree, the parties then submitted Proposed Resolution Memorandums¹⁵ to the TA Mediator. The TA Mediator issued a Recommended Resolution on June 23, 2014.¹⁶ On July 8, 2014, the parties filed their statements of position with the Bureau.¹⁷

5. The Parties stipulated to a timeline of uncontested facts (Timeline) related to their dispute.¹⁸ We include some of these dates below:

⁶ The *800 MHz Report and Order* originally provided for referral and *de novo* review of unresolved mediation issues by the Public Safety and Critical Infrastructure Division of the Commission's Wireless Telecommunications Bureau. *800 MHz Report and Order*, 19 FCC Rcd at 15075 ¶ 201. However, the Commission has since delegated this authority to the Public Safety and Homeland Security Bureau. *See* Establishment of Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

⁷ *See* RR at 3.

⁸ *See* RR at 7.

⁹ *See 800 MHz Report & Order*, 19 FCC Rcd 14977.

¹⁰ *See* RR at 7. The frequencies are associated with two sites, White Tank Mountain and Sierra Estrella Mountain, and have been programmed in 2,654 subscriber units used by school bus fleets and 72 other customers. *See* RR at 4.

¹¹ *See* Timeline of Uncontested Facts for Mediation of R&M Repeater, TAM-45186, May 19, 2014 (Timeline) at 3-4.

¹² *800 MHz Report & Order*, 19 FCC Rcd 14977.

¹³ *See* RR at 2.

¹⁴ *See* RR at 3; Email from C. Landron, Drinker Biddle & Reath LLP to PSHSB800 (May 29, 2014).

¹⁵ *See* Proposed Resolution Memorandum of R&M Repeater, filed May 30, 2014 (R&M PRM); Proposed Resolution Memorandum of Sprint Corporation, filed June 10, 2014 (Sprint PRM).

¹⁶ *See* RR.

¹⁷ *See* Statement of Position of R&M Repeater, filed July 8, 2014 (R&M SOP); Statement of Position of Sprint Corporation, filed July 8, 2014 (Sprint SOP).

¹⁸ *See* Timeline.

- August 28, 2012: The TA first informs Vulcan that its license contains frequencies that may be subject to reconfiguration in accordance with the August 18, 2012 *Fourth Further Notice of Proposed Rulemaking* in the 800 MHz proceeding.¹⁹
- November 15, 2012: The TA again informs Vulcan that its license contains frequencies that may be subject to reconfiguration.
- Early 2013: R&M Repeater enters into negotiations with Vulcan to purchase the frequencies at issue.
- April 1, 2013: The Commission adopts and releases the 5th R&O,²⁰ establishing a Mexican Border band plan and a 30-month rebanding timetable. At this point R&M does not have any frequencies subject to rebanding.
- April 23, 2013: The 5th R&O is published in the Federal Register.
- Late April, 2013: R&M and Vulcan reach verbal agreement for Vulcan to assign the four frequencies to R&M.
- May 2013: R&M begins to install the four frequencies into its radios as part of the routine annual maintenance of school bus radios.
- June 24, 2013: Effective date of the 5th R&O.
- July 11, 2013: The TA issues Frequency Proposal Reports (FPRs) to Vulcan (the licensee of record)
- Early August 2013: R&M completes installation of the four frequencies into its radios.
- August 23, 2013: 30-Month rebanding timetable commences (Vulcan cost estimate is due November 20, 2013)
- September 2013: Vulcan informs R&M that the frequencies at issue are subject to rebanding.
- Early October 2013: R&M and Vulcan finalize sale of the frequencies.
- October 30, 2013: R&M and Vulcan file assignment of license applications with the FCC.
- November 11, 2013: R&M and Vulcan close their transaction.
- November 14, 2013: TA informs R&M that it is subject to rebanding.
- November 25, 2013: TA sends an FPR to R&M.
- January 21, 2014: R&M submits a statement of work to the TA.

6. The parties dispute whether Sprint has an obligation to pay for programming the new rebanding frequencies into R&M's mobile and portable radios.²¹ They also disagree on how much

¹⁹ See In the Matter of Improving Public Safety Communications in the 800 MHz Band- New 800 MHz Band Plan for U.S.-Mexico Sharing Zone, WT Docket No. 02-55, *Fourth Further Notice of Proposed Rulemaking*, 27 FCC Rcd 9563 (2012)(800 MHz Fourth FNPRM).

²⁰ See In the Matter of Improving Public Safety Communications in the 800 MHz Band- New 800 MHz Band Plan for U.S.-Mexico Sharing Zone, WT Docket No. 02-55, *Fifth Report and Order*, 28 FCC Rcd 4085 (PSHSB 2013) (5th R&O).

²¹ RR at 3.

rebanding should cost. R&M estimates that the amount is \$249,522²² and Sprint argues that it is \$60,015.²³ In addition to directing the Parties to address Sprint's obligation to pay the cost of R&M's rebanding in their proposed resolution memorandums, the TA Mediator directed them to respond to the following questions:²⁴

- Did R&M have a duty to wait until the TA issued FPRs and/or until the Commission assigned the Vulcan frequencies to the Licensee, before installing the Vulcan frequencies in the school bus radios?
- Was R&M required to halt the installation of the Vulcan frequencies once the FRPs were issued by the TA?
- If R&M was required to halt the installation of the Vulcan frequencies once the FPRs were issued, how should costs be allocated?
- How do the Parties propose that the TA should handle the Licensee's request for a new replacement frequency for the Sierra Estrella Mountain site on station WRE431?²⁵

7. In their proposed resolution memorandums, both parties argue that the other failed to act in good faith.²⁶ Sprint alleges that R&M breached its duty of good faith because R&M did not provide truthful representations and delayed responding to Sprint's request for information.²⁷ R&M alleges that Sprint breached its duty of good faith because it "failed to negotiate in good faith any terms of R&M's proposal."²⁸ R&M also argues that Sprint withheld arguing certain points until submission of the Parties' proposed resolution memorandums.²⁹

A. Sprint Position

8. Sprint claims it is not obligated to pay for R&M's rebanding activities.³⁰ It argues that the principal of R&M is also the CEO of a second company (C&M Communications) that underwent rebanding in 2004. Sprint notes that R&M and C&M Communications also have an agreement to share network facilities.³¹ Therefore, Sprint argues, R&M was familiar with the details of rebanding and knew

²² See RR at 3; R&M Subscriber Equipment Deployment Request, January 20, 2014 (*R&M SED*); R&M Statement of Work, January 2014 (*R&M SOW*). The Licensee's cost estimate for the rebanding was \$197,102.00 in its Subscriber Equipment Deployment Request. The Licensee's estimate in its Statement of Work was \$194,427.00. This amount has increased in the Licensee's PRM due to increased legal costs associated with the dispute and now totals \$249,522.00. R&M PRM at 14-15 (explaining costs in R&M SED and SOW).

²³ See Sprint PRM at 19-20.

²⁴ See RR at 8.

²⁵ "The TA Understands that the Licensee shall not seek in any respect reimbursement from Sprint or the 800 MHz program for any costs or expenses involving the new replacement frequency for station WRE431, Location #2, Sierra Estrella Mountain." See RR at 9 n. 55; see also Email from T. Zeno to M. Higgs, *et al.* dated June 18, 2014 at 1.

²⁶ See Sprint PRM at 8; R&M Reply at 13.

²⁷ See Sprint PRM at 5-6.

²⁸ R&M Reply at 13.

²⁹ *Id.*

³⁰ See RR at 8.

³¹ *Id.*

that the frequencies acquired from Vulcan would have to be changed.³² In addition, Sprint contends that publication of the 5th R&O in the Federal Register placed R&M on legal notice of the upcoming U.S.-Mexico border region rebanding. Sprint argues that this prior knowledge and legal notice meant that R&M should have waited to reband its radios until it received replacement channels from the TA.³³ Sprint contends that R&M has not shown that it was “necessary” to install the Vulcan channels prior to the release of the replacement channels on July 11, 2013.³⁴ Sprint also claims that R&M was unreasonable when it continued to load only Vulcan frequencies into its radios following the issuance of FPRs to Vulcan on July 11, 2013,³⁵ instead of loading both the Vulcan and new replacement frequencies after that date, which would have reduced the cost of rebanding.³⁶

B. R&M Repeater Position

9. R&M denies it had actual knowledge of the 5th R&O.³⁷ R&M concedes that it was generally aware that rebanding in the Mexico border area would be necessary at some point, but was unsure when this would occur based on “delays of approximately a decade regarding the rebanding process for the U.S.-Mexico border region.”³⁸ R&M argues that “[e]ven if R&M were aware of every detail of the rebanding process...it would still be entirely reasonable for R&M to avail itself of the use of the Vulcan channels between the date when the assignment of the licenses was complete and the date when the channels would need to be rebanded.”³⁹ R&M states its actions were necessary due to changes in the composition of its user base and its need for network resources.⁴⁰ The Licensee stated that it loaded the Vulcan frequencies during the summer of 2013 because it believed that adding the frequencies as part of routine maintenance activities was the most efficient use of its resources.⁴¹ In fact, R&M submits that it was not aware that the FPRs were issued to Vulcan on July 11, 2013 until after it had completed installation of the Vulcan channels in August 2013.⁴² Moreover, R&M argues, “no Commission regulation, policy or directive prevented R&M from installing the Vulcan frequencies in its radios in anticipation of their purchases, so long as the frequencies were not used prior to transfer of the license to the Licensee.”⁴³

C. Mediator’s Findings

10. The TA Mediator discounts the importance of the issue of whether R&M had actual knowledge of the 5th R&O, stating that “[t]he TA Mediator does not find it necessary to resolve the

³² Sprint SOP at 6.

³³ See RR at 19.

³⁴ See Sprint PRM at 15; see also RR at 20.

³⁵ See Sprint PRM at 15; RR at 21.

³⁶ Sprint PRM at 16.

³⁷ See R&M PRM at 4-5.

³⁸ RR at 10; see also R&M PRM at 7.

³⁹ R&M PRM at 8.

⁴⁰ See R&M Reply at 3; see also RR at 21.

⁴¹ See R&M Reply at 2.

⁴² See R&M PRM at 9.

⁴³ RR at 8.

question of what R&M knew and when it knew it.”⁴⁴ Instead, the TA Mediator finds that even were R&M completely familiar with the rebanding process it still would have been reasonable for R&M to install the frequencies it had acquired from Vulcan “between the date when the assignments of the licenses was complete and the date when the channels would need to be rebanded.”⁴⁵

11. The TA Mediator finds that R&M was neither obligated to defer loading the Vulcan channels prior to issuance of the FPRs,⁴⁶ nor obliged to start loading the new replacement frequencies into their radios upon issuance of the FPRs.⁴⁷ The TA mediator noted: “[t]he TA’s issuance of an FPR does not trigger a licensee’s obligation to start loading the proposed replacement frequencies into its radios. Rather, it marks the start of a multi-step process.”⁴⁸

12. While finding that R&M provided a reasonable explanation for installing the Vulcan frequencies in its radios,⁴⁹ the TA mediator also found that R&M was not required to demonstrate that it was “necessary” to load the Vulcan channels in advance of grant of the assignment application.⁵⁰ The TA Mediator noted that: “Sprint has not cited, and the TA Mediator has been unable to find, any legal authority to support Sprint’s contention that the Licensee had a legal obligation to forgo loading and using frequencies ... until after the Parties had an approved FRA.”⁵¹

13. The TA Mediator acknowledged that adding the replacement frequencies during the Licensee’s routine maintenance activities during summer 2014 would have significantly reduced costs,⁵² but notes that “[n]o Commission rule or policy requires the Licensee to undertake this work in the absence of either an agreement by Sprint to pay the costs or a ruling from the Commission that it must do so without reimbursement.”⁵³

14. The TA Mediator concluded that neither Sprint nor R&M met its burden of demonstrating that the other acted in bad faith during the mediation process.⁵⁴ Sprint identified only two instances of misstatement to support its allegation of bad faith against R&M⁵⁵ and R&M satisfactorily explained its errors.⁵⁶ Additionally, Sprint’s failure to make a counteroffer, did not constitute a breach of the good faith obligation because, in the TA Mediator’s view, Sprint was acting on a sincerely held belief

⁴⁴ *See id.* at 19.

⁴⁵ *Id.* quoting R&M PRM at 8.

⁴⁶ *See* RR at 19.

⁴⁷ *See id.* at 21.

⁴⁸ *Id.*

⁴⁹ *See id.* at 20-21.

⁵⁰ *See id.* at 22.

⁵¹ *Id.* at 23.

⁵² *See id.* at 24.

⁵³ *Id.* at 25.

⁵⁴ *See id.* at 26-27.

⁵⁵ *See id.* at 27.

⁵⁶ *See* R&M Reply at 8.

that R&M was not entitled to any payment.⁵⁷ Although R&M faulted Sprint for raising new matter in a proposed resolution memorandum, the TA found that Sprint was allowed to do so.⁵⁸

III. DISCUSSION

15. This case turns on a single fact—R&M only became subject to the rules and policies governing rebanding on November 11, 2013, the day it and Vulcan closed their transaction and R&M became the licensee of frequencies that needed to be reconfigured. Nothing prior to that date created a duty for R&M to take any action—or refrain from taking any action—concerning rebanding. Sprint’s reliance on the *Indiana* decision⁵⁹ for a contrary conclusion is seriously misplaced. The *Indiana* licensee had concluded an FRA with Sprint and then deployed radios in the field without programming replacement frequencies in them. That difference—the existence of an FRA—is a crucial one not present here. Thus, on review of the record, we agree with the Mediator that Sprint is responsible for rebanding R&M’s system.

16. Moreover, we credit R&M’s representation that it had a need to program the Vulcan frequencies into its radios before it became the licensee for those frequencies. Because most of R&M’s customers are school bus operations, it made business sense for R&M to perform routine maintenance on its radios when school was not in session and to reprogram its radios at that time for the Vulcan frequencies.

17. The fact that R&M’s principal is the CEO of a company that underwent rebanding, or that it shares network facilities with that company, is irrelevant to our analysis. Thus, even had R&M known to a certainty that not programming its radios with the replacement channels would result in Sprint’s incurring higher costs once R&M became a licensee of the former Vulcan channels, that would not have created a duty on R&M’s part. Until R&M acquired the Vulcan channels by assignment it was not bound by the Commission’s rebanding orders. Until that time, Sprint and R&M were contractual strangers to one another and neither owed a duty to the other. Until the parties concluded an FRA, R&M was under no obligation to program the replacement channels into its radios. We find, therefore, that Sprint is responsible for reconfiguring R&M’s system as it was configured on November 11, 2013 – the day the Vulcan/R&M transaction closed—regardless of any action or inaction on R&M’s part prior to that date.⁶⁰ Our decision in that regard moots three of the questions that the TA Mediator directed the parties to address in their proposed resolution memorandums as all three questions deal with events prior to the closing of the Vulcan/R&M transaction.⁶¹ The fourth question—liability for the cost of changing the

⁵⁷ See RR at 27.

⁵⁸ *Id.*

⁵⁹ See *State of Indiana and Sprint Nextel, Memorandum Opinion and Order*, 26 FCC Rcd 1023 (2011), *review denied*, 27 FCC Rcd 11469 (2012) (*Indiana*).

⁶⁰ We note that during the same period of time that R&M and Vulcan were negotiating their transaction, Sprint was in the process of negotiating and finalizing its merger with SoftBank Corporation. We doubt that Sprint would argue that the Commission obtained jurisdiction over SoftBank on October 15, 2012, when the parties announced the proposed merger (See <http://newsroom.sprint.com/news-releases/softbank-to-acquire-70-stake-in-sprint.htm> (Oct. 15, 2012)) as opposed to July 10, 2013 when the parties completed the merger. (See <http://newsroom.sprint.com/news-releases/sprint-and-softbank-announce-completion-of-merger.htm> (July 10, 2013)).

⁶¹ See *supra* para. 6.

frequency of the Sierra Estrella Mountain base station—also became moot when the parties agreed that the cost was R&M’s responsibility.⁶²

18. Having concluded that Sprint is responsible to reconfigure R&M’s system we now examine the cost dispute. In the *800 MHz Report and Order*, the Commission assigned “financial responsibility to Sprint for the full cost of relocation” for 800 MHz licensees.⁶³ In the *800 MHz Supplemental Order*, the Commission clarified Sprint’s obligations, requiring it to pay the “reasonable and prudent costs” associated with rebanding.⁶⁴ Licensees are entitled to reimbursement for “any reasonable and prudent expense directly related to the retuning of a specific 800 MHz system”⁶⁵ and the licensee must certify that “the funds requested for reconfiguration are the minimum necessary to provide facilities comparable to those presently in use.”⁶⁶

19. R&M seeks \$249,522 to reband its system.⁶⁷ Sprint does not dispute that R&M believes that is what it would cost for R&M to reconfigure its system outside of the annual summer routine maintenance period.⁶⁸ Sprint, however, argues that if it is found responsible for rebanding R&M’s system, the reconfiguration of R&M’s radios should take place during the annual preventive maintenance period. Sprint claims that, if done then, the cost of rebanding the radios would only total \$60,015,⁶⁹ representing “costs that are above and beyond what is already performed and included in the annual routine preventative maintenance.”⁷⁰

20. The TA mediator recommends that the Bureau find that Sprint is required to pay the full amount R&M demanded, \$249,522, because Sprint has not shown that the Licensee’s requested costs fail to satisfy the Commission’s minimum cost standard.⁷¹ However, in making that recommendation the TA Mediator noted:

[T]he TA Mediator has recommended that the Commission find that the Licensee is not required to reband its system until it either enters into a FRA with Sprint or the Commission rules that it must reband its system without compensation. In the event that the Commission determines that Sprint must fund the cost of rebanding the Licensee’s system, the Parties are free to negotiate an FRA, subject to TA approval and the Commission’s Minimum Cost Standard, that addresses when the Licensee should undertake the reconfiguration of its system, taking into account the interests of both Sprint and the Licensee, as well as the need to completed rebanding in a timely manner.⁷²

⁶² See *id.* and n.25.

⁶³ *800 MHz Report & Order*, 19 FCC Rcd at 14977.

⁶⁴ See *800 MHz Supplemental Order*, 19 FCC Rcd at 24152 ¶ 71.

⁶⁵ *Id.*

⁶⁶ *800 MHz Report and Order*, 19 FCC Rcd at 15074.

⁶⁷ See RR at 3.

⁶⁸ Sprint PRM at 4-5.

⁶⁹ *Id.* at 19-20.

⁷⁰ See *id.* at 19.

⁷¹ See RR at 18-19.

⁷² *Id.* at 28.

21. We concur with this observation and find that under the Commission's minimum cost standard R&M should reband its system during the 2015 annual preventive maintenance period. This will accommodate R&M's stated preference to only make adjustments to its system during the summer to minimize the impact on its users. However, a search of our Universal Licensing System data base reveals that delaying R&M's rebanding could potentially hinder the rebanding of at least three other licensees. Such a delay would not be in the best interests of the rebanding program. Therefore, while we direct the parties to negotiate an FRA for the rebanding of R&M's system in the summer of 2015 as part of the R&M's annual maintenance effort; the parties must also negotiate how much rebanding will cost should the TA require R&M to reband earlier than anticipated in order to expedite rebanding in the Mexican border regions.

22. We now address the mutual charges of bad faith. Under Section 90.677(c) of the Commission rules, "both Sprint Nextel and the incumbents must negotiate in 'good faith'" during the reconfiguration mandatory negotiations period.⁷³ In the *800 MHz Supplemental Order*, the Commission stated that "the underlying theme governing all reconfiguration negotiations is 'good faith,'" ⁷⁴ and further notes that it "cannot predict what good faith may be for all parties in all circumstances..."⁷⁵ The party alleging lack of good faith bears the burden of proof.⁷⁶ Specifically, the Commission noted that:

Among the factors that are relevant to a good-faith determination are: (1) whether the party responsible for the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the Parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures; requested by the other party.⁷⁷

23. The Commission has previously noted that "[a]ll parties are charged with the obligation of utmost good faith in the negotiation process."⁷⁸ The Commission has made clear that there is no "one size fits all" rule to determine good faith.⁷⁹ Instead, finding bad faith requires a fact dependent analysis, and varies from case-to-case.⁸⁰

24. Here, during mediation, Sprint failed to make a counteroffer to R&M's estimate of \$249,522 to reband its system. We agree with the TA Mediator that Sprint's not making a counteroffer stemmed from a good faith, but misguided, belief that Sprint was not obligated to pay to reband R&M's system because R&M should have programmed the replacement frequencies into its radios when it conducted routine maintenance. Similarly, we do not find a lack of good faith in Sprint's refusing to

⁷³ 47 C.F.R. § 90.677(c).

⁷⁴ *800 MHz Supplemental Order*, 19 FCC Rcd at 25152-53 ¶ 73.

⁷⁵ *Id.*

⁷⁶ See Wireless Telecommunications Bureau Announces Procedures for *De Novo* Review in the 800 MHz Pub. Safety Proceeding, *Public Notice*, 21 FCC. Rcd 758, 760 (2006).

⁷⁷ *800 MHz Report and Order*, 19 FCC Rcd at 15076 n.524.

⁷⁸ *Id.* at 15076 ¶ 201.

⁷⁹ *Id.* at 15077 ¶ 202.

⁸⁰ *Id.* at 15078 ¶ 202.

consider R&M's settlement proposal.⁸¹ Agreeing to settlement proposals, or not, is part of the "back and forth" of negotiation.

25. Finally, we find no lack of good faith in Sprint's observing, in its proposed resolution memorandum, that R&M was, at most, entitled to \$60,015 to reband its system. Parties are free to make such observations in a proposed resolution memorandum without breaching the good faith obligation and, as the TA Mediator mentions, R&M had the opportunity to reply.⁸²

26. Sprint has failed to make out a case of lack of good faith on R&M's part. It focuses on two instances of R&M making incorrect statements in the course of mediation, one regarding a purported network sharing agreement between R&M and Vulcan, the other concerning the dates when R&M loaded the Vulcan channels into its radios. In fact, the network agreement was between R&M and C&M, and the incorrect dates were the consequence of failed recall. Neither inadvertence rises to the level of bad faith.

IV. CONCLUSION AND ORDERING CLAUSES

27. In sum, we affirm the TA Mediator's Recommended Resolution entered June 23, 2014, to the extent that it assigns Sprint the responsibility to pay the full cost of rebanding R&M's system. However, rather than assign a cost to the rebanding based upon a limited record, we direct the parties to negotiate a FRA for the rebanding of R&M's system under two circumstances (1) in the summer of 2015 as part of the R&M's annual maintenance effort; and (2) earlier as directed by the TA. This will accommodate the specialized work window of the licensee, unless programmatic considerations dictate otherwise.

28. Accordingly, pursuant to the authority of Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331; 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 dispute submitted by the Transition Administrator is resolved as discussed above.

29. IT IS FURTHER ORDERED, that representatives of Sprint Corporation and R&M Repeater, each with the authority to bind its principal, SHALL MEET under the auspices of the Transition Administrator Mediator, within ten business days of the release date of this *Memorandum Opinion and Order* to conclude a Frequency Reconfiguration Agreement consistent herewith and that such meeting shall continue from business day to business day until the parties reach agreement in principle.

30. This action is taken under delegated authority pursuant to Sections 0.191(f) and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191(f) and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
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⁸¹ RR at 27.

⁸² *Id.*