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

In the Matter of	)	
	)	
R&M Repeater, LLC	)	WT Docket 02-55
	)	Mediation No. TAM 60018
and	)	
	)	
Nextel West Corp.	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2020 **Released: October 2, 2020**

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* we address a case referred to us by the 800 MHz Transition Administrator[1] concerning a rebanding cost dispute between Nextel West Corp. (Sprint)[2] and 800 MHz licensee, R&M Repeater, LLC (R&M) (collectively, Parties). The dispute concerns how much Sprint should pay under the Frequency Reconfiguration Agreement that Sprint negotiated with R&M (R&M Agreement) to cover the cost of rebanding R&M's system.[3] Sprint has proposed to withhold $76,254.00 from the final payment due R&M because it claims to have mistakenly paid that amount to another licensee, Christopher Salgot (Salgot), whose system was rebanded by R&M. R&M contends that Sprint should pay the $76,254 in dispute. The matter is before the Public Safety and Homeland Security Bureau (Bureau) because the Parties were unable to resolve their differences in mediation. Based on our

[1] The 800 MHz Transition Administrator, under the Federal Communication Commission's (FCC or Commission) oversight, is responsible for mediating disputes that may arise in the course of 800 MHz band reconfiguration and for ensuring that band reconfiguration proceeds on schedule. *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, 15070-74 paras. 190-200 (2004) amended by *erratum*, WT Docket 02-55 (Sep. 10, 2004); second *erratum*, 19 FCC Rcd 19651 para. 27 (2004); third *erratum*, 19 FCC Rcd 21818 (2004) (*800 MHz Report and Order*). *See also Improving Public Safety Communications in the 800 MHz Band*, Order and Sixth Further Notice of Proposed Rulemaking, 34 FCC Rcd 10208 (2019) (*800 MHz Streamlining Order*) (collectively, Rebanding Orders).

[2] Nextel West Corp is a subsidiary of Sprint Corp. On April 1, 2020, Sprint and T-Mobile US, Inc. merged to create a new company operating under the name T-Mobile with T-Mobile US, Inc. as the parent company. *See Applications of T-Mobile US Inc. and Sprint Corp. for Consent to Transfer Control of Licenses*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578, 10732 para.348 (2019); T-Mobile Completes Merger with Sprint to Create the New T-Mobile, (April 1, 2020), https://www.t-mobile.com/news/t-mobile-sprint-one-company. For purposes of uniformity in 800 MHz proceedings, we refer to Sprint subsidiaries, such as Nextel West Corp., as Sprint.

[3] The Frequency Reconfiguration Agreement is the contract that Sprint and each 800 MHz licensee enter into for rebanding the licensee's system. A cost reconciliation is required by the Commission's orders governing the nationwide 800 MHz rebanding initiative. *See 800 MHz Report and Order* at 15021-45, 15069 paras. 88-141, 189.

review of the mediation record and the Parties' Statements of Position,[4] we resolve the matter in favor of R&M and direct Sprint to pay R&M the full cost of rebanding R&M's 800 MHz system agreed to in the R&M Agreement, including the withheld amount of $76,254.

II. BACKGROUND

2. On April 20, 2007, Salgot executed a Frequency Reconfiguration Agreement (Salgot Agreement) with Sprint as part of the 800 MHz rebanding program, implemented by the Commission to address interference being caused by Sprint facilities to public safety and other 800 MHz band licensees' systems.[5] To reband his system, Salgot hired R&M, an 800 MHz licensee in which Salgot holds an interest.[6] R&M completed rebanding Salgot's system at Sprint's expense and the Salgot Agreement closed with Sprint on March 3, 2010.[7]

3. After the rebanding of Salgot's system and the closing of the Salgot Agreement, R&M entered into the R&M Agreement with Sprint on December 2, 2014, to reband its own system. R&M subsequently completed rebanding of its own system and invoiced Sprint $185,364.75 for the cost of doing so.[8] Rather than paying R&M the full invoiced cost, however, Sprint withheld $76,254.00 from its proposed payment based on the contention that it had already mistakenly paid R&M $76,264.00 when R&M rebanded Salgot's system in 2010.[9]

4. Under the mediation procedures established by the *800 MHz Report and Order* to resolve rebanding disputes, Sprint and R&M attempted to resolve their differences regarding the disputed payment, but the mediation was unsuccessful. The 800 MHz Transition Administrator accordingly advised the Bureau that the parties were at an impasse and forwarded the mediation record to the Bureau for *de novo* review. Pursuant to the *800 MHz Streamlining Order*.[10] Sprint and R&M timely filed Statements of Position on March 27, 2020.[11]

III. DISCUSSION

5. At issue, are (a) whether we should reopen the closed Salgot Agreement to determine if Salgot, or his rebanding contractor, R&M, acted in bad faith by refusing to refund the $76,254.00 that Sprint alleges it mistakenly paid in connection with the rebanding of Salgot's 800 MHz system; and (b) assuming that the first issue is resolved in favor of Sprint, is Sprint foreclosed from making its $76,254.00 claim against R&M because Sprint did not timely raise the overpayment issue when it negotiated the R&M Agreement?

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[4] Statement of Position of Sprint Corp. March 27, 2020 (Sprint Statement of Position); Statement of Position of R&M Repeater, LLC, March 27, 2020 (R&M Statement of Position).

[5] *See 800 MHz Report and Order* at 14980 note 42.

[6] Salgot is the managing partner and a principal of R&M. *See* R&M Frequency Reconfiguration Agreement at 10 (Salgot's signature as Managing Partner of R&M).

[7] *See* Closing Certificate of Christopher Salgot, March 23, 2010.

[8] R&M Statement of Position at 2. *See* Mutual Assignment of FCC Licenses – Reconfiguration Certifications at 2 listing the "Total Actual Costs of Reconfiguration" as $ 221,338.10.

[9] Sprint alleges it made two duplicate payments to R&M as the rebanding contractor for Salgot; one for $28,594 on December 20, 2007, and another for $47,660 on February 21, 2008. *See* Sprint Statement of Position at 3, note 3.

[10] *See 800 MHz Streamlining Order* at 10212, para. 12.

[11] Email from Joseph Markoski, Esq., 800 MHz Transition Administrator, to Michael Wilhelm, *et al*. FCC, Mar. 20, 2020.

6. *Sprint Position*. Sprint asserts that it is entitled to reduce its payment to R&M by $76.254.00 because it mistakenly paid R&M two interim payments totaling that amount when R&M served as the rebanding contractor for Salgot.[12] Sprint argues that there is a commonality of interest between R&M and Salgot because Salgot, in addition to being a licensee of his own 800 MHz system, is also a principal and managing partner of R&M.[13] Sprint requests that we reopen the closed Salgot Agreement to determine whether Salgot engaged in bad faith by accepting Sprint's overpayment.[14] Sprint argues that "the Commission has ample authority to re-examine a closed Frequency Reconfiguration Agreement in light of suspected fraud and has done so in other cases throughout the course of the 800 MHz program."[15]

7. *R&M Position.* R&M argues that Sprint knew of the overpayment to Salgot before the Salgot Agreement closed, but nevertheless proceeded with the closing.[16] R&M also contends that, because Sprint did not raise the overpayment when the R&M Agreement was negotiated with Sprint, it is estopped from raising the matter after the R&M Agreement was executed by both parties.[17] R&M also contends that (a) the Commission lacks jurisdiction to decide this matter; (b) the matter is a contractual dispute of the kind the Commission has previously declined to adjudicate; and (c) if the Commission attempted to make Sprint whole, it would have to re-open the already-closed Salgot Agreement, despite having previously declined to re-open such agreements.[18] R&M also points to language in the Salgot Agreement in which the parties agreed that claims under the agreement could only be brought in Arizona state or federal courts.[19] R&M argues that even if the Commission had jurisdiction to adjudicate this matter, precedent in 800 MHz rebanding decisions holds that a party cannot "recover costs that were reasonably foreseeable during PFA [Planning Funding Agreement] or FRA negotiations but were not raised in negotiations…."[20]

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[12] Sprint Statement of Position at 2-3.

[13] *Id*. at 2, note 2.

[14] Sprint notified Salgot and R&M of the alleged overpayment before the Salgot Agreement was closed on March 25, 2010 and requested return of the alleged overpayment. *See* Sprint Statement of Position at 5; *see also*, letter dated April 22, 2009 from Amy Byely, Finance Manager, Sprint, to R&M Repeater, Attn. Robert Miller/Accounts Receivable.

[15] Sprint Statement of Position at 10, note 18.

[16] *See* R&M Statement of Position at 4.

[17] *Id*. at 5.

[18] *See id*. at 3.

[19] The Salgot Agreement provides: "This Agreement is governed by the laws of the State of Arizona without regard to conflicts of law principles thereof. Subject to the requirements of Section 16 herein and, if applicable, any Party bringing a claim hereunder may bring such claim only in the Superior County of Maricopa County, Arizona or the Federal District Court located in Maricopa County, Arizona, and the Parties hereto consent to the exercise of personal jurisdiction over them by any such courts for purposes of any such action or proceeding." R&M Statement of Position at 3-4 *citing*, Salgot Frequency Reconfiguration Agreement at para. 28. Paragraph 16 of the Frequency Reconfiguration Agreement, referenced above, states: "Disputes: The Parties agree that any dispute related to the Replacement Frequencies, Nextel 's obligation to pay any cost of the Reconfiguration of Incumbent's system contemplated by this Agreement, or the comparability of incumbent's reconfigured system to Incumbent's existing system prior to Reconfiguration, which is not resolved by mutual agreement, shall be resolved in accordance with the dispute resolution provisions of the *Order*, as it may be amended from time to time." *Id*. at para. 16.

[20] *FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding*, Public Notice, 22 FCC Rcd 17227, 17229 (2007) (*Supplemental Procedures)* ("[l]icensees may not use the Change Notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations but were not raised in negotiations, or that were considered and rejected."). *See also* R&M Statement of Position at 5, note 5, *citing*

(continued….)

8. The 800 MHz rebanding process calls for a closing procedure whereby the parties agree that the terms of the Frequency Reconfiguration Agreement have been complied with and that Sprint owes nothing more to the licensee.[21] Those provisions have been complied with in the case of the completed Salgot rebanding. The Salgot Agreement was closed on March 3, 2010 and approved by the 800 MHz Transition Administrator. On March 25, 2010, Sprint concurred in the closing without conditioning its concurrence on resolution of the alleged overpayment issue.[22] Based on these facts, we decline to reopen and reexamine the closed Salgot Agreement. First, Sprint's claim that the Bureau has re-opened closed Frequency Reconfiguration Agreements in other 800 MHz rebanding cases is unsupported.[23] To the contrary, the Commission has stated that its dispute resolution procedures are not available for resolution of the kind of dispute present here.[24] Second, the Salgot Agreement explicitly provided for the parties to seek resolution of contractual disputes in Arizona state or federal court, and the Commission historically and consistently has left such matters to be adjudicated by courts of appropriate jurisdiction.[25] Accordingly, we decline to reopen the Salgot Agreement ten years after the fact to adjudicate Sprint's claim.

9. We also find no basis for granting Sprint relief in the context of the closing of the R&M Agreement. Our rebanding procedures provide that a party may not "recover costs that were reasonably foreseeable during PFA [Planning Funding Agreement] or Frequency Reconfiguration Agreement

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Broward County, Florida and Sprint Nextel Corp, Memorandum Opinion and Order, 26 FCC Rcd 7635 (PSHSB 2011). S*ee also Port Authority of New York and New Jersey and Nextel Communications Inc*., Memorandum Opinion and Order, 27 FCC Rcd 1888 (PSHSB 2012); *Hinds County, Mississippi and Sprint Nextel Corp*., Memorandum Opinion and Order, 25 FCC Rcd 12336 (PSHSB 2010); *State of Indiana and Sprint Nextel*, Memorandum Opinion and Order on Reconsideration, 26 FCC Rcd 5067 (PSHSB 2011) (app. for rev. denied); *Dallas Fort Worth International Airport Board and Sprint Nextel,* Memorandum Opinion and Order, 26 FCC Rcd 1116 (PSHSB 2011); *Town of Wethersfield, Connecticut and Sprint Nextel*, Memorandum Opinion and Order, 26 FCC Rcd 1129 (PSHSB 2011).

[21] *See 800 MHz Streamlining Order*, 34 FCC Rcd at 10211, para. 10.

[22] *See* Closing Certificate of Nextel West Corp. March 25, 2010.

[23] Sprint contends that the Commission reopened a Frequency Reconfiguration Agreement in a rebanding case involving Stamford, Connecticut. *See* Sprint Statement of Position at 10 *citing City of Stamford, Connecticut 800 MHz Rebanding Project*, Letter, 30 FCC Rcd 12716 (2015) (*Stamford*). This reliance is misplaced. In *Stamford*, the Bureau approved a settlement agreement regarding a cause of action Sprint had against Stamford for breach of their Frequency Reconfiguration Agreement. The Transition Administrator noted that one potential solution to the Sprint claim would entail reopening the Frequency Reconfiguration Agreement in a related case involving the City of Hartford, Connecticut. *See Stamford*, 30 FCC Rcd at 17218. Instead, however, the Transition Administrator recommended approval of the Stamford settlement agreement, which did not require reopening the Hartford agreement, and the Bureau approved this alternative. *Id.*

[24] *See Listeners' Guild, Inc. et al*., 813 F. 2d 465, 469 (D.C. Cir. 1987) ("This decision is entirely consistent with the Commission's longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts.") *Cf. Illinois Citizens Committee for Broadcasting*, Memorandum Opinion and Order, 35 FCC 2d 237 (1972); *Metro Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 13083, 13091 para. 24 (WTB 1996); *see Metromedia Co*., 1 FCC Rcd 1227, 1229 para. 16 (CCB 1986) ("The Commission has consistently indicated it will not adjudicate claims arising out of private contractual agreements; the appropriate forum for private litigation is the courts."); *S.A. Dawson*, Memorandum Opinion and Order, 17 FCC Rcd 472, 474 note 15 (WTB 2002); *Airtouch Paging, Inc*., Order 14 FCC Rcd 9658 (WTB 1999).

[25] *See, e.g., Maricopa County, Arizona*, Order, 31 FCC Rcd 5255, *citing Caribbean SMR, Inc.,* Order*,* 16 FCC Rcd 15663, 15664-65 (WTB 2001) *citing Northwest Broadcasting, Inc.,* Memorandum Opinion and Order*,* 6 Com. Reg. 685 (1997).

negotiations but were not raised in negotiations…."[26] Despite being a party to numerous rebanding disputes, Sprint did not raise the alleged overpayment under the Salgot Agreement during negotiation of the R&M Agreement, though it was fully aware of the facts and could easily have done so. Rather, Sprint raised the issue after the R&M rebanding was completed, at which point it proposed to deduct $76,254.00 from the amount that Sprint and R&M had agreed to in the R&M Agreement. Our 800 MHz rebanding rules and procedures militate against such last-minute tactics. Thus, if a cost is foreseeable at the negotiation stage – and a party fails to raise it then – that party is not entitled to raise it later.[27] Accordingly, we decline to approve Sprint's reduction of R&M's rebanding payment by $76,254.00 to offset the overpayment it alleged was made in connection with the Salgot rebanding.

10. Finally, we address R&M's claims that (1) Sprint should pay R&M's counsel $10,173 for legal services provided before he prepared the R&M Statement of Position, and (2) R&M should receive an additional $10,000 for preparation of the Statement of Position and work to be performed by counsel after issuance of the instant *Memorandum Opinion and Order*, i.e., preparation of closing documents reflecting our decision herein.[28] With respect to the claimed $10,173.00 for services performed by counsel prior to preparation of the R&M Statement of Position, R&M may file a change notice for the claim provided that it can demonstrate that those fees were unforeseeable. However, we disallow R&M's claim that Sprint should pay $10,000 for preparation of its Statement of Position. Although the Commission's 800 MHz orders require Sprint to pay licensees' reasonable and prudent legal fees, Sprint's payment obligation ceases when, as here, mediation is over and a party or parties seek recourse to the Commission.[29] Thereafter, legal fees and related expenses are the respective parties' responsibility.[30]

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that Sprint Corporation shall pay to R&M Repeater, LLC within 15 calendar days of the effective date of this *Memorandum Opinion and Order*, the agreed minimum necessary cost of reconfiguring R&M's 800 MHz Communications System.

12. **IT IS FURTHER ORDERED** that R&M Repeater, LLC and Sprint Corporation shall, within 30 days of the effective date of this *Memorandum Opinion and Order*, close their Frequency Reconfiguration Agreement consistent herewith.

13. **IT IS FURTHER ORDERED** that R&M Repeater LLC's request for payment of legal fees incurred in preparing the R&M Repeater LLC Statement of Position is hereby, **DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

[26] *See Supplemental Procedures*, 22 FCC Rcd 17227, 17229.

[27] *See id.*

[28] R&M Statement of Position at 7.

[29] *See Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 43 FCC Rcd 10647, 10483 paras. 43-50 (2007).

[30] R&M Statement of Position at 7.