

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

OPEN RANGE COMMUNICATIONS INC.,
Debtor,

Case No.: 11-13188-KJC

Chapter 11

Hon. Kevin Carey

Relates to: Docket No. 505

Declaration of Jonathan S. Adelstein

Administrator of the Rural Utilities Service

1. I, Jonathan S. Adelstein, am the Administrator of the Rural Utilities Service (“RUS”) of the U.S. Department of Agriculture.

2. In that position, I act as the Administrator of the RUS, and officially represent and administer RUS. 7 CFR 2.47.

3. RUS has long had a policy of protecting its deliberative processes from disclosure in court, other public proceedings, or other public disclosure. The RUS works closely with the Office of General Counsel in determining how best to address matters pending before it. Draft memoranda, written materials containing opinions, recommendations, and advice about agency decisions are usually circulated among and between employees at the RUS and other federal agencies as needed, as the RUS’s particular approach to a matter is refined. Concerns about possible disclosure of such written matter in a court proceeding would interfere with the free flow of ideas and opinions and would discourage candid discussion in the agency’s deliberative process. Further, release of such pre-decisional materials would not necessarily reflect the actual decision or policy ultimately reached by the delegated decision makers. For these reasons, the RUS considers it essential to its efficient operations to maintain the confidentiality of its deliberative processes to the full extent allowed by law.

4. Counsel for the Official Committee of Unsecured Creditors (the “Committee”) interviewed several RUS witnesses, including me, between December 12-14, 2011. During these interviews, counsel for the U.S. Department of Justice (“DOJ”) raised objections based on the deliberative process privilege to certain of the Committee’s questions (the “Deliberative Questions”). DOJ generally instructed the RUS witnesses, including me, to answer each question to the extent that it did not reveal information subject to the deliberative process privilege. I followed the DOJ instruction and answered each question to the extent it did not reveal information subject to the deliberative process privilege.

5. I understand that the Committee has moved to compel further responses to the Deliberative Questions (the “Deliberative Responses”).

6. As the interviewee and as the ADMINISTRATOR of RUS, I have personally considered the Deliberative Responses, both at the time the questions were asked to me and after the interview, to determine whether the deliberative process privilege applies to the Deliberative Responses. Based upon my review, I believe that the disclosure of the content of these Deliberative Responses will reveal the RUS’s deliberative processes.

7. The Deliberative Questions and Deliberative Responses generally fall into three categories.

RUS’ response to FCC decisions regarding Globalstar and STA

In order to provide internet service, the Debtor leased spectrum from Globalstar. The availability of spectrum was a condition to the RUS loan. The FCC regulated Globalstar’s spectrum license, and any suspension of Globalstar’s license affected the Debtor’s ability to operate. At several times during the life of the Debtor, the FCC reviewed applications by Globalstar for spectrum license renewals and by the Debtor for Special Temporary Authority

(STA) to permit the Debtor to operate independent of Globalstar's license. During the pendency of these applications, RUS and the FCC had frank discussions on the ramifications of each agency's actions. Moreover, in the aftermath of the FCC decisions on the applications, RUS considered the effect of the FCC's actions on its loan and further advances. Accordingly, any communications, whether internal or with the FCC, revealing RUS's deliberations on these considerations is protected by the deliberative process privilege.

Specifically:

- A. In response to potential licensing problems with the Debtor's spectrum partner, I testified that I spoke to FCC officials, Paul de Sa and Zachary Katz. This concerned RUS because if Globalstar lost its FCC license, the Debtor could not operate. The Committee asked me what was discussed. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed, and I did so. (Adelstein, Pages 34-35)
- B. The FCC was considering renewal of Globalstar's license and the Debtor's application for Special Temporary Authority (STA) from the FCC so that the Debtor could continue to operate even if Globalstar's license was not renewed. RUS was considering whether to weigh in on the FCC's decision. RUS provided a public letter in support of the Debtor's application for Special Temporary Authority (STA) from the FCC so that the Debtor could continue to operate. I testified that I received an informal response from the FCC. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed, and I did so, stating that the FCC told me that they had decided to grant the Debtor's application for an STA. (Adelstein Pages 38-41; 45-47)
- C. In September 2010, the FCC granted the STA to Debtor, but suspended Globalstar's license. The Debtor, accordingly, was seeking a new spectrum partner to replace Globalstar so that it would not have to reapply for STAs every 3 to 6 months. Given the circumstances, RUS was concerned that the Debtor could only obtain a new spectrum partner on unfavorable terms, thereby threatening the Debtor's operations. Lightsquared/Harbinger had such spectrum and may have been aware that the Debtor was (1) seeking a new spectrum partner; and (2) could not lease spectrum from Globalstar. The Committee asked me to discuss the circumstances of an email between me and Mr. de Sa of the FCC, which included a discussion of Harbinger/Lightsquared's spectrum, and whether RUS suggested the FCC permit Lightsquared to lease spectrum to the Debtor. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed. I stated that I could not answer without revealing privileged information. (Adelstein Pages 68-72)

D. By July 1, 2011, Globalstar, the Debtor's spectrum partner, was required to meet certain FCC criteria in order to retain its license (and in order for Debtor to continue operation). As part of the Debtor's loan agreement, Debtor was required to have an acceptable spectrum plan. By June, 2011, Globalstar had not yet met the FCC criteria, and RUS was considering the effect on its loan and further advances. In July 2010, RUS suspended advances to the Debtor because, in part, the Debtor did not have an acceptable spectrum plan. The Debtor filed its own application with the FCC for Special Temporary Authority (STA) to continue operation even if the FCC suspended Globalstar's license. RUS then partially lifted the restriction of advances. RUS, accordingly, was considering the effect of the potential loss of Debtor's spectrum on its loan and further advances. The Committee asked Kuchno why RUS suspended advances. DOJ instructed Kuchno to answer only to the extent that information predecisional and deliberative would not be revealed. Kuchno responded that the Debtor "needed to have spectrum fully locked down for operations." The Committee asked why the restriction was partially lifted. DOJ instructed Kuchno to answer only to the extent that information predecisional and deliberative would not be revealed. Kuchno responded that RUS "reached a position with Open Range where Open Range was working toward getting that spectrum, and it required additional advances on ... [RUS's] part so that they could continue down that path." (Kuchno Page 36, 37)

February 2011 Suspension of Advances, 153 Market Plan, and Loan Amendment

Under the RUS loan, the Debtor was required to submit a 6 month business plan to RUS for approval before advances could be made. In late 2010/early 2011, the Debtor submitted a plan to reduce the scope of its service markets from 264 to 153 markets. In February 2011, RUS denied the Debtor's plan to move from 264 to 153 markets and suspended advances. RUS did so, in part, because the projections of the 153 plan showed a negative cash balance over time and because there was no additional equity infusion. RUS considered whether it could continue making advances under the existing loan, whether it would require a different business plan, or whether it would require an entirely different loan agreement. Accordingly, any communications revealing RUS's deliberations on these considerations is protected by the deliberative process privilege.

Specifically:

- A. In February 2011, RUS denied the Debtor's plan to move from 264 to 153 markets and suspended advances. RUS did so, in part, because the projections of the 153 plan showed a negative cash balance over time and because there was no additional equity infusion. RUS was in negotiations with the Debtor and equity advisor as to how the Debtor's plan could be modified, including the possibility of an equity infusion, to get to approval. The Committee asked if RUS made a determination of how much equity was needed to approve the 153 plan. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed. I answered generally that RUS requires business plans that don't run into negative cash positions and that RUS does not finance operations. (Adelstein Page 87)
- B. In February 2011, RUS denied the Debtor's plan to move from 264 to 153 markets and suspended advances. During this time, RUS was considering whether, and on what terms, to resume advancement of funds. In February 2011, a lobbyist for the Debtor suggested that the Debtor was close to insolvency. I testified that my staff questioned this statement, and that RUS considered terminating the loan agreement. The Committee asked whether I requested my staff to evaluate the Debtor's financials to determine whether it was insolvent. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed. I did not answer that particular question, but I did answer generally other related questions and indicate that I did not have a clear recollection of what occurred at that time. (Adelstein Page 111)
- C. In February 2011, RUS denied the Debtor's plan to move from 264 to 153 markets and suspended advances. During this time, RUS was considering whether, and on what terms, to resume advancement of funds. The Committee showed me an email from Matz, Debtor's lobbyist, to Krysta Harden, regarding RUS's suspension of advances, and asking Harden to intervene. I was forwarded a copy of the email. I testified that I did talk with Harden about the "overall issue." The Committee then asked what Harden told me regarding whether RUS should resume advances. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed. I did not answer. (Adelstein Page 115)

September 2011 FTI Visit

In September 2011, FTI, on behalf of the Debtor, met with RUS regarding the Debtor's precarious financial condition. FTI revealed that the Debtor was on the verge of bankruptcy. In light of this previously unknown information, RUS was considering how, and whether, to respond to the Debtor's financial condition, including suspension of advances. Accordingly,

any communications revealing RUS's deliberations on these considerations is protected by the deliberative process privilege.

Specifically:

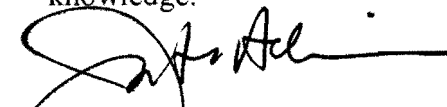
A. In September 2011, FTI, on behalf of the Debtor, met with RUS regarding the Debtor's precarious financial condition. RUS was considering how, and whether, to respond to the Debtor's precarious financial condition. I testified that I provided this information to the Office of the Secretary. The Committee asked what feedback the Office provided. DOJ instructed me to answer only to the extent that information predecisional and deliberative would not be revealed. I did not answer. (Adelstein Page 147)

8. As the Administrator of RUS, I have personally considered the Deliberative Responses with respect to myself and the other RUS witnesses to determine whether the deliberative process privilege applies to the Deliberative Responses. Based upon my review, I believe that the disclosure of the content of these Deliberative Responses will reveal the RUS's deliberative processes.

9. I have concluded that disclosure of the Deliberative Responses would be injurious to the federal government's decision-making functions because such disclosure would tend to inhibit the frank and candid discussions necessary to effective government. Indeed, disclosure would have a chilling effect on any future loan making or advance of loan funds determinations requiring a give-and-take discussion of issues between RUS decision makers and staff and between RUS and other government entities.

10. I have determined that, on balance and based on my understanding of the facts, the public interest in nondisclosure outweighs the Committee's need for the Deliberative Responses. Accordingly, I respectfully assert the RUS's deliberative process privilege as to the Deliberative Responses.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.



JONATHAN S. ADELSTEIN