

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-13453-JMD  
Chapter 11Spike Broadband Systems, Inc.,  
Debtor

**MEMORANDUM OPINION**

**I. BACKGROUND**

On January 3, 2002 the Court held a hearing on the motion of Spike Broadband Systems, Inc. (the “Debtor”), dated December 12, 2001 (the “Motion”), for an order approving the sale of substantially all of the Debtor’s assets pursuant to the terms of an Asset Purchase Agreement, dated as of December 10, 2001, and amended by an Amendment to Asset Purchase Agreement, dated December 27, 2001 (the “Purchase Agreement”), to REMEC, Inc. (“REMEC”). Focused Energy Holding Company, Inc. (“FEH”) objected to the Motion on the basis that it included certain property interests and technologies which it had licensed to the Debtor and which the Debtor did not have the right to sell or assign. REMEC and the Debtor contend that they never intended to transfer any property interests or technology in which FEH has any rights and that the December 27, 2001 amendment to the Purchase Agreement specifically excludes certain patents and other rights claimed by FEH which were erroneously included in the original agreement. In short, the Debtor and REMEC contend that FEH’s objection is now moot.

At the hearing the Debtor and REMEC stated on the record that the transactions contemplated by the Purchase Agreement did not include the transfer of any rights or property interests of FEH and that the granting of the Motion would not alter FEH’s rights to protect any right or property interest which it may have against any person, firm or company, including the Debtor and REMEC. After hearing the arguments of the parties, the Court stated that it would enter an order granting the Motion, but that it was not making

any determination on the validity or invalidity of any current or future claims of FEH against the Debtor or REMEC which it might have. The Court directed counsel for the parties to draft language reflecting the Court's decision for inclusion in the order granting the Motion.

On January 10, 2002, the Debtor's counsel submitted a form of proposed order together with a letter memorandum outlining the remaining areas of disagreement between the Debtor, REMEC, the Unsecured Creditors' Committee and counsel for the Secured Noteholders on the one hand and FEH on the other. Doc. No. 83. Counsel for FEH submitted similar documents outlining its views on the appropriate language for inclusion in the Court's order granting the Motion. Doc. No. 84. After consideration of the arguments of the parties and the papers submitted, the Court has entered an order of dated January 11, 2002 granting the Motion (the "Sale Order"). Doc. No. 85.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. DISCUSSION**

The disagreements between the parties regarding the form of the Sale Order fall into three categories. The first is FEH's request that the Sale Order include in paragraphs 13, 15, 23, E, F, G, H, N and U language which adds emphasis to those paragraphs that the Debtor and REMEC may be subject to certain liabilities and claims as specified in paragraph BB. The Debtor and REMEC contend that such additional language is redundant and is adequately covered in paragraph BB. Paragraph BB is the last paragraph in the Sale Order. Paragraph BB begins "[n]otwithstanding anything in the foregoing provisions of this Order to the contrary, . . . ." Since that opening clause applies to all of the provisions of the Sale Order, the Court fails to see any need to include language in some of those provisions stating that they are subject to paragraph BB other than to provide comfort to FEH or to employ a belt and suspenders approach

to the inclusion of the provisions of paragraph BB in the Sale Order. The Court does not see the need for such an approach and, therefore, has not included the language requested by FEH in the Sale Order.

The second area includes the proposal by the Debtor and REMEC to include the words “to the extent such Technology is owned by FEH” in defining the term “Intellectual Property Rights.” The Debtor and REMEC want this language included in an attempt to define the breadth of Intellectual Property Rights, as defined in the Sale Order, which FEH may pursue. FEH objects to this language as an attempt by the Debtor and REMEC to change the scope of the definition of “Technology” in the Sale Order and because the language could imply that this Court has made a determination of the extent of FEH’s rights under the license agreement between the Debtor and FEH mentioned in paragraph BB. At the hearing, the Court stated that it was not making any determination on the merit, or lack of merit, on any intellectual property claim that FEH believes it has against either the Debtor, on account of pre-sale activities, or against REMEC, on account of post-sale activities. The language in paragraph BB of the Sale Order defines “Intellectual Property Rights” in terms of post-sale claims against REMEC. The parties are not disputing that definition with the exception of the language mentioned in the first sentence of this paragraph. The Court shall not use the words “to the extent such Technology is owned by FEH” as suggested by the Debtor and REMEC because it believes that such language may be construed as imposing limits not intended by the Court. However, the Court believes that simply deleting such language, as requested by FEH, could result in a broader interpretation of the word “Technology” than intended by the Court. The Court shall modify the proposed Sale Order by inserting the words “to the extent FEH has an interest in” immediately before the words “the Technology” as a limitation on the definition of Technology. Regardless of the definition of the term “Technology” in the 1997 license agreement between the Debtor and REMEC, FEH would be required to have a protected interest in any such technology at the time it alleged that REMEC violated any such rights. Even if such rights existed in 1997, they may have been lost through public disclosure or simply by becoming generally known in the industry. In any event, this Court has not made any determination on

such issues. Accordingly, a final sentence has been added to paragraph BB to clarify that the Court has not made any such determination.

Finally, FEH proposes that this Court order the Debtor and REMEC to return certain items before the closing and other items within thirty days after the closing. The record before the Court does not provide any basis for making such an order. In addition, any such order would be inconsistent with the Court's ruling that it was making no determination on the extent of FEH's interest in Intellectual Property Rights or Technology, as defined in the Sale Order. Accordingly, FEH's request for such language in paragraph BB and the inclusion of Exhibit B to the Sale Order is denied.

### **III. CONCLUSION**

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court has issued a separate order granting the Motion consistent with this opinion.

DATED this 11<sup>th</sup> day of January, 2002, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge