

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18
)	
)	

COMMENTS OF SHULMAN ROGERS

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

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SUMMARY

The law firm of Shulman, Rogers, Gandal, Pordy & Ecker, P.A. (“Shulman Rogers”), hereby submits the following comments in response to the Commission’s October 22, 2004 Public Notice, requesting comments on certain ex parte communications by Nextel Communications, Inc. (“Nextel”) and other parties in the above-referenced proceeding.

During the past several months, Shulman Rogers attorneys have literally traveled the country educating the industry on the Commission’s *Report and Order*. These Comments reflect the questions and concerns expressed to the firm by public safety and private licensees, engineers, consultants and manufacturers. Each group is struggling to determine how re-banding will work, both logistically and practically. Given the limited time frame to complete re-banding, and the significant amount of education of licensees which must be accomplished in a short period of time, it is imperative that the Commission specify, up-front, as many aspects of re-banding as possible, leaving little to chance or speculation.

On this basis, Shulman Rogers requests clarification from the Commission on numerous issues arising from the *Report and Order*, including funding issues, the authority of the Transition Administrator, unjust enrichment payments for Economic Area license swaps, and the designation of channels held for public safety (and later critical infrastructure) licensees. Further, Shulman Rogers believes that the Commission must ensure that interference that has occurred at 800 MHz not be revisited at 900 MHz, and therefore the Firm believes that the Commission must adopt an interference standard for that band.

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¹*Commission Seeks Comment On Ex Parte Presentations And Extends Certain Deadlines Regarding The 800 MHz Public Safety Interference Proceeding*, FCC 04-253, released October

I. BACKGROUND

The Law Firm of Shulman, Rogers, Gandal, Pordy & Ecker, P.A. is counsel to numerous Part 90 public safety, private radio and SMR licensees. The Firm has conducted over 100 separate negotiations with Nextel with regard to the relocation of so-called “Upper 200” SMR block licensees.

On behalf of PCIA - The Wireless Infrastructure Association (“PCIA”) and Aeronautical Radio, Inc. (“ARINC”), the Firm participated in the drafting of the “Consensus Plan”, which was the basis of the Commission’s *Report and Order* in this proceeding.² In addition, the Firm filed several sets of Comments on behalf of the City and County of Denver, Colorado. The City of Denver Comments provided significant documentary evidence to the Commission with regard to the amount and severity of interference, and the effectiveness of a variety of proposed solutions. Finally, the Firm filed several sets of Comments on behalf of other SMR and private radio with interests at 800 MHz.

Initially, it should be noted that Shulman Rogers is filing these Comments prior to the deadline imposed by the Commission in its October 22, 2004 Public Notice. Because Shulman Rogers is providing comments on several additional clarifications which the Firm believes is necessary, and the Commission has stated that it does not wish to accept Reply Comments, the Firm believes that the early filing of these Comments will enable other parties the opportunity to provide additional insight on the matters presented herein.

22, 2004. *In the Matter of Improving Public Safety Communications in the 800 MHz Band.*

² Report and Order. Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order. WT Docket 02-55, et. al, FCC 04.168 (August 6, 2004) (the “Report and Order”).

During the past several months, Shulman Rogers attorneys have literally traveled the country educating the industry on the Commission's *Report and Order*. These Comments reflect the questions and concerns expressed to the Firm by public safety and private licensees, engineers, consultants and manufacturers. Each group is struggling to determine how re-banding will work, both logistically and practically. Given the limited time frame to complete re-banding, and the significant amount of education of licensees which must be accomplished in a short period of time, it is imperative that the Commission specify, up-front, as many aspects of re-banding as possible, leaving little to chance or speculation.

II. COMMENTS

A. Interim Interference Protection Standard

The Firm spent a considerable amount of time working with public safety and Nextel engineers in order to craft a definitive interference standard that could be applied should there be any incidences of interference once re-banding has been completed. During these discussions, it was considered critical that any public safety system constructed to reasonable standards receive interference protection at any and every location where unacceptable interference occurred.

The extraordinary effort by these engineers resulted in an agreement on a standard which was acceptable by both communities. However, it was never anticipated by the drafting parties that the interference standard would become effective immediately. Rather, it was believed that the recommended standard would become effective upon the completion of re-banding in the particular region. It was specifically recognized by the drafters that the developed standard could never be met by Nextel, or other operators in a similar operational mode, in interleaved spectrum.

In the *Report and Order*, the Commission has elected to make the new interference standard effective immediately upon the effective date of the balance of the Rules.³ While the Firm's clients appreciate the Commission's desire to immediately protect their systems to this level, it also must be recognized that this would result in a significant negative impact on Nextel's existing operation. In fact, if this level of interference protection were possible today, in an interleaved environment, there would be no need for re-banding in the first place.

On this basis, Shulman Rogers attorneys participated in discussions with public safety and Nextel engineers, in order to attempt to find a compromise that will provide incumbent licensees with a tolerable level of protection while the re-banding process takes place. The result of these discussions is reflected in the September 28, 2004 *Ex Parte* filing by Nextel, which proposed an interim interference standard.

Based upon the representations of engineers involved in the discussions, including engineering firms that have participated in this proceeding, the Firm believes that the proposed interim standard is fair and adequately protects incumbent licensees temporarily. However, this interim standard should apply only until re-banding is completed in a region, and should never be considered a substitute for re-banding. Rather, the proposal is only interim, and represents a significant advancement forward over the total lack of an objective standard in the existing rules.

B. Interference Criteria At 900 MHz

While Shulman Rogers appreciates the Commission's effort in applying the recommended standard at 800 MHz, the Commission failed to provide similar protection at 900 MHz. Under the original Consensus Plan, Nextel was to have returned its 900 MHz spectrum to the Commission.

³ Report and Order at ¶101.

This spectrum was then intended to serve as an incentive for 800 MHz Business, Industrial/Land Transportation and SMR licensees to move to 900 MHz, in order to make additional spectrum available at 800 MHz for public safety entities.

The Commission elected not to adopt this portion of the Consensus Plan, and instead permitted Nextel to retain its 900 MHz spectrum.⁴ Coupled with the ability of Business and Industrial/Land Transportation licensees to covert their licenses to commercial operation (without a holding period),⁵ there is a significant danger of recreating at 900 MHz the interference experienced at 800 MHz. While the interference will not necessarily be experienced by public safety licensees, the licensees at 900 MHz include critical infrastructure licensees, as well as traditional SMR operators that have public safety agencies as a significant portion of their customer base. Interference protection to these licensees can be just as critical as to public safety licensees.

On this basis, Shulman Rogers believes that the Commission should clarify that the interference standards adopted in this proceeding apply to all frequency bands impacted in this proceeding, both 800 MHz and 900 MHz.

C. Funding Issues

During educational seminars since the release of the *Report and Order*, numerous public safety agencies have asked a series of questions about funding that was not covered by the Commission. While it could be argued that these matters are therefore left to the Transition Administrator's ("TA") discretion, Shulman Rogers instead believes that these issues should be specifically addressed by the Commission. The Commission has stated that the TA serves as a

⁴ *Id.* At ¶207.

⁵ *Id.* At ¶337.

fiduciary to the Commission, and not as a representative of any incumbent licensee, or of Nextel.⁶ As a result, the TA will be in the position of balancing expending funds to speed up or ease the re-banding process, with the TA's obligation to ensure the full value of Nextel's gain is delivered to the United States Treasury. Uncertainty in the re-banding process will only lead to delays, and delays are the anathema to completion of this task in thirty-six months. Therefore, Shulman Rogers urges the Commission to specify its expectations of the TA, and the TA's ability to fund certain projects.

1. Regional Planning Committees

The *Report and Order* makes it clear that the TA shall interface with the public safety Regional Planning Committees ("RPCs") to coordinate the transition process.⁷ Presumably, the RPCs will review proposed band plans for each region for the 854-861 MHz band, as well as perform other tasks to effectuate re-banding. However, the *Report and Order* does not specify whether the RPCs, comprised entirely of volunteers, may obtain funding for their efforts and, if so, how such funding should be appropriated.

Shulman Rogers believes that the coordination between licensees (particularly where public safety mutual aid channels are concerned) will be an enormous task in the process. The Firm believes that RPCs will play an important part in this process, and Shulman Rogers urges the Commission to clarify that the TA may authorize funding for these groups. However, any such funding approved by the TA should be for efforts directly related to the re-banding effort, and not ancillary activities such as drafting modifications to the NPSPAC Regional Plans already in place.

⁶ *Id.* At ¶¶191-200.

⁷ *Id.* At ¶¶195-196.

2. Public Safety Agency “Up-Front” Funding

This re-banding effort will involve an enormous amount of work on the part of some public safety agencies before they even begin negotiations with Nextel. For example, agencies will need to conduct system-wide audits to determine items such as: (1) the number of actual mobiles in use; (2) the models of the various radios (in order to determine which radios may be re-programmed, which will require software upgrades, and which radios will need to be replaced); and (3) baseline coverage measurements to ensure that re-banded systems are measurably equivalent in coverage.

While it may seem that agencies should have such information readily on hand, the reality is that it can be difficult to keep track of every radio utilized by an agency which has thousands of mobile units in a municipality that may cover hundreds of miles. Further, agencies often have interoperability agreements with neighboring agencies, and it must therefore be determined which agencies have the frequencies programmed into their units, and how many radios are impacted. Similarly, some agencies have a large number of transmitter sites, and surveys must be conducted to determine what type(s) of equipment exists at each site, such as repeaters and combiners, which might need replacement as a result of this process. Finally, for some licensees, their knowledge of their current system coverage is often anecdotal at best, making verification of the “comparable facilities” standard after re-banding extremely difficult.

For some agencies, this work may be performed internally, with a significant diversion of agency man-power to accomplish the task. However, in most cases, this work will be contracted out to consultants, engineers and radio dealers. These outside vendors may not be able to perform work “on spec”, essentially providing a “float” for the public safety agency prior to the reaching of an agreement between the agency and Nextel. Further, because of time necessary in the procurement

process in some municipalities, some agencies must start immediately to retain these outside vendors.

This represents only a small portion of the effort that some agencies must undertake prior to the start of negotiations. Each of these efforts will require considerable expense on the part of the agency. The Commission has made it clear that it does not expect public safety agencies to expend funds for re-banding.⁸ However, some agencies (because of their own financial situation, politics or their budgetary process) will be unable to front money for these efforts. The Commission did not specify in the *Report and Order* whether the TA is authorized to provide public safety agencies any “up-front” money to fund these necessary efforts. Yet these efforts are a vital part of ensuring a timely and orderly re-band.

Many public safety agencies will not begin this important, beginning process until such time as the Commission makes its position on this issue clear. Shulman Rogers believes that the TA and the public safety industry can arrive at a reasonable accommodation for agencies needing authorization of “up-front” funds. Therefore, Shulman Rogers requests that the Commission clarify the *Report and Order* to specify that the TA may authorize “up-front” funding for public safety agencies.

While the firm supports some level of funding as an “advance” on the re-banding funds that will eventually be received by the agency, this should not be taken as a recommendation that there be a wholesale funding of any and every project desired by a licensee, and that this presents an opportunity to fund endless consultants. Rather, there should be a recognition that there is a need for certain actions to be taken by certain licensees prior to the conclusion of re-banding negotiations

⁸ *Id.* At ¶178.

which will enable the process to flow smoothly and efficiently. Shulman Rogers believes that the TA, in conjunction with public safety representatives, can develop guidelines which will be appropriate. These costs, similar to other costs expended in the project, will be subject to the TA's audit authority.

3. "Legitimate And Prudent" Transaction Expenses

In the "Upper 200" re-banding proceeding, the Commission created Section 90.699, which governed the expenses for which compensation was permitted.⁹ One portion of Section 90.699(c) provides that "legitimate and prudent" expenses are limited to two percent of the "hard costs" expended in re-banding. "Hard costs" are defined as "... the actual costs associated with providing a replacement system, such as equipment and engineering expenses. EA licensees are not required to pay incumbent licensees for internal resources devoted to the relocation process."

In the *Report and Order*, the Commission did not adopt a definition of the costs which are considered to be "covered," nor did the Commission mention any "two percent cap." Rather, the Commission indicated that all costs would be covered. However, without the adoption of a definitive rule section defining the costs which are covered, numerous public safety agencies are reluctant to engage in the efforts necessary to begin to prepare for re-banding negotiations, until such time as the Commission clarifies its compensation policies. As a result, important work which should begin now (because of the time involved) is being delayed.

Based upon its work in negotiating numerous re-banding agreements, Shulman Rogers is aware that costs (such as attorney's fees) can easily exceed two percent. While two percent is often more than sufficient with regard to large system re-tunes with large equipment and engineering

⁹ 47 C.F.R. §90.699.

costs, a small system may have no equipment costs, and minimal engineering costs. Yet these smaller re-tuning efforts can frequently have other expenses that are similar in scope to larger re-tunes. In this re-tuning effort, the Commission should specify that the costs are the costs, subject to the auditing authority of the TA, and there is no two percent limitation.

Similarly, Section 90.699(c)'s restriction on the recovery of internal costs should not be applied in this re-banding project. Some public safety agencies in particular will be expending enormous amounts of time and resources to complete this task. The Commission promised such licensees that this re-banding effort would not impose costs upon their agencies, and the Commission should specify that Section 90.699(c)'s prohibition on recovery of internal costs is not applicable in the current process.

In each of the "Upper 200" negotiations between Shulman Rogers (on behalf of its clients) and Nextel, disputes over costs were always resolved between the parties without the need for third party arbitration or mediation. However, in this process, there is a Transition Administrator that is the ultimate arbiter (other than appeals to the Commission) of covered expenses. While Shulman Rogers has always reached agreement with Nextel, it is unknown whether the TA will approve the same expenses which Nextel has traditionally approved. Therefore, it is necessary for the Commission to provide additional guidance on "covered costs," as well as the role of the TA in this portion of the process.

As a fiduciary to the Commission, the TA is not a representative of licensees or Nextel, but rather the Commission. In this position, the TA would appear to have two opposing tasks: (1) ensure that re-banding happens in an efficient and timely manner, with licensees receiving just and fair compensation for their costs; and (2) ensure that the United States Treasury receives the appropriate

“windfall” payment. Thus, some in the industry believe that in this position the TA is bound to ensure that no licensee receives more than it is entitled to, because for every extra dollar given to a licensee, there is one less dollar to the U.S. Treasury. In this view, the TA would ultimately be extremely harsh in its auditing function in order to preserve the largest windfall payment possible.

Shulman Rogers does not believe that this was the Commission’s goal in creating the TA concept. The firm believes that the Commission intends that the TA should not be an impediment to a prudent agreement on expenses between Nextel and the licensee, but rather the TA should audit the process to ensure that there is no “gold plating” by licensees, while giving discretion to the parties to the transaction (the licensee and Nextel) to reach agreement on appropriate costs.

On this basis, Shulman Rogers recommends that the Commission clarify its views with regard to the responsibilities of the TA in auditing costs requested by the licensee and approved by Nextel.

D. Frequency Advisory Committee Authority

The *Report and Order* specifies that: (1) the TA is not to be certified as a frequency advisory committee (FAC); and (2) existing FACs will process re-banding applications (and presumably assure that the applications conform with the region band plans).¹⁰

The frequencies which Nextel is making available for re-banding in this proceeding are a combination of Business, Industrial/Land Transportation and SMR Pool frequencies. However, the public safety FACs are not presently authorized to “coordinate” these frequency bands, and no frequency advisory committee is authorized to coordinate the SMR Pool.

¹⁰ *Report and Order* at ¶197.

Shulman Rogers believes that this was a mere oversight on the Commission's part, and the firm recommends a clarification that any of the currently authorized 800 MHz FACs may coordinate applications generated strictly for the re-banding process for any of the relevant frequency pools.

E. Unjust Enrichment Payments

Finally, in some cases, Nextel will be exchanging Economic Area ("EA") licenses with other EA licensees. In some cases, these licenses were obtained through auction with small business bidding credits. However, Nextel is not eligible for this credit. Normally, the acquisition of a small business-credited EA license by a non-small business entity results in a penalty payment due to the United States Treasury pursuant to Section 1.2111(d) of the Commission's Rules. However, in this case the EA licensee is trading the small business-credited EA license for an EA license obtained by Nextel without a credit. Therefore, the Commission should grant a blanket waiver of Section 1.2111(d) for purposes of this proceeding.

The Commission established Section 1.2111 to "... ensure that meaningful small business participation in spectrum-based services is not thwarted by transfers of licenses to non-designated entities."¹¹ To obtain a waiver of this rule, it must show either that: (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome

¹¹ *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use 4660–4685 MHz, Third Report and Order and Second Further Notice of Proposed Rule Making, WT Docket No. 97-82, 13 FCC Rcd 374 (1997) at para. 52.*

or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹² In fact, each of these factors are in evidence in this proceeding.

First, small business participation in spectrum-based services will not be thwarted by the Commission's waiver of the unjust enrichment payment. The transactions involve the exchange of licenses, not the outright sale of authorizations. The "one-for-one" swap results in the incumbent licensee having the exact number of frequencies as before. Thus, the transaction is supportive of the continued involvement of small businesses in the auction process.

The license swaps are intended by the Commission to reduce the possibility of interference to public safety (and other) 800 MHz licensees, and to facilitate the relocation of NPSPAC public safety systems. Thus, the swaps represent a unique situation, not previously encountered by the Commission with regard to auction licenses. It is patently unfair to require auction licensees, who are being moved despite the fact that they are not causing interference, to pay unjust enrichment penalties.

This license swap is part of the ultimate resolution in WT Docket No. 02-55, a multi-year litigation that is aimed at solving a public safety emergency. The Commission should do all that it can to facilitate an orderly and timely channel swaps, with minimal cost to incumbents involuntarily moved. It is entirely within the Commission's discretion to waive the unjust enrichment payment, and the public interest clearly demands such treatment in this case.¹³

¹² *NextWave* at para. 44.

¹³ *NextWave* at para. 43.

While it is possible for every licensee to ask for a waiver of the Commission of Section 1.2111(d), the Commission should issue a blanket waiver. This will eliminate delays in re-banding which would inevitably result from a series of waiver requests.

F. Designation Of Unused Frequencies For Public Safety Licensees

The Commission has designated that any spectrum recovered from Nextel, and not utilized for re-banding incumbent licensees, would be held for a period of three years for public safety licensees, and for another two years after that for public safety and critical infrastructure licensees.¹⁴ This rule is a variation on the recommendation of the Consensus Plan that unused spectrum recovered from Nextel be held for five years for public safety licensees. Unfortunately, the *Report and Order* fails to designate a methodology for identifying which spectrum, which is available after re-banding has been completed, is spectrum that was recovered from Nextel, versus spectrum that was available in the same market prior to re-banding.

It is the firm's concern that without a specific identification mechanism, all vacant spectrum vacant after re-banding in a market would appear to be spectrum held for public safety. While this may indeed be true for larger markets, in smaller areas there is spectrum available today, which should remain available for Business and Industrial/Land Transportation. The *Report and Order* specifies that only spectrum recovered from Nextel (and not utilized in re-banding) should be held for public safety, not all vacant spectrum. Therefore, Shulman Rogers recommends that the Commission adopt a mechanism to identify after re-banding the specific Nextel-recovered spectrum. It may be possible for the Commission to create "phantom licenses," which would specify channels and geographic locations. However, whatever mechanism is ultimately adopted, the Commission

¹⁴ *Report and Order* at ¶¶152, 153 and 158.

must assure the continued access by Business and Industrial/Land Transportation licensees to spectrum to grow and support their operations.

III. CONCLUSION

WHEREFORE, the premises considered, it is respectfully requested that Commission act in accordance with the views expressed herein.

Respectfully submitted,

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