

**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
)	

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO MOTION FOR PARTIAL STAY**

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Summary

Mobile Relay Associates (MRA) and Skitronics, LLC (Skitronics) (collectively, Petitioners) have filed a Motion to Stay the Commission's 800 MHz band reconfiguration plan indefinitely pending appellate review. Petitioners ask the Commission to elevate their private, commercial interests above the vital public safety objectives of expeditious 800 MHz reconfiguration; *i.e.*, eliminating interference to public safety communications from commercial cellular services.

Petitioners have not made the requisite "strong showing" that their arguments are likely to succeed on judicial review. The extensive, well-developed record in this proceeding does not support Petitioners' assertions of irreparable injury or of dissimilar treatment from similarly situated 800 MHz incumbent licensees. The record does, however, demonstrate that a stay would further jeopardize the safety of public safety personnel whose lives often depend on clear, reliable wireless communications. Accordingly, the public interest will be best served by expeditious 800 MHz band reconfiguration.

As the Government Accountability Office recently confirmed, the Commission's 800 MHz band reconfiguration plan is consistent with its statutory spectrum management authority. The Commission found reconfiguring the 800 MHz band to be the only solution to the spectrally-incompatible mix in adjacent and interleaved channels of cellular-architecture low-site systems – such as those used by Nextel, Cingular, Verizon and others – and traditional high-site non-cellular systems – such as those used by public safety communications providers, private wireless licensees and dispatch-oriented Specialized Mobile Radio (SMR) licensees like Petitioners.

Thus, the record in this proceeding establishes a compelling public interest basis for separating systems like Petitioners', which are compatible neighbors to public safety licensees in the reconfigured non-cellular channel block, and systems like Nextel's, which must be retuned to the cellular channel block adjacent to other cellular-architecture systems. There is no public interest justification for retuning high-site SMR licensees to the cellular block where they would be susceptible to interference from low-site cellular operators. To the extent Petitioners are seeking a modification of their licenses to enhance their ability to extract a buy-out payment from Nextel, they are running afoul of the Commission's rules, which prohibit licensees from filing "greenmail" pleadings to coerce settlements or produce non-economic license transactions.

Furthermore, Petitioners have failed to demonstrate that they will be harmed by 800 MHz reconfiguration, let alone *irreparably* harmed. Not one of Skitronics's channels has to be retuned under the Commission's band reconfiguration plan and Skitronics can continue operating just as it does today. In fact, Skitronics previously endorsed without qualification the Consensus Plan for 800 MHz Realignment – the relevant parts of which remain in the Commission's reconfiguration plan. About half of the 39 800 MHz channels licensed to MRA will be retuned to comparable 800 MHz channels in the non-cellular block, enabling MRA to provide its customers the same functionality, geographic coverage and service quality they receive today. Like any other retunee, MRA's retuning costs will be funded by Nextel. Moreover, both MRA and Skitronics will receive *greater* interference protection post-realignment than they do today, thus *enhancing* their current spectrum positions.

Petitioners' glib reliance on reactive interference abatement measures to address public safety interference ignores the extensive expert technical analysis in the record herein. No matter how quickly licensees attempt to respond to public safety interference complaints, these

measures are inherently after-the-fact and consequently may be too late when it comes to the need for clear, ungarbled communications in an emergency. *As the leading public safety organizations have stated in opposing Petitioners' Motion, "[a]ny delay in the implementation of band reconfiguration, e.g., pending appellate review, will expose our nation's first responders to unexpected and potentially deadly interference to their radio systems."*¹

For all of the above reasons, the Commission should deny Petitioners' Motion.

¹ Opposition to Motion to Partial Stay by Association of Public-Safety Communications Officials-International, International Association of Chiefs of Police, International Association of Fire Chiefs, Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, at 2 (Nov. 24, 2004) (emphasis added) (Public Safety Opposition). (Unless otherwise indicated, all comment and *ex parte* submissions referenced herein were filed in WT Docket No. 02-55.)

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**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
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Nextel Communications, Inc. (Nextel) hereby opposes the Motion for Partial Stay of Decision Pending Appellate Review (Stay Motion) filed in the above-captioned proceedings by Mobile Relay Associates (MRA) and Skitronics, LLC (Skitronics) (collectively, Petitioners).

Petitioners' arguments fall far short of the standard for granting a stay of the *800 MHz Report and Order* (the "*R&O*").² Petitioners have not demonstrated that they are likely to prevail on the merits or that they will suffer irreparable injury in the absence of a stay. The stay Petitioners seek would indefinitely delay 800 MHz band reconfiguration, which is essential to remedy the interference that increasingly plagues the communications systems relied on by our nation's first responders and other public safety personnel. Every day of delay in completing 800 MHz reconfiguration is another day that first responders remain at risk; accordingly, a stay would substantially harm the police, fire fighters and other public safety personnel that the *R&O* is intended to benefit.

The Commission's reconfiguration plan, including any modifications of Petitioners' licenses, "*are essential components of the most effective and equitable band restructuring plan required to resolve serious and heretofore intractable interference problems – problems that have impaired and continue to impair public safety operations in the 800 MHz band.*"³ This public interest rationale goes to the heart of the Commission's statutory mandate to manage the spectrum. As the U.S. Government Accountability Office recently determined, the *R&O* falls within the Commission's statutory authority and within the deference accorded expert agency actions upon judicial review.⁴ Thus, the public interest overwhelmingly favors continued progress to complete 800 MHz reconfiguration in accordance with the *R&O*.

² *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) (*R&O*).

³ *Id.* ¶ 68 (emphasis added).

⁴ Letter from Anthony H. Gamboa, General Counsel, GAO, to Honorable Frank R. Lautenberg, U.S. Senate (Nov. 8, 2004).

I. THE STAY MOTION MISREPRESENTS THE RECORD IN THIS PROCEEDING AND IS REFUTED BY SKITRONICS'S PREVIOUS ENDORSEMENT OF THE COMMISSION'S REBANDING PLAN

Petitioners make numerous assertions that misrepresent or simply ignore the record in this proceeding, perhaps none more egregious than Skitronics's blatant contradiction of its previous unqualified endorsement of 800 MHz band reconfiguration, as discussed further below. For example, Petitioners' argument that they will be irreparably harmed is based entirely on the claim that they will lose customers when forced to retune to different channels. As explained below, however, *none* of Skitronics's channels need to be retuned and *only 19* of MRA's 39 Denver-area channels need to be retuned to comparable 800 MHz channels. Retuning will have no impact on Skitronics's operations or its customers and will have no detrimental effect on MRA's services.

Petitioners also state that they have never filed an interference complaint against Nextel with the FCC. Although this may be technically accurate, it ignores Skitronics's own statement in the record that "we have had to resolve issues where Nextel sites were causing interference on our systems."⁵ Petitioners disingenuously attempt to hide the fact that their systems and commercial mobile radio cellular systems (CMRS) are incompatible and must be separated to prevent interference because this fact undercuts their desire to be retuned into the cellular block – which would recreate the very interference problem the *R&O* eliminates.

Petitioners also ignore the fact that *Skitronics has previously endorsed the Commission's rebanding plan*. The Stay Motion (at 2) states that each of the Petitioners "has been an active participant throughout this proceeding." This is true, but the Stay Motion creates the misleading implication that Skitronics has consistently opposed the Commission's rebanding plan. A review

⁵ Comment of Skitronics at 3 n. 3 (May 2, 2002).

of Skitronics's pre-*R&O* filings, which are not even cited in the Stay Motion, tells quite a different story.⁶ In comments filed on February 25, 2003, Skitronics stated that “we have no problems with giving unqualified endorsement to the *Supplemental Comments of the Consensus Parties* [Consensus Plan].”⁷

Skitronics's endorsement of the Consensus Plan undermines the credibility of the factual assertions made in the Stay Motion. The *R&O* adopts the same band reconfiguration plan proposed in Consensus Plan, with some modifications not relevant to the Stay Motion. Like the Consensus Plan, the *R&O* creates a cellular block and a non-cellular block, with public safety and non-cellular, high-site Specialized Mobile Radio (H-SMR) licensees such as Petitioners located in the non-cellular block and cellular, enhanced SMR (ESMR) licensees such as Nextel located in the cellular block. If anything, the rebanding plan adopted by the *R&O* is more advantageous to H-SMR licensees such as MRA and Skitronics. For example, the *R&O* makes Nextel responsible for all incumbent retuning costs, even if they exceed the \$850 million funding commitment made by Nextel in the Consensus Plan, and provides greater post-reconfiguration interference protection for H-SMR licensees.

A rebanding plan Skitronics previously endorsed without qualification cannot now, after the Commission adopted its relevant aspects in the *R&O*, suddenly be arbitrary and harmful to H-SMR licensees. The courts have invoked their equitable powers to estop parties from

⁶ In its initial comments in this proceeding, Skitronics expressed a number of concerns regarding various rebanding proposals described in the Notice of Proposed Rulemaking (*NPRM*). *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rule Making, 17 FCC Rcd 4873 (2002). According to Skitronics, however, these concerns were fully addressed by the rebanding plan subsequently proposed by the Consensus Parties. Comment of Skitronics at 2 (Feb. 25, 2003).

⁷ Comment of Skitronics at 2 (Feb. 25, 2003).

“pressing a claim that is inconsistent with a position taken by [a party] either in a prior legal proceeding or in an earlier phase of the same legal proceeding.”⁸ This doctrine is intended “to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system.”⁹ Although called “judicial estoppel,” the doctrine has been applied to statements made by parties in administrative as well as judicial proceedings.¹⁰

The Commission should apply this doctrine to bar Petitioners from “playing fast and loose” with its administrative proceedings.¹¹ The issuance of a stay is a matter of equitable discretion, and the equities require dismissal of Petitioners’ disingenuous motion.

II. MRA AND SKITRONICS FAIL TO SATISFY THE STANDARDS FOR GRANTING A STAY

In determining whether to grant a stay request, the Commission considers the following factors:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
- (2) Has the petitioner shown that without the requested relief, it will be irreparably injured?
- (3) Would issuance of a stay substantially harm other parties interested in the proceedings?
- (4) What action is in the public interest?¹²

⁸ *Alternative System Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) (citations omitted).

⁹ *Id.*

¹⁰ *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996).

¹¹ *Id.* at 601 (citations omitted). *See also Microwave Communications, Inc.*, 18 F.C.C.2d 953, ¶ 26 (1969) (“[W]e cannot ignore statements made by a party in filings with the Commission which contradict or are inconsistent with the position taken by that party in an adjudicatory proceeding.”).

As explained below, each of these factors requires the Commission to deny the Stay Motion.

A. Petitioners Will Not Prevail on Appeal

1. Petitioners Are Not Similarly Situated to Nextel and Southern LINC

Petitioners claim that the *R&O* “arbitrarily treats similarly situated licensees differently”¹³ and will result in Petitioners receiving less valuable spectrum and Nextel and Southern LINC receiving more valuable spectrum.¹⁴ This claim, however, ignores the obvious distinctions both for customers and for 800 MHz interference resolution purposes between Petitioners’ local high-site, non-cellular SMR facilities and the low-site, high-density, advanced cellular systems operated by Nextel nationwide and by Southern LINC in the southeast.

Petitioners pay only cursory lip-service to the problem of interference to public safety systems in the 800 MHz band, almost as if the rebanding plan is unrelated to this problem. The Stay Motion ignores a comprehensive record, developed over the course of over two and a half years and based on thousands of submissions by hundreds of parties, which documents beyond any reasonable doubt the severity of the interference problem and the need to realign the 800 MHz band to eliminate the interference problem. As the *R&O* states, interference to 800 MHz public safety systems “is serious and will only increase in severity” without action from the Commission “to ensure that first responders ... have communications channels free of

¹² *Conmark Cable Fund III*, 104 F.C.C.2d 451, ¶ 9 (1985) (citing *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 F.C.C.2d 973, 978 (1981)).

¹³ Stay Motion at 15.

¹⁴ *Id.* at 4-5.

unacceptable interference and thereby suitable for mission-critical operations including rapid response to major incidents that threaten Homeland Security.”¹⁵ Petitioners ignore the root cause of this interference: “a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems – used by ESMR and cellular telephone licensees – and high-site non-cellular systems – used by public safety, private wireless and some SMR licensees.”¹⁶ The Commission correctly found, based on a compelling record, that addressing the root cause of the problem requires separating cellular systems and non-cellular systems into different spectrum blocks.

The Commission thus has a strong public interest justification for distinguishing between licensees such as Petitioners, which operate non-cellular H-SMR facilities, from cellular ESMR licensees such as Nextel and Southern LINC. Contrary to Petitioners’ claims, they are not “similarly situated” to Nextel or Southern LINC. Nextel and Southern LINC operate facilities that use low-site, high-density cellular technology, which pose a significant interference risk to high site public safety, SMR and private wireless systems channels (as an inherent by-product of their design and normal operation) when operating in interleaved and adjacent channels in the same geographic area. The non-cellular, high-site facilities used by Petitioners do not pose such a risk, a fact Petitioners readily admit,¹⁷ and are therefore good spectral neighbors to public safety communications systems.

¹⁵ *R&O* ¶ 13.

¹⁶ *Id.* ¶ 2.

¹⁷ “Neither [petitioner] has ever been implicated in any instance of harmful interference to public safety operations.” Stay Motion at 2.

The Nextel and Southern LINC facilities consequently must be retuned to the new cellular block, while Petitioners will be located in the non-cellular block. This fact is only reinforced by Skitronics's own admission that Nextel's current cellular operations on channels interleaved and/or adjacent to Skitronics have caused interference to its non-cellular facilities.¹⁸ The incompatible system architectures used by public safety and high-site licensees such as Petitioners, on the one hand, and ESMR licensees like Nextel, on the other hand, need to operate in different spectrum blocks. Petitioners' claim that this is all part of some sinister plot to "protect[] those which are arbitrarily favored and destroy[] those who are not so favored,"¹⁹ is pure bunk; on the contrary, the Commission's 800 MHz reconfiguration plan is the most technically sound solution available to a serious and growing interference problem.

The technical differences between the systems operated by Petitioner and ESMR licensees such as Nextel stem from the very different services they offer. Petitioners offer only localized "traditional SMR mobile dispatch services" to small, regional businesses.²⁰ They do not market their services to the general public, and do not provide interconnection to the public switched telephone network.²¹ This is a "niche market" that depends on providing low-cost equipment and service to customers, as Petitioners themselves acknowledge.²² In contrast, Nextel has invested billions of dollars to install a high-density cellular network to offer its customers a broad range of nationwide and international wireless communications services that

¹⁸ Comment of Skitronics at 3 n. 3 (May 2, 2002).

¹⁹ Stay Motion at 15.

²⁰ Comment of Skitronics at 2-4 (May 2, 2002). *See also* Comments of MRA on Supplemental Comments of the Consensus Parties at 2 (Feb. 10, 2003).

²¹ *Id.*

²² Comment of Skitronics at 14-15 (May 2, 2002).

go far beyond Petitioners' regional, traditional dispatch service. Nextel provides interconnected mobile voice and data services as well as Direct Connect[®] service that gives its customers push-to-talk capability throughout the U.S. and parts of Canada, Mexico and South America.

The different systems architectures Petitioners and Nextel use are consequently a product of the different business strategies they have each chosen to pursue, and require different treatment in the Commission's 800 MHz reconfiguration plan. Petitioners have no basis to complain about being treated differently than Nextel. They have, for their own business reasons, chosen to deploy non-cellular systems. Just like the other non-cellular incumbents, their channels will be located in the non-cellular block of the realigned 800 MHz band, where they pose no interference threat to public safety licensees and will not experience interference from Nextel, Southern LINC or the other cellular operators. Nextel's facilities, along with those belonging to Southern LINC, will be retuned to the cellular block, where they will no longer pose an interference risk to public safety and other high-site licensees, including Skitronics and MRA.

Petitioners claim they will be harmed because they will face restrictions in converting their facilities to "new technology" in the future.²³ But they offer no specifics, and certainly no evidence, to substantiate such harm. Nothing in the *R&O* will preclude Petitioners from upgrading their facilities in any number of ways, including, for example, installing digital technology to enhance the capacity of their systems.²⁴ Although Petitioners will be restricted, as

²³ Stay Motion at 4-5.

²⁴ There is no merit to Petitioners' vague claims that they somehow were deterred from "construct[ing] any digital upgrade" of their systems merely because the Commission sought comment on various rebanding proposals in the *NPRM*. Stay Motion at 11. No party in this proceeding ever proposed prohibiting digital upgrades in any part of the 800 MHz band, and certainly nothing in the *NPRM* prevented Petitioners from installing such upgrades.

of the effective date of the *R&O*, from deploying a low-site, high-density cellular architecture in the non-cellular block,²⁵ they have not done so to date because it would be impractical and uneconomic given their limited channel positions in secondary markets.²⁶

In any case, however, the Commission has statutory authority to modify existing licenses and impose reasonable technical restrictions to prevent interference.²⁷ After all, permitting high-density cellular systems in the “non-cellular block” on a wholesale basis would risk replicating the very public safety interference problem that gave rise to this proceeding. Yet, even this prohibition will not prevent Petitioners or any other licensee from deploying cellular technology provided it will not cause interference to other licensees. The *R&O* (§ 173) specifically establishes a waiver process to permit such a deployment.

2. Petitioners Will Not Be Harmed By the Retuning Process

Petitioners distort the record in asserting that they will be forced to relinquish their existing spectrum and receive less valuable spectrum in exchange.²⁸ This assertion flies in the

²⁵ *R&O* § 172.

²⁶ Petitioners have shown no inclination toward deploying the types of cellular technologies that will be restricted in the non-cellular block. Petitioners have long chosen to operate as non-cellular H-SMR licensees, as such technology is the most efficient way to provide their traditional dispatch service, particularly in smaller markets. Skitronics endorsed a rebanding plan that included the same cellular technology restrictions, presumably because it believed such restrictions would not interfere with its business plans. As for MRA, its 800 MHz spectrum holdings – only 39 site-specific channels in Colorado that are located outside the core population center of Denver – do not provide it the critical mass of channel holdings and geographic coverage that would justify the substantial investment required in constructing a high-density cellular network. Significantly, *MRA holds no EA licenses in the 800 MHz band*, having assigned the EA licenses it previously held to other licensees, including Nextel. These are not the hallmarks of a licensee contemplating converting its operations to an ESMR system.

²⁷ *R&O* at § 65; 47 U.S.C. §§ 154(i), 303, 316.

²⁸ Stay Motion at 4.

face of the fact that *none* of Skitronics’s facilities will need to be retuned. According to FCC licensing records, all of Skitronics’s EA and site-specific SMR licenses are located outside of channels 1-120, which will need to be cleared for the new NPSPAC band. Skitronics consequently will continue to operate on the very same spectrum on which it operates today. It will suffer no adverse impact from the rebanding plan.

According to data Nextel has gathered in preparation for 800 MHz rebanding, MRA holds 39 site-specific licenses in Colorado. Only 19 of these channels are between channels 1-120 and will need to be retuned. The rebanding process established by the *R&O* will ensure that incumbent licensees such as MRA that are required to retune will be made whole. The Commission expressly addressed this issue in the *R&O*:

We are sensitive to the concerns of those parties ... who assert that reconfiguring the 800 MHz band could unnecessarily disrupt their communications while their operating frequencies are changed, or that their new channels would not be comparable to their original channels. We are committed to ensuring that band reconfiguration will not result in degradation of existing service. We believe the rules we adopt today will ensure both continuity of service and “comparable facilities.” With respect to the latter, we note that the rules we adopt today track rules the Commission has successfully used to accomplish previous band reconfigurations.²⁹

The few MRA facilities that will need to be retuned from channels 1-120 will be retuned to comparable replacement channels in other portions of the non-cellular block of the realigned band. MRA’s replacement channels will have the same geographic coverage and same functionality as its existing licenses. Nextel will fund MRA’s retuning costs. In addition, both MRA and Skitronics will receive *increased* interference protection thanks to the far more

²⁹ *R&O* ¶ 148. One of the “essential” factors the Commission used in evaluating band reconfiguration proposals was the “extent to which incumbents would be treated most fairly, including the degree of disruption associated with channel changes, [and] the ability to provide relocated incumbents with truly comparable spectrum.” *Id.* ¶ 149.

stringent interference protection requirements the Commission is imposing on CMRS operators.³⁰ The *R&O* will consequently *enhance* their current spectrum positions.

Petitioners' own proposals in this proceeding belie their claim that they will lose customers if their channels are retuned. In *ex parte* filings submitted after the release of the *R&O*, Petitioners have requested that they be retuned from their current channels to the new cellular block in the realigned band.³¹ This request is instructive in one respect, for it undermines Petitioners' claims in the Stay Motion that they will be harmed in the retuning process. These stark inconsistencies in Petitioners' arguments further demonstrate their weakness and reveal the apparent motive behind the Stay Motion. Their real complaint appears not to be that they will suffer customer churn from retuning, but that their particular site-specific licenses (their "holes") will no longer encumber EA licenses (the "donuts") after band realignment. Petitioners fear that ESMR licensees will no longer have an incentive to buy out these "holes" or Skitronics's EA licenses. Petitioners' arguments imply that the Commission's priority should be enhancing Petitioners' ability to sell their assortment of non-cellular, high-site spectrum holdings in the secondary market, not remedying the life-threatening interference problem in the 800 MHz band.

It should go without saying that such an objective has nothing to do with the public interest. As the Commission has stated, "[a]ltering the distribution of profits among private

³⁰ *R&O* ¶¶ 92-141.

³¹ Letter from David Kaufman, Counsel for MRA and Skitronics, to Marlene Dortch, FCC Secretary (Sept. 30, 2004); Letter from David Kaufman, Counsel for MRA and Skitronics, to Marlene Dortch, FCC Secretary (Oct. 8, 2004). The Commission should reject this request because there is no public interest justification for retuning H-SMR licensees to the cellular block. These licensees pose no interference risk to public safety licensees and are therefore ideally suited to operate in the non-cellular block. Retuning them to the cellular block will only expose them to interference from ESMR licensees.

parties is not, and never has been, a proper or desirable function of the Commission.”³² The Commission should reject Petitioners’ efforts to place their own economic interests above the public interest issues at stake in this proceeding. This proceeding is about remedying a serious public safety interference problem. The Commission acted in accordance with its statutory mandate in adopting the rebanding plan to achieve this pressing goal.

Petitioners plainly have not made a “strong showing” that they are likely to prevail on the merits of any appeal of the *R&O*. To the contrary, their Stay Motion is akin to a “strike pleading” intended to use the Commission’s licensing process to extract a buy-out payment from Nextel. The Commission has long enforced a strong policy against such greenmailing tactics.³³

3. Petitioners’ “Confiscation” Claims Are Based on a Mischaracterization of the *R&O*

Petitioners make a convoluted argument based on their status as site-specific SMR licensees entitled to interference protection from EA licensees. As noted above, EA licenses have been described as donuts, with the holes in these donuts constituting the geographic areas licensed to site-specific licenses that must be protected. According to Petitioners, the *R&O* “confiscate[s]” their site-specific licenses “in favor of the [EA] auction licensee.”³⁴ Petitioners proclaim that the Commission’s decision “gives the hole in each donut to the auction licensee for free.”³⁵

³² *Evaluation of the Syndication and Financial Interest Rules*, Second Report and Order, 8 FCC Rcd 3282, ¶ 42 (1993). *See also Review of the Prime Time Access Rule*, Report and Order, 11 FCC Rcd 546, ¶ 18 (1995) (The Commission’s statutory duty is to promote its “public interest mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry.”).

³³ 47 C.F.R. § 1.935.

³⁴ Stay Motion at 9.

³⁵ *Id.*

Petitioners' donut argument is at best half-baked. Their claims grossly mischaracterize the *R&O*. Petitioners' channels will neither be confiscated nor given to Nextel or any other ESMR licensee. As described above, Skitronics will continue operating on its existing channels; none of its channels will be retuned. Only 19 of MRA's site-specific licenses will be retuned from channels 1-120, with these channels being cleared for NPSPAC public safety licensees, *not* Nextel or other ESMR licensees.³⁶ MRA will be retuned to comparable replacement channels entitled to *greater* interference protection than it currently enjoys, with their retuning costs funded by Nextel. Petitioners' hyperbole notwithstanding, this is a far cry from a "confiscation" of their channels.³⁷ Their licenses will enjoy the same functionality and geographic coverage provided by their existing licenses, and will be able to continue serving their customers just as they are today.

³⁶ Nextel will *temporarily* occupy vacated spectrum on channels 1-120, but only to permit an orderly, "one-step" retuning of NPSPAC licensees to the new NPSPAC block in each region. Once this has occurred all Nextel systems will be retuned to the cellular block above 817/862 MHz.

³⁷ Contrary to Petitioners' argument, the *R&O* does not constitute "unfair retroactive rulemaking." Stay Motion at 10. As the FCC and federal courts have made clear, a retroactive rule forbidden by the Administrative Procedure Act (APA) is one that "alter[s] the *past* legal consequences of past actions." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis in original); *see also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001). By contrast, a rule with "exclusively future effect" – such as the new rules and rebanding plan adopted in the *R&O* – is permissible under the APA. *Bowen*, 488 U.S. at 219. The FCC thus may adopt reasonable rules whose effect would be prospective only, even if such rules upset the past expectations of existing licensees or create so-called "secondary retroactivity" by affecting the desirability of their past transactions. *See Bowen*, 488 U.S. at 219-220; *Celtronix*, 272 F.3d at 589. As the D.C. Circuit has explained, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectation frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectation were deemed suspect." *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989); *see also DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

Petitioners also distort the record in suggesting that Nextel will receive spectrum “for free” and enjoy a windfall under the Commission’s rebanding plan. The *R&O* will require Nextel to contribute at least \$4.86 billion toward the rebanding plan or the U.S. Treasury and ensures that Nextel will not be the recipient of any windfall.³⁸ The Commission conducted an extensive analysis of the value of Nextel’s financial and spectrum contributions to the rebanding plan and the 800 MHz and 1.9 GHz replacement spectrum Nextel will receive under the plan.³⁹ As Petitioners themselves concede, the Commission discounted the value of Nextel’s General Category channels because they are encumbered by site-specific licensees.⁴⁰ Petitioners make the conclusory assertion that this discount should have been even greater, but they offer nothing to back up this claim.⁴¹ Petitioners also fail to mention that Nextel will suffer a net *loss* of 4.5 MHz of 800 MHz spectrum – the very spectrum Petitioners maintain is *more* valuable than the 1.9 GHz replacement spectrum Nextel will be assigned.⁴² Petitioners’ analysis is in stark contrast to the extensive expert evidence submitted in this proceeding, and offers nothing to undermine the Commission’s conclusion that the rebanding plan is fair and equitable to all parties.

³⁸ In addition, Nextel’s funding obligations are not capped at \$4.86 billion. The *R&O* will require Nextel to “complete reconfiguration of the 800 MHz band regardless of the ultimate cost. ... Thus, [the Commission is] requiring Nextel to assume the risk that the cost of 800 MHz band reconfiguration could exceed any value Nextel ultimately realizes from [the 1.9 GHz] spectrum.” *R&O* ¶ 214.

³⁹ *R&O* ¶¶ 210-222, 277-324.

⁴⁰ *Id.* ¶ 321. The Commission also discounted the value of Nextel’s interleaved channels to account for what the Commission viewed as “the technical efficiency loss in an iDEN configuration from the spectrum being non-contiguous.” *Id.* ¶ 318.

⁴¹ Stay Motion at 9.

⁴² *Id.* at 9-10.

4. The Commission's Rebanding Plan Will Not Harm Competition

Petitioners argue that they are likely to succeed on appeal because the *R&O* will harm competition in the “dispatch services market.”⁴³ Like Petitioners’ other claims, this argument is based on vague, unsworn factual assertions contradicted by the record. As described above,⁴⁴ Petitioners and Nextel offer quite different services, and any relative impact the rebanding plan would have on these parties would have little if any competitive effect since they primarily compete in different product markets. Even assuming Nextel and Petitioners compete in the same market, there is robust competition in the provision of dispatch services. In a 2001 decision approving the assignment of numerous SMR licenses from Chadmoore Wireless Group to Nextel, the Commission found that

Nextel is unlikely to be able to exercise market power in these markets for several reasons: (1) there is competition provided by other firms offering trunked dispatch services in those locations; (2) we expect near-term and long-term competitive entry into the trunked dispatch market; and (3) for some consumers, traditional dispatch, private dispatch or data dispatch are viable alternatives to trunked dispatch, providing additional constraint on Nextel.⁴⁵

Market conditions have only become more competitive since this 2001 decision, with Verizon, Sprint PCS, and ALLTEL now offering push-to-talk service to customers.⁴⁶

The *R&O* will in no way undermine this strong competition. There is no basis to Petitioners’ argument that the retuning of their channels will result in customer churn and the

⁴³ *Id.* at 12.

⁴⁴ *See supra*, pages 8-9.

⁴⁵ *Applications of Chadmoore Wireless Group and Various Subsidiaries of Nextel Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 21105, ¶ 13 (2001) (footnotes omitted).

⁴⁶ *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20597, ¶¶ 89, 152 (2004).

loss of customers by Petitioners.⁴⁷ Indeed, as described above, none of Skitronics's channels will be retuned; it thus obviously faces no risk of customer churn under Petitioners' own theory. Petitioners claim that MRA lost customers in its prior "800 MHz migration experience," but in fact this experience was not an 800 MHz retuning, but rather the result of a voluntary, business decision by MRA to sell its 800 MHz channels to Nextel and to migrate its 800 MHz customers to systems operating below 512 MHz.⁴⁸

The relocation of MRA's 800 MHz systems to channels below 512 MHz presents significantly different circumstances than the retuning of channels within the 800 MHz band. Moving to the 512 MHz band, for example, necessitated replacing customer handsets with equipment generally perceived as less advanced and desirable than 800 MHz customer equipment and a less up-to-date network. MRA's voluntary migration of its customers to systems operating below 512 MHz is not an "apples-to-apples" comparison to 800 MHz rebanding, and provides no basis for MRA to claim that it will lose customers as the result of the rebanding plan established by the *R&O*.

MRA has entered into numerous transactions in recent years in which it sold 800 MHz EA licenses to Nextel. It strains credulity to suggest that MRA would have repeatedly entered into such arrangements unless they were advantageous business decisions. It is not the Commission's regulatory responsibility to protect MRA's customer base from the vicissitudes of

⁴⁷ Stay Motion at 12.

⁴⁸ Comments of MRA on Supplemental Comments of the Consensus Parties, at 12 (Feb. 10, 2003). Perhaps MRA is attempting to replicate that sale for its Colorado site-specific licenses by means of the instant pleading. *Cf.* 47 C.F.R. § 1.935 (FCC "anti-greenmailing" rule restricting the filing of strike petitions in licensing proceedings).

a competitive marketplace or preserve what MRA calls its “competitive advantage of inertia.”⁴⁹ This certainly provides no reason to delay 800 MHz rebanding.

As explained above, the Commission has designed the rebanding process to minimize any disruption of incumbent operations. MRA, like all other incumbents that will be retuned, will have the right to negotiate retuning agreements to ensure an orderly transition to its replacement channels as provided under the *R&O*. These channels will be comparable to their existing channels, and the retuning process for MRA’s site-specific facilities will be straightforward. A Transition Administrator will oversee the entire process to promote a smooth rebanding process, and incumbent licensees will have access to mediation by the Transition Administrator or the Commission’s complaint process in the unlikely event a problem arises.

B. Petitioners Have Failed to Show That They Will Be Irreparably Harmed

Petitioners devote only three short paragraphs to their attempt to show that denial of the Stay Motion will cause them irreparable harm. They simply repeat their unsupported claims that they will suffer customer churn from retuning. Petitioners’ conclusory assertions are no substitute for a detailed, documented showing of irreparable injury. As described above, the record contradicts Petitioners’ claims; Skitronics will not be retuned at all, and the rebanding process is carefully crafted to prevent disruption to MRA’s service when its few channels are retuned out of channels 1-120.

Hundreds if not thousands of licensees have been relocated to different spectrum channels pursuant to various Commission orders adopted over the years, including the relocation of point-to-point microwave incumbents in the Personal Communications Service bands and the

⁴⁹ Comments of MRA on Supplemental Comments of the Consensus Parties at 2 (Feb. 10, 2003).

relocation of incumbents from the Upper 200 SMR channels. As noted in the *R&O* (§ 148), these incumbent relocations were successful in providing the incumbent licensees comparable spectrum and avoiding disruption of their services. Petitioners offer no reason why this success will not be repeated in the reconfiguration of the 800 MHz band. Moreover, as discussed above, Petitioners' purported evidence – that MRA lost customers in a prior channel retuning – turns out not to have been a comparable channel retuning within 800 MHz at all, but rather a voluntary (and assumedly profitable) sale of its 800 MHz channels in certain markets. Petitioners fail in their attempt to show irreparable injury and thus have not justified the grant of their Stay Motion.

C. The Public Interest and Potential Harm to Other Parties Warrant Denial of Petitioners' Stay Motion

The issuance of a stay pending appellate review of the *R&O* would delay indefinitely 800 MHz band reconfiguration. As described above, reconfiguration is critical to eliminating the root cause of the interference that has plagued public safety systems in the 800 MHz band – a problem that is increasing as public safety and CMRS operators deploy additional facilities to meet increased service requirements. Clear, uninterrupted radio communication is an essential public safety tool, and every blocked or garbled call hinders the ability of public safety personnel to do their job and potentially exposes them to grave danger. This is all the more true as public safety agencies confront the challenges of protecting the nation against terrorist attack.

Petitioners make light of the risks of the current interference problem, asserting that it can be adequately managed for the time being through the interference abatement measures adopted in the *R&O*. The leading public safety organizations “strongly disagree” with this assertion in an opposition they have filed to the Stay Motion.⁵⁰ The Commission considered and rejected

⁵⁰ Public Safety Opposition at 2.

proposals – including the so-called “Balanced Plan” – that would have relied on interference mitigation measures alone to address the problem. Nothing in the Stay Motion comes close to raising doubt about the Commission’s conclusion, which was reached after robust debate and comment on an extensive, well-developed record. Simply put, interference abatement measures are an important supplement but in no way a substitute for rebanding. They inherently rely on after-the-fact, stop-gap measures that, in the absence of rebanding, may prove too late to prevent interference that places lives at risk. *As the leading public safety organizations have stated, “[r]eliance on ‘best practices’ and after-the-fact interference mitigation is simply inadequate to protect our first responders.”*⁵¹

Every day of delay in realigning the 800 MHz band prolongs the current environment in which first responders are placed at risk. A stay would introduce unacceptable delay and uncertainty into this process. As the public safety community has made clear, until an effective remedy is implemented, “the interference problem will continue without a comprehensive solution in sight, and sooner or later a first responder will be injured or killed because they failed to receive a critical radio message or were unable to call for help in a dangerous situation.”⁵²

Nextel will also suffer harm from delay. Upon satisfactory clarification of a number of issues that have been raised in recent *ex parte* filings, Nextel is prepared, in cooperation with the Transition Administrator and other 800 MHz licensees, to move expeditiously in implementing

⁵¹ See Letter from Vincent Stile, Association of Public-Safety Communications Officials-International, Joseph Polisar, International Association of Chiefs of Police, Wayne Gay, National Sheriffs’ Association, Ernest Mitchell, International Association of Fire Chiefs, to FCC Chairman Powell, at 2 (April 22, 2004) (emphasis added) (April 22, 2004 Public Safety Letter). See *R&O* ¶ 119 (“It would be scant consolation for a public safety officer subjected to a life-threatening communications failure to know that he or she could report the problem so that technical fixes could eventually be applied to fix it – or not.”).

⁵² April 22, 2004 Public Safety Letter at 2.

band realignment. This will involve a multi-billion dollar commitment by Nextel, as well as the dedication of thousands of hours of work by Nextel personnel. A stay would interrupt the extensive planning and financial commitments Nextel is undertaking, and create significant uncertainty. The delay caused by a stay will also prolong the period in which Nextel and other CMRS carriers must compromise their networks to mitigate interference on a case-by-case basis in the current spectrum environment. As the Consensus Parties explained in this proceeding, interference mitigation measures without rebanding are not only ineffective in remedying the interference problem, they place substantial burdens and spectrum inefficiencies on the operation of CMRS networks.⁵³ The Commission agreed with this analysis, finding in the *R&O* (§ 120) that *the “record supports our conclusions about the high transactional costs of employing case-by-case remedies alone to abate harmful interference to public safety systems in the 800 MHz band.”* The equities point in one direction: denial of the Stay Motion.

III. CONCLUSION

Nextel urges the Commission to deny the Stay Motion. It falls far short of satisfying the standard for granting a stay. Petitioners fail to show that any aspect of the *R&O* is likely to be

⁵³ *Ex Parte* Submission of the Consensus Parties at 21-23 (Aug. 7, 2003).

overturned on appeal, and a stay would only delay the comprehensive resolution of an interference problem that threatens the safety of first responders across the nation.

Respectfully submitted,

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November 26, 2004

Certificate of Service

I, Charles W. Logan, hereby certify that on this 26th day of November, 2004, I caused true and correct copies of the foregoing Opposition of Nextel Communications, Inc. to Motion for Partial Stay to be mailed by electronic mail to:

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