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November 19, 2004

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Federal Communications Commission
Office of Secretary

Marlene Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

Re: Motion for Partial Stay of Decision Pending Appellate Review

Dear Ms. Dortch:

Enclosed is a motion for partial stay of FCC 04-16 being filed by Mobile Relay Associates and Skitronics, LLC, as well as ten copies, including copies for each of the Commissioners.

Out of an abundance of caution, Mobile Relay and Skitronics are filing this motion both manually and electronically on the ECFS filing system. Although being filed in two ways, they are one and the same document.

Sincerely,

David J. Kaufman

Enclosures
cc: Michael Powell, Chairman, FCC
Kathleen Abernathy, Commissioner, FCC
Michael Copps, Commissioner, FCC
Kevin Martin, Commissioner, FCC
Jonathan Adelstein, Commissioner, FCC
Mobile Relay Associates
Skitronics, LLC
Regina M. Keeney (via e-mail)
Robert Gurss (via e-mail)

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 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

To: The Commission

MOTION FOR PARTIAL STAY OF DECISION PENDING APPELLATE REVIEW

Mobile Relay Associates ("MRA") and Skitronics, LLC ("Skitronics") (collectively, "Movants"), pursuant to Section 1.41 of the Commission's Rules, hereby move for a partial stay of the Commission's decision, FCC 04-168, released August 6, 2004 in the captioned proceeding ("*Rebanding Decision*"). Specifically, Movants request that the Commission stay indefinitely pending appellate review those portions

of the *Rebanding Decision* which implement an involuntary modification of existing licenses to other spectrum; they ask that the so-called "reconfiguration" of the 800 MHz spectrum band not commence unless and until it is upheld by the U.S. Court of Appeals. Movants do not seek a stay of new rules pertaining to interference protection; nor do they seek a stay of the new rule allowing 900 MHz PMRS licensees to convert their licenses to SMR/CMRS.[1]

Each of the Movants has been an active participant throughout this proceeding. Each is a closely-held small business entity that has been providing 800 MHz band communications services in the public interest for well over twenty years.[2] Neither has ever been implicated in any instance of harmful interference to public safety operations. Neither has ever filed a complaint at the FCC alleging receipt of harmful interference from the operations of Nextel Communications, Inc. ("Nextel"), Southern Linc or any Part 22 cellular system operator. Each has thousands of mobile/portable units operating on its existing 800 MHz systems, and each would be required involuntarily to give up its current spectrum for other, virtually worthless spectrum under the *Rebanding Decision*.[3] Additionally, under the *Rebanding Decision*, each

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[1]Specifically, Movants do not seek a stay of the effectiveness of the following: a) changes to Part 22; b) revised Section 90.621(f); and c) new Sections 90.672 thru 90.675. Movants request that all other rules adopted in the *Rebanding Decision* be stayed pending appellate review.

[2]*See* MRA Reply Comments filed August 7, 2002, p.1; MRA Comments to the Consensus Parties Reply Comments, filed September 23, 2002, p.1; MRA Notice of Oral *Ex Parte* Presentation filed October 22, 2002 (Attachment, p.1); MRA Comments to Supplemental Comments of the Consensus Parties, filed February 10, 2003, p.1.

[3]Currently, Movants have a wide range of permissible uses under their 800 MHz licenses, as well as a wide scope of flexibility in terms of moving among permissible uses and the timing of movement to new technologies for their systems. If the new rules are implemented, Movants will be stripped of a large number of their current permitted uses, and will have to forego forever implementing digital technology.

would be required to retune or replace the mobile /portable units in their entirety, with no compensation whatever for the resulting customer churn. Thus, each of the Movants will be injured by the implementation of the *Rebanding Decision;* each has standing to seek this stay and to seek administrative reconsideration and (if no relief is provided) appellate review of the *Rebanding Decision.*

According to Commission precedent,[4] the standards for determining whether a stay is appropriate in a particular case are those originally set forth in *Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm.*, 259 F.2d 921, 925 (DC Cir. 1958) ("*Virginia Jobbers*"):

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits. (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. (4) Where lies the public interest?

As set forth below, Movants satisfy the grounds for obtaining a stay.

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[4]*See, e.g., In the Matter of the 4.9 GHz Band Transferred from Federal Government Use*, FCC 04-185, released August 2, 2004 at ¶ 5; *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 14508, 14515 (1998).

I. MOVANTS HAVE A STRONG LIKELIHOOD OF PREVAILING ON THE MERITS

A. The Commission Has Arbitrarily Treated Movants Worse Than Favored Licensees

Throughout the *Rebanding Decision*, the Commission reiterates that the current situation (of supposed crisis for Public Safety) is not Nextel's fault (¶ 300), and that therefore Nextel cannot be forced to cede spectrum without receiving equivalent value in return. *See, e.g.*,¶¶ 5, 12, 72, 211-12. The continued emphasis is upon value-for-value, not MHz-pop for MHZ-pop, as the Commission acknowledges that different spectrum is not fungible and that some spectrum has more permissible uses and more flexibility (and thus is more valuable) than other spectrum. *Id.*, ¶¶ 16, 32, 278. Similarly, the Commission goes out of its way, carving out special exceptions to its new 800 MHz channel configuration plan, just to accommodate a favored licensee, Southern Linc, to make certain that at the end of the day, Southern Linc will have received value-for-value with respect to spectrum lost and gained. *Id.*, ¶¶164-69 & App. G.

However, despite the fact that Movants raised their need for similar treatment in various pleadings and *ex parte* meetings with Commission staff,[5] the Commission declined to afford similar treatment to Movants and others in their class of licensees. Instead, the Commission confiscates Movants' existing spectrum and replaces it with far less valuable spectrum having far fewer permmissible uses and far less flexibility, eliminating Movants' ability to time their move to new technology based upon their unique

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[5]*See* MRA Reply Comments filed August 7, 2002, pp.6-8; MRA Comments to the Consensus Parties Reply Comments, filed September 23, 2002, pp.8-9; MRA Notice of Oral *Ex Parte* Presentation filed October 22, 2002; MRA Comments on Supplemental Comments of the Consensus Parties filed February 10, 2003, *seriatim*; MRA/Preferred/Silver Palm Joint Notice of Oral *Ex Parte* Presentation filed April 8, 2004 (Attachment, p.1); MRA Written *Ex Parte* Presentation filed June 14, 2004, *seriatim*.

business needs, as well as destroying Movants' respective balance sheets. The Commission made no attempt to justify this disparate treatment; rather, it chose not to discuss Movants' pleadings on this issue.

Patently, Movants are receiving replacement spectrum worth only a tiny fraction of the spectrum being confiscated from them. Movants currently hold SMR spectrum that traditionally has sold at a premium, both in Commission auctions and in the secondary markets. *See, e.g.* MRA Notice of Oral *Ex Parte* Presentation filed October 22, 2002 (Attachment, p.2); MRA Written *Ex Parte* Presentation filed October 25, 2002 (Attachment, p.1, estimating a difference of $2,160,000 between the fair market value of the MRA Denver spectrum to be confiscated and the replacement cellular-prohibited spectrum it would receive); MRA Comments on Supplemental Comments of Consensus Parties, filed February 10, 2003, pp.9-10; MRA/Preferred Joint Supplemental Comments filed July 15, 2003, *seriatim*; MRA Written *Ex Parte* Presentation filed June 14, 2004, p.1. But for the *Rebanding Decision*, this spectrum would either be available for Movants' long-term expansion via introduction of digital equipment (at a time of Movants' choosing based upon their unique needs and the evolving state of the equipment industry) or resale to others. The replacement spectrum will be forever barred from cellular usage and will have virtually no market value.

As noted, the Commission chose not to discuss this issue in the *Rebanding Decision*. The reason is that there is no possible justification for requiring that Nextel and Southern Linc receive value-for-value before being required to cede their current spectrum, but not requiring the same thing with respect to innocent incumbent licensees such as Movants.

The *Rebanding Decision*, ¶ 65, nn. 214-216, cited three cases to justify its claimed right to force involuntary modification of licenses – *California Metro Mobile Communications v. FCC*, 365 F.3d 38

(DC Cir. 2004); *Community Television, Inc. v. FCC*, 216 F.3d 1133 (DC Cir. 2000); and *Peoples B'casting Co. v. United States*, 209 F.2d 286 (DC Cir. 1953). However, none of these cases involved any issue of disparate treatment when engaging in involuntary license modification.

The Commission cannot discriminate within a class of licensees. *See, e.g., Telephone and Data Systems v. FCC*, 19 F.3d 655, 657 (DC Cir. 1994) ("*TDS II*"); *Telephone and Data Systems v. FCC*, 19 F.3d 42, 49-50 (DC Cir. 1994) ("*TDS I*"); *Melody Music v. FCC*, 345 F.2d 730 (DC Cir. 1965) ("*Melody Music*"). In the *Rebanding Decision*, the Commission modifies the licenses of its favored licensee, Nextel, only if and to the extent that Nextel voluntarily agrees in advance it is receiving benefits at least as great as the costs it would bear. At the same time, the Commission modifies the licenses of MRA and Skitronics involuntarily, eviscerates the fair market value of their licenses in doing so, and essentially confiscates their spectrum licenses.

On this ground alone, the *Rebanding Decision* is most likely going to be overturned as arbitrary and capricious agency action, inconsistent with *TDS I, TDS II*, and *Melody Music, supra*.

B. The Commission Understated the Value of Nextel's (and Southern Linc's) New 800 MHz Spectrum

The Commission acknowledges that the holder of an "EA" auction license in the 800 MHz band is not necessarily the licensee of that spectrum in the major metropolitan area whose name, for convenience, is used to identify the auction license, because an auction license, by its terms, conveyed only the right to operate on a non-interference basis to "grandfathered" incumbent licensees. *Rebanding Decision*, ¶321. Even if it were not so referenced, the Commission would be required to take official notice of that fact, because it is due to the Commission's own regulatory rulings in advance of Auction Nos. 34 and 36, the

auctions where the remaining "white space" in the lower 230 channels[6] was sold. In its rules for that spectrum, the Commission established that there would be *no forced migration of incumbents* and that auction bidders would be acquiring only the "white space" on the fringes of what was a mostly occupied band of spectrum, especially in urban areas. *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Second Report and Order*, 12 FCC Rcd. 19079, 19100 (1997) ("*800 MHz Second Report and Order*"), stating:

> We will not adopt mandatory relocation procedures for either SMR or non-SMR incumbents on the lower 230 channels. The record supports our tentative conclusion that requiring incumbents to migrate off this spectrum would be impractical *because there is no identifiable alternative spectrum to accommodate such migration.* [Footnote omitted.] In addition, it is likely that many of the incumbents who will operate on these channels will have relocated from the upper 200 channels, and we have already determined that such relocatees should not be required to relocate more than once. Therefore, EA [auction] licensees on the lower 230 channels will not have the right to move incumbents off their spectrum blocks unless the incumbent voluntarily agrees to move.

(Emphasis added.)[7]

In addition, the Commission made no change in the range of permissible uses of other portions of the 800 MHz band where SMR operations were permitted; thus, the 800 MHz channels between the General Category and the Upper 200 remained available for both analog and digital use, with the timing of any technology change vested in the individual licensee based upon evolving market conditions and its

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[6]These channels are the "General Category" channels (1-150, 851-854.75 MHz), plus the "lower 80" SMR channels, *i.e.*, 201-08, 221-28, 241-48, 261-68, 281-88, 301-08, 321-28, 341-48, 361-68, and 381-88.

[7]The Commission later reiterated this holding and increased the flexibility for incumbent licensees to modify their protected licenses. *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Memorandum Opinion and Order on Reconsideration,* 14 FCC Rcd. 17556, 17569-74 (1999) ("*800 MHz Reconsideration Order*").

unique needs.

In justified reliance upon that Commission-promulgated playing field, incumbent licensees such as Movants had no need to purchase redundant "auction" spectrum in the geographic areas where they already held incumbent spectrum licenses below the upper 200 channels; rather, it made sense for them to purchase auction licenses in adjoining or other geographic areas into which they might decide to expand. This is precisely what they did, with MRA purchasing an auction license for Pueblo, Colorado, rather than in Denver, Colorado where it already held 800 MHz spectrum, and Skitronics purchasing auction licenses in other parts of the Carolinas, rather than in North Carolina, where it already had a strong 800 MHz spectrum position.[8]

Thus, when Auctions Nos. 34 & 36 took place, potential bidders were placed on notice that they were acquiring only "white space", with no right to force incumbents to move out, and auction bidding proceeded accordingly. Where one acquires a "donut" around the edges of a metropolitan area, but not the "hole" in that donut containing the main city and close-in suburbs, there is a substantial additional cost to go into the secondary market and acquire, at arms'-length, that lucrative "hole", which is worth substantially more than the peripheral "donut."

Thus, for example, MRA holds the license for Denver, Colorado for 27 channels as to which

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[8]*See Public Notice, "Wireless Telecommunications Bureau Grants 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Licenses"* 16 FCC Rcd. 1427, 1429 (WTB, 2000) (as to MRA's purchases in the Tampa, FL and Pueblo, CO BTAs in Auction No. 34); *Public Notice, "Wireless Telecommunications Bureau Announces It Is Prepared to Grant 800 MHz Specialized Mobile Radio (SMR) Service Frequencies in the Lower 80 Channels Auction Licenses after Final Payment Is Made"* 16 FCC Rcd. 3182, 3263 (WTB, 2000) (as to Skitronics' purchases in various other BTAs in the Carolinas and West Virginia, but not in the Raleigh/Durham, NC BTA, in Auction No. 36).

Nextel is the "auction" licensee. As another example, Skitronics holds the license for Raleigh/Durham for two channels as to which Nextel is the "auction" licensee.[9]

However, the *Rebanding Decision* arbitrarily gives the hole in each donut to the auction licensee for free! There are no arms'-length negotiations, there is no possibility of any incumbent licensee deciding not to sell to the auction licensee -- it is simply confiscation of the spectrum from the incumbent in favor of the auction licensee. This is a multi-billion dollar windfall for the likes of Nextel and Southern Linc, far more than is reflected in the Commission's calculations of "equitable compensation." For example, within the city of Denver, Colorado alone, Nextel will be obtaining 27 brand new 800 MHz SMR channels that today belong to MRA!

To grasp the scope of this windfall, one must remember that Nextel, as a private entity, had no right to either confiscate the incumbents' co-channel spectrum or even to obtain it via eminent domain. The presence of incumbents reduced the value of this spectrum far more than the $736M reduction calculated by the Commission.[10] Unlike the 1.9 GHz spectrum involved in this proceeding, this new "donut" spectrum at 800 MHz is concentrated in the largest urban areas, where spectrum will be needed first. More importantly, this spectrum is more valuable than 1.9 GHz spectrum, because Nextel subscribers can utilize

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[9]Each Movant also holds substantial non-auction 800 MHz spectrum below the upper 200 channels which is eligible for use and being used as SMR spectrum.

[10]*See Rebanding Decision*, ¶¶ 319-322. The Commission reduced the value of Nextel's "lower 80" spectrum based on assumptions that: a) incumbents hold an average of 0.08 MHz of lower 80 spectrum in Nextel markets; b) Nextel markets have a total population of 234 million; and c) lower 80 spectrum is worth $1.49/MHz-pop. That equates to a reduction of $28M.

The Commission reduced Nextel's General Category spectrum holdings by 1.78 MHz on account of assumed holdings of incumbent licensees, which equates to a $700M reduction in value based upon a value of $1.70 per MHz-pop. (1.78 MHz x 234M pops @ $1.70 per MHz-pop = $708M.)

it using their existing installed base of customer units! There is none of the disruption that accompanied the change-over from TDMA to GSM in the cellular/PCS industry. This feature alone adds over another billion dollars to the value of the 800 MHz spectrum being confiscated from incumbents and redistributed to Nextel and Southern Linc.[11] As such, it constitutes an independent ground on which the *Rebanding Decision* is likely to be reversed.

C. The *Rebanding Decision* Is Unfair, Retroactive Rule Making

As discussed in Part I.B above, the Commission has engaged in unfair retroactive rulemaking, undoing the playing field which the Commission set up in *800 MHz Second Report and Order, supra*. The Commission, at ¶ 178, makes the bald statement that: "... a licensee electing to relocate to the ESMR block voluntarily, must receive clear, incumbent-free replacement spectrum." However, nowhere does the Commission explain why or how a licensee that knowingly acquired incumbent-encumbered spectrum (and paid less for it precisely because it was and would remain incumbent-encumbered) is now entitled to receive incumbent-free spectrum. Nor did the Commission explain how the clearing of competing SMR incumbent licensees has any connection whatsoever to the supposed interference problems of Public

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[11]The 800 MHz spectrum being confiscated to deliver to Nextel and Southern Linc is worth far more than $1.70 per MHz-pop. The recent agreement between Verizon Wireless and Nextwave is comparable to this 800 MHz spectrum, because there, as here, the purchaser (Verizon) is obtaining spectrum that is already programmed to work with its existing customer units and its existing infrastructure equipment in the areas where it needs additional capacity the most. According to Nextwave's November 4, 2004 filing with the bankruptcy court seeking approval of its Verizon agreement, Verizon is paying $3 billion cash for Nextwave's 27 PCS licenses (10 MHz each) and its one 24 MHz LMDS license in Las Vegas. Based upon the list of the PCS licenses in that filing, Movants have calculated the price to be approximately $3 per MHz-pop. Legg Mason released an analysis on November 5, 2004 (copy attached for convenience) calculating the price to be $2.85 per MHz-pop. Even assuming the lower Legg Mason figure is correct, that is far more than the per-MHz pop price the Commission estimated the new Nextel spectrum to be worth in the *Rebanding Decision*.

Safety. The Commission gave no explanation of any of this, because the only possible explanation is that doing so benefits Nextel, harms its SMR competition, and thus materially sweetens the pot for Nextel.

Had incumbent licensees such as Movants known that the Commission was prevaricating and would be forcing them to migrate off the spectrum in favor of the auction licensee, they would have sought appellate review of such a new regulatory structure in advance of Auctions Nos. 34 & 36, and if they failed to obtain relief, they would have bid differently during those auctions. This aspect of the *Rebanding Decision* constitutes a third independent ground for reversal on appellate review.

D. The *Rebanding Decision* Materially Harms Competition

In its Notice of Proposed Rule Making herein ("*NPRM*"),[12] the Commission proposed to involuntarily modify the licenses of all of Nextel's 800 MHz non-digital dispatch service competitors so as to: a) require each of them to physically retune or replace all existing customer units at their own expense; and b) forever prohibit them from implementing digital technology. Thus, the *NPRM* placed Nextel's non-digital competitors, including MRA and Skitronics, at a competitive disadvantage while it remained pending, as none could construct any digital upgrade while faced with the prospect of having to tear it down if the *NPRM* were adopted as proposed, and as Nextel could (and did) tell prospective customers that the customers would have substantial retuning disruption in the near future unless the customer chose Nextel over the competition.

The *Rebanding Decision* has exacerbated the competitive imbalance, and threatens to provide

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[12]*Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, WT Docket No. 02-55*, 17 FCC Rcd. 4873, 4892-93 (2002), as modified in *Erratum*, 17 FCC Rcd. 7169 (PSPWD 2002).

Nextel with near-monopoly power in the dispatch services market. Specifically, the *Rebanding Decision* is precisely crafted so that no existing Nextel customer will have its operations disrupted by retuning or replacement of the customer's existing mobile/portable units, while all of Nextel's 800 MHz dispatch competitors will have to call in their customers' fleets for retuning and/or replacement of all of the existing customer units. Movants have explained that based upon the prior 800 MHz migration experience, approximately 50% of their customer base will churn off the system and onto Nextel under such circumstances.[13] As Movants explained, and again, based upon their actual, real-world experience with Nextel during the last forced migration, even with redundancy, there is a huge amount of customer churn, particularly churn onto the competing Nextel system, which is uniquely situated to know the timing of the switchover, and therefore well-situated to know when to solicit an incumbent's customers with special offers to achieve that churn. *Id.*

Nextel is already the dominant player in the dispatch services market, where the cellular and PCS carriers licensed under Parts 22 and 24 generally do not compete. In the Colorado and Carolina markets served by Movants, this abrupt loss of customers, coupled with the virtual elimination of the value of their spectrum holdings, will most likely force them out of the business and leave Nextel with virtual monopoly power. As MRA explained below, in a submission which Nextel did not even bother to rebut and which the *Rebanding Decision* declined to discuss:

> Nextel's marketing department used the occasion of MRA's customer relocation [from 800 MHz to 470/512 MHz band in southern California] to poach MRA's customers, emphasizing to them in sales calls the inconvenience associated with replacement/retuning

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[13] *See, e.g.*, MRA Comments on Supplemental Comments of the Consensus Parties filed February 10, 2003, pp.11-12; MRA Written *Ex Parte* Presentation filed October 25, 2002, *seriatim*.

> of the customer's entire fleet all at once, and the relative ease of simply becoming a Nextel customer instead. Despite MRA's best efforts at customer retention, over 50% of MRA's California customer base churned off MRA's system rather than relocate to new channels. Only the absolute size of the southern California fleet dispatch market (the world's largest consumer of fleet dispatch services) enabled MRA's southern California operations to survive. **Were MRA to suffer a similar percentage loss in Colorado (where fixed costs are spread over a smaller number of units), the operation would be forced out of business.**

(Emphasis added.) MRA Comments on Supplemental Comments of Consensus Parties filed February 10, 2003, p.12. Because the *Rebanding Decision* fails to explain why the artificial creation of such undue market power is in the public interest, it is susceptible to reversal on this fourth independent ground.

II. MOVANTS FACE IRREPARABLE HARM

As discussed in Part I.D, *supra*, when forced re-channelization of an analog 800 MHz system occurs, there is tremendous customer churn, of approximately 50% of the pre-existing customer base. However, as harmful as relocation of an incumbent system from one channel to another is under the best of circumstances, it is disastrous in this instance, because without a stay Movants will have to migrate their customers not once, but twice – first to the valueless spectrum to be reserved for non-EA licensees, and then again to the former NPSPAC channels at the upper end of the band, after prevailing on the issue of value-for-value.

Without a stay, this will be a pyrhhic victory, because approximately 75% of their customers will churn off their systems forever due to the disruption, and Movants will be forced out of business despite prevailing on the merits. Thus, the harm to Movants is irreparable, and cannot be remedied later.

The absence of a stay will work materially to the benefit of Movants' major competitor, Nextel, because Nextel customer phones already operate across not only the 800 MHz band but also the 900

MHz band. Thus, no Nextel customer will have to physically bring his or her phone to a Nextel store for retuning or replacement, and Nextel faces no customer churn as a result of the *Rebanding Decision*. Rather, Nextel can gear up to solicit Movants' customers (and those of other independent Nextel competitors around the country) with special offers timed to coincide with retuning/replacement schedules. Because the *Rebanding Decision* does not call for reimbursement to Movants for their financial losses due to customer churn occasioned by their forced migration, Movants can never be made whole if they are required to move *pendente lite*.

III. NO PERSON IS IRREPARABLY HARMED BY A STAY

The Commission's rationale for the forced spectrum migration portion of the *Rebanding Decision* is that alternative rule changes such as codification of "Enhanced Best Practices" and strict ESMR/cellular responsibility for interference to Public Safety (both of which the Commission has implemented in the portions of the *Rebanding Decision* as to which no stay is requested) are allegedly short term solutions.[14] Only over the long term were these measures ostensibly not sufficient in themselves, said the Commission:

> Proposals advancing the use of Enhanced Best practices – however defined – as the sole remedy for interference abatement have a significant drawback that makes them problematic as a long-term solution: they incur high transactional costs for all parties and would have to be continuously applied to an increasing number of incidents that are inevitable as use of the 800 MHz band intensifies.[342]
>
> [342]This is due to the increased use of this band by public safety licensees as well as the increased use necessitated by the expanding subscribership of ESMR and cellular systems.

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[14]*See, e.g., Rebanding Decision* at ¶ 3:

> As the short-term vehicle by which we ensure a more effective response to the ongoing interference problem, we implement technical standards defining unacceptable interference in the 800 MHz band as well as procedures detailing who bears responsibility for abating this interference and what steps responsible parties must take.

See also, id., at ¶121: ". . . we do not question the short-term efficacy of Enhanced Best Practices . . ."

Rebanding Decision, at ¶ 119, p.67. Thus, by the Commission's own admission, the forced migration of innocent licensees such as Movants is needed for the long-term, and public safety licensees can continue to operate effectively using the alternative solutions during the temporary period of a stay pending appeal.

IV. THE PUBLIC INTEREST MILITATES IN FAVOR OF A STAY

As the Commission itself noted in the *Rebanding Decision*, ¶ 18 (2nd bullet), ". . . there are significant short-term costs associated with band reconfiguration . . ." The Commission acknowledged that the absolute worst possible result for public safety entities and for the public at large would be the spectre of a partially-implemented rebanding effort being halted in midstream, with some areas rebanded and others not. Given the likelihood of reversal on appeal and the disagreement within the Public Safety community on the merits of rebanding in the first place,[15] the public interest militates against taking the risk of creating precisely this worst-case scenario by commencing the rebanding effort piece-meal in advance of appellate review. Rather, the public interest lies with beginning a rebanding effort only if and when the Commission can be assured the process will continue unabated to nationwide completion.

CONCLUSION

The *Rebanding Decision* arbitrarily treats similarly situated licensees differently, protecting those which are arbitrarily favored and destroying those who are not so favored, without any discussion of why one group deserves special treatment and the other group does not. It also understates by far the value of the new 800 MHz spectrum they are receiving. It constitutes unfair, retroactive rule making, undoing the Commission's own recent decisions (upon which Movants and the public relied) in setting up the

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[15] *See, e.g.*, Comments of City of Baltimore.

structure of the 800 MHz band for auctions nos. 34 & 36. Finally, it virtually destroys the ability of Nextel's competitors in the dispatch services market to compete with Nextel, and facilitates Nextel achieving a near-monopoly position which it could not attain on a level playing field. As such, the *Rebanding Decision* is unlikely to survive appellate review.

The Movants will suffer immediate and material harm if the forced migration onto new spectrum begins before they have exhausted their right to appellate review, and because of the nature of that harm, once it is inflicted it cannot be cured later. Once their respective businesses are destroyed, it will be too late to try to put the broken eggs back together again. Conversely, no person will suffer any irreparable harm from a temporary stay pending appeal. The immediate implementation of the new Commission rules regarding interference protection will suffice in the short term in those areas where public safety claims a need for rebanding. Where, as in many areas, the public safety community is not suffering significant harmful interference and opposes the forced rebanding to new spectrum, a stay actually dovetails with both its short-term and long-term needs.

Finally, the worst possible result is a partially completed nationwide rebanding being halted in midstream. The risk of such a nightmarish result compels the issuance of a stay pending appellate review.

Respectfully submitted,
MOBILE RELAY ASSOCIATES
SKITRONICS, LLC

November 19, 2004

By: David J. Kaufman /SO

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NEXTWAVE AGREES TO SELL SPECTRUM TO VERIZON WIRELESS FOR $3B

November 5, 2004

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Price (11/04/04)	$41.08
S&P Index (11/04/04)	1,161.67
52-Week Range	$42 – $32
Market Cap.($mm)	$115,147.2
Shr.O/S-Diluted (mm)	2,803.0
Enterprise Val. ($mm)	NA
Avg Daily Vol (3 Mo)	6,556,493
LT Debt/Total Cap.	53.5%
Net Cash/Share	NA
Dividend ($)	$1.54
Yield (%)	3.7%
Book Value/Share	$12.70
Target Price	NA

FY Ends: Dec	**2003**	**2004**	**2005**
Revenue($mm)	$67,752.0A	$71,398.0E	$75,383.0E
Earnings EPS (Net)			
1Q	$0.68A	$0.58A	$0.62E
2Q	$0.69A	$0.64A	$0.65E
3Q	$0.67A	$0.65A	$0.71E
4Q	$0.58A	$0.64E	$0.71E
Fiscal Year	$2.62A	$2.51E	$2.70E
Previous Est.	$2.62A	$2.51E	$2.69E
EV/Revenue	NA	NA	NA
P/E	15.7x	16.4x	15.2x

As speculated for the last few weeks, NextWave (NXLCQ) has agreed to sell all of its PCS spectrum licenses to Verizon Wireless (VZ-VOD) for $3B as part of NextWave's plan for emerging from Chapter 11 bankruptcy. NextWave is expected to file the plan soon in federal bankruptcy court and is subject to approval by shareholders and a bankruptcy judge, which we expect early next year.

The transaction must also pass antitrust muster and related license transfers must be reviewed by the FCC. We are not aware of any potential deal breakers, though the spectrum acquisition by Verizon Wireless will presumably receive careful government scrutiny, particularly the additional 20 MHz in New York. We understand that the additional spectrum in New York City would raise Verizon Wireless's spectrum holding there to 65 MHz, below a "cap" applied by regulators in some markets in evaluating the Cingular merger with AT&T Wireless.

With the terms announced matching those speculated, any response by the market should be muted. However, we view this transaction as strategically important and likely necessary for Verizon to plug a deficient spectrum position in its most important regional market (New York City) and bolstering its holdings throughout the Northeast corridor with 20 MHz in Boston, Washington, DC, and Baltimore, enabling it to continue to aggressively pursue subscribers, expand wireless data capabilities, more efficiently deploy capital and preserve its industry leadership position. In addition, the company added 10 MHz of spectrum in several markets including a new market for Verizon Wireless, Tulsa, Oklahoma.

The $2.85/MhzPOP value compares to the $4.63 the company recently paid for New York spectrum and $1.50-$1.70 other comparable industry spectrum deals and roughly half the price Nextwave originally purchased these licenses for. Ascribing a similar multiple to the 20 MHz of New York City spectrum, the remaining per Mhz pop valuation of roughly $1.90-$1.95 is marginally ahead of recent deal comps.

Company Description

Verizon companies are the largest providers of wireline and wireless communications in the United States, with 54 million access lines and 40 million wireless customers. Verizon holds a 55% stake in Verizon Wireless.

Important Disclosures and Certifications

I, Daniel Zito, certify that the views expressed in this research report accurately reflect my personal views about