

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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)	
)	ET Docket No. 00-258
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)	RM-9498
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	ET Docket No. 95-18
)	
Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	

JOINT REQUEST FOR CLARIFICATION

TMI Communications and Company, Limited Partnership (“TMI”) and TerreStar Networks Inc. (“TerreStar”), by their attorneys, hereby request that the Commission clarify or otherwise modify certain aspects of the *Report and Order, Fifth Report and Order, Fourth*

Memorandum Opinion and Order, and Order (“*R&O*”) released on August 6, 2004 in the above-captioned proceeding.¹

The *R&O* requires Nextel Communications, Inc. (“Nextel”) to relocate Broadcast Auxiliary Service (“BAS”) licensees from their current frequencies in the 1990-2110 MHz band to a new set of channels in the 2025-2110 MHz band within *30 months* of the effective date of the *R&O*. At the same time, however, the *R&O* requires a Mobile Satellite Service (“MSS”) licensee to reimburse Nextel for this relocation if the licensee begins service before the end of a *36-month* 800 MHz band reconfiguration period — a period that has no definite start date and that could be subject to delays for a variety of reasons, including Nextel’s recently announced merger with Sprint.

There is no support in the record for tying the potential reimbursement liability of an MSS licensee to the open-ended 36-month reconfiguration period, particularly given that Nextel has committed to a 30-month BAS relocation period with a definite start-date and will be compensated for its costs with a credit as part of the 800 MHz true-up.

In view of the foregoing, the Commission should either (i) relieve an MSS party that enters the market after Nextel’s *30-month* BAS relocation period from having any reimbursement obligation to Nextel, or (ii) at a minimum, clarify that the MSS reimbursement obligation ends 36 months after the effective date of the *R&O* (i.e., January 21, 2008) and *not* at the end of the indefinite 36-month 800 MHz band reconfiguration period. Otherwise, despite facing strict milestones that require 2 GHz MSS parties to begin service or launch their satellites in mid-2007, MSS operators will face an inequitable and open-ended reimbursement obligation which was not contemplated in the Nextel BAS relocation plan.

¹ 19 FCC Rcd 14969 (2004).

I. Background

TMI is a Canadian satellite operator holding a FCC spectrum reservation to provide 2 GHz MSS in the United States.² TMI filed an application on December 11, 2002 for authority to assign its spectrum reservation to its affiliate TerreStar.³ That application is currently pending, which is why this pleading is being jointly filed by TMI and TerreStar.

In 1997, the Commission reallocated the 1990-2025 MHz band for use as MSS uplink frequencies, thus requiring relocation of incumbent BAS licensees.⁴ Subsequently, in February 2003, the Commission reallocated a portion of this band — 1990-2000 MHz and 2020-2025 MHz — for advanced wireless services (“AWS”).⁵ As part of that decision, the Commission provided for the recovery by MSS licensees of some of their band-clearing costs from subsequent AWS entrants and vice versa.⁶ In the July 2004 *R&O* and at Nextel’s request, the Commission further reallocated a portion of the band — 1990-1995 MHz — to Nextel as part of

² TMI filed its letter of intent to reserve spectrum in the 2 GHz MSS band in 1997, *see* File No. SAT-LOI-19970926-0061, and the FCC granted the reservation in 2001, *see TMI Communications and Company, L.P.*, 16 FCC Rcd 13808 (2001). The International Bureau subsequently issued an order in 2003 declaring the reservation null and void. *See TMI Communications and Company, L.P.*, 18 FCC Rcd 1725 (Int’l Bur. 2003). The Commission, however, reinstated TMI’s spectrum reservation in June 2004. *See TMI Communications and Company, L.P.*, 19 FCC Rcd 12603 (2004).

³ *See* File No. SAT-ASG-20021211-00238.

⁴ *See 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, *First Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 7388 (1997). The 2165-2200 MHz band was reallocated in the same order for MSS downlink frequencies. *See id.*

⁵ *See 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, IB Docket No. 99-81, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 FCC Rcd 23638 (2003).

⁶ *See id.* at 23644, ¶ 9.

an overall reorganization of spectrum used by Nextel and public safety operators in the 800 MHz band. In return for this and other new spectrum being allocated to Nextel, and again at Nextel's request, the *R&O* provides that Nextel must bear the initial cost for relocating all BAS incumbents in the 1990-2025 MHz band and must complete this process within 30 months of the effective date of the *R&O* — i.e., by July 21, 2007.⁷ Nextel's BAS relocation costs are to be credited to the company as part of the 800 MHz true-up process⁸.

In addition to allowing Nextel a credit for its BAS relocation costs, the *R&O* allows Nextel to seek *pro rata* reimbursement for certain of those costs from MSS licensees that enter the market before the end of the 36-month period for reconfiguration of the 800 MHz band. According to the *R&O*, the 36-month reconfiguration period will begin on the date of an FCC public notice announcing the date for beginning reconfiguration in the first 800 MHz geographic service area.⁹ However, Nextel has since requested in an *ex parte* filing that this start date be

⁷ The *R&O* provides that its effective date is 60 days after publication in the Federal Register. *See R&O*, 19 FCC Rcd at 15128, ¶ 341. The Federal Register publication date was November 22, 2004. *See* 69 Fed. Reg. 67823 (Nov. 22, 2004). Thus, the effective date of the *R&O* is January 21, 2005, and the BAS relocation period will therefore end 30 months after that on July 21, 2007.

⁸ To ensure that the value of the that 1.9 GHz of spectrum awarded Nextel does not exceed Nextel's costs, and thus constitute a windfall, the FCC has established a financial reconciliation or "true-up" process. *See R&O*, 19 FCC Rcd at 15123-25, ¶¶ 329-32. At the end of the 36-month 800 MHz band reconfiguration, Nextel will be given a credit for the value of the 800 MHz spectrum it has relinquished plus Nextel's costs to reconfigure the 800 MHz band and to clear the 1.9 GHz band of BAS incumbents minus funds received by Nextel as reimbursement for the 1.9 GHz band clearing. *Id.* at 15099, 15124, ¶¶ 261, 330. If Nextel's credits total less than the value of the 1.9 GHz spectrum, then Nextel will be required to pay the difference to the U.S. Treasury thirty days after release of a public notice to that effect by the Wireless Telecommunications Bureau. *Id.* at 15124, ¶ 330.

⁹ *See id.* at 14986-87, ¶ 28. The geographic regions for 800 MHz public safety spectrum, typically spanning a state, were established by the FCC in 1987 and are overseen by the National Public Safety Policy Advisory Committee ("NPSPAC"). Hence, *R&O*'s reconfiguration plan is based on NPSPAC regions. *See id.* at 15075-76, ¶ 201.

delayed to the date on which band reconfiguration in the first geographic region commences.¹⁰ As discussed further below, having the MSS reimbursement obligation tied to an uncertain time period unrelated to Nextel's actual BAS relocation period -- which TMI/TerreStar support, is unfair to MSS licensees and has no basis in the record. The R&O accordingly should be clarified or otherwise modified as stated herein.

II. The Commission Should Not Require MSS Licensees to Reimburse Nextel for Market Entry Beyond a Fixed 36-Month Period from the Effective Date of the R&O

Nextel committed in this proceeding to pay the upfront costs of relocating BAS incumbents and to complete the relocation process within 30 months.¹¹ Hence, based on Nextel's commitment and the prior support of the BAS community, the *R&O* requires that Nextel complete such relocation within 30 months of the *R&O*'s effective date.¹² Nextel has not requested that it be reimbursed for these costs by MSS licensees¹³ given that Nextel is already being reimbursed for these costs in the form of a credit to be issued toward the value of the 1990-1995 MHz spectrum that it has been awarded, subject to the 800 MHz true-up process. The *R&O*'s requirement that MSS licensees reimburse Nextel if they enter the market during the 36-

¹⁰ See Letter from to Regina M. Keeney to Marlene H. Dortch, dated Sept. 16, 2004, at 3. The FCC has requested comment on this matter in a public notice released on October 22, 2004. See FCC Public Notice, "Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding," WT Docket No. 02-55, FCC 04-253 (released Oct. 22, 2004).

¹¹ See Joint Proposed Relocation Plan of MSTV, NAB and Nextel, May 3, 2004.

¹² See *R&O*, 19 FCC Rcd at 15095, ¶ 252.

¹³ In their joint filing on May 3, 2004, MSTV, NAB and Nextel stressed that their proposal to have Nextel relocate BAS operators within 30 months would relieve MSS licensees from the obligation to make upfront payments for the relocation and thus facilitate MSS. See Joint Proposed Relocation Plan of MSTV, NAB and Nextel, May 3, 2004, at 7-8. The joint filing suggested that MSS and terrestrial licensees make payments into the U.S. Treasury to fund their *pro rata* share of the costs, see *id.* at 8, but Nextel did not request that any payments be made to it for reimbursement of its costs beyond the credit it would receive from the FCC as part of the 800 MHz true-up.

month reconfiguration period thus has no record support. The Commission's choice of this period as opposed to the 30-month BAS relocation period also is nowhere explained and runs counter to Nextel's original pledge to shoulder the full cost of BAS band clearance and to complete that relocation within 30 months.¹⁴

Even assuming *arguendo* that it is equitable for MSS parties to make a contribution to BAS clearance if they use the 2000-2020 MHz band within 36 rather than 30 months, the *R&O* makes this obligation open-ended because it is currently unclear when this 36-month period will commence or whether reconfiguration of the 800 MHz band can actually be completed in that time. According to the *R&O*, the 36-month reconfiguration period will only commence when the FCC issues a public notice to that effect and following approval of the timetable for market-by-market reconfiguration proposed by the Transition Administrator ("TA").¹⁵ Yet, even that uncertain start-date could now be delayed further for at least three reasons.

First, as noted earlier, Nextel has asked the FCC to make the start-date for the 36-month reconfiguration period the date when the actual reconfiguration of the first geographic region commences.¹⁶ Second, on November 12, 2004, the TA asked the FCC for an extension from November 29, 2004, until January 31, 2005, to file its initial band reconfiguration plan and

¹⁴ To the extent that the MSS contribution period was tied to the 36 month reconfiguration period for administrative purposes (i.e., so that any contributions payments due Nextel from MSS parties would be captured within the overall 36 month true-up period), this goal would be equally well served by capping the contribution period at 30 months from the effective date of the *R&O*. That date would still fall within the 36 month reconfiguration period and any MSS contribution made during the applicable period could still be accounted for under the true-up.

¹⁵ See *R&O*, 19 FCC Rcd at 14986-87, ¶ 28.

¹⁶ See note 10, *supra*.

timetable.¹⁷ As a result, if the foregoing requests are granted, and given that the TA's plan must first be reviewed and approved by the FCC's staff, the commencement date for band reconfiguration in the first region probably will not begin until April or May 2005, at earliest.

Finally, this month, Nextel announced that it has reached an agreement to merge with Sprint. Though the terms and conditions of the merger have yet to be filed with the FCC, it is clear that the magnitude of the merger may well affect the timing of the 800 MHz band reconfiguration process, and may create additional administrative issues related to the *R&O*.

Under the current rules, any delay in the start of the 36-month period will also move back the reimbursement cut-off date for MSS licensees. This additional, contingent liability for the MSS industry is unfair and does not appear to have been intended by either Nextel or the *R&O*. All MSS licensees are subject to strict construction milestones which generally require that service commence or launch be completed in 2007. Consistent with these long established milestones, Nextel's original band clearance plan proposed to relocate BAS incumbents within 30 months and the July 2004 *R&O* reflects this plan, thus ensuring that Nextel's BAS band clearance plan would conclude in mid 2007 prior to or at the start of service by most 2 GHz MSS operators.

Given the foregoing milestone schedule, it was obviously reasonable for the FCC to tie any contribution obligation of a MSS operator to the foregoing 30-month schedule or, at most, to a slightly longer, but fixed, 36-month period. Otherwise, the basic cost-sharing balance established in the *R&O* will be altered and MSS parties may be unfairly required to reimburse Nextel for a portion of the company's BAS relocation costs even though Nextel has never requested this.

¹⁷ See Motion Of The 800MHz Transition Administrator For Extension Of Time, dated November 12, 2004, at 1.

Beyond that, there is no record basis for applying traditional cost-sharing rules to the band clearance obligation assumed by Nextel when it requested use of the 1990-1995 MHz spectrum. The *R&O* provides a framework for a complex series of transactions whereby Nextel will relinquish certain spectrum for other spectrum in various bands. As part of the quid pro quo for the new spectrum Nextel is receiving in this arrangement, Nextel agreed to assume the costs of clearing the entire 1990-2025 MHz band of BAS incumbents within 30 months. As such, there is actually no public policy reason why there should be any reimbursement obligation for MSS licensees that runs through the end of either the 36-month 800 MHz reconfiguration period or the period during which Nextel must clear the BAS band.

III. Conclusion

For the reasons discussed above, TMI and TerreStar respectfully request that the Commission clarify or otherwise modify its decision in the *R&O* concerning BAS relocation and only require a MSS licensee to contribute to Nextel's BAS relocation costs if a licensee enters the market prior to the end of Nextel's 30-month BAS relocation period.

Alternatively, so that an additional and uncertain contribution burden is not unfairly placed upon MSS parties, the FCC should clarify the *R&O* by stating that Nextel will not be entitled to seek contribution from an MSS licensee that enters the market more than 36 months after the effective date of the *R&O* (i.e., after January 21, 2008) rather than tying the 36-month date to the open-ended reconfiguration period for the 800 MHz band.

Respectfully submitted,

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LIMITED PARTNERSHIP

and

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