

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

To: John A. Rogovin, General Counsel

PETITION FOR RECONSIDERATION

Respectfully submitted,

CITY AND COUNTY OF DENVER, COLORADO
AERONAUTICAL RADIO, INC.

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SUMMARY

The City And County Of Denver, Colorado (“Denver”) and Aeronautical Radio, Inc. (“ARINC”)(collectively the “Incumbents”), through counsel and pursuant to Section 1.106 of the Commission’s Rules, 47 C.F.R. §1.106, hereby respectfully request that the Office Of The General Counsel (“OGC”) reconsider its decision of December 22, 2004, which modified the Commission’s *ex parte* rules for the 800 MHz Transition Administrator (“TA”).

The Incumbents do not dispute that the Commission has the statutory authority to grant a waiver of its *ex parte* rules in the *800 MHz Proceeding*. Indeed, as OGC notes, the FCC Rules provide that “[w]here the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice,” and such flexibility is important in the balancing of interests necessary to allow the Commission to collect information sufficient to make informed decisions while also ensuring fundamental fairness to all parties. However, the Incumbents believe the OGC improperly applied this discretion in granting this waiver of *ex parte* rules which is not in the public interest. The decision of OGC in the instant matter is not in the public interest because it threatens the rights of the Incumbents and similarly situated FCC licensees, prohibits Incumbents and other parties to the *800 MHz Proceeding* from participating in continuing decision-making by the Commission, risks prejudice of future Commission action in resolving disputes arising from the system relocation process, and violates fundamental principles of administrative fairness and transparency.

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I. BACKGROUND

ARINC and Denver (collectively, the “Incumbents”) are each licensees of multiple Private Mobile Radio Service (PMRS) frequencies in the 800 MHz band, and as such are subject to the Commission’s Order in WT Docket No. 02-55 (the “800 MHz Proceeding”) establishing the process for system relocation to achieve reconfiguration of the band (the “Rebanding Order”). Denver operates a multicast trunked radio system used by multiple public safety agencies within its jurisdiction and has suffered sustained difficulty with harmful interference. ARINC operates private radio systems at multiple airports across the country used to coordinate critical day-to-day commercial flight operations.

Because of their positions as licensees, the Incumbents have been interested and active participants in the 800 MHz Proceeding. Denver has provided the Commission with the most detailed information in the proceeding regarding the impact of interference and the effectiveness of efforts to mitigate it. ARINC was part of the committee which draft the so-called Consensus Plan, upon which the Commission based its decision. Each of the Incumbents (as well as several hundred similarly situated incumbent 800 MHz licensees) will be subject to mandatory relocation to alternate frequencies in a process mandated by the Commission¹ and overseen by the TA under Commission mandate.² As such, the Incumbents are parties to the 800 MHz Proceeding, and each of the Incumbents have a vested individual interest in the TA’s discharge of its duties. These interests are jeopardized by the granted waiver of established *ex parte* rules.

On December 22, 2004, the Office of General Counsel (“OGC”) granted a request³ from the 800 MHz Transition Administrator (“TA”)⁴ for waiver of the Commission’s *ex*

¹ See, generally, *Rebanding Order* at ¶¶142-176.

² See, generally, *Rebanding Order* at ¶¶188-203.

³ Letter from Robert B. Kelly, Esq., Squire, Sanders & Dempsey, LLP, to John Rogovin, General Counsel, dated December 8, 2004 (the “Waiver Request”).

⁴ The 800 MHz Transition Administrator is a consortium of Squire, Sanders & Dempsey, LLP, BearingPoint, and Baseline Telecom, Inc. *Wireless Telecommunications Bureau Concurs with Search Committee Selection of a Transition Administrator*, Public Notice, DA-04-3492 (October 29, 2004).

parte rules with respect to all conversations, meetings, and correspondence between Commission staff and the TA in the matter of reconfiguration of the 800 MHz band under Commission Order.⁵

The Incumbents do not dispute that the Commission has the statutory authority to grant a waiver of its *ex parte* rules in the *800 MHz Proceeding*. Indeed, as OGC notes, the FCC Rules provide that “[w]here the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice,”⁶ and such flexibility is important in the balancing of interests necessary to allow the Commission to collect information sufficient to make informed decisions while also ensuring fundamental fairness to all parties. However, the Incumbents believe the OGC improperly applied this discretion in granting this waiver of *ex parte* rules which is not in the public interest. The decision of OGC in the instant matter is not in the public interest because it threatens the rights of the Incumbents and similarly situated FCC licensees, prohibits Incumbents and other parties to the *800 MHz Proceeding* from participating in continuing decision-making by the Commission, risks prejudice of future Commission action in resolving disputes arising from the system relocation process, and violates fundamental principles of administrative fairness and transparency.

⁵ Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004). (the “Rebanding Order”).

⁶ 47 C.F.R. §1.1200(a).

II. PETITION FOR RECONSIDERATION

A. The Commission Properly Designated The Rebanding Proceeding As Permit-But-Disclose

Under the current FCC Rules, every Commission proceeding is subject to one of three categories for the purposes of *ex parte* communications: (1) “restricted” proceedings, in which all communications between FCC officials and the parties is prohibited;⁷ (2) “permit-but-disclose” proceedings, which allow *ex parte* communications, but require that full disclosure of all written and oral presentations to be placed on the public record;⁸ and (3) “exempt” proceedings, which require no notice of *ex parte* communications and allow unlimited off-the-record unrecorded discussions.⁹

The Commission correctly designated the *800 MHz Proceeding* as a permit-but-disclose proceeding under its Rules,¹⁰ and the proceeding was to become one of the most active in Commission memory with a record of over 2,200 filings during multiple comment/reply cycles.¹¹ This robust discussion was instrumental to the successful resolution of a matter of intense general interest “crucial to homeland security and the overall general safety of life and property.”¹² The balance of interests in the permit-but-disclose process allowed for the free exchange of information in a matter with complicated technical and policy considerations, while allowing the broad collection of parties affected by the proposed changes to monitor the record and to provide information as necessary in response to other parties’ *ex parte* presentations. If the entire *800 MHz Proceeding* had been an “exempt” proceeding, the resulting *Rebanding Order* would not have been properly decided in the

⁷ 47 C.F.R. §1.1208.

⁸ 47 C.F.R. §1.1206.

⁹ 47 C.F.R. §1.1204.

¹⁰ 47 C.F.R. §1.1206(a)(3).

¹¹ *Rebanding Order* at ¶61.

¹² *Id.* at ¶338.

public interest,¹³ would be the subject of greater confusion, and would not have the imprimatur of legitimacy necessary in the face of widespread suspicion certain parties would manipulate the process to their advantage. In such an event, the core tenets of fairness and transparency in the administrative process would be violated.

The TA's conduct of its duties falls under the *800 MHz Proceeding*, and should be subject to the same permit-but-disclose designation. The TA is a creation of the *Rebanding Order*, it was created for the purposes of guiding implementation of the *Rebanding Order*, and its actions are to be governed by the FCC under the *Rebanding Order*. The prescribed duties of the TA include obtaining estimates on the costs of system reconfiguration, resolving disputes between Nextel Communications, Inc. ("Nextel") and licensees on reconfiguration costs, establishing a relocation schedule on a NPSPAC region-by-region basis, coordinating relocation of NPSPAC channels, and monitoring the schedule to resolve delays.¹⁴ These responsibilities impact the same group of parties in the same manner as the underlying issues decided in the *Rebanding Order*, so there is no compelling reason to treat these *ex parte* discussions differently than discussions during the NPRM process in the *800 MHz Proceeding*.

The TA is charged by the Commission with determining crucial details of the rebanding process under Commission authority and oversight, with the broad mandate of "ensuring that band reconfiguration proceeds on schedule."¹⁵ While the Commission as set forth a list of general duties of the TA, it granted the TA considerable discretion in determining the operational details of both the timing¹⁶ and cost reimbursement¹⁷ for the relocation of incumbent licensees. When necessary, it is anticipated that relevant decisions

¹³ For instance, the intense exchange between Nextel Communications, Inc. ("Nextel"), Verizon Wireless and others on spectrum valuation conducted through the *ex parte* record was vital to the final decision, and ensured the public treasury received fair value in the exchange of spectrum with Nextel as set forth in the *Rebanding Order*. See *Rebanding Order* at ¶277.

¹⁴ *Rebanding Order* at ¶¶195-196.

¹⁵ *Rebanding Order* at 191.

¹⁶ *Id.* at ¶195.

¹⁷ *Id.* at ¶195, fn. 513.

of the TA will be memorialized by Commission Order, creating binding authority on the Incumbents and similarly situated licensees. Important decisions to be made by the TA include, *inter alia*, the timing of reconfiguration in each region; the specific line items of reimbursable parts and labor costs, and the rates at which those costs will be reimbursed; whether frequency coordination will be required for replacement frequencies; whether exceptions will be granted to timing requirements; and the timing and method of reimbursement payments. The grant of the Waiver Request allows these decisions to be formulated in the background to the potential detriment of all interested parties.

These critical decisions, being made subject to this *de facto* delegated authority, impact the Incumbents and all interested parties in the proceedings, and their deliberations should be part of the record of the proceeding. The TA falls under none of the narrow, specific delineated categories for an exception to the Commission's *ex parte* rules,¹⁸ including the exception allowing presentations between Commission staff and advisory coordinating committees.¹⁹

In its Waiver Request, the TA seeks to cast its situation as analogous to that of a frequency coordinator,²⁰ even though the Commission in the Rebanding Order specifically declined to certify the TA as a frequency coordinator.²¹ Further, the TA makes no justification for keeping secret its deliberations and interactions with FCC staff for the purposes of developing the general administrative rules of the rebanding process. These decisions are more likely to be wrongly decided without the input of the Incumbents and interested parties.

¹⁸ 47 C.F.R. §1.1204(a).

¹⁹ 47 C.F.R. §1.1204(a)(7).

²⁰ In noting the 1994 appointment of UTAM, Inc., and the 1996 appointment of the Personal Communications Industry Association and the Industrial Telecommunications Association, Inc., as administrators for prior band reconfigurations, the TA noted, "In both of these cases, the appointed administrators were certified as frequency coordinators and were therefore apparently able to communicate openly with Commission staff utilizing the *ex parte* exemption for frequency coordinators." Waiver Request at 2.

²¹ *Rebanding Order* at ¶197.

Unlike the frequency coordinators, the TA, by Commission design and intent, is not representative of 800 MHz licensees. Instead, the Commission provided that “the Transition Administrator will be an independent party with no financial interest in any 800 MHz licensee.”²² In mandating a TA selection of an entity that is not representative of licensees in the band, the Commission effectively ensured that the TA’s principals would not have current knowledge as an existing system operator or licensee in the 800 MHz band or a current working knowledge of the intricacies of the FCC’s regulation of the 800 MHz band.²³ With the waiver of *ex parte* rules, the TA will be able to deliver its unilaterally developed proposed rules and procedures to the Commission, which will then issue an implementing Order in a vacuum, with no input from the community of affected parties.

While it is true that aggrieved parties could petition for reconsideration of such orders, such a superfluous and time-consuming use of administrative process can hardly be what the Commission had in mind when it has made clear “[t]here may be no matter within our jurisdiction more crucial to Homeland Security and the overall general safety of life and property than assuring that public safety communications systems are free from unacceptable interference and have adequate capacity.”²⁴ To that end, the Commission stressed, “parties must work together to abate interference and endure an occasional hardship as a necessary concession to the nation’s overall Homeland Security obligations.”²⁵ This Order frustrates attempt by the parties to “work together” toward a smooth transition process, in the name of sparing the TA the “occasional hardship” of preparing a written summary of their meetings with FCC staff.

²² *Rebanding Order* at ¶191.

²³ This is not to suggest that the particular TA selected is incapable of performing the assigned task, but rather that the Commission’s chosen ground rules for the TA’s selection mitigated the ability on the part of the TA Selection Committee to select an applicant with the most extensive knowledge of the band and this proceeding.

²⁴ *Id.* at ¶338.

²⁵ *Id.* ¶339.

B. Ex Parte Discussions Between The TA And The FCC Will Have A Potential Adverse Impact On The Present Rights Of Incumbents

In support of its Waiver Request, the TA states that a full exemption from the *ex parte* rules “would serve the public interest by facilitating open communications with the Commission and thereby expediting the reconfiguration process, [because] the 800 MHz TA will likely need to confer with the Commission staff on matters subject to arbitration, investigation or litigation.”²⁶ The TA concludes that for these reasons, “[i]t would be appropriate for these deliberations to take place on an undisclosed basis.”²⁷ The Incumbents strenuously disagree, and the Incumbents believe that these stated reasons should only lead the OGC to the opposite result, that the public interest is best served by retaining the permit-but-disclose designation.

While it could be argued that there may be some discussions between the TA and the Commission regarding particular licensee matters that could lead to “arbitration, investigation or litigation,” the TA has not limited its Waiver Request to these adjudicative situations. Rather, the TA’s request is all encompassing, including within its purview discussions that apply to no particular licensee, such as discussions as to rebanding procedures and processes. In particular, there is no valid justification for keeping these discussions private, and such discussions must be subject to disclosure because of their impact on the entire 800 MHz community. This is particularly the case because the TA is not a governmental entity, but rather a party privately contracted and paid by Nextel. In order to ensure the transparency in this proceeding that the Wireless Telecommunications Bureau has repeatedly pledged, it is crucial that TA non-adjudicative discussions with the Commission be subject to the Commission’s *ex parte* rules.

In carrying out its responsibilities under the *Rebanding Order* (including obtaining cost estimates from licensees, resolving disputes between Nextel and licensees on

²⁶ Waiver Request at 1.

²⁷ Id.

reimbursable costs, and coordinating NPSPAC relocation²⁸), the TA is likely to receive material non-public information about licensees and their system operations. This information could conceivably include information pertaining to Incumbents' license validity or compliance, but could be from dubious, unverified third-party origins, since the TA has no direct or implied duty to investigate the validity of any information provided to them in the conduct of their duties. Under the granted waiver, the TA has *carte blanche* to communicate this hearsay to the Commission, and the impacted licensees will have no knowledge that such a communication even has taken place, much less an idea as to the substance and source of the information communicated.

While the Incumbents ascribe no malicious motives to the TA, the prospect for error is real and substantial for the particular licensee. Even an innocent mistake could have dire consequences for any incumbent licensee. For example, a licensee, for the purposes of preparing an estimate of relocation costs, may be asked to provide basic system information to the TA in a signed writing. The licensee, through a typographical error, lists operating coordinates at several miles' variance from its licensed parameters. Under the *ex parte* waiver, the TA, unbeknownst to the licensee, could inform the Commission, which based on that information could issue a Show Cause Order for termination of the licensee's authorizations due to non-compliance with FCC Rules. Under the "exempt" regime, the incumbent licensee will never even know about the communication until the Commission takes action. This is hardly an equitable result for the licensee, nor could this be the Commission's intent. At a minimum, in such circumstances the licensee must be apprized and have the opportunity to be present at any meeting between the Commission and the TA.

²⁸ *Rebanding Order* at ¶195.

C. **Ex Parte Discussions Between The TA And The FCC Will Prejudice Incumbents In The De Novo Commission Review Of TA Decisions**

With regard to matters impacting individual licensees, the TA is empowered, *inter alia*, to “mediate any disputes that may arise in the course of band reconfiguration; or refer the disputant parties to alternative dispute fora.”²⁹ Following a decision from the TA, “[s]hould issues still remain unresolved, they may be referred to the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau within ten days of the Transition Administrator’s ...recommended decision or advice.”³⁰ The TA is required to forward its entire record of the proceeding to the Wireless Telecommunications Bureau (“WTB”), and the decision is to be made by the WTB based on the record.³¹

With the TA exempt from the *ex parte* rules in all discussions, the disputing parties have no confidence at all that the matter is indeed being decided on the merits through a review of the record. The TA could be communicating additional information not contained in the record, including its “color commentary” on the case, with such issues as its personal opinions on the personalities involved, the decorum of the parties, their perceived veracity, or any other potential bias of the TA. Thus, the review of the WTB, far from being a *de novo* consideration of the facts, could be entirely prejudiced by off-the-record information and opinions provided by the TA. The true danger to the Incumbents and all potential disputant licensees in this process is that, if such prejudice were to enter into the proceeding, **the parties will never know**. Without the record created in a permit-but-disclose proceeding, the incumbent licensees impacted by Commission action will have no idea what evidence has truly been presented against them. It is for this reason that disputed issues slated for formal evidentiary hearing by the Commission are usually designated as

²⁹ Id. at ¶194.

³⁰ Id.

³¹ Id.

“restricted,”³² so that all parties have fair and equal access to the record, and to limit undue influence by any of the parties or any other entity with knowledge or interest in the proceeding. Because it is impossible to exclude the TA from forwarding case information on arbitrations to the WTB, retaining the permit-but-disclose designation for the TA to transmit the written record of the proceeding is the next best alternative, so that the parties have some assurance that the Commission is deciding the issues based only on the full and complete record.

Furthermore, to the extent that the exemption is carried forward through the conduct of *de novo* hearings on cost reimbursement after a particular dispute has been designated for hearing, the exception violates general federal administrative rules. Each and every *de novo* hearing on cost reimbursement by the WTB would be considered an “adjudication” under the Administrative Procedure Act,³³ and thus subject to the restrictions on *ex parte* communications contained therein.³⁴ These rules prohibit all *ex parte* communications and, if any such communications are made in violation of the rule, require that the substance of those communications be placed on the record to provide equal access to all parties.³⁵ While there is a reasonable interest in transmitting the record on the TA’s arbitration proceeding for the sake of administrative expediency, it does not follow that there exists a compelling need for the TA to have unlimited off-the-record discussions with the WTB before, during, and after the conduct of the review on the record.

D. The Waiver Of The *Ex Parte* Rules In This Instance Violates Principles Of Fundamental Fairness

In its Report and Order instituting the current rules governing *ex parte* presentations, the Commission “sought to enhance the ability of the public to communicate with the

³² Amendment of 47 C.F.R. Sec. 1.1200 et seq. *Concerning Ex Parte Presentations in Commission Proceedings, Report and Order*, 12 FCC Rcd. 7348, ¶7 (March 19, 1997).

³³ Any “agency process for the formulation of an Order.” 5 U.S.C. §551(7).

³⁴ 5 U.S.C. §557(d)(1).

³⁵ *Id.*

Commission in a manner that comports with fundamental fairness,”³⁶ by creating rules which “are simpler and clearer, and thus more effective in ensuring fairness in Commission proceedings.” Within the Commission, WTB Chief John Muleta has stressed a need for a transparent, effective and reliable administrative process governing important spectrum management decisions by the WTB and the FCC.³⁷ The Commission’s intent is seconded by the Court of Appeals for the District of Columbia, which has emphasized, “[i]t is simply unacceptable behavior for any person directly to attempt to influence the decision of a judicial officer in a pending case outside of the formal, public proceedings. This is true for the general public, for ‘interested persons,’ and for the formal parties to the case.”³⁸

The need for openness and transparency in the administration of the 800 MHz rebanding process is all the more imperative because of the lack of transparency and accountability in the selection of this critical, powerful entity. The TA was selected by a group of five entities appointed unilaterally by the Commission,³⁹ and this search committee met in secret, refused requests by both the public and the FCC to release even the identities of applicants wishing to become the TA, did not disclose any information on its internal procedures (such as voting on substantive matters), made its selection in a closed meeting with no minutes or other public documentation of its deliberations, and provided no information to the FCC on the qualifications of the TA relative to the other unsuccessful (and unidentified) applicants. Neither the *Rebanding Order* nor the Order confirming the search committee’s selection of the TA impose any public disclosure, public notice, public record or open meeting requirements on the TA in the conduct of its duties under Commission oversight. The OGC’s grant of the waiver request tosses the third strike against transparency

³⁶ *Id.* at ¶4.

³⁷ Forum on Spectrum Management Policy Reform, presentation of John Muleta to the National Academy of Science Computer Science & Telecommunications Board at 7 (February 12, 2004). <<http://wireless.fcc.gov/statements/NAS.pdf>>.

³⁸ *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d. 547, 570 (D.C. Cir 1982) (A PATCO union official had dinner with a FLRA official charged with deciding a current issue, at which the union official sought to press PATCO’s case in front of the FLRA).

³⁹ *Rebanding Order* at ¶¶191-192.

and accountability: an entity which was chosen in secret and conducts its affairs in secret can now interact with and influence the Commission in secret. This is simply not how government is supposed to work.

For all of these reasons, the Incumbents strenuously argue that the decision to grant an *ex parte* waiver to the TA does not comport with the broad, well-settled federal goal of fairness to all parties, as it is fundamentally unfair to the Incumbents and similarly situated licensees. It creates the opportunity for the creation of a “shadow record” devoid of any paper trail and outside the knowledge, review, and confrontation of the Incumbents and all similarly situated parties.

IV. CONCLUSION

WHEREFORE, the premises considered, it is respectfully requested that the Office of General Council RECONSIDER and revoke its Order granting an exception to the Commission’s *ex parte* provisions for the 800 MHz Transition Administrator.

Respectfully submitted,

CITY AND COUNTY OF DENVER,
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AERONAUTICAL RADIO, INC.

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CERTIFICATE OF SERVICE

I, Alan S. Tilles, an attorney in the law offices of Shulman, Rogers, Gandal, Pordy & Ecker, P.A., do hereby certify that I have on this 24th day of January, 2005, sent via First Class, United States Mail, postage prepaid, a copy of the foregoing “Petition For Reconsideration” to the following:

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