

**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: John A. Rogovin, General Counsel

**OPPOSITION TO
PETITION FOR RECONSIDERATION**

The 800 MHz Transition Administrator (“800 MHz TA” or “TA”), pursuant to Section 1.106(g) of the Commission’s rules, hereby opposes the petition for reconsideration that was filed by the City and County of Denver, Colorado and Aeronautical Radio, Inc. (hereinafter “the

Petitioners”).¹ The Petitioners challenged a December 22, 2004 Public Notice issued by the Office of the General Counsel that exempted the TA from the Commission’s *ex parte* rules with respect to presentations to the Commission and its staff regarding the 800 MHz reconfiguration.²

As a procedural matter, the deadline for parties to file petitions for reconsideration of the General Counsel’s Public Notice was January 21, 2005.³ The Petitioners missed this deadline, filing their Petition on January 24, 2005. Despite this procedural infirmity, the TA addresses herein the substance of the Petitioners’ claims. As explained below, the Petitioners’ objections should be rejected because the General Counsel’s decision will promote the public interest, is consistent with long established Commission precedent and will not harm any party to the 800 MHz proceeding or inhibit their procedural rights.

I. THE GENERAL COUNSEL WAS FULLY JUSTIFIED IN EXEMPTING THE TA FROM THE COMMISSION’S *EX PARTE* REQUIREMENTS

The Commission has a long and successful history of using private administrators to implement and manage complex aspects of telecommunications regulation. The Commission has used private administrators to manage the interstate telecommunications relay services fund, the Universal Service Fund, the North American Numbering Plan and local number portability.⁴

¹ See *Petition for Reconsideration*, WT Docket 02-55 et al. (Jan 24, 2004) (“*Petition*”).

² See Public Notice, “*General Counsel Modified Ex Parte Rules for 800 MHz Transition Administrator*,” DA 04-4026 (Dec. 22, 2004).

³ See 47 C.F.R. § 1.106 (requiring petitions for reconsideration to be filed within 30 days of a public notice issued by the Commission); see also *Petition* at 1 (acknowledging the applicability of Section 1.106 in this case).

⁴ The Commission has also used private administrators to implement spectrum reconfigurations. For example, the Commission appointed UTAM, Inc. to oversee the transition and band clearing of fixed microwave operations and it appointed the Personal Communications and Industry Association (“PCIA”) and the Industrial Telecommunications Association, Inc. (“ITA”) to administer the microwave clearinghouse cost-sharing plan.

In each of these cases, the Commission facilitated open communications between the private administrator and the Commission staff by exempting the administrator from the Commission's *ex parte* rules.⁵ Despite this long history of reasonable and justified exemptions from the Commission's *ex parte* rules for private administrators, the Petitioners attempt to single out the 800 MHz reconfiguration process as inappropriate for an *ex parte* exemption. The Petitioner's, however, fail to articulate any valid rationale for such a deviation from the Commission's past – and highly successful – approach.

The Petitioners suggest that, in past cases, an *ex parte* exemption was appropriate only because the private entity was “representative” of the licensees in question.⁶ In contrast, as the Petitioners highlight in their pleading, the 800 MHz TA is “an independent party with no financial interest in any 800 MHz licensee.”⁷

In reality, however, it is precisely this independence and neutrality that were the primary common denominators in each of the previous cases in which the Commission granted an *ex parte* exemption to a private administrator, not whether the entity was “representative” of the industry participants being administered. For example, when the Commission appointed a Universal Service administrator, it specifically required that it be “neutral and impartial” and “not be an affiliate of any provider of telecommunications services.”⁸ When the Commission appointed an administrator for number portability, it followed Congress' express instruction that

⁵ See 47 C.F.R. § 1.1204(a)(12). None of the exemptions was challenged by any party, either at the time that they were issued, or subsequently.

⁶ See *Petition* at 7.

⁷ *Id.* (quoting *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, FCC 04-168, ¶ 191 (Aug. 6, 2004) (“*800 MHz Reconfiguration Order*”)).

⁸ 47 C.F.R. § 54.701(a)

the administrator be “impartial.”⁹ The Commission also highlighted the “independent” nature of UTAM, Inc., which was appointed as the administrator of the microwave band clearinghouse.¹⁰ Furthermore, when the Commission selected Lockheed Martin as the administrator of the North American Numbering Plan, it did so because Lockheed was “independent” and was “not closely associated with any particular industry segment.”¹¹ In short, the Commission’s decision to grant the 800 MHz TA an *ex parte* exemption was entirely consistent with established precedent and was further justified by the successful outcomes of those prior, complex administrative efforts.

The Petitioner’s acknowledge that “the Commission has the statutory authority to grant a waiver of its *ex parte* rules in the *800 MHz Proceeding*.”¹² The Petitioners further concede that “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.”¹³

In this case, the use of an *ex parte* exemption will help to further the public interest by ensuring that the reconfiguration process is well-managed and efficiently executed.

⁹ 47 U.S.C. § 251(e).

¹⁰ See *800 MHz Reconfiguration Order*, ¶ 191 n. 509 (citing *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994)). It is true that UTAM, Inc., along with PCIA and ITA, were each representative of large segments of the telecommunications industry. This broad representation, however, helped to contribute to their neutrality and independence from excessive influence by any single entity having interests in the reconfiguration. In most cases, the Commission has ensured an administrator’s independence through a requirement that the administrator have no financial interest in any party involved in the proceeding.

¹¹ See *Administration of the North American Numbering Plan*, Third Report and Order, *Toll Free Service Access Codes*, Third Report and Order, 12 FCC Rcd 23040 (1997); *Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd 2588 (1995).

¹² *Petition* at iii.

¹³ *Id.* at 3.

Furthermore, as discussed below, the exemption will not jeopardize the procedural rights or otherwise harm any party to this proceeding as alleged by the Petitioners.

II. THE USE OF AN *EX PARTE* EXEMPTION WILL NOT INHIBIT FURTHER PARTICIPATION BY LICENSEES IN THE 800 MHz PROCEEDING

The Petitioner's primary objection to the grant of an *ex parte* exemption to the TA appears to be that it may inhibit the Petitioners in filing comments and petitions addressing individual communications between the TA and the Commission staff. The Petitioners seem to envision the reconfiguration process as an endless series of rulemakings, with each incremental communication subject to notice, comment and eventual Commission action. The Petitioners even speculate that "relevant decisions of the TA will be memorialized by Commission Order, creating binding authority on the Incumbents and similarly situation licensees."¹⁴

In reality, very few, if any, communications between the TA and the Commission staff are expected to result in Commission orders. The TA's communications with the Commission staff will generally be advisory and organizational in nature, permitting the TA and the Commission to align and coordinate their processes as necessary to fulfill the obligations of the 800 MHz reconfiguration process in a timely and efficient manner.

Absent an *ex parte* exemption, it would be extremely difficult and time consuming to discriminate between those subjects that would have to be disclosed in the 800 MHz proceeding docket and potentially interrelated subjects that would otherwise be exempt from disclosure under the Commission's preexisting exemptions to its *ex parte* requirements. Thus, far from giving the Petitioners additional insight regarding the reconfiguration process, an imposition of *ex parte* requirements on such meetings would likely prevent many of them from happening.

¹⁴ *Id.* at 5-6.

The Petitioners are also incorrect in claiming that the TA will “unilaterally develop[] proposed rules and procedures . . . with no input from the community of affected parties.”¹⁵ The TA is undertaking extensive and ongoing outreach and process development efforts to ensure that the comments of 800 MHz licensees and other relevant parties are taken into consideration. For example, prior to filing its Regional Prioritization Plan (“RPP”) with the Commission earlier this week, the TA conducted in-depth interviews and data gathering involving the public safety community, 800 MHz licensees and other relevant parties.¹⁶ In fact, the TA requested,¹⁷ and the Commission granted, a 60-day extension of time to file the RPP primarily to provide adequate opportunity for stakeholders to provide their input to the RPP process.¹⁸

Moreover, the TA is continuing its outreach to affected stakeholders through stakeholder meetings, participation in upcoming conferences, and otherwise. The TA will also be developing and disseminating materials providing stakeholders with information and assistance in understanding and planning for reconfiguration to ensure an orderly commencement of the program. The Petitioners therefore will continue to have an abundance of opportunity to provide their views on the 800 MHz reconfiguration process to the TA and, of course, to the Commission.

¹⁵ *Id.* at 7.

¹⁶ A more detailed description of the TA’s outreach efforts to date is included in the TA’s RPP. *See Improving Public Safety Communications in the 800 MHz Band*, Regional Prioritization Plan of the 800 MHz Transition Administrator, WT Docket No. 02-55 (Jan. 31, 2005).

¹⁷ *See Motion of the 800 MHz Transition Administrator for Extension of Time*, WT Docket No. 02-55 (Nov. 12, 2004).

¹⁸ *See Improving Public Safety Communications in the 800 MHz Band*, Order, DA 04-3676 (Nov. 24, 2004).

If, as the Petitioners suggest, the TA were required to solicit public input on every internal decision and procedure that impacted 800 MHz stakeholders, the reconfiguration process would quickly grind to a halt. The TA would need to devote additional resources to unnecessary and time-consuming administrative processes that ultimately would increase costs and jeopardize the ability of the TA to meet the tight deadlines requested by the public safety community and imposed by the Commission.

III. THE USE OF AN *EX PARTE* EXEMPTION WILL NOT HARM OR INHIBIT THE PROCEDURAL RIGHTS OF ANY PARTY

The Petitioners attempt to bolster their case by arguing that 800 MHz licensees may be harmed by the use of an *ex parte* exemption for communications between the TA and the Commission staff. The Petitioners, however, fail to provide any credible examples of alleged harms that could result to licensees.

For example, the Petitioners argue that an 800 MHz licensee may inadvertently provide to the TA erroneous information about its network, which, absent an *ex parte* requirement, could be passed along to the Commission without the licensees' knowledge.¹⁹ The Petitioners speculate that the erroneous information could result in the issuance of a Show Cause Order for termination of the licensee's authorization.²⁰ It seems highly unlikely, however, that the Commission would issue such an order without first making an inquiry with the licensee. In any event, the TA is putting into place administrative safeguards within its operational procedures that are intended to prevent the creation, perpetuation or dissemination of erroneous information. The TA also believes that all parties to this proceeding are already on notice that any information

¹⁹ See *Petition* at 9.

²⁰ See *id.*

that is provided to the TA could at some point be provided to the Commission. Licensees are therefore expected to take the same level of care when preparing information for submission to the TA that they would when preparing submissions to the Commission.

The Petitioners also suggest that in those cases in which the TA is required to submit the administrative record of a disputed negotiation to the Wireless Telecommunications Bureau (“WTB”) for *de novo* review, the TA might, absent an *ex parte* requirement, provide its own “color commentary” on the case without the parties’ knowledge.²¹ In reality, the 800 MHz Reconfiguration Order requires the TA to include in the record submitted to the WTB the TA’s “advice on how the matter(s) may be resolved.”²² Furthermore, the Petitioners concede in their pleading that it would likely be appropriate for the TA to be exempt from the *ex parte* rules with respect to communications with the Commission “regarding particular licensee matters that could lead to “arbitration, investigation or litigation.”²³ Therefore, their argument is internally inconsistent and appears to acknowledge the appropriateness of an *ex parte* exemption in such circumstances.

Most important, throughout their Petition, the Petitioners appear to disregard the Commission’s fundamental criteria in authorizing the TA to administer the 800 MHz reconfiguration. Specifically, the TA is required to act as an independent entity with no financial interests in any 800 MHz licensee and subject to Commission oversight.²⁴ The TA’s duties include serving in a ministerial role, as an auditor, and in a manner similar to a special master in

²¹ *Id.* at 10.

²² 800 MHz Reconfiguration Order, ¶ 201.

²³ *Petition* at 8 (*emphasis in original*).

²⁴ *See* 800 MHz Reconfiguration Order, ¶ 191.

a judicial proceeding.²⁵ The Commission explained that the “overriding obligation of the Transition Administrator is to facilitate timely band reconfiguration in a manner that is equitable to all concerned, including the United States government.”²⁶

The 800 MHz TA takes each of its obligations very seriously and is working to ensure that the 800 MHz band reconfiguration is carried out in a manner that is fair and equitable to all parties, while expediting the availability of new spectrum resources to support critically important public safety communications services. Among other measures, the TA is developing an Independence Management Plan, which will include a Code of Conduct for the TA’s member companies and their personnel. Furthermore, the TA is required to file with the Commission quarterly reports and annual reports on the details of the reconfiguration, providing further transparency to the process.

In conclusion, the General Counsel’s decision to grant an *ex parte* exemption for communications between the TA and the Commission staff will serve the public interest by permitting a free exchange of information between the Commission and the TA and thereby facilitating a well coordinated and efficient reconfiguration of the 800 MHz band within the tight deadlines sought by the Commission and the public safety community. The use of an *ex parte* exemption is also consistent with longstanding Commission precedent and will not harm any

²⁵ *Id.*, ¶¶ 194, 199; 47 C.F.R. § 90.676.

²⁶ *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Order and Order on Reconsideration, FCC 04-294, ¶ 72 (Aug. 6, 2004).

party to this proceeding, or otherwise inhibit their procedural rights to provide ongoing comment on the reconfiguration process.

Respectfully submitted,

THE 800 MHz TRANSITION ADMINISTRATOR

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition To Petition For Reconsideration Of The 800 MHz Transition Administrator was mailed this 3rd day of February, 2004 by U.S. mail to the following:

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