

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18
)	

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO MRA AND SKITRONICS MOTIONS RELATING TO BEARINGPOINT AND FOR
PARTIAL STAY**

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Summary

On February 2, 2005, the U.S. Court of Appeals for the D.C. Circuit denied a motion filed by Mobile Relay Associates (MRA) and Skitronics, LLC (Skitronics) (collectively, Petitioners) to stay the Commission's plan to reconfigure the 800 MHz band. The court's decision followed a January 14, 2005 order by the Commission denying Petitioners' request that the FCC stay the reconfiguration process.

Now Petitioners have filed yet another stay request, this time in conjunction with a motion to disqualify BearingPoint, Inc. (BearingPoint) from serving on the Transition Administrator team. The Commission should reject these obstructionist tactics. Petitioners' latest motions have no more merit than their previous requests, and threaten to create uncertainty and delay the reconfiguration of the 800 MHz band that is essential to remedying potentially life-threatening interference to public safety radios.

Petitioners argue that BearingPoint should be disqualified because of an ongoing commercial relationship it has with Nextel. This relationship, however, was disclosed in the record of this proceeding in October 2004 when the Transition Administrator Search Committee recommended the Transition Administrator team. Petitioners raised no objection then, and should not be allowed to raise one now, three months after the appointment of the Transition Administrator and after its work is well underway. Petitioners have consequently waived any right they had to contest BearingPoint's qualifications.

Petitioners' motion should be denied not only because it is untimely but also because it lacks merit. Petitioners have failed to show that BearingPoint lacks the independence and impartiality required under Commission precedent, especially in light of the safeguards it has

adopted to ensure appropriate separation between BearingPoint's Transition Administrator personnel and its Nextel commercial account interests. The Commission should be guided by its own precedent and judgment in assessing the required degree of independence of the Transition Administrator, not, as Petitioners argue, the American Bar Association's Model Code of Judicial Conduct. This code applies to judges and other officers of the judicial system, who exercise considerable discretion and power in adjudicating disputes. It certainly does not apply to the Transition Administrator, a creature of an administrative agency that will have no power to compel action by any party and that will be subject to complete oversight and control by the Commission.

The Commission should also deny Petitioners' renewed stay request. It is premised on their disqualification motion, which, as discussed, is procedurally defective and meritless. In addition, petitioners have failed to demonstrate irreparable harm, instead relying on the same sort of vague and conclusory assertions that prompted the Commission to deny their earlier request for a stay. Petitioners cannot show irreparable harm because they will have the full and unfettered right to bring any dispute regarding the reconfiguration process before the Commission, which will be able to expeditiously and fully remedy any such alleged harm. Petitioners also offer nothing to refute the Commission's previous finding in its January 14 order that, "were a stay granted, there would be palpable – even life-threatening – harm to both public safety agencies and to the public as a whole resulting from continued and unabated interference to public safety and CII systems."

Nextel has accepted the license modifications and obligations established in the Commission's 800 MHz reconfiguration plan, and has already taken numerous steps to implement this plan. Nextel is committed to working with the Commission, the public safety

community, other 800 MHz licensees, and the Transition Administrator in achieving the Commission's objective of reconfiguring the 800 MHz band expeditiously and efficiently and improving public safety communications. Unfortunately, MRA and Skitronics apparently do not share this spirit of cooperation, nor has Skitronics ever offered a legitimate explanation about why it now contests a reconfiguration plan it endorsed in comments filed earlier in this proceeding. The Commission should summarily reject their latest efforts to obstruct the Commission's public interest objectives.

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**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
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Nextel Communications, Inc. (Nextel) hereby opposes yet another effort by Mobile Relay Associates (MRA) and Skitronics, LLC (Skitronics) (collectively, Petitioners) to delay the Commission's 800 MHz reconfiguration plan and frustrate the elimination of potential life-threatening interference to public safety radio communications. Less than a week after the U.S.

Court of Appeals for the D.C. Circuit denied its previous request to stay the reconfiguration plan established by the Report and Order (*R&O*) in this proceeding,¹ Petitioners have filed another motion for a partial stay of this plan² as well as a motion to remove BearingPoint, Inc. (BearingPoint) from the Transition Administrator team.³ Petitioners' latest motions should meet the same fate as their previous obstructionist tactics.

I. THE COMMISSION SHOULD DENY PETITIONERS' MOTION TO REMOVE BEARINGPOINT

A. Petitioners Have Waived Their Right to Object to BearingPoint's Qualifications

Petitioners' motion to disqualify BearingPoint is untimely, coming almost four months after BearingPoint's commercial relationship with Nextel was disclosed in the public record of this proceeding and over three months after the Commission approved the Transition Administrator team. In an October 12, 2004 letter filed in the docket of this proceeding, the Transition Administrator Search Committee (TASC) recommended the selection of BearingPoint, Squire-Sanders-Dempsey LLP (Squire Sanders), and Baseline Telecom, Inc. (Baseline), as the Transition Administrator team.⁴ This letter disclosed that:

BearingPoint has current commercial contracts with Nextel Communications, Inc. including subsidiaries and affiliates. BearingPoint is one of several vendors providing support for Nextel's ongoing enterprise projects. These services predominantly relate to back-office systems testing and support. As part of this relationship, BearingPoint recently submitted a proposal to be considered a Nextel

¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) (*R&O*).

² Petition for Partial Stay of Decision (Feb. 7, 2005) (Stay Motion). (Unless otherwise indicated, all filings referenced herein were filed in WT Docket No. 02-55.)

³ Emergency Motion for Removal of BearingPoint, Inc., From Transition Administrator Team and Cessation of Transition Process Pending Announcement of a Replacement Administrator (Feb. 7, 2005) (Removal Motion).

⁴ Letter from TASC to Michael Wilhelm, FCC (Oct. 12, 2004).

prime vendor to provide similar testing-related series over a period of years. BearingPoint is under a confidentiality obligation with respect to the details of its Nextel work, however, BearingPoint can state that the contracts do not involve any work with respect to 800 MHz networks and that BearingPoint has not had any interaction with Nextel's TASC representative for any of these contracts.⁵

Taking this disclosure into account, the TASC, composed of a cross-section of organizations representing all types of 800 MHz licensees, unanimously determined that the BearingPoint-Squire Sanders-Baseline team was best qualified to serve as the Transition Administrator and that this team would be "independent, impartial and will remain free of any potential conflict with regard to this undertaking."⁶ No party objected to the TASC's recommendation. On October 29, 2004, the Commission staff issued a public notice concurring with the TASC's selection of the BearingPoint-Squire Sanders-Baseline team.⁷ Once again, no party objected.

Petitioners should not be allowed to raise an objection months later, after the Transition Administrator's work is well underway. Petitioners attempt to excuse their tardiness by claiming that they only recently learned that Nextel paid BearingPoint \$31.7 million in non-Transition Administrator fees in 2004, which, according to Petitioners, amounts to one percent of BearingPoint's annual revenues.⁸ The Commission should reject this argument. The exact dollar amount of Nextel's payments was not necessary to place Petitioners on notice regarding the commercial relationship between the two companies. They were given fair and sufficient notice of this relationship in the TASC's October 2004 filing, which described in direct, plain terms BearingPoint's ongoing business dealings with Nextel.

⁵ *Id.* at attachment entitled "Disclosures – BearingPoint, Inc."

⁶ *Id.*, attached Transition Administrator Search Committee Recommendation at 6.

⁷ Public Notice, "Wireless Telecommunications Bureau Concurs With Search Committee Selection of a Transition Administrator," 19 FCC Rcd 21923 (2004).

⁸ Removal Motion at 6.

“The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that . . . a claim [of disqualifying prejudice] be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist.”⁹ Petitioners failed to comply with this general rule when they neglected to raise any objection to BearingPoint’s relationship with Nextel in October 2004. Petitioners should consequently be deemed to have waived any rights to object to BearingPoint’s qualifications. The Commission should not allow Petitioners to game its processes, filing objections that should have been filed months ago after learning that their initial attempts to stall 800 MHz band reconfiguration failed both at the Commission and in the D.C. Circuit. Entertaining Petitioners’ objections at this late date will only create uncertainty, disrupt the 800 MHz band reconfiguration process, and invite further abuse of the Commission’s processes.

⁹ *Marcus v. Director, Office of Workers’ Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) (finding that, where a petitioner could have raised allegations of an Administrative Law Judge’s (ALJ) bias before the ALJ’s decision, but instead “wait[ed] until after the initial adverse decision” of the ALJ to do so, “petitioner must be deemed to have waived his claim” of bias). *See also Pharaon v. Board of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998) (finding that because petitioner was “aware of the ALJ’s alleged bias when he appealed the [ALJ’s] recommended decision” but “failed to raise the issue or argue that the case should be remanded to a different ALJ,” petitioner “waived his principal ground for asserting bias”), *cert. denied*, 525 U.S. 947 (1998); *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998) (finding that a discharged federal employee waived his objection to alleged bias of a member of the Federal Labor Relations Authority because the employee did not object “as soon as practicable after [he had] reasonable cause to believe that grounds for disqualification exist[ed]”); *cf.* Administrative Procedure Act, 5 U.S.C. § 556(b) (“On the filing in good faith of a *timely* and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.”) (emphasis added).

B. The Facts and FCC Precedent Do Not Warrant Removal of BearingPoint

In addition to being untimely, Petitioners' Removal Motion fails on the merits. Petitioners have not shown that BearingPoint will be unable to remain independent and impartial in carrying out its Transition Administrator functions, even with its ongoing commercial relationship with Nextel. According to Petitioners' own calculations, the Nextel commercial account amounts to only about one percent of the gross revenues of BearingPoint, one of the world's largest business consulting firms with 15,000 employees, a broad customer base, and over \$3 billion in revenues in 2003.¹⁰ In addition, BearingPoint has adopted insulation safeguards to further ensure the independence of the Transition Administrator. The Transition Administrator's January 24 filing provides a detailed description of these safeguards, which establish a "firewall" and organizational structures and procedures to insulate BearingPoint's Transition Administrator personnel from BearingPoint's commercial account interests.¹¹

Commission precedent demonstrates that BearingPoint can maintain its independence given these safeguards and the relatively small size of its commercial account with Nextel. This precedent involves FCC licenses placed in a trust so that the trust beneficiary can comply with spectrum cap or other regulatory requirements, with the trustee required to be independent of the trust beneficiary. The Commission has recognized that such trustees may have extra-trust business relationships with the trust beneficiary yet still maintain the required degree of independence, provided the business relationship is *de minimis* or subject to safeguards that insulate the trustee. For example, the Commission has allowed a trustee to have a business or

¹⁰ See BearingPoint 2003 Annual Report, available at: <http://media.corporate-ir.net/media_files/NYS/be/reports/ar03.pdf>.

¹¹ Letter from Robert B. Kelly, Squire, Sanders & Dempsey, to Marlene H. Dortch, FCC Secretary, and attached BearingPoint Special Implementation Plan for Nextel (Jan. 24, 2005).

familial relationship with someone holding up to one percent of the trust beneficiary's stock.¹² It has also permitted a trustee's law firm to represent the trust beneficiary on various non-FCC matters so long as the legal fees generated from this representation "are not material to the firm's business."¹³ In addition, in a case involving a broadcast station placed in a voting trust pending the outcome of a hostile tender offer, the Commission allowed the law firm in which the trustee was a partner to represent large investors in the party making the hostile takeover attempt, provided the trustee took certain steps to insulate himself from other members of the law firm that represented the investors.¹⁴

BearingPoint has taken steps to ensure that it maintains the level of independence required by these cases. It bears noting, however, that the precedents described above involve trustees empowered to hold FCC licenses and exercise full control and discretion over the licensee's operations. The trustees were consequently held to a high standard of conduct in order to carry out the Commission's objectives. The Transition Administrator, in contrast, has been given a far more restricted set of duties that are directly overseen by the Commission. The Transition Administrator will perform a range of tasks – recommending to the Commission a schedule for band reconfiguration, overseeing the payment of retuning costs, conducting audits, submitting reports – but it is limited to facilitating the reconfiguration process, and in no way will it control this process.¹⁵ The Transition Administrator's dispute resolution role is limited to

¹² *Applications of GTE Corporation, Vodafone AirTouch Plc, and Bell Atlantic Corp. for Consent to Transfer Control of or Assign Properties to Divestiture Trust and For Temporary Waiver of the CMRS Spectrum Cap Rule*, Order, 15 FCC Rcd 11608, ¶ 6 & Exhibit A at 5 (Article II C) (WTB 2000) ("*GTE/Bell Atlantic Divestiture Trust*").

¹³ *GTE/Bell Atlantic Divestiture Trust*, Exhibit A at 5 (Article II C).

¹⁴ *Macfadden Acquisition Corp.*, Memorandum Opinion and Order, 60 Rad. Reg. 2d (P&F) 872, ¶¶ 15-16 (1986).

¹⁵ *R&O* ¶ 194.

mediating disputes or referring parties to other non-binding dispute resolution fora.¹⁶ The Transition Administrator has no inherent power to adjudicate disputes or compel a licensee to retune its system or accept particular retuning agreement terms.¹⁷ The Transition Administrator's limited duties and direct oversight by the Commission substantially lessen any risk that a party would be adversely affected by the Transition Administrator's actions. It consequently would be reasonable for the Commission to apply a more flexible conflict of interest standard to the Transition Administrator than the standard applied in the trustee cases discussed above.

One additional point bears noting. Petitioners explicitly state that they have no objection to Squire Sanders being a member of the Transition Administrator team.¹⁸ Squire Sanders is the legal component of the Transition Administrator and its role provides further assurance of the impartiality of the Transition Administrator's actions. This further undermines Petitioners' claim that they will be harmed by BearingPoint's commercial relationship with Nextel.

C. The ABA's Model Code of Judicial Conduct Does Not Apply to the Transition Administrator

Petitioners ignore the Commission precedent discussed above, and instead baldly assert that the Transition Administrator is subject to the American Bar Association's Model Code of Judicial Conduct (ABA Code). The ABA Code, however, applies only to officers of a judicial system. A section of the code entitled "Application of the Code of Judicial Conduct" states:

¹⁶ R&O ¶¶ 194, 201.

¹⁷ *Id.* ¶ 201 (delegating to the Wireless Telecommunications Bureau the authority to modify licenses); "800 MHz Band Reconfiguration, Frequently Asked Questions: Transition Administrator (TA)," available at: <<http://wireless.fcc.gov/publicsafety/800MHz/bandreconfiguration/faq-transition.html>>.

¹⁸ Removal Motion at 5 n.6.

Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.¹⁹

The Transition Administrator is by no means “an officer of a judicial system.” Although the *R&O* (§ 194) notes that the Transition Administrator’s functions will be “similar” to a special master, the Transition Administrator is a creature of the Commission, an administrative agency, not the judicial system. Moreover, as described above, far from performing “judicial functions,” the Transition Administrator will play a “ministerial role” in carrying out limited tasks that are not binding on any party and that are subject to the Commission’s direct oversight.²⁰

Application of the ABA Code to the Transition Administrator would lead to absurd results. For example, Canon 3.B.(7) of the ABA Code generally prohibits judges from engaging in *ex parte* communications. Such a prohibition would paralyze the Transition Administrator in carrying out its duties under the *R&O*. Application of the ABA Code’s strict standards regarding conflicts of interest would also make it exceedingly difficult to find qualified parties to serve as Transition Administrators. There are thousands of licensees, manufacturers, and other parties that have some sort of financial interest at stake in the 800 MHz reconfiguration plan. It could

¹⁹ ABA Code, “Application of the Code of Judicial Conduct” (2000), available at: <<http://www.abanet.org/cpr/mcjc/toc.html>>.

²⁰ The ABA Code leaves it to each relevant jurisdiction to determine whether the ABA Code should be applied to administrative law judges (ALJs), noting that “[a]dministrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges.” *Id.* at n.11. This statement is instructive in several respects. First, it draws an express distinction between administrative agencies and the judiciary, and makes clear that ALJs (let alone Transition Administrators, no matter what their similarities to “special masters”) are *not* considered judges or officers of a judicial system for purposes of the Code. Second, it recognizes that context and the particular tasks performed by the person or entity in question are critical in determining what standards of conduct should apply. As explained above, the context and tasks involving the Transition Administrator warrant a different set of standards than those set forth in the Model Code.

very well prove impossible to find an entity that is both qualified to serve as Transition Administrator *and* that has no business or personal relationship with any of these thousands of parties that would be covered by the ABA Code's strict standards. The ABA Code applies to judges, not the Transition Administrator.

II. THE COMMISSION SHOULD DENY PETITIONERS' MOTION FOR A PARTIAL STAY

Petitioners' Stay Motion requests that the Commission stay the band reconfiguration process "until the Commission removes Bearingpoint and replaces it with a new independent and impartial Transition Administrator."²¹ As the Commission stated in denying Petitioners' initial motion to stay, to warrant a stay Petitioners must demonstrate that:

- (1) they are likely to prevail on the merits;
- (2) they will suffer irreparable harm if a stay is not granted;
- (3) other interested parties will not be harmed if the stay is granted; and
- (4) the public interest favors granting a stay.²²

Like their last stay request, Petitioners' Stay Motion fails on all four counts. For the reasons set forth in Section I above, Petitioners are unlikely to prevail on the merits. They waived their right to contest BearingPoint's qualifications by failing to raise any objection when BearingPoint's commercial relationship with Nextel was disclosed in October 2004. Putting aside this procedural flaw, Petitioners have failed to show that BearingPoint lacks the independence and impartiality under Commission precedent, especially in light of the safeguards

²¹ Stay Motion at 2-3.

²² *Improving Public Safety Communications in the 800 MHz Band*, Order, WT Docket No. 02-55, DA 05-82, ¶ 7 (released Jan. 14, 2005) ("*Order Denying Stay Request I*") (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)).

it has adopted to maintain appropriate separation between BearingPoint's Transition Administrator personnel and its Nextel commercial account interests.

Petitioners also fail to demonstrate that they will be irreparably harmed if the Commission denies their stay request. In finding that Petitioners had failed to make this demonstration in their previous stay request, the Commission stated that:

The standards for demonstrating irreparable injury are clear: "A party moving for a stay is requested to demonstrate that the injury claimed is 'both certain and great.'" As is the case with injunctive relief, a stay "will not be granted against something merely feared as liable to occur at some indefinite time"; rather, the party seeking a stay must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur."²³

Once again, Petitioners fall woefully short of these standards. They devote two scant paragraphs to vague, conclusory and unfounded assertions that they will be irreparably harmed. To the extent Petitioners believe they are harmed during the reconfiguration process, they will have the full and unfettered right to bring the matter before the Commission, which will be able to expeditiously and fully remedy any such alleged harm.

Finally, as the Commission found in rejecting Petitioners' earlier motion, a stay would injure other parties and is contrary to the public interest.

We find that grant of a stay would both harm other parties and be contrary to the public interest because it would prevent the Commission from achieving its core goal of abating interference to public safety and CII communications. The record in this proceeding overwhelmingly demonstrates that the interference problem is real, growing, and a threat, not only to the safety of first responders, but also to the citizens whose lives and property they are charged to protect. . . . [W]ere a stay granted, there would be palpable – even life-threatening – harm to both public safety agencies and to the public as a whole resulting from continued and unabated interference to public safety and CII systems.²⁴

²³ *Order Denying Stay Request I* ¶ 13 (citations omitted).

²⁴ *Id.* ¶ 16.

This finding applies with equal force to Petitioners' latest request for a stay and further warrants its denial.

III. CONCLUSION

Nextel urges the Commission to reject Petitioners' latest efforts to obstruct the 800 MHz band reconfiguration plan. Their motion to remove BearingPoint as Transition Administrator and their motion for a partial stay should both be denied.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

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February 14, 2005

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 14th day of February, 2005, I caused true and correct copies of the foregoing Opposition of Nextel Communications, Inc. to MRA and Skitronics Motions Relating to BearingPoint and for Partial Stay to be mailed, postage prepaid, to:

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