

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Applications of)	
)	
NEXTEL COMMUNICATIONS, INC.,)	
Transferor,)	
)	
and)	
)	
SPRINT CORPORATION,	)	WT Docket No. 05-63
Transferee,)	
)	
	)	Application File Nos. 0002031766
	)	through 0002031797
For Consent to the Transfer of Control of)	
Entities Holding Commission Licenses and)	
Authorizations Pursuant to Section 310(d))	
of the Communications Act)	

To: The Commission

SAFE COMPETITION COALITION
PETITION TO DENY

SAFETY AND FREQUENCY EQUITY
COMPETITION COALITION (SAFE)

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March 30, 2005

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Exhibit 1A – Affidavit of Daniel C. Hobson
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SUMMARY

Today, thousands of Commercial Mobile Radio Service (“CMRS”) customers, primarily small businesses, are served by small, independent, regional providers of unbundled, dispatch services, forms of Specialized Mobile Radio Service (“SMR”). The unbundled SMR dispatch services enjoyed by these customers, and the price, terms, and conditions for such services, are greatly jeopardized by the proposed Sprint/Nextel merger. The proposed merger threatens to exacerbate the competitive imbalance now present in certain smaller regional markets by increasing concentration in the offering of dispatch services (and imperfect substitutes to traditional SMR dispatch service) resulting from Sprint/Nextel’s combined market power and substantial competitive barriers to entry.

The Sprint/Nextel application is incomplete and deficient because it: (1) fails to demonstrate that there will be no harm to competition in the dispatch market; (2) fails to consider the adverse impact of the merger on smaller, regional SMR providers; (3) fails to demonstrate that the combined Sprint/Nextel will meet the December 31, 2005 deadline for E911 compliance; (4) fails to disclose the extent of market concentration in combined dispatch service and mobile telephony market that will result from the proposed merger; and (5) fails to propose any remedial measures for the resulting concentration to remove competitive barriers to entry, most importantly, fair and complete access to upper-800 MHz spectrum by competitors in the dispatch service market for conversion of their systems to competitive high-density digital cellular architecture.

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To: The Commission

**SAFE COMPETITION COALITION
PETITION TO DENY**

The Safety and Frequency Equity (“SAFE”) Competition Coalition, an association of certain non-Nextel EA licensees in the 800 MHz Band,¹ by its attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 1.939 of the Commission’s Rules, 47 C.F.R. § 1.939, hereby submits this Petition to Deny the applications of Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel”).²

¹ SAFE Competition Coalition members include Coastal SMR Network, LLC; A.R.C., Inc. d/b/a Antenna Rentals Corp; Skitronics, LLC; Waccamaw Wireless, LLC; and CRSC Holdings, Inc.

² On February 8, 2005, pursuant to Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), Nextel Communications, Inc. (“Nextel”) and Sprint Corporation (“Sprint”) filed 33 applications seeking consent to the transfer of control of licenses held by Nextel and its subsidiaries to Sprint. See Nextel Communications, Inc. and Sprint Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 05-63, Public Notice DA 05-502 (ULS File No. 0002031766 has been designated as the lead application and all pleadings and other submissions filed in this matter that pertain generally to the transaction and not to a particular application will be available through this file number in ULS at <http://wireless.fcc.gov/uls/>). *Id.* The other applications seeking FCC consent to transfer control of Broadband Radio

Throughout this Petition, Sprint and Nextel are referred to each as an “Applicant” and collectively as the “Applicants.” The Sprint/Nextel application seeks Commission consent to the transfer of control Nextel’s licenses and authorizations in connection with the proposed Sprint/Nextel merger pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214 and 310(d). This Petition to Deny is supported by affidavits, attached hereto as Exhibit 1, of persons with personal knowledge of the facts demonstrating that: (1) the SAFE Competition Coalition is a party in interest because its members provide Commercial Mobile Radio Service (“CMRS”) in competition with Nextel and Sprint; and (2) grant of the application would be prima facie inconsistent with the public interest, convenience and necessity.

I. THE APPLICANTS HAVE FAILED TO MEET THEIR BURDEN OF PROOF UNDER THE APPLICABLE STANDARDS OF REVIEW

A. The Applicants Must Prove the Sprint/Nextel Merger is in the Public Interest and Will Not Result in Detrimental Market Power or Create or Enhance Barriers to Entry.

The public interest standards of Sections 214(a) and 310(d) require the Commission to engage in a “balancing process” that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits.³ The Applicants bear the

Service, 700 MHz Guard Band, Wireless Communications Service, Private Land Mobile Radio Service, Specialized Mobile Radio Service, and Microwave licenses from Nextel to Sprint have been assigned ULS file numbers 0002040050, 0002040051, 0002040053, 0002040054, 0002040056, 0002040057, 0002040058, 0002040059, 0002040060, 0002040064, 0002040066, 0002040067, 0002040068, 0002040069, 0002040071, 0002040073, 0002040076, 0002040077, 0002040078, 0002040080, 0002040082, 0002040083, 0002040084, 0002040085, 0002040088, 0002040091, 0002040092, 0002040093, 0002040094, 0002040095, 0002040096, and 0002040097. *Id.*

³ See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to the Transfer of Control of Licenses, WT Docket 04-70, *Memorandum Opinion and Order*, FCC 04-255 (2004) (“*Cingular-AT&T Order*”), citing Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2580-81 ¶ 24 (2004) (“*Cingular-NextWave Order*”); 19

burden of proving, by a preponderance of the evidence, that the proposed Sprint/Nextel merger, on balance, serves the public interest.⁴ If the Applicants fail to meet their burden of proof, and the Commission is unable to find that the proposed Sprint/Nextel merger transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Communications Act, as amended, requires that the application be designated for hearing.⁵

The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"⁶ which include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally

FCC Rcd. at 2580-81 ¶ 24 (2004); *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, WC Docket No. 02-215, *Memorandum Opinion and Order*, 18 FCC Rcd. 26,484, 26,492 ¶ 12 (2003) ("*WorldCom Order*"); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No.02-70, *Memorandum Opinion and Order*, 17 FCC Rcd. 23,246, 23,255 ¶ 26 (2002) ("*AT&T-Comcast Order*").

⁴ See *Cingular-AT&T Order* at ¶ 40, citing *Cingular-NextWave Order*, 15 FCC Rcd. at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 26; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,512 ¶ 13; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160, 3169 ¶ 15 (1999) ("*AT&T-TCI Order*"); *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031-32 ¶ 10.

⁵ See 47 U.S.C. § 309(e) (Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. The Commission is not required to designate for hearing applications for the transfer or assignment of Title II authorizations when it is unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if it finds that a hearing would be in the public interest).

⁶ See *Cingular-AT&T Order* at ¶ 41, citing *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 16; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,575 ¶ 26; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, 9821 ¶ 11 (2000) ("*AT&T-MediaOne Order*"); *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,030 ¶ 9.

managing the spectrum in the public interest.”⁷ Such public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁸ By corollary, it should also entail an assessment of whether the merger will result in the discontinuance of certain services to consumers or significant increases in prices for certain services.

The Commission’s analysis is not limited by traditional antitrust principles.⁹

The Commission has recognized that competition in communications services is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.¹⁰ In addition to considering whether the merger will reduce existing competition, therefore, the Commission has traditionally focused on a proposed merger’s effect on future competition.¹¹ The Commission has also recognized that the same consequences of a proposed merger that are beneficial in one sense, may be harmful in another. For instance, combining

⁷ See 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; see also *Cingular-NextWave Order*, 19 FCC Rcd. at 2583 ¶ 29; *GM-News Corp. Order*, 19 FCC Rcd. at 483-84 ¶ 16; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,575 ¶¶ 26; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,030-31 ¶ 9; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6244 ¶ 29; 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22,668, 22,696 ¶ 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); cf. 47 U.S.C. §§ 521(4), 532(a).

⁸ See *Cingular-AT&T Order* at ¶ 40, citing *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031 ¶ 9.

⁹ See *Cingular-NextWave Order*, 19 FCC Rcd. at 2580-81 ¶ 24 (2004), citing *GM-News Corp. Order*, 19 FCC Rcd. at 484 ¶ 17; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd. at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd. at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,033 ¶ 13. See also *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff’d sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”).

¹⁰ See *AT&T-Comcast Order*, 17 FCC Rcd. at 23,256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821 ¶ 10.

¹¹ See *Cingular-AT&T Order* at ¶ 42, citing *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,256 ¶ 28.

assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.¹²

B. The Application Fails to Provide Any Analysis of Impacts on Competition in the Dispatch Market.

Today, thousands of Commercial Mobile Radio Service (“CMRS”) customers, primarily small businesses, are served by small, independent, regional providers of unbundled dispatch services, forms of Specialized Mobile Radio Service (“SMR”), who are in direct competition with Nextel for these customers. The dispatch services enjoyed by these customers, and the price, terms, and conditions for such service, are jeopardized by the proposed Sprint/Nextel merger. However, despite the Commission’s repeated recognition of SMR dispatch as a differentiated service, the Sprint/Nextel transfer application does not adequately address these issues.¹³

Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions, such as raising prices or reducing output, either by itself or in coordination with other firms (market power). In general, competition depends on consumers having choices among products or services that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise

¹² See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc. Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30, *Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6550, 6553 ¶¶ 5, 15 (2001) (“*AOL-Time Warner Order*”).

¹³ See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service*, Ninth Report, WT Docket No. 04-111, FCC 04-216, (Sept. 28, 2004) (“*Ninth Report on CMRS Competition*”) at ¶ 89.

its prices above the “competitive” level because consumers will switch to a substitute. The level of competition depends on what products or services are substitutes for each other (service market), where those substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). The relevant service market may be marked by substitutes that are closer fits than others from the viewpoint of customers (differentiated service market).

The unbundled dispatch services offered by smaller, independent, regional SMR providers is a differentiated service, generally distinct from mobile telephony services offered by PCS and cellular carriers and distinct from the limited-capacity ancillary services offered by carriers such as Verizon Wireless (“Push-to-Talk”), Sprint PCS (“Ready Link”), and ALLTEL (“Touch2Talk”), all of whom do not generally offer unbundled dispatch service (or close substitutes) with the wide-range of capabilities afforded by dedicated SMR dispatch service providers. In some locations, there are no substitutes for SMR dispatch service; it is the only practical communications service for certain customers in certain locations. In sum, for most SMR dispatch customers, cellular telephony or PCS service is not an economically and technically-comparable substitute for the service they now enjoy.

The Applicants have invited the Commission to put on “blindness” in reviewing the proposed merger and to ignore completely the important issues buried in the “details.” The entire analytical structure advocated by the Applicants is supplanted seriatim from the analysis utilized by the Commission in review of the Cingular/AT&T Wireless, without any justification or rationale for applying that analytical structure – and only that analytical structure – to this proposed merger. That structure emphasized analysis of competition issues affecting primarily the nationwide mobile telephony market, and, because of important factual distinctions, did not

require a close look at impacts affecting differentiated markets such as SMR dispatch service. Simply put, neither Cingular nor AT&T Wireless participated, or participate, in the differentiated dispatch service market.

If the Commission accepts the analytical structural advocated by the Applicants, it will never see the “devil” in the “details.” The application invites the Commission to assume incorrectly that the customers, services, and markets affected by the proposed merger are essentially identical to those in the Cingular/AT&T Wireless case, and therefore the public interest analysis should be identical. However, the proposed Sprint/Nextel merger affects significantly different types of customers, different services and different markets, warranting detailed examination.

C. The Application Fails to Prove that the Proposed Merger Will Not Result in Detrimental Market Power in the Dispatch Market and Create or Enhance Barriers to Entry in the Dispatch Market.

The Applicants have failed to acknowledge and address the fact that there is concentration in the dispatch market and that there are a number of small, independent, regional SMR service providers who would be greatly impacted by the proposed merger. The Commission has long recognized that the local trunked dispatch markets are generally concentrated.¹⁴ Yet, there simply is no analysis of concentration in the dispatch market contained in the application whatsoever.

Granted, market concentration is a necessary, but not a sufficient structural condition for unilateral or coordinated anticompetitive behavior to occur. If entry into a market is easy, then entry or the threat of entry may prevent incumbent operators from exercising market

¹⁴ See *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, FCC 00-289 (Aug. 18, 2000), p. 78.

power, either collectively or unilaterally, even in highly concentrated markets.¹⁵ The ease or difficulty of entry generally depends on the nature and significance of entry barriers. In this case, barriers to entry include first-mover advantages, large sunk costs, and access to spectrum. Each of these must be addressed by the Applicants to meet their burden of proof.

The Affidavits attached hereto demonstrate the existence of a competitive imbalance now affecting the future of small, independent, regional SMR dispatch service providers who directly compete with Nextel. These issues are before the Commission in another proceeding,¹⁶ as summarized in the *SAFE Petition for Partial Reconsideration* attached hereto as Exhibit 2. Essentially, the competitive imbalance results primarily from spectrum access barriers to entry faced by smaller, independent, regional SMR providers. Nextel dominates spectrum resources in the upper 800 MHz band, which, under new rules adopted last year, is the only portion of the 800 MHz band where high-density cellular operations are permitted. The Applicants have not proven that these barriers to entry (spectrum access problems) faced by Nextel's smaller, independent, regional competitors in the dispatch market will not be made worse by the proposed merger.

The spectrum analysis contained in the application completely fails to acknowledge the critical importance of 800 MHz spectrum to providers of dispatch service. The Applicants and their consulting economists incorrectly treat spectrum fungibly, glossing over Nextel's monopoly on the cellular portion of the newly reconfigured 800 MHz band, and the critical importance of this spectrum to Nextel's smaller, independent, regional competitors, who

¹⁵ See *Ninth Report on CMRS Competition*, note 181.

¹⁶ See *Joint Petition for Partial Reconsideration of Coastal/A.R.C., Inc. and Scott C. MacIntyre*, filed December 22, 2004 (WT Docket 02-55) ("*Joint Petition*"); *Petition for Partial Reconsideration of Supplemental Report and Order of Safety and Equity Competition Coalition*, filed March 10, 2005 (WT Docket 02-55) ("*SAFE Petition for Partial Reconsideration*") (attached hereto as Exhibit 2).

acquired EA licenses at auction with a view toward constructing high-density cellular architecture to enable their entry into the hybrid mobile telephony/dispatch market and to remain competitive with Nextel in the future. The 800 MHz band represents spectrum in which SAFE Competition Coalition members have an embedded investment. Because of the great difference in their size relative to Nextel, they are hostage to an equipment marketplace (both base stations and mobile units) that are driven by the requirements of the provider with market power, Nextel. The 800 MHz spectrum is the only home to Nextel's small, independent regional competitors, unless equipment is made available by manufacturers for dual-band or tri-band operation. Because of their small size, these competitors cannot expect to drive the manufacturing market, particularly up against a competitor such as Nextel, and worse yet, Sprint/Nextel, with vast market power and dominance in the 800 MHz band.

In the past, the Commission has tolerated increased concentration in the dispatch market where: (1) there was competition provided by other firms offering trunked dispatch services in those locations; (2) the Commission expected near-term and long-term competitive entry into the trunked dispatch market;¹⁷ and (3) for some consumers, traditional dispatch, private dispatch or data dispatch were considered viable alternatives to dispatch, providing additional constraint on Nextel.¹⁸ The Sprint/Nextel application fails to demonstrate that these moderating factors exist. Indeed, the application does not address the impact of further concentration in the offering of imperfect substitutes to SMR dispatch service resulting from the proposed merger.

¹⁷ See *In Re Application of AWI Spectrum Co., LLC and ACI 900, Inc. for Consent to Assignment of Specialized Mobile Public Licenses, Order, DA 01-1268* at ¶14 (2001) (“*AWI Spectrum Order*”); *Motorola Order* at ¶¶ 18-20, 22, 31; *Geotek Order* at ¶¶ 31, 35-41.

¹⁸ See *Motorola Order* at ¶ 32.

D. The Applicants Fail To Include Promises Of Timely E911 Compliance In The List Of Public Safety Benefits From The Proposed Merger.

Conspicuously absent from the list of public safety or public interest benefits in the Sprint/Nextel application, is any promise by the by the Applicants of full and complete E911 compliance by December 31, 2005. The application describes the benefits to public safety communications as including many things, but that is nothing more than camouflage for an underlying truth – timely E911 compliance is apparently not an intended goal of or priority for the Applicants. The merged entity would appear to have many other higher priorities. Nevertheless, smaller, independent, regional competitors face E911 compliance pressures as they move toward conversion/upgrades to enter the hybrid mobile telephony/dispatch business in competition with Nextel. The Commission should insist that the Applicants address this issue in the Sprint/Nextel application, and should not accept anything less than a promise of enterprise-wide, full and complete E911 compliance by the merged entities before the December 31, 2005 deadline, as a condition of the merger.

II. THE APPLICATION SHOULD BE DESIGNATED FOR HEARING AND THE APPLICANTS SHOULD BE REQUIRED TO SUPPLEMENT THE RECORD

Because the Applicants have failed to meet their burden of proof, and because nearly all of the information relating to the alleged benefits of the proposed merger and the costs of achieving them is in the sole possession of the Applicants, the application should be designated for hearing and the Applicants should be required to provide sufficient evidence that the alleged benefits of the proposed merger outweigh the costs of achieving them.¹⁹ There is

¹⁹ See *Cingular AT&T Order* at ¶ 205, citing *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,630, ¶ 190; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 20,063, ¶ 157 (“These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies ... are sufficiently likely and verifiable”); *AT&T-*

absolutely no evidence presented by the Applicants of any of the public interest costs of the proposed merger – only the alleged benefits. Given the existing concentration in the dispatch market, with Nextel as the dominant carrier, the Applicants must prove by a preponderance of the evidence, that no further harm to competition will result from the proposed merger. In addition, they must prove that existing barriers to entry will not be exacerbated.

Specifically, the Applicants should be required to provide a complete analysis of the impact of the proposed merger on competition in SMR dispatch service, in particular in geographical areas where smaller, independent, regional SMR service providers are the only competition currently faced by Nextel in the dispatch market. In addition, the Applicants should be required to disclose all existing arrangements with independent, regional, SMR dispatch service providers including options to purchase, spectrum leases, roaming and resale agreements, etc., as well as all arrangements with equipment vendors who currently supply equipment to Nextel and who will supply equipment to Sprint/Nextel for use in the 800 MHz band. The Commission must inquire about these arrangements and the potentially adverse impact of restrictions in such arrangements that post-merger could have an adverse effect on competition from smaller, independent, regional competitors to Nextel.

Comcast Order, 17 FCC Rcd. at 23,313, ¶ 173 (Commission considers whether benefits are “verifiable”); *SBC-Ameritech Order*, 14 FCC Rcd. at 14,825, ¶ 255; *DOJ/FTC Merger Guidelines* § 4 (“[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete...”).

III. NARROWLY-TAILORED TRANSACTION-SPECIFIC CONDITIONS SHOULD BE IMPOSED TO REMEDY OR AVOID ANTICOMPETITIVE HARMS

The Commission's public interest authority also authorizes it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. These conditions may include the divestiture of certain licenses along with associated facilities and customers, for example. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.²⁰ Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."²¹

Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables the Commission to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.²² In the Cingular/AT&T Wireless decision, the Commission correctly identified specific markets in which it determined that the public interest would not be served by the transfer of control of AT&T Wireless to Cingular and would likely lead to

²⁰ See 47 U.S.C. § 303(r). See also *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,032 ¶ 10 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to Section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (Section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to Section 303(r) authority).

²¹ *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15.

²² See, e.g., *GM-News Corp. Order*, 19 FCC Rcd. at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18034-35 ¶ 14. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

anticompetitive harms that require a remedy.²³ When the record of this application is complete with the vital missing analyses and information, the Commission should consider the need for such market-specific conditions, in addition to any other conditions justified by the facts.

IV. CONCLUSION

For the reasons set forth above and in the attached Exhibits, the Applicants have failed to meet their burden of proof. Because nearly all of the information relating to the alleged benefits of the proposed merger, and the undisclosed public interest costs of achieving them, is in the sole possession of the Applicants, the application should be designated for hearing and the Applicants should be required to provide sufficient evidence that the alleged benefits of the proposed merger outweigh the costs of achieving them. The Commission's public interest authority should be exercised on the basis of a full and complete record, addressing all of the relevant competition issues. Only on the basis of such a complete record can the Commission appropriately exercise its authority to impose and enforce appropriately-tailored, transaction-specific conditions to ensure that the public interest is served by the transaction. When the record of this application is complete with the vital missing analyses and information, the Commission should consider the need for market-specific conditions, including, if necessary, the divestiture of certain licenses along with associated facilities and customers, in addition to any other conditions justified by anti-competitive harms that require a remedy.

²³ See *Cingular-AT&T Order*, Appendix D.

Respectfully submitted,

SAFETY AND FREQUENCY EQUITY
COMPETITION COALITION (SAFE)

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March 30, 2005

CERTIFICATE OF SERVICE

I, Angela C. Spencer, do hereby certify that on this 30th day of March, 2005, a copy of the foregoing "SAFE Competition Coalition Petition to Deny" was served by first class United States mail, postage prepaid, addressed to:

Robert Foosaner
Senior Vice President and Chief
Regulatory Office
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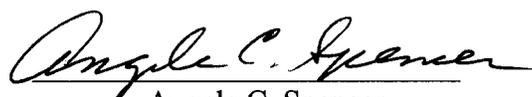

Angela C. Spencer

EXHIBIT 1A

Affidavit of Daniel C. Hobson

of

Performance Industries, LP

AFFIDAVIT OF DANIEL C. HOBSON

Under penalty of perjury, I, Daniel C. Hobson, hereby declare that:

1. I am the President of Performance Industries, LP, and have been engaged by John W. Harris relative to his spectrum holdings through A.R.C., Inc., Coastal SMR Network, LLC and CRSC Holdings, Inc. I have personal knowledge of the following facts, except where noted.

2. My client has provided service to the Virginia and North Carolina marketplace for more than 30 years through Specialized Mobile Radio (“SMR”) sales and service. In an effort to expand services to the current market, in September 2000, A.R.C., Inc. purchased six blocks of 800 MHz spectrum at Auction 34 in Economic Areas 14, 15, 20, 21, 22 and 25. In December 2000, A.R.C., Inc. purchased 21 additional blocks of 800 MHz spectrum at Auction 36 in Economic Areas 14, 15, 16, 17, 18, 19, 20, 21, 22 and 26.

3. In March 2001, Performance Industries began providing services to Mr. Harris to expand the market services it was currently providing through the site-based licenses used in the systems of Coastal SMR Network and CRSC Holdings, which included engineering studies relative to the build out of the EA channels as provided in the FCC guidelines allowing permissible operations such as analog or digital services used for voice communications, paging, data and facsimile services. Our engineering studies included the determination of “white space” available in the EAs through 40/22 dBu service/interference contours for each of the frequencies acquired at auction. To further our efforts, Performance Industries’ facilitated meetings with Motorola, ComSpace, Central Tech Wireless and others to develop a plan to build out all EAs, including exploring opportunities for the conversion to a cellular-architecture system via iDen, Harmony or similar technology.

4. As our engineering, market plan development and system analysis progressed throughout 2001, the unfortunate activities of September 11, 2001 transpired. Following the terrorist attacks of September 11, Nextel issued a White Paper on November 21, 2001 petitioning the FCC to realign the 800 MHz land mobile radio band to rectify interference through separation of cellular and non-cellular architectural systems and to allocate additional spectrum to meet critical public safety needs. In March 2002, the FCC responded to Nextel's White Paper with the adoption of a Notice of Proposed Rule Making ("NPRM") to explore ways to improve the spectrum environment for public safety operations in the 800 MHz band. During this time, we constructed the EA licenses in an analog format while awaiting clarity from the FCC on its decision and anticipating beginning our expansion plan for a cellular-architecture system.

5. In September 2002, the Consensus Parties (including Nextel) filed their relocation plan in response to the FCC's NPRM. This plan was further edited through a Supplemental Consensus Plan filed in December 2002. The FCC issued an extension to the original NPRM in January 2003 as a result of the supplemental comments by the Consensus Parties. Again, during this time our client faced uncertainty on the implementation and capital expense relating to building a cellular architecture system until a firm decision was made by the FCC. In April 2004, our client filed comments urging the Commission to adopt a balanced approach to treat all licensees fairly and allowing for the election of operation in the "cellularized" portion of the band however that is defined.

6. Based upon the events of 9/11, the issuance of Nextel's White Paper, and the resulting action by the FCC, our client's plans for the development of a cellular-architecture system were halted pending the FCC's Report and Order in the 800 MHz rebanding proceeding. The FCC's repeal of the rule that provided the my client with the right to integrate its high-site SMR licenses with the EA licenses has rendered impossible its plan to build an ESMR system

that can compete effectively with Nextel in offering integrated dispatch/mobile telephony. My client's high-site SMR licenses – which represent over one third of its capacity – now appear to be permanently restricted to providing dispatch services without integrated mobile telephony in a high-density cellular configuration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 2005.

A handwritten signature in black ink that reads "Daniel C. Hobson". The signature is written in a cursive style with a large, sweeping initial "D".

Daniel C. Hobson

EXHIBIT 1B

Affidavit of John W. Harris

of

**Coastal SMR Network, LLC
A.R.C., Inc. dba Antenna Rentals Corp.
CRSC Holdings, Inc.**

AFFIDAVIT OF JOHN W. HARRIS

Under penalty of perjury, I, John W. Harris, hereby declare that:

1. I am the President and holder of controlling interests in Coastal SMR Network, LLC (“Coastal SMR”), A.R.C., Inc. dba Antenna Rentals Corp. (“ARC”), and CRSC Holdings, Inc. (“CSRC”, and together with ARC and Coastal SMR, the “Coastal Companies”). I have personal knowledge of the following facts, except where noted.

2. Coastal SMR, ARC, and CRSC are members of the Safety and Frequency Equity Competition Coalition (“SAFE”), which represents the interests of 800 MHz Specialized Mobile Radio (“SMR”) licensees who hold both site-specific “high site” licenses and Economic Area (“EA”) licenses with which they provide commercial dispatch services.

3. Commercial Radio Service Corp. was established in the early 50’s and was in the business of sales and service of what were popularly known as two-way radios. The core of the business was the installation and maintenance of two-way radios used by a wide range of public entities and private businesses. CRSC met the needs of law enforcement organizations, fire departments, municipal maintenance departments, as well as construction contractors, service companies, and the security operations of large corporations. In the beginning, CRSC concentrated primarily on serving municipal customers in southeastern Virginia and northeastern North Carolina. In Virginia, our clients included the City of Norfolk, Virginia Beach, Chesapeake, Suffolk, Franklin, Emporia, and Lawrenceville Virginia. In North Carolina, we installed and maintain systems in counties of Currituck, Dare, Perquimins, Pasquatank, Hyde and the towns of Elizabeth City, Hereford, Ahoskie, Kitty Hawk, Kill Devil Hills, Nags Head, Southern Shores, Hatteras, Rodanthe, and several other small towns. We installed and maintained the State of North Carolina Ferry System in these areas.

4. Since then, CRSC has evolved into the Coastal Companies, expanding from the Virginia and North Carolina regional footprint into today's present multi-state footprint, which reaches down the Atlantic coast from Virginia through North Carolina, then South Carolina, and into Georgia. This growth occurred in response to our customers growing need for service throughout the mid-Atlantic seaboard. In anticipation of further growth and customer demands for more sophisticated services, we participated in the EA license auctions to acquire the licenses we needed to ensure that we could meet these demands. While our existing high-site SMR infrastructure met our customers' present needs, we knew that we had to move up to the new cellular technologies ("ESMR") to continue to compete effectively.

5. The Coastal Companies face competition from Nextel's Direct Connect service in a majority of our markets. We do not compete with Nextel in some of the more rural markets, where they have yet to construct any systems.

6. The Coastal Companies' dispatch service competes directly with Nextel's "Direct Connect" service in that both provide private subscriber-to-subscriber communications services to business customers.

7. Coastal Companies' dispatch services are priced well below Nextel's "Direct Connect" business services. Many of our customers neither need nor desire the full complement of services available through integrated mobile telephony, and we take pride in being able to meet their needs for inexpensive analog dispatch communications. However, for every customer that wants only analog dispatch, there are another five who are thinking about moving to Nextel to take advantage of their integrated mobile telephony services.

8. Coastal Companies, then, must find a way to offer integrated dispatch/mobile telephony services at competitive prices to a large portion of its current dispatch customers. Traditionally, Coastal Companies have met the changing needs of its customers by investing in

and developing its offerings as technologies change. It was this responsiveness that led us retain Performance Industries, LP, to help us plan and prepare for the construction of a cellular architecture system. One of the first major steps we took was participating in FCC Auctions No. 34 and 36, securing 27 EA licenses representing 255 frequency pairs, which generally overlay our existing high-site SMR network. Fundamental to our plan was the fact that the Commission's rules at the time permitted any EA license holder to integrate its high site licenses with its EA holdings to construct a unified cellular architecture ESMR system that would permit the delivery of integrated dispatch/mobile telephony to our customers. The Commission itself, in its Auction 34 and Auction 36 Data Sheets, recognized that the EA licenses were integral to the development of SMR services, noting that the licenses could be used to "provide analog or digital services used for voice communications, paging, data and facsimile services. The SMR marketplace is allowing new acknowledgement paging and inventory tracking, credit card authorization, automatic vehicle location, fleet management, remote database access and voicemail."

9. Just as we were developing this plan, however, the post 9/11 tightening of the capital markets, in combination with the Commission's 800 MHz rebanding proceeding's uncertainty, stalled our capital raising efforts, and our plans were put on hold pending the outcome of the proceeding.

10. What at first seemed to be prudent caution has turned out to be a costly mistake. The actions taken in the Commission's Report and Order in the 800 MHz rebanding proceeding may well put an end to a business that has been 50 years in the making.

11. Without notice, the Commission repealed the rule that provided the Coastal Companies with the right to integrate our extensive high-site holdings into the EA licenses for which we paid dearly at auction. As a result, our original plan to build an ESMR system that can

compete effectively with Nextel in offering integrated dispatch/mobile telephony is in shambles. Our high site licenses – which represent over one third of our capacity – are now permanently restricted to providing analog dispatch services. While we will continue to provide our existing dispatch customers with the same excellent service at a fair price that we have for so many years, it is now obvious that the door is closing on any future for the Coastal Companies in offering integrated dispatch/mobile telephony through an ESMR system. If the 800 MHz Report and Order swung the door halfway shut, the control over ESMR spectrum that a Sprint-Nextel merger will create slams it shut.

12. The loss of the high-site license spectrum, while certainly a setback, would not be so devastating if the Coastal Companies had access to replacement spectrum in which to build an ESMR system. Such access would allow us to offer the integrated dispatch/mobile telephony services that our customers desire. However, as a result of the Commission's Report and Order (which provided Nextel with additional spectrum in which to offer their own ESMR services) and the combination of the spectrum held by Nextel and Sprint, Nextel will have gained control over practically all of the remaining spectrum designated for the provision of ESMR services in our markets. Verizon offers a "Push to Talk" service that, at first glance, appears to meet the needs of those who need integrated dispatch/mobile telephony, but our customers have generally found that it is not robust enough to serve their needs. Further, this service isn't even available in most of our North Carolina markets.

13. Thus, in most of Coastal Companies' markets, we are the sole practical alternative to Nextel as a provider of commercial dispatch services. Nextel gained abundant ESMR spectrum as a result of the 800 MHz rebanding Report and Order. Adding Sprint's spectrum on top of that, a merged Sprint/Nextel would have absolutely no incentive to exchange, lease, sell, or otherwise make any ESMR spectrum available to us for use in constructing our planned

ESMR system (or even a significantly reduced one). As a result of this lack of access to spectrum, we will not be able to operate a network that will permit us to provide the same services that Nextel does. Thus, while we were a strong competitor to Nextel in providing subscriber-to-subscriber communications services in the past, the combined Sprint/Nextel entity will face little effective competition from a competitor hobbled by the constraints of its ESMR-impaired network. While Coastal Companies will continue to serve our analog dispatch customers, the future does not look bright. Should we disappear, those customers will be faced with a single provider of integrated dispatch/mobile telephony services.

14. The Coastal Companies joined SAFE in part to bring to light the anti-competitive threat to small market providers of dispatch services resulting from recent FCC decisions in the 800 MHz band reconsideration and from the proposed Sprint/Nextel combination. The post-merger Sprint/Nextel entity will control the vast majority of the spectrum necessary that represents the future of the commercial dispatch sector, with a high density cellular design. As a result, the Coastal Companies will be prevented from building out systems that offer the integrated dispatch/mobile telephony services our customers demand. Furthermore, Sprint/Nextel's dominant position as the primary purchaser of equipment designed to meet the needs of commercial dispatch customers will threaten our ability (and companies like us) to get new equipment developed that will allow us to provide competitive dispatch services. Thus, unless the Commission imposes conditions on the post-merger Sprint/Nextel entity that take account of the restricted spectrum access of the Coastal Companies and similarly situated licensees, the Coastal Companies be left to service an ever decreasing pool of analog dispatch customers, and many of those customers will fall victim to a single monopoly provider when they decide to move on to integrated dispatch/mobile telephony services – Sprint/Nextel.

15. In light of this, it is plain that grant of the Sprint/Nextel merger application will result in harm to the public interest, convenience and necessity, through the elimination of competition in many of the markets in which the Coastal Companies compete with Nextel. Unless the Commission imposes conditions upon the merger that ensures the Coastal Companies will be granted access to the ESMR spectrum, the merger will effectively eliminate competition.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 2005.

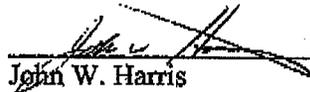

John W. Harris

EXHIBIT 1C

Affidavit of John Komorowski

of

Skitronics, LLC

Waccamaw Wireless, Inc.

Southern Real Estate Management, LLC

AFFIDAVIT OF JOHN W. KOMOROWSKI

Under penalty of perjury, I, John W. Komorowski, hereby declare that:

1. I am the controlling interest holder of Skitronics, LLC (“Skitronics”). I have personal knowledge of the following facts, except where noted.
2. Skitronics is a member of the Safety and Frequency Equity Competition Coalition (“SAFE”), which consists of certain 800 MHz Specialized Mobile Radio (“SMR”) licensees who hold both site-specific “high site” licenses and Economic Area (“EA”) licenses with which they provide commercial dispatch services.
3. Skitronics and its affiliated companies (Waccamaw Wireless, Inc. and Southern Real Estate Management, LLC) had its start in 1994, when Skitronics began acquiring its first licenses. Skitronics purchased them on the open market, won them thru competitive bidding at auction, traded channels with other operators, and applied for channels with the FCC. Skitronics, both on its own and through its subsidiaries, holds licenses for over 200 SMR channels. Forty of these are EA channels. Several of the EA channels are in areas where we have little or no high site-specific spectrum. For the most part, however, our high site and EA licenses operate in overlapping geographic areas in the Mid-Atlantic Region.
4. Skitronics competes with Nextel in approximately 70% of our markets, which are located throughout North Carolina, South Carolina and West Virginia. The areas in which we do not compete with Nextel are generally rural areas where Nextel holds licenses, but has yet to construct any systems.
5. Skitronics competes directly with Nextel’s “Direct Connect” service in that we both provide private subscriber-to-subscriber communications services to business customers. While dispatch operators are often stereotyped as providing dispatch service to only taxicab-type operations, Skitronics is emblematic of the reality that dispatch service is used and valued by a

significant cross-section of the business community. We serve many large firms across many industries, including GlaxoSmithKline, Marriott Hotels, DHL Worldwide Express, Airborne Freight, and Time Warner Cable. Skitronics also serves the critical communications needs of small businesses in our markets, such as local concrete companies, farmers in eastern North Carolina, and small delivery operations throughout the region. Many of these are in rural markets where national carriers have little if any system presence.

6. Skitronics's dispatch services are priced well below Nextel's "Direct Connect" integrated dispatch/mobile telephony services. On average, Skitronics customers pay about \$20 a month per subscriber for our services. Nextel, in comparison, charges business subscribers an average of \$70.17 per unit (represents 2003 average as reported in the March 8, 2004 issue of RCR News) for its Direct Connect services (which provide the same private subscriber to subscriber communications that we do). Skitronics offers an affordable alternative to businesses that do not want to pay Nextel's high rates.

7. Skitronics is, in fact, a very strong competitor that has worked hard to offer competitive services at competitive prices in its markets. Skitronics has accomplished this by investing and developing its offerings as customer needs and technologies change. We have, at one time or another, constructed about every type of trunking system available in the United States. We have, or have had, Motorola Type 1 and Type 2 systems, EF Johnson's "LTR" system, General Electric "G-MARC" system, Ericsson's "EDACS" system, CommSpace's "DCMA" 8 to 1 digital system and have installed Motorola's "iDEN" on a trial basis.

8. However, for various reasons, each of these systems (with the exception of Motorola's iDEN system) suffer from designs that will limit their future usefulness. Skitronics recognizes that its future lay in providing integrated dispatch/mobile telephony services that require the construction of a high-density cellular system. While our high site facilities could

not provide such services, the Commission's rules at the time permitted any EA license holder to integrate its high site licenses with its EA holdings to construct such a system. To this end, we bid on and won 40 EA licenses in Auction 36 for the purpose of constructing systems that would permit use to expand the range of services and features to our customer base. These EA licenses were purchased at an auction in which even the FCC acknowledged that SMR providers could use them to "provide analog or digital services used for voice communications, paging, data and facsimile services. The SMR marketplace is allowing new acknowledgement paging and inventory tracking, credit card authorization, automatic vehicle location, fleet management, remote database access and voicemail." This language is taken directly from the Permissible Operations section of the Auction 34 and 36 Data Sheets. Ultimately, we did then pursue and begin construction of a wide area network that would permit us to offer integrated dispatch/mobile telephony services (an "ESMR" system). We were in the process of constructing that ESMR system when our primary equipment manufacturer was unable to secure its final round of funding (in the post-9/11 capital markets). This forced us to abandon that technology in face of the instability of our equipment supply. With our preferred choice in vendors no longer available, we then planned to build out an ESMR system with Motorola's iDEN technology. At this point, however, the concerns of technology and business competition were forced to take a back seat to the regulatory uncertainty raised by the Commission's 800 MHz rebanding proceeding.

9. The uncertainty of the 800 MHz rebanding proceeding made it impossible to raise capital to finance the expansion of our operations. As a result, we could not construct an ESMR system. While we expected some competitive fallout from that inability to build (with existing customers leaving us in order to use Nextel's service), we were completely surprised by the

enormous regulatory barriers dropped in place by the Commission's Report and Order in the 800 MHz rebanding proceeding.

10. Skitronics lost the right to convert our high-site licenses for use with an ESMR system built by combining those licenses and our EA licenses. As a result, we no longer have enough spectrum with which to build an ESMR system that can compete effectively with Nextel in offering integrated dispatch/mobile telephony. The Skitronics spectrum represented by its high-site licenses – which once formed a cornerstone of a strategy to develop our ESMR offerings – will now be forever restricted to high-site architecture under the new band plan, which will not allow Skitronics to utilize geographic frequency re-use techniques in high-density cellular configuration. This represents a significant, if not fatal, blow to our future ability to compete with a merged Sprint/Nextel entity.

11. The loss the ability to incorporate high-site licenses spectrum into our planned ESMR system, while certainly a setback, would not be so devastating if Skitronics had access to replacement spectrum in which to build that ESMR system. Such replacement spectrum would allow us to use the licenses as a complete system as initially authorized through the FCC, as well as allow us to achieve our goal of providing the integrated dispatch/mobile telephony services that our customers desire, albeit at a higher price than we would have been able to offer on a system constructed with our own existing high-site and EA licenses. However, access to replacement spectrum is unlikely for two primary reasons. First, the Commission's 800 MHz rebanding Report and Order provided Nextel with the vast majority of spectrum with which ESMR services can be offered. Second, by combining the spectrum and operations of Nextel and Sprint, Sprint/Nextel will have gained control over practically all of the remaining spectrum designated for the provision of ESMR services in our markets while also eliminating its only significant national competitor in integrated dispatch/mobile telephony – Sprint's ReadyLink

service. Verizon's offering – its "Push to Talk" service, is generally viewed in the industry as not robust enough to serve the needs of business customers and involves a significantly delayed connect time which renders it unsuitable for the instant communications needed by these customers. Further, Verizon simply doesn't offer its Push to Talk service in many of our markets, particularly in West Virginia and North Carolina.

12. Given that Skitronics will be the sole competitive alternative to Nextel as a provider of advanced commercial dispatch services in most of our markets, Nextel will have absolutely no incentive to exchange, lease, sell, or otherwise make any spectrum available to Skitronics for use in constructing an ESMR system. This will almost certainly be the death blow for Skitronics, as we will not be able to upgrade our network to provide the same services that Nextel does. Thus, by maneuvering its way into the role of gatekeeper to the spectrum which allows the provision of integrated dispatch/mobile telephony services in our markets, Nextel will have eliminated all competition.

13. In light of this, it is plain that grant of the Sprint-Nextel merger application will result in harm to the public interest, convenience and necessary, through the elimination of competition in many of the markets in which Skitronics competes with Nextel. Unless the Commission imposes conditions upon the merger that ensures Skitronics will be granted access to the ESMR spectrum, Skitronics's digital future is all but destroyed, and with that, competition in its markets.

14. Skitronics now faces the near-impossible task of competing effectively with a Sprint-Nextel combination that will soon control the vast majority of the 800 MHz ESMR spectrum necessary for Skitronics, or any other regional competitor of Nextel, to offer competitive services in the future, which require a high-density cellular architecture with geographic frequency re-use. While Skitronics has historically been able to grow and thrive by

offering 800 MHz SMR dispatch services, dispatch with integrated mobile telephony is what many customers are beginning to demand.

15. If Skitronics and other, similarly situated SMR providers are restricted from building the high-density cellular systems they envisioned, planned for and received authorization from the FCC for when they went to auction, they will almost certainly be unable to survive. In most of the markets in which it competes with Nextel, Skitronics is the sole alternative provider of dispatch services. Should Skitronics be forced out of business by Nextel's control over spectrum which represents the future of dispatch services, our customers will be stranded in a market that lacks competition on both price and service.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 2005.



John W. Komorowski

EXHIBIT 2

**Petition for Partial Reconsideration of Supplemental
Report and Order of
Safety and Equity Competition Coalition
filed March 10, 2005**

(WT Docket No. 02-55)

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 To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Services	)	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		

**PETITION FOR PARTIAL RECONSIDERATION OF THE
SAFETY AND FREQUENCY EQUITY COMPETITION COALITION**

The Safety and Frequency Equity Competition Coalition ("SAFE"), an association of certain non-Nextel EA license holders in the frequencies 806 to 824 MHz and 851 to 869 MHz (the "800 MHz Band"),¹ by its attorneys, hereby submits this Petition for Partial

¹ SAFE members include Coastal SMR Network, LLC; A.R.C., Inc. d/b/a Antenna Rentals Corp; Skitronics, LLC; Mobile Relay Associates ("MRA"); Waccamaw Wireless, LLC; CRSC Holdings, Inc.; and Silver Palm Communications, Inc.

Reconsideration (“Petition”) of the Supplemental Report and Order (“*Supplemental Report and Order*”)² in the above-captioned proceedings, which modified the rules for the relocation of Public Safety and non-Public Safety licensees in the 800 MHz Band adopted in the Commission’s August 6, 2004 Report and Order (“*Report and Order*”).³ SAFE seeks reconsideration of the Commission’s arbitrary and capricious decisions that result in economic harm to SAFE members and harm to competition in the dispatch communications service market.⁴

On December 22, 2004 Coastal SMR Network, L.L.C., a SAFE member, filed a Joint Petition for Partial Reconsideration (“*Joint Petition*”).⁵ SAFE incorporates that *Joint Petition* herein by reference. The *Joint Petition*: (1) sought reconsideration of the major technical infirmities in the *Report and Order*; (2) sought reconsideration of major legal and procedural infirmities in the adoption of the *Report and Order*; and (3) sought the adoption of solutions to these technical, legal and procedural infirmities that preserve the intended benefits to Public Safety while correcting gross inequities in the treatment of all the adversely-affected non-Nextel/SouthernLINC EA licensees.

² See *Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, et al., FCC 04-294 (rel. December 22, 2004) (“*Supplemental Report and Order*”).

³ See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et al., FCC 04-168 (rel. August 6, 2004) (“*Report and Order*”).

⁴ The Commission has recognized the uniqueness of the dispatch service market in its *Annual Report and Analysis of Competitive Market Conditions with Respect to CMRS*. See *Ninth Report* in WT Docket No. 04-111, FCC 04-216, rel. September 28, 2004, at ¶ 89.

⁵ See Joint Petition for Partial Reconsideration of Coastal/A.R.C., Inc. and Scott C. MacIntyre, filed December 22, 2004 (“*Joint Petition*”) (attached).

I. THE SUPPLEMENTAL ORDER DOES NOT CORRECT THE INFIRMITIES OF THE REPORT AND ORDER.

The *Supplemental Report and Order* fails to cure fundamental flaws in the Report and Order. The *Report and Order*, with neither adequate notice nor public comment, eliminated the rights of incumbent SMR high-site licensees to modify their systems, as previously allowed by Section 90.693 of the Commission's rules, to provide ESMR cellular-type digital services.⁶ This decision has a particularly harsh impact on those high-site licensees that purchased Economic Area licenses at auction with the intention of constructing digital ESMR systems in the future, using their combined spectrum resources. All of SAFE's members are in this category. Before the *Report and Order* was adopted, SAFE members were free to change their operational configuration from high-site facilities to cellular-like facilities, although the uncertainties regarding the imminent relocation process temporarily impeded investment in the construction of new digital ESMR systems.⁷

The *Supplemental Report and Order* modified the *Report and Order*'s criteria for eligibility to relocate site-based facilities to the ESMR band by providing that:

a non-Nextel, non-SouthernLINC, EA licensee, operating an ESMR system and relocating to the ESMR portion of the band, may also elect to relocate site-based cells, licensed to it as of the date the 800 MHz R&O was published in the Federal Register under the following conditions:

⁶ The *Report and Order* provided:

in order to transfer a site-based facility into the ESMR segment, a licensee must: (a) currently hold an EA license in the relevant market; and (b) be using the site-based facility as part of a cellular-architecture system in that market as of the date of publication of this Report and Order in the Federal Register, and (c) must have been an operational part of the licensee's ESMR system, within the relevant EA.

Supplemental Report and Order at 78.

⁷ See 47 C.F.R. § 90.693.

- The site-based cell must have been an integral part of the EA licensee's ESMR system as of the date the 800 MHz R&O was published in the Federal Register. A cell that is an integral part of a ESMR system is a cell that has a 40 dBi/V coverage contour overlapping the 40 dBi/V coverage contour of another cell integral to the ESMR system, and must be capable of "hand-off" of calls to and from the cell its 40 dBi/V coverage contour overlaps.
- Such a site-based cell may be moved into the ESMR spectrum, but is limited to the 40 dBi/V coverage contour it provided as of the date the 800 MHz R&O was published in the Federal Register. *Supplemental Report and Order* at 78.

However, the *Supplemental Report and Order's* modification does nothing to eliminate the economic harm to SAFE members and the ultimate harm to competition in the dispatch services market. Moreover, the Commission's *Supplemental Report and Order* does not cure the procedural defects in the underlying rulemaking proceeding, including violations of the Administrative Procedure Act, the due process rights of site-based SMR licensees, and statutory requirements for the equitable treatment of CMRS licensees.⁸

II. CONCLUSION

In addition to the issues raised in the attached Petition for Reconsideration, SAFE seeks reconsideration of the Commission's modification of the *Report and Order* described above. SAFE members seek to relocate all of their licenses – including high-site licenses – into the upper (cellular) portion of the new 800 MHz Band plan. SAFE members understand that high-site configurations would not be permitted in that portion of the band, and SAFE members understand that, if granted access to that portion of the band, they would be obligated to construct digital ESMR systems at their own expense.

⁸ See, e.g., *Joint Petition* at 5, 7 and 9.

Respectfully submitted,

SAFETY AND FREQUENCY EQUITY
COMPETITION COALITION (SAFE)

By:



Julian L. Shepard
Mark Blacknell

Williams Mullen, A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 833-9200
Its Attorneys

March 10, 2005

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

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

To: The Commission

JOINT PETITION FOR PARTIAL RECONSIDERATION
OF COASTAL SMR NETWORK, L.L.C./A.R.C., INC.
AND SCOTT C. MACINTYRE

By: Julian L. Shepard
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SUMMARY

With the best of intentions, the Commission adopted a new 800 MHz band plan to solve an important public safety interference problem. Indeed, the Commission's decision is a major step forward in many respects. Consequently, this Joint Petition seeks only partial reconsideration and does not challenge: (1) the Commission's recognition of a long-standing and growing interference problem in the 800 MHz Band with an adverse impact on Public Safety users; (2) the Commission's decision to utilize a two-pronged approach to address the interference problem; and (3) the Commission's finding that the 1.9 GHz spectrum is the most viable and best option to facilitate the restructuring of the 800 MHz Band.

However, the new 800 MHz band plan is built on a faulty foundation, and, unless it is repaired, the Commission's noble objectives will not be achieved. The Commission's decision will fail to meet the expectations of the public safety community, harm competition in the commercial mobile radio service market, and spawn time-consuming and costly appeals. Therefore, the Joint Petitioners request that on reconsideration the Commission: (1) conduct the proper engineering analysis and make it public; (2) ensure that adequate spectrum is allocated to provide a sufficient degree of service replication for all the affected 800 MHz licensees; and (3) adopt a band plan without the unlawful preferential features of the current plan that benefit Nextel and Nextel Partners. An even-handed treatment of all incumbent SMR licensees, including Nextel and Nextel Partners, is in the public interest and is required by law. The Joint Petitioners request that they be permitted to share in the same benefits and burdens as Nextel in a revised band plan based on a solid foundation of engineering analysis that illuminates the actual coverage-area outcomes of the transition.

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 To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Services	)	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)	

JOINT PETITION FOR PARTIAL RECONSIDERATION
OF COASTAL SMR NETWORK, L.L.C. /A.R.C., INC.
AND SCOTT C. MACINTYRE

Coastal SMR Network, L.L.C. and its affiliates¹ ("Coastal/A.R.C."), licensees of 27 EA and 138 high-site Specialized Mobile Radio Service ("SMR") authorizations in the Mid-Atlantic region, and Scott C. MacIntyre, the licensee of three EA licenses and the holder of non-

¹ Commercial Radio Service Corp. and A.R.C., Inc. d/b/a Antenna Rentals Corp. A listing of the licenses held by these entities is available as Exhibit A to the Comments filed December 2, 2004, by Coastal (attached hereto as Exhibit One).

controlling interests in entities holding four EA licenses and six high-site SMR licenses (collectively, the “Joint Petitioners”), by their attorneys, hereby submit this Joint Petition for Partial Reconsideration (“Joint Petition”) of the Report and Order (“*Report and Order*”) in the above-captioned proceedings (the “*800 MHz Rebanding*”), adopting rules for the relocation of Public Safety and non-Public Safety licensees in the frequencies 806 to 824 MHz and 851 to 869 MHz (the “800 MHz Band”).² Coastal/A.R.C. recently filed Comments in response to the Public Notice released by the Commission on October 22, 2004 in this proceeding.³ The Joint Petitioners hereby incorporate those Comments in this Joint Petition by reference. In sum, Coastal’s Comments stated: (1) the newly-adopted band plan thwarts Nextel’s competitors (including Coastal) who plan to “cellularize” their existing SMR systems; and (2) the proposals in Nextel’s further *ex parte* submissions affecting the placement of incumbents (other than Nextel, Nextel Partners, and SouthernLINC) should not be adopted because they would only sharpen the inequities in the new band plan.

This Joint Petition for Partial Reconsideration has a three-fold purpose: (1) to seek redress of the major technical infirmities in the *800 MHz Rebanding Report and Order*; (2) to seek redress of major legal and procedural infirmities in the adoption of the *800 MHz Rebanding Report and Order*; and (3) to advocate a solution to these technical, legal and procedural infirmities that will preserve the intended benefits to Public Safety while correcting gross inequities in the treatment of all the adversely-affected non-Nextel/SouthernLINC SMR licensees.

² See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et. al, FCC 04-168 (rel. August 6, 2004) (“*Report and Order*”).

³ See Comments of Coastal SMR Network, L.L.C., filed December 2, 2004 (attached hereto as Exhibit One)..

I. THERE IS NO RATIONAL BASIS TO CONCLUDE THAT THE SPECTRUM ALLOCATED FOR THE NEW 800 MHZ BAND IS ADEQUATE TO AVOID SERVICE DEGRADATION

The *Report and Order* describes the new band plan adopted by the Commission in a manner that obscures a material fact: the Commission lacks a rational basis for concluding that the spectrum allocated for the new band plan is adequate to avoid service degradation. The answer to the question of whether, and to what extent, existing Public Safety, CII, B/ILT and SMR service will be fairly replicated for all affected licensees after the transition remains completely unknown. While the Commission says that it is “committed to ensuring that band reconfiguration will not result in degradation of service,”⁴ the *Report and Order* promises “comparable facilities.”⁵ In fact, the Commission recognizes a spectrum shortfall in Paragraph 164 of the *Report and Order*, which states:

We are aware that, in some markets, there may be insufficient spectrum in the 816-824 MHz/861-869 band segment to accommodate both incumbent ESMR licensees already operating there and new ESMR entrants migrating from the lower channels.

Public Safety licensees, CII licensees, B/ILT licensees, and SMR licensees may optimistically interpret the Commission’s commitment as being one of “service replication.” However, the Commission knows that a standard of “service replication” is materially different from “comparable facilities.” “Comparable facilities” essentially means “comparable equipment” – not necessarily a high degree of service area replication. It is relatively easy to satisfy a promise of comparable facilities, while completely failing to deliver service replication. Even if the comparable facilities standard includes “comparable coverage,” comparable coverage

⁴ *Report and Order* at ¶ 148.

⁵ See *Report and Order, Appendix C, § 90.677(f)*.

is not “service replication.” In sum, a Public Safety licensee, a CII licensee, a B/ILT licensee, or an SMR licensee may receive comparable facilities *without* being able to replicate its current geographic service area contour. Either there is no justification for such optimism, or the Commission must clarify its intentions regarding service replication.

To determine whether the spectrum allocated is adequate to achieve service replication, and to determine where any shortfalls would occur, substantial engineering analysis is required – far beyond anything in the public record of these proceedings. The Commission is quite capable of such analysis; it conducted such analysis in other recent proceedings involving a spectrum allocation overlay in another interference-limited service – the broadcast television service. Indeed, the Commission is capable of modeling the outcome of the *800 MHz Rebanding* and publishing a new table of channel allotments for all affected licensees to review, just as it modeled the outcome of the DTV transition for television broadcasters. Under such an approach, the new table of frequency assignments would include statistics describing the degree of service replication both in geographic and demographic terms.

There is no explanation in the *Report and Order* for why the Commission departed from its customary practice of conducting such an engineering analysis to support its conclusions. To justify the departure from sound engineering analysis on grounds that there is a public safety imperative is illogical. The outcome directly affects public safety and the technical aspects should be thoroughly understood before sweeping changes are made. Further, to justify the lack of sound engineering analysis on grounds that the Commission does not have the data to conduct the analysis is an irresponsible dereliction of duty. The frequency coordinators whose cooperation would permit the Commission to undertake such an assessment are known to and

sanctioned by the Commission, and as a result, all of the necessary data is available upon request.

These technical infirmities are such that the Commission could not fairly claim to have made a rational decision in this matter, as required by the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* (“APA”). It is true that the courts have afforded substantial deference to the Commission’s discretion in its consideration of technical matters.⁶ However, the factual basis underlying the Commission’s decisions in this proceeding is so fundamentally inadequate that the Commission will be unable to “cogently explain why it has exercised its discretion in a given manner.”⁷ The Commission’s explanation must be sufficient to enable a reviewing Court “to conclude that the [agency’s action] was the product of reasoned decisionmaking.”⁸ In the absence of adequate engineering analysis, the new band plan can only be characterized as arbitrary and capricious, and an abuse of discretion, in violation of 5 U.S.C. §706(2)(A).

II. THE JOINT PETITIONERS COULD NOT MEANINGFULLY PARTICIPATE IN THE RULE MAKING PROCEEDING WITHOUT ADEQUATE NOTICE OF THE IMPACT OF THE PROPOSED REBANDING

The *Notice of Proposed Rulemaking* in this proceeding does not meet the requirements of the Administrative Procedure Act’s Section 553.⁹ The Commission failed to apprise the Joint Petitioners and any other affected licensee of the impact on current service resulting from the proposed reconfiguration of the 800 MHz band. Even the *Report and Order*

⁶ See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Atlantic Tele-Network, Inc. v. FCC, 59 F.3d 1384, 1389 (D.C. Cir. 1995).

⁷ Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983)

⁸ United States Telecom Ass’n v. FCC, No. 99-1442, (D.C. Cir. 2000), *citing* A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995).

⁹ See *Improving Public Safety Communications in the 800 MHz Band, Notice of Proposed Rulemaking*, FCC 02-81 (rel. March 15, 2002) (“*Notice*”).

fails to provide that information. Moreover, there is insufficient information for interested parties to conduct their own independent engineering analysis of the outcome. Even after the *Report and Order* was adopted, a party would have to make many assumptions about the Commission's intentions and the Transition Administrator's future decisions to conduct such an analysis. During the rulemaking, there was no way for interested parties to conduct such independent analyses.

While the *Notice* was adequate for the adoption of certain portions of the *Report and Order*, it was not adequate for the adoption of the new band plan in its entirety. Collectively, the *Notice*, the comments and reply comments in the proceeding, the *ex parte* submissions in the proceeding, and the *Report and Order* all fail to provide sufficient engineering analysis. Stated another way, there was no "cure" for the deficiencies of the *Notice* in this rulemaking proceeding by virtue of public participation. There is not sufficient engineering analysis anywhere in the record of this proceeding through comments, reply comments or *ex parte* submissions.

The engineering analysis with detailed frequency assignments and frequency coordination is yet to be conducted. Consequently, the public does not know whether the amount of spectrum in the band plan adopted is adequate to ensure no degradation in service for the affected licensees, or if there is to be a differential impact among licensees, that fact should be made known to the public and should be justified under the governing statutes. Moreover, there is no requirement that the Transition Administrator envisioned by the *Report and Order* conduct such analysis in order to optimize the outcome of the reconfiguration of the band in a fair and equitable manner for all licensees. There was no assessment of the impact of the first-come-first-served policy on the spectrum available to incumbent SMR licensees. As a matter of

fact, the outcome of the new band plan is a variable in the hands of the Transition Administrator and remains unknown to all interested parties. There are many different potential outcomes of the new band plan on various licensees, depending on what the Transition Administrator decides to do in giving priority to the elimination of interference to Public Safety. Those potential outcomes have never been described and interested parties were not provided notice and an opportunity to be heard. The Joint Petitioners could not assess the likely outcome of proposed rule changes affecting their service authorizations in the absence of such information.

In this vacuum of technical information, no licensee could meaningfully participate in the rulemaking proceeding because no licensee could assess the relative impact of the proposed methods or rule changes on their authorized service. Because all 800 MHz licenses are not equal – coverage and interference are variables – licensees need to know whether the new band plan deprives them of coverage after the transition. Due to the lack of information in the *Notice* and in the *Report and Order*, no licensee can know this critical information. Hence, the outcome on individual licensees remains unstated and is apparently unknown. The vague assurance of “comparable facilities,” as previously noted, is a wholly-inadequate substitute for this missing information.

III. WITHOUT DUE PROCESS THE NEW BAND PLAN DEPRIVES THE JOINT PETITIONERS OF THEIR PRIOR RIGHT TO IMPLEMENT CELLULAR-LIKE INFRASTRUCTURE

Before the *Report and Order* was adopted, the Joint Petitioners were free to change their operational configuration from high-site facilities to cellular-like facilities.¹⁰ Indeed, it was this regulatory and technical flexibility that provided the economic incentive for Coastal/A.R.C.’s participation in two of the Commission’s spectrum auctions. As noted in

¹⁰ See 47 C.F.R. § 90.693.

Coastal/A.R.C.'s recent Comments, Coastal/A.R.C. intended to exercise its rights under the Commission's rules and build a cellular-like system, once the regulatory uncertainty surrounding the *800 MHz Rebanding* had been settled. Instead, these rights have been taken from the Joint Petitioners without notice. This was a wholly unexpected development, as it is completely inconsistent with the licensing framework that has developed for SMR licenses and other CMRS providers.

Previously, the licensing framework that governed incumbent SMR operators in the 800 MHz band was that which grew out of a set of rules first adopted in 1994.¹¹ In December 1995, the Commission adopted a wide-area geographic area licensing approach for SMR systems operating in the 800 MHz frequency band.¹² As part of this licensing approach, the Commission adopted construction and coverage requirements for Economic Area (EA)¹³ licensees similar to those required of broadband Personal Communications Services (PCS) and 900 MHz band SMR licensees.¹⁴ At that time, contiguous blocks of spectrum throughout

¹¹ *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Further Notice of Proposed Rule Making*, PR Docket No. 93-144, PP Docket No. 93-253, 10 FCC Rcd 7970 (1994) ("Further Notice").

¹² *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995) ("*800 MHz Report and Order*"). Prior to the adoption of geographic licensing, qualified applicants were awarded licenses on a site-by-site, channel-by-channel basis.

¹³ *See Final Redefinition of the BEA Economic Areas*, 60 Fed. Reg. 13114 (March 10, 1995). There are a total of 175 Economic Areas. *See* 47 C.F.R. § 90.7 [*Economic Areas (EAs)*].

¹⁴ *800 MHz Report and Order* at 1521 ¶ 104. The Commission had previously determined that interconnected SMR services fell within the new category of mobile services known as commercial mobile radio services (CMRS), such as cellular and broadband PCS licensees. *See Implementation of Sections 3(N) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1448-58 (1994); *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8042-43 (1994) ("*Third Report and Order*").

defined service areas were awarded to single licensees in these services on an exclusive basis.¹⁵ This stood in contrast to the site-based licenses which were held by incumbent SMR operators. In an effort to achieve the regulatory parity mandated by Congress, the Commission adopted further changes to its rules.

One important change to create regulatory parity was the adoption of Section 90.693 of the Commission's rules, which permitted incumbent SMR 800 MHz licensees to add, remove, or modify transmitter sites within a certain field strength contour of their existing systems. This had the practical effect of providing incumbent SMR licensees with the capacity to provide the same cellular digital service as the holders of EA authorizations in the same markets. In fact, once an incumbent SMR operator brought multiple sites online through this mechanism, it was eligible to convert its existing high-site SMR licenses into geographic area licenses.¹⁶ The *800 MHz Rebanding Report and Order*, with neither notice nor comment, eliminated this substantial right of many, if not most incumbent SMR licensees.

This action stands in stark contrast to previous Commission actions regarding the SMR service. When the Commission adopted Section 90.629, which permitted additional time for existing SMR licensees to build out their existing high-site licenses to provide digital cellular service, the Commission stated: “[t]his new scheme is not designed to benefit any particular entity, but to provide opportunities for a variety of licensees of different sizes to participate in the

¹⁵ *Third Report and Order*, 9 FCC Rcd 7988, 8042 ¶ 94 (1994).

¹⁶ See § 90.693(d)(1) (“Spectrum blocks A through V. Incumbent licensees operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBmV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information on Form 601 for each of their external base sites after the close of the 800 MHz SMR auction. The incumbent’s geographic license area is defined by the contiguous and overlapping 22 dBmV/m contours of its constructed and operational external base stations and interior sites that are constructed within the construction period applicable to the incumbent. Once the geographic license is issued, facilities that are added within an incumbent’s existing footprint and that are not subject to prior approval by the Commission will not be subject to construction requirements.”)

provision of wide-area service.”¹⁷ The fruits of the Commission’s efforts to achieve regulatory parity were further realized with the Commission’s auction of 800 MHz spectrum, and many existing high-site SMR providers (including Joint Petitioners) participated. Many auction participants, including Joint Petitioners, were drawn by the Commission’s promise that “800 MHz licensees may provide analog or digital services used for voice communications, paging, data, and facsimile services.”¹⁸

Suddenly and abruptly, the Commission took these rights away from the Joint Petitioners and similarly situated licensees. Specifically, the rights of incumbent SMR high-site licensees to modify their systems as provided for under Section 90.693 to provide cellular-type digital services have been completely eliminated by the *Report and Order*. Further, this is wholly an *implicit* outcome of the rulemaking. It results from the fact that the Joint Petitioners are assigned to a part of the new band plan where cellular infrastructure is prohibited. Forevermore, they will be locked into a high-site configuration. There is no discussion of, or justification for, this harsh decision in the *Report and Order*.

There was never any public notice of the Commission’s intention to take these rights away from these licensees. There was never a public notice providing such licensees with a deadline for constructing cellular-like infrastructure before these rights were taken away. Clearly, the due process rights of the Joint Petitioners have been violated. Their licenses have been modified to remove the right to utilize cellular-like technology without notice and an opportunity to be heard. The *Report and Order* asserts the Commission’s broad authority to

¹⁷ 800 MHz *Report and Order* at 1479 ¶ 14.

¹⁸ See *FCC Factsheet for Auction 34*.

modify existing licenses.¹⁹ However, this authority cannot be exercised without due process of law, and the right is not unlimited – it is clearly circumscribed by the separate statutory mandate to maintain regulatory parity among cellular, PCS, and SMR licensees; the Commission’s obligation to comply with the APA and the Constitution.²⁰

On this point, the *Report and Order* again runs afoul of the APA, which requires the Commission to publish substantive rule changes for comment prior to adoption. Section 553 of the APA imposes specific requirements on an agency that is involved in “rule making.”²¹ The substantive revision of 47 C.F.R. § 90.693 clearly falls within the statutory definition of rule making.²² Therefore, Section 553 governs the procedures that the Commission must use to repeal or revise that rule.²³ The Commission has not complied with these procedures.

Courts applying Section 553 of the APA generally refer to rules requiring notice and comment as “substantive rules.”²⁴ In general terms, case law has defined “substantive rules” as those that effect a change in existing law or policy or which affect individual rights and

¹⁹ See *800 MHz Rebanding Report and Order*, at paras. 12, 65-74.

²⁰ For a general discussion of the constitutional limitations upon the FCC’s authority to modify licenses under Section 316, see William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 *Federal Communications Law Journal* 2, 13-23 (1997) (“*Fishman*”); see also Preferred Communications, Inc.’s March 2, 2004 filed Ex Parte Notice at p. 29, n. 58, and p. 36 of its December 2, 2004 filed Comments.

²¹ See 5 U.S.C. §§ 551(4) and 551(5).

²² See 5 U.S.C. § 551(5) (1994).

²³ The Commission’s failure to comply with these requirements clearly falls within the jurisdiction of the D.C. Circuit Court of Appeals, and thus that court may directly review the Commission’s repeal of 47 U.S.C. § 90.693.

²⁴ See, e.g. *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991) (“*Animal Defense Fund*”). The Administrative Procedure Act provides: “(a) General Notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual Notice thereof in accordance with law. [. . .] (c) After Notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments [. . .].” 5 U.S.C. § 553 (1994).

obligations.²⁵ The Commission's actions here certainly alter individual rights and obligations. Therefore, Section 553 of the APA required the Commission to provide the public with notice of, and an opportunity to comment on, the Commission's intention to eliminate the substantive right of incumbent SMR licensees to modify their facilities to provide cellular digital services. In other words, an existing right – the right to provide digital services for voice communications – has now been taken away from the Joint Petitioners by the *800 MHz Rebanding Report and Order* without due process of law. Nowhere in the Commission's *Notice* for the *800 MHz Rebanding* proceeding did it provide 800 MHz SMR licensees with notice that the Commission intended to modify their licenses in such a fundamentally disabling manner.

Thus, in eliminating a substantial right of incumbent SMR licensees – without providing any notice, either explicit or constructive – the Commission violated Section 553 of the APA. The adverse economic impact of this rule change on the Joint Petitioners is enormous. Covertly and by fiat, the Commission has completely undermined the business plan of spectrum-auction winners and devalued all of their spectrum assets in the marketplace. It is impossible to view this outcome as fair and even-handed, especially in the face of the preferential treatment afforded to Nextel and others in this rulemaking proceeding.

IV. THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN COMPENSATING NEXTEL WITH PREFERENTIAL ACCESS TO SPECTRUM

The Commission lacks statutory authority to compensate Nextel with an exclusive and preferential award of spectrum. Nextel is *not only* getting spectrum in exchange for the spectrum it is to vacate just like other SMRs; it is being *further compensated* by the Commission with additional spectrum for “facilitating band reconfiguration, giving up spectrum rights, and

²⁵ See *Animal Defense Fund* at 927.

bearing the financial burden of the relocation process for all affected incumbents.”²⁶ An illustration of the compensation scenario is set forth in Exhibit Two, attached hereto. The Commission’s compensation of Nextel is explicit: “We conclude that it is in the public interest to compensate Nextel for the surrendered spectrum rights and costs it incurs as a result of band reconfiguration.”²⁷ Nowhere does the *Report and Order* provide any statutory justification for the Commission’s assertion of power to compensate certain licensees for such voluntary undertakings.

The *Report and Order*’s discussion of its statutory authority appears to assert sweeping authority under the public interest provisions of the Communications Act, 47 U.S.C §§ 303 and 151. However, those sections are intended to give the Commission authority to carry out the specific duties with which it is charged by other enabling statutes. Sections 303 and 151 do not stand independently as a source of statutory authority upon which the FCC can base any action. A finding that an action is in the public interest does not mean that the Commission can simply take that action, unless the Commission has statutory authority to act in the specific manner contemplated.

In Motion Picture Ass’n of America v. FCC, the Court of Appeals for the DC Circuit made this point very clearly when it struck down the FCC’s video description rules.²⁸ In response to the Commission’s claim that its authority to require video description by broadcasters rested in its inherent authority to carry out the public interest, the court replied:

The FCC cannot act in the "public interest" if the agency does not otherwise have the authority to promulgate the regulations at issue.

²⁶ *Report and Order* at 31.

²⁷ *Report and Order* at 31, 211.

²⁸ See Motion Picture Ass’n of America v. FCC, 309 F.3d 796 (D.C. Cir. 2002) (“MPAA v. FCC”).

An action in the public interest is not necessarily taken to “carry out the provisions of the Act,” nor is it necessarily authorized by the Act. The FCC must act pursuant to delegated authority before any “public interest” inquiry is made under Section 303(r).²⁹

The Commission has overstepped its statutory authority because Congress has not given the Commission the discretion to compensate *any* licensee for *anything*. A review of the history of *all* of the band-clearing initiatives sanctioned by the Commission to date reveals one important common element – the Commission did not compensate *any* licensee. *Licensees* compensated other *licensees*. The Commission set the ground rules for such compensation, and all similarly-situated licensees were treated equally. Here, the Commission has accepted an offer from one licensee to pay relocation costs to other licensees, and then granted that licensee a spectrum “credit” for the spectrum that licensee is to vacate, plus an *additional* spectrum credit for good conduct! Not only is such an arrangement unprecedented, it is an illegal and *ultra vires* act beyond the statutory powers of the Commission.

V. THE COMMISSION’S COMPENSATION OF NEXTEL DESTROYS THE REGULATORY PARITY MANDATED BY SECTION 332

Assuming, *arguendo*, that the Commission had the requisite statutory authority to compensate Nextel, it cannot do so in violation of Section 332, which requires that the Commission maintain regulatory parity among 800 MHz EA and SMR licensees as well as between SMR, cellular and PCS services. The *Report and Order’s* structure for the *800 MHz Rebanding* is based entirely upon a new method of classifying licensees, rather than upon the existing categories of licenses. Footnote 5 of the *Report and Order* adopts a new definition for an “800 MHz Cellular System.”³⁰ Through a reference to paragraph 172 of the *Report and Order*, the Commission defined for the first time “800 MHz Cellular System” as “a system

²⁹ *MPAA v. FCC*, at 801.

³⁰ *Report and Order* at 2, n.5.

having more than five overlapping interactive sites featuring hand-off capability;” and “any one of such sites has an antenna height of less than 100 feet above ground level with an antenna height above average terrain (HAAT) of less than 500 feet and more than twenty paired frequencies.” Similarly, a new definition was adopted for “Non-cellular systems.”³¹ Footnote 9 defines “Non-cellular” systems as “systems that provide service to their mobile users or subscribers from one or a small number of base stations, which are typically “high site” (*i.e.*, located at high elevations, on towers, mountains, hill tops, or tall buildings) multiple, interconnected, multi-channel transmit/receive cells and employ frequency reuse to serve a larger number of subscribers.” Non-cellular refers to systems which do not employ a “high-density cellular” architecture.”³²

Section 332 directs the Commission to maintain regulatory parity among cellular, PCS, and SMR licensees (all of whom are Commercial Mobile Radio Service (“CMRS”) providers).³³ The 1993 amendments to Section 332 ensure similar regulatory treatment for similar services. The Commission’s Report and Order implementing the 1993 amendments acknowledges Congress’s instruction to “ensure that economic forces – not disparate regulatory

³¹ *Report and Order* at 2, n.9.

³² Footnote 42 in the *Report and Order* adds further gloss to these new definitions: “The designations “high-site” and “low-site” are often used to distinguish cellularized from non-cellularized systems. Thus, for example, the typical public safety 800 MHz system will employ one, or only a few, base stations with antennas located on high terrain, towers, buildings, etc. to provide wide-area coverage from the base station. Cellular-architecture systems, by comparison, make use of multiple, localized coverage, base stations whose antennas generally are mounted on low towers or other structures. We note, however, that the term “low-site” is often used to denominate cells within a cellularized system that have very low antenna elevations, e.g. thirty-feet and, accordingly, have a greater potential to cause interference than high-elevation cells in the system.” *See also, Report and Order* ¶¶ 170-174.

³³ *See Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B)* (requiring that the Commission “assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to the licensees that are providers of substantially similar common carrier services”), 107 Stat. 312, 397 (1993), 47 USC § 332(c).

burdens – shape the development of the CMRS marketplace.”³⁴ Not only has the Commission adopted new regulatory license status definitions without notice and comment in violation of the APA, it has used this definitional system to circumvent the statutory requirements of Section 332, drawing illegal distinctions between the entities to which it is required to grant regulatory parity. Providing Nextel/SouthernLINC with preferential additional spectrum as “compensation” while categorically reclassifying Nextel’s competition to remove their right to implement cellular systems is a direct violation of the statute.

In 1994, the Commission itself found that symmetrical regulation for competing wireless carriers would be needed to avoid “potentially distorting effects on the market” (*i.e.*, harm to competition). The courts, as well as the Commission, have continued to recognize the Commission’s duty to provide equal treatment to licensees within the same service. In Fresno Mobile Radio, Inc. v. FCC, the Court of Appeals for the D.C. Circuit held that the Commission could not discriminate among similarly situated EA licensees and the holders of Extended Implementation Authorizations (“EIA”) with respect to construction requirements, as it had not articulated a reasonable basis for the disparity in treatment.³⁵ Accordingly, the Commission may not adopt a system of categorical discrimination among SMR licensees in the *800 MHz Rebanding* process. The Commission must revise its new band plan to treat *all* CMRS licensees in a similar manner.

³⁴ See also *Ex Parte* Presentation of Southern Communications Services, Inc., page 3, n. 6, filed June 23, 2004.

³⁵ 165 F.3d 965 (D.C. Cir. 1999)(“*Fresno Mobile Radio*”).

VI. THE COMMISSION'S ILLEGAL COMPENSATION OF NEXTEL IS UNFAIR TO OTHER LICENSEES AND DEPRIVES THE UNITED STATES TREASURY OF AUCTION REVENUE

Compensation of Nextel with spectrum illegally circumvents the requirements for auctions.³⁶ An auction would not be required if the spectrum were used in an even-handed allocation to an existing service for the relocation of licensees within that service. However, the Commission is not doing that – it is using the 1.9 GHz spectrum to *compensate* Nextel on a preferential basis. The Joint Petitioners urge the Commission to recognize this important distinction on reconsideration. Spectrum may be used to relocate incumbents in an even-handed manner across a given service without triggering an auction, but the compensation of particular licensees with preferential awards of spectrum is illegal.

CONCLUSION

With the best of intentions, the Commission has adopted a new band plan to solve an important public safety interference problem. However, the course taken, if not corrected on reconsideration, will result in a failure to meet the expectations of the public safety community, harm competition, and result in time-consuming and costly appeals and remands causing needless delay. Joint Petitioners seek reconsideration of the issues set forth above and request that on reconsideration the Commission suspend its new band plan until: (1) the proper engineering analysis is conducted and made public; (2) the Commission and all affected licensees can determine whether the spectrum allocated in the new band plan is adequate to

³⁶ We note that other parties to this proceeding have raised significant issues regarding the Commission's actions under the Anti-Deficiency Act and Miscellaneous Receipts Act, and further note that the Commission has not satisfactorily addressed these issues in the *Report and Order*. To the extent that the Commission continues on the present course to award spectrum as compensation to Nextel on a preferential basis, these arguments of statutory violations remain relevant.

provide a sufficient degree of service replication for all the affected 800 MHz licensees; (3) a Further Notice of Proposed Rule Making is issued setting forth a specific table of assignments as described above; and (4) a band plan is adopted without the unlawful preferential feature of the current plan.

At least one Further Notice of Proposed Rulemaking is necessary to adopt a new band plan – one with the missing engineering analysis described above. The specific channel assignments should be proposed in detail, with the outcome of frequency coordination specified. Replication statistics should be provided. Most importantly, the method used by the Commission to make specific channel assignments must be transparent, and subject to public comment. All SMR licensees should then be afforded the opportunity to participate in the benefits and burdens of the 800 MHz Rebanding on an equal basis. Ultimately, unless the proper engineering analysis is developed as a basis for the solutions adopted, and the legal infirmities are cured, licensees of all types will be harmed – Public Safety, CII, B/ILT, and SMR alike.

Respectfully submitted,

JOINT PETITIONERS COASTAL SMR
NETWORK, L.L.C./A.R.C., INC. AND
SCOTT C. MACINTYRE

By:



Julian L. Shepard
Mark Blacknell
Williams Mullen, A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 833-9200
Their Attorneys

December 22, 2004

EXHIBIT ONE

Comments of Coastal SMR Network, L.L.C.

**Federal Communications Commission**

**The FCC Acknowledges Receipt of Comments From ...
Coastal SMR Network, L.L.C.
...and Thank You for Your Comments**

Your Confirmation Number is: '2004122234933 '

Date Received: Dec 2 2004

Docket: 02-55

Number of Files Transmitted: 1

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updated 12/11/03

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

In the Matter of:)
)
Improving Public Safety Communications) WT Docket No. 02-55
In the 800 MHz Band)
)
Consolidating the 900 MHz Industrial/Land)
Transportation and Business Pool Channels)
)

COMMENTS OF COASTAL SMR NETWORK, L.L.C.

Coastal SMR Network, L.L.C. and its affiliates ("Coastal"), licensees of 27 EA and 138 high-site Specialized Mobile Radio Service ("SMRS") authorizations in the Mid-Atlantic region,¹ by its attorneys, hereby submit its Comments on certain *ex parte* presentations by Nextel Communications, Inc. ("Nextel") and other parties in the above-captioned proceeding (the "800 MHz Rebanding") in response to the Public Notice released by the Commission on October 22, 2004.² The Commission's August 6, 2004 *Report and Order* in this proceeding adopts rules for the relocation of Public Safety and non-Public Safety licensees in the frequencies 806 to 824 MHz and 851 to 869 MHz (the "800 MHz Band").³ The new 800 MHz band plan greatly favors Nextel to the detriment of Coastal and many other Nextel competitors in the 800 MHz Band. By depriving Coastal and other non-Nextel incumbents of the ability to implement

¹ A listing of licenses held by Coastal and its affiliates, Commercial Radio Service Corp. and A.R.C., Inc. d/b/a Antenna Rentals Corp., is attached hereto as Exhibit A.

² *Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding*, FCC 04-253, rel. October 22, 2004.

³ See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et. Al, FCC 04-168 (rel. August 6, 2004) ("*Report and Order*").

cellular architecture in the future with (non-EA) licenses currently in a high-site configuration, the new rules greatly diminish the economic value of Coastal's and other non-Nextel licensees' spectrum resources, while permanently locking non-Nextel incumbents into a position where they cannot compete effectively with Nextel.

The many legal and policy infirmities in the *800 MHz Rebanding* are beyond the scope of these Comments. Those issues resulting in unlawful and inequitable treatment of Coastal will be presented for timely reconsideration by the Commission. These Comments are limited to the further proposals and revisionist clarifications in Nextel's *ex parte* submissions, adoption of which would only exacerbate the problems and inequities in the new band plan.

I. THE NEWLY-ADOPTED BAND PLAN THWARTS NEXTEL'S COMPETITORS WHO PLAN TO "CELLULARIZE" THEIR SYSTEMS.

Over the past 30 years, Coastal built a substantial communications system utilizing 138 site-based SMRS licenses in the 800 MHz Band throughout the Mid-Atlantic region. As the regulatory structure permitted and technology developed, Coastal recognized the opportunity to convert its high-site facilities into a cellular-type system to compete more effectively with Nextel. However, in order to implement such a system, Coastal required additional spectrum. The Commission's Spectrum Auctions 34 and 36 presented the opportunity to acquire most of the necessary spectrum. In those auctions, Coastal acquired 27 EA licenses in the same and contiguous geographic areas as its existing site-based licenses.

Coastal's intention was to convert its high-site facilities to cellular infrastructure in an integrated system utilizing not only the spectrum acquired in Auctions 34 and 36, but additional spectrum where needed to be acquired in the secondary market. Coastal's intentions in this regard were manifest not only in the nearly \$800,000 it paid in the auctions, but in its retention of Performance Industries, a leading consulting firm in the SMRS industry, to assist in

the cellular system design and implementation. See Letter from Performance Industries attached hereto as Exhibit B. Adverse economic conditions in the aftermath of September 11, 2001, coupled with the regulatory uncertainty following Nextel's November 2001 "White Paper" (petitioning the FCC to reconfigure the 800 MHz land mobile radio band to rectify interference and to allocate additional spectrum to meet public safety needs), retarded investment in Coastal's digital-cellular conversion. As a result, Coastal was temporarily unable to go forward with the construction of a cellular system until the investment climate improved and the spectrum variables were resolved.

The *Report and Order* adopts a band plan that does not accommodate Coastal's site-based facilities into a band-segment where cellular systems can operate. Without adequate public notice, the Commission changed the existing flexibility of the site-based licenses, eliminating the ability of licensees to upgrade to digital cellular technology. Apparently, only Coastal's EA authorizations will be accommodated in the cellular portion of the new band plan. It remains to be seen where in the cellular portion of the new band plan those EA licenses ultimately will be relocated. The result is a huge reduction in the utility and economic value of both Coastal's site-based licenses and the spectrum acquired by Coastal at auction.

II. NEXTEL'S FURTHER PROPOSALS AFFECTING THE PLACEMENT OF INCUMBENTS (OTHER THAN NEXTEL, NEXTEL PARTNERS, AND SOUTHERN LINC) SHOULD NOT BE ADOPTED.

The inequities in the Commission's new band plan would be sharpened if the proposals in Nextel's *ex parte* presentations are implemented. Each time Nextel refers to "incumbents" other than "Nextel and Southern LINC" in its *ex parte* communications, Nextel proposes to further harm Nextel's competitors. For example, Nextel advocates that incumbent

B/ILT or SMR licensees (other than Nextel and Southern LINC) need not be relocated from channels 121-150.⁴ Of course, if they are not relocated, they cannot implement cellular systems in the future. They will be forever locked into high-site configurations in the new band plan. Moreover, Nextel advocates that incumbents (other than Nextel and Southern LINC) that elect to be relocated out of the non-cellular channel block be subject to a packing plan starting at 861.9875 MHz. This, of course, would place Nextel's competitors into a secondary guard band, leaving Nextel to claim the best spectrum on a preferential basis. Simply put, these proposals worsen the inequities in the new band plan and should not be adopted.

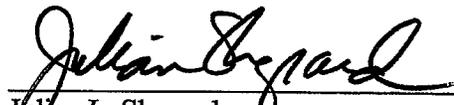
III. CONCLUSION

For those reasons, Coastal urges the Commission to reject the further modifications to the new band plan advocated by Nextel.

Respectfully submitted,

COASTAL SMR NETWORK, L.L.C.

By:


Julian L. Shepard
Mark Blacknell
Williams Mullen, A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006-1200
(202) 833-9200
Its Attorneys

December 2, 2004

⁴ Nextel Letter of September 16, 2004, at p. 2.

**Summary of EA & License Holdings
for...**

Commercial Radio Service Corp.

**A.R.C., Inc.
dba Antenna Rentals Corp.**

Coastal SMR Network, LLC

October 2004

C

C

EXHIBIT A

EA LICENSE SUMMARY:

Call Sign	EA	EA Description	Block	Channels	# Chnls	Date of Auction	\$ Pd at Auction	POPs
WPRV491	EA 014	Salisbury, MD-DE-VA	F	853,5125-854,1125	25	9/6/2000	\$ 20,150	363,970
WPSA396	EA 014	Salisbury, MD-DE-VA	R	856,857,858,859,860.5875	5	12/7/2000	\$ 1,235	363,970
WPSA401	EA 014	Salisbury, MD-DE-VA	T	856,857,858,859,860.6375	5	12/7/2000	\$ 975	363,970
WPRV489	EA 015	Richmond-Petersburg, VA	E	852,2625-852,8625	25	9/6/2000	\$ 108,550	1,446,123
WPSA383	EA 015	Richmond-Petersburg, VA	H	856,857,858,859,860.0375	5	12/7/2000	\$ 10,400	1,446,123
WPSA393	EA 015	Richmond-Petersburg, VA	Q	856,857,858,859,860.5625	5	12/7/2000	\$ 7,150	1,446,123
WPSA397	EA 015	Richmond-Petersburg, VA	S	856,857,858,859,860.6125	5	12/7/2000	\$ 14,950	1,446,123
WPSA386	EA 016	Staunton, VA-WV	K	856,857,858,859,860.1125	5	12/7/2000	\$ 8,450	334,087
WPSA394	EA 016	Staunton, VA-WV	Q	856,857,858,859,860.5625	5	12/7/2000	\$ 5,525	334,087
WPSA387	EA 017	Roanoke, VA-NC-WV	K	856,857,858,859,860.1125	5	12/7/2000	\$ 5,070	826,284
WPSA390	EA 017	Roanoke, VA-NC-WV	L	856,857,858,859,860.1375	5	12/7/2000	\$ 8,450	826,284
WPSA395	EA 018	Greensboro-Winston Salem-High Point, NC-VA	Q	856,857,858,859,860.5625	5	12/7/2000	\$ 20,150	1,854,853
WPSA398	EA 018	Greensboro-Winston Salem-High Point, NC-VA	S	856,857,858,859,860.6125	5	12/7/2000	\$ 16,900	1,854,853
WPSA403	EA 018	Greensboro-Winston Salem-High Point, NC-VA	V	856,857,858,859,860.6875	5	12/7/2000	\$ 8,450	1,854,853
WPSA388	EA 019	Raleigh-Durham-Chapel Hill, NC	K	856,857,858,859,860.1125	5	12/7/2000	\$ 22,750	1,831,510
WPSA391	EA 019	Raleigh-Durham-Chapel Hill, NC	L	856,857,858,859,860.1375	5	12/7/2000	\$ 11,050	1,831,510
WPSA402	EA 019	Raleigh-Durham-Chapel Hill, NC	U	856,857,858,859,860.6625	5	12/7/2000	\$ 38,350	1,831,510
WPRV490	EA 020	Norfolk-Virginia Beach-Newport	EE	852,8875-853,4875	25	9/6/2000	\$ 208,000	1,722,764
WPSA385	EA 020	Norfolk-Virginia Beach-Newport News, VA-NC	I	856,857,858,859,860.0625	5	12/7/2000	\$ 31,200	1,722,764
WPSA399	EA 020	Norfolk-Virginia Beach-Newport News, VA-NC	S	856,857,858,859,860.6125	5	12/7/2000	\$ 1,040	1,722,764
WPRV492	EA 021	Greenville, NC	FF	854,1375-854,7375	25	9/6/2000	\$ 61,750	823,517
WPSA389	EA 021	Greenville, NC	K	856,857,858,859,860.1125	5	12/7/2000	\$ 29,900	823,517
WPRV493	EA 022	Fayetteville, NC	FF	854,1375-854,7375	25	9/6/2000	\$ 53,300	528,224
WPSA384	EA 022	Fayetteville, NC	H	856,857,858,859,860.0375	5	12/7/2000	\$ 37,050	528,224
WPRV494	EA 025	Wilmington, NC-SC	FF	854,1375-854,7375	25	9/6/2000	\$ 35,750	878,267
WPSA392	EA 026	Charleston-North Charleston, SC	L	856,857,858,859,860.1375	5	12/7/2000	\$ 3,900	587,297
WPSA400	EA 026	Charleston-North Charleston, SC	S	856,857,858,859,860.6125	5	12/7/2000	\$ 20,800	587,297
								255
								\$ 791,245

SITE-BASED LICENSE SUMMARY:

Call Sign	EA	EA Description	Channels	# Chnls
WPGC449	14	BELLE HAVEN, VA	851.0875	1
WPGD653	14	BELLE HAVEN, VA	854.4375	1
WPGJ612	14	BELLE HAVEN, VA	851.1875	1
WPGJ613	14	BELLE HAVEN, VA	851.3375	1
WPXR374	15	RICHMOND, VA	856,857,858,859,3125	4
WPGD465	19	HENDERSON, NC	853.2875	1
WNXS388	20	VIRGINIA BEACH, VA	855,856,857,858,859,860,6125	6
WPAI798	20	VIRGINIA BEACH, VA	856,857,858,859,860,6875	5
WPEA277	20	SMITHFIELD, VA	851.1875	1
WPFCT90	20	VIRGINIA BEACH, VA	856,857,858,859,860,0625	5
WPFEE27	20	HAMPTON, VA	854.3625	1
WPFU496	20	FRANKLIN, VA	851.1125	1
WPFV465	20	AHOSKIE, NC	853.5625	1
WPFV467	20	COINJOCK, NC	854.7375	1
WPFV468	20	AHOSKIE, NC	853.6625	1
WPFV649	20	FRANKLIN, VA	853.4875	1
WPFV704	20	HAMPTON, VA	851.1625	1
WPFV705	20	FRANKLIN, VA	854.4625	1
WPFV707	20	ELIZABETH CITY, NC	854.5125	1
WPFV709	20	ELIZABETH CITY, NC	853.2625	1
WPFV852	20	ELIZABETH CITY, NC	854.0375	1
WPFV924	20	COINJOCK, NC	852.2875	1
WPFV929	20	COINJOCK, NC	853.3875	1
WPFV961	20	COINJOCK, NC	851.5125	1
WPFV962	20	WINFALL, NC	853.3625	1
WPGC357	20	AHOSKIE, NC	851.8875	1
WPGC739	20	NEWPORT NEWS, VA	855.7625;858,859,7875	3
WPLP771	20	EDENTON, NC	856,857,858,859,860,3125	5
WPMJ841	20	NEWPORT NEWS, VA	851,854,5125;852,2875;852,5625;853,0125;853,3875;853,6625; 853,8375;854,8125;855,0625;856,857,9125	12
WPMN633	20	VIRGINIA BEACH, VA	856,857,858,859,7875	4
WPNP446	20	CHESAPEAKE, VA	856,857,858,859,7875	4
WPEX902	21	BUXTON, NC	856,857,858,859,860,0125	5
WFFF766	21	WINDSOR, NC	852.5625	1
WFFF768	21	WINDSOR, NC	853.0125	1
WPHQ295	21	NEW BERN, NC	852.2625	1
WPLP933	21	WANCHESE, NC	851,2875;851,7125;852,0125;852,4375;852,9125;853,2375;853,5875; 853,859,8125;854,1625	10
WPTH683	21	KITTY HAWK, NC	851,0625;854,7125, 856,857,858,1125	5
WPGD453	25	GEORGETOWN, SC	854.2125	1
WPGD455	25	FLORENCE, SC	853.4125	1
WPGD460	25	FLORENCE, SC	852.3625	1
WPGD461	25	FLORENCE, SC	852.4875	1

SITE-BASED LICENSE SUMMARY (Cont.):

Call Sign	EA	EA Description	Channels	# Chnls
WPGD463	25	GEORGETOWN, SC	854.2625	1
WPGD543	25	GEORGETOWN, SC	854.3875	1
WPGD656	25	FLORENCE, SC	853.3625	1
WPGD848	25	FLORENCE, SC	853.6375	1
WPGG291	25	GEORGETOWN, SC	854.3625	1
WPGJ654	25	GEORGETOWN, SC	851.7625	1
WPGD443	26	CHARLESTON, SC	854.4125	1
WPGD444	26	CHARLESTON, SC	854.5125	1
WPGD445	26	MOUNT PLEASANT, SC	854.5875	1
WPGD451	26	MOUNT PLEASANT, SC	854.5625	1
WPGD452	26	CHARLESTON, SC	851.2125	1
WPGD454	26	FROGMORE, SC	854.3625	1
WPGD456	26	MOUNT PLEASANT, SC	854.1375	1
WPGD464	26	FROGMORE, SC	854.3875	1
WPGD466	26	CHARLESTON, SC	854.1625	1
WPGD475	26	MOUNT PLEASANT, SC	854.5375	1
WPGD542	26	FROGMORE, SC	854.2125	1
WPGD544	26	CHARLESTON, SC	854.1875	1
WPGD545	26	FROGMORE, SC	854.2625	1
WPGD845	26	MOUNT PLEASANT, SC	853.4625	1
WPGD541	23	CLOVER, SC	852.8625	1
WPGY441	23	CHARLOTTE, NC	851.6375	1
WPGY469	23	CHARLOTTE, NC	852.1625	1
WPGY470	23	CHARLOTTE, NC	852.3875	1
WPFZ979	24	ORANGEBURG, SC	852.1875	1
WPFZ980	24	ORANGEBURG, SC	854.0625	1
WPGD602	24	COLUMBIA, SC	852.2625	1
WPGD623	24	ORANGEBURG, SC	854.1125	1
WPGD640	24	ORANGEBURG, SC	852.5875	1
WPHE598	28	STATESBORO, GA	853.3375	1
WPHE631	28	SAVANNAH, GA	852.5625	1
WPHE638	28	SAVANNAH, GA	853.3375	1
WPHE642	28	STATESBORO, GA	852.5625	1
WPHE646	28	STATESBORO, GA	852.9375	1
WPHE654	28	SAVANNAH, GA	853.8375	1
WPHE673	28	SAVANNAH, GA	852.9375	1
WPHE674	28	SAVANNAH, GA	853.0125	1
WPFZ978	41	GREENWOOD, SC	853.4875	1
WPGD457	41	SIX MILE, SC	851.2125	1
WPGD477	41	SIX MILE, SC	853.5125	1
WPGD627	41	GREENWOOD, SC	854.0125	1

EXHIBIT B

Performance
industries, LP
Consulting, Mergers & Acquisitions

November 30, 2004

Mr. Julian Shepard
Williams Mullen
1666 K Street, NW
Suite 1200
Washington, DC 20006

Dear Mr. Shepard,

Pursuant to your request, the following is a summary of Performance Industries' engagement history with John W. Harris relative to his spectrum holdings through A.R.C., Inc., Coastal SMR Network, LLC and CRSC Holdings, Inc.

Background

My client, as noted above, has provided service to the Virginia and North Carolina marketplace for more than 30 years through Specialized Mobile Radio sales and service. In an effort to expand services to the current market, in September 2000, A.R.C., Inc. purchased six blocks of 800 MHz spectrum at Auction 34 in Economic Areas 14, 15, 20, 21, 22 and 25. In December 2000, A.R.C., Inc. purchased 21 additional blocks of 800 MHz spectrum at Auction 36 in Economic Areas 14, 15, 16, 17, 18, 19, 20, 21, 22 and 26.

In March 2001, Performance Industries began providing services to Mr. Harris to expand the market services it was currently providing through the site-based licenses used in the systems of Coastal SMR Network and CRSC Holdings, which included engineering studies relative to the build out of the EA channels as provided in the FCC guidelines allowing permissible operations such as analog or digital services used for voice communications, paging, data and facsimile services. Our engineering studies included the determination of "white space" available in the EAs through 40/22 dBu service/interference contours for each of the frequencies acquired at auction. To further our efforts, Performance Industries' facilitated meetings with Motorola, ComSpace, Central Tech Wireless and others to develop a plan to build out all EAs, including the conversion to a cellular-architecture system via iDen, Harmony or similar technology.

As our engineering, market plan development and system analysis progressed throughout 2001, the unfortunate activities of September 11, 2001 transpired. Following the terrorist attacks of September 11, Nextel issued a White Paper on November 21, 2001 petitioning

600 J Eden Road, Suite 4, Lancaster, PA 17601
717.560.3704 • FAX 717.560.3707
www.performanceindustries.com

the FCC to realign the 800 MHz land mobile radio band to rectify interference through separation of cellular and non-cellular architectural systems and to allocate additional spectrum to meet critical public safety needs. In March 2002, the FCC responded to Nextel's White Paper with the adoption of a Notice of Proposed Rule Making (NPRM) to explore ways to improve the spectrum environment for public safety operations in the 800 MHz band. During this time, we constructed the EA licenses in an analog format while awaiting clarity from the FCC on its decision and anticipating beginning our expansion plan for a cellular-architecture system.

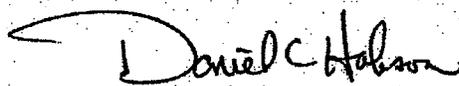
In September 2002, the Consensus Parties (including Nextel) filed their relocation plan in response to the FCC's NPRM. This plan was further edited through a Supplemental Consensus Plan filed in December 2002. The FCC issued an extension to the original NPRM in January 2003 as a result of the supplemental comments by the Consensus Parties. Again, during this time our client faced uncertainty on the implementation and capital expense relating to building a cellular architecture system until a firm decision was made by the FCC. In April 2004, our client filed comments (attached hereto) urging the Commission to adopt a balanced approach to treat all licensees fairly and allowing for the election of operation in the "cellularized" portion of the band however that is defined.

Summary

Based upon the events of 9/11, the issuance of Nextel's White Paper, and the resulting action by the FCC, our client's plans for the development of a cellular-architecture system were halted pending the FCC's decision on rebanding within 800 MHz. As the decision regarding 800 MHz band reconfiguration has taken nearly 3 years, it is unrealistic to expect the implementation of a cellular system prior to the R&O publication in the Federal Register.

Thank you for your time and consideration. If I can provide additional clarity on this matter, please feel free to contact me.

Regards,



Daniel C. Hobson
President

cc: John W. Harris
Attachment

April 8, 2004

Via Email

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.
Washington, DC 20554

Re: A.R.C. Inc.; WT 02-55

Dear Chairman Powell:

A.R.C. Inc. ("ARC"), as a licensee purchased, awarded and operating a network of multiple EA licenses through Auctions 34 and 36, including many site-based licenses within the 800 MHz band, wishes to communicate with urgency that ARC's 800 MHz network must receive nondiscriminatory treatment should the Commission decide to move forward with some form of rebanding in this proceeding. ARC urges the Commission to adopt the following approach:

- ARC must be allowed to operate in the "cellularized" portion of the band however that is defined. If the Commission decides to establish the cellularized band above 861 MHz ARC must be allowed to relocate its operations into this portion of the band.
- ARC and other EA licensees must be allowed to relocate to clear, contiguous spectrum throughout its operating area, either current NPSPAC or upper 200 or a combination thereof.
- The spectrum must be cleared of incumbents with fair treatment and consideration to all EA licensees. ARC and all EA licensees should be treated the same as Nextel.
- The Commission must ensure the "exchange rate" for spectrum for all concerned is non-discriminatory. ARC's spectrum must be counted in the same manner as other parties who would be relocated including Nextel and Nextel Partners. Nextel and Nextel Partners cannot be allowed to trade spectrum on one basis while all other parties are forced to accept replacement spectrum on another, less favorable, basis.

ARC respectfully requests the Commission to take these points into consideration when it moves towards a decision in this important proceeding.

Very truly yours,

A.R.C., INC.

John W. Harris

EXHIBIT TWO

The Preferential Treatment of Nextel/SouthernLINC

The *Report and Order* adopts a spectrum allocation method that results in Nextel/SouthernLINC receiving proportionally more replacement spectrum than non-Nextel/SouthernLINC licensees, in the form of a *double credit* for any 800 MHz spectrum lost. This fact is implicit in the method, though it is not explicitly described in the *Report and Order* used to calculate entitlement to replacement spectrum in the ESMR band.

For example, this is illustrated by considering the Washington-Baltimore-DC-MD-VA-WVA-PA (BEA) EA in which Nextel and an incumbent SMR licensee both have EA-wide licenses and also some site-specific licenses.

In this area, Nextel presently holds licenses for 330 EA channels while the incumbent has licenses for 100 EA channels. The new ESMR band has 320 channels including those in the guard band. Using the apportionment scheme of Footnote 444 of the *Report and Order*, Nextel would get 76.74% or licenses for 246 channels and the incumbent would get 23.26% or 74 channels. Although Nextel has a loss of 84 channels, some of these have previously been counted as relinquished and used as a credit toward 1.9 GHz spectrum so that a *double credit* would be given to Nextel for some of the channels lost. In contrast, the incumbent would receive *no* 1.9 GHz spectrum rights and only its pro rata share of replacement spectrum in the ESMR band.



WILLIAMS MULLEN

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March 21, 2005

BY ELECTRONIC MAIL AND HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

Re: Erratum – Joint Petition for Partial Consideration of the
Safety and Frequency Equity Competition Coalition,
WT Docket No. 02-55, ET Docket No. 00-258, RM-9498,
RM-10024 and ET Docket No. 95-18

Dear Ms. Dortch:

On March 10, 2005, a Petition for Partial Reconsideration (“Petition”) was filed on behalf of the Safety and Frequency Equity Competition Coalition (“SAFE”), in the above-captioned docket. Footnote 1 listed the members of SAFE as of the date of the Petition. Inadvertently, Mobile Relay Association (“MRA”) was incorrectly listed as a member of SAFE. MRA is not a member of SAFE. Please associate this letter with the Petition for Partial Reconsideration so that all parties to the proceedings are clear that MRA is not a member of SAFE nor has it joined in SAFE’s Petition for Partial Reconsideration.

Kindly direct any questions regarding this letter to the undersigned.

Respectfully submitted,

Mark Blacknell

cc: Dan Hardway, Esq. (by email)
David Kaufman, Esq. (by email)
Mr. John Komorowski (by email)

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