

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY TO OPPOSITION

AIRPEAK Communications, LLC (“AIRPEAK” or “Company”) , by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission (“FCC” or “Commission”) rules and regulations, respectfully submits its Reply to the Opposition and Comments (“Opposition”) filed by Nextel Communications, Inc. (“Nextel”) regarding Petitions for Reconsideration filed in the above-identified proceeding.¹ The Opposition challenges, among other filings, the Petition for Reconsideration (“Reconsideration Request”) filed by AIRPEAK. For the reasons described herein, AIRPEAK urges the Commission to reject Nextel’s Opposition as it relates to the Company’s Reconsideration Request and grant the relief sought by AIRPEAK.

I. AIRPEAK REQUESTED LIMITED RECONSIDERATION OF TWO ASPECTS OF THE COMMISSION’S SUPPLEMENTAL 800 MHz ORDER

As the operator of an iDEN network that is in all technical and operational respects, other than comparative size, identical to the systems operated by Nextel and SouthernLINC Wireless

¹ *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) (“800 MHz Order”); *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) (“Supplemental Order”).

("SouthernLINC"), AIRPEAK has had a significant interest in this proceeding from the outset. It has supported the Commission's decision to bifurcate the 800 MHz band and segregate cellular architecture from high-site operations in an effort to eliminate interference between these disparate system types. It remains confident that the Commission will honor its commitment to treat similarly situated entities in a consistent fashion and not to disadvantage any incumbent through the 800 MHz band reconfiguration process.

AIRPEAK did not request reconsideration of the premise of the 800 MHz Order. It also accepted that Order's decisions governing the election options available to non-Nextel, non-SouthernLINC ESMR operators, both in respect to EA and site-based licenses.² However, it did seek reconsideration of two aspects of the Supplemental Order relating to this same issue. In both instances, the Supplemental Order modified the standards adopted in the 800 MHz Order. More critically, it changed those standards **after** the November 22, 2004 deadline for qualifying for ESMR status. Moreover, it did so without any record discussion of the reasons for the changes or how they might impact parties.

First, the original rules defining site-based stations eligible for relocation to the ESMR band, and the only rules that were applicable at the November 22, 2004 deadline for qualification, stated that the EA licensee must "be using the site-based license as part of a cellular-architecture system in the market"³ in which the licensee also held an EA authorization. It was one month **after** that cut-off date that the Commission in the Supplemental Order added the condition that the site-based cell site, including even site-based stations within an EA, must have an overlapping 40 dBu/V contour with another cell site in the network.⁴

² 800 MHz Order at ¶¶ 159-169.

³ *Id.* at ¶ 163.

⁴ The Opposition at n. 30 appears to misunderstand or misstate AIRPEAK's objections on this point. The footnote lectures that the Commission has the authority to establish any effective date for its new rules, including a deadline earlier than the November 22, 2004 date selected. The Company has never disputed that. Its concern is that, having established a deadline and the conditions to be satisfied by that date, the Administrative Procedures Act, 5 U.S.C. §§

In its Reconsideration Request, the Company noted that the Commission had offered no policy or technical justification for adding the condition.⁵ AIRPEAK explained certain stations in its network were “being used as part of a cellular architecture system” in markets in which it also held EA licenses, stations it considered “integral” to its network, but they did not yet have 40 dBu/V contour overlap with other sites in the system. Those cell sites are the first, but assuredly will not be the last, facilities constructed in those markets. They are integrated into the network through AIRPEAK’s switch and carry traffic between subscribers throughout the network. Thus, the Company urged the Commission to reconsider the adoption of a condition that had not been included in the original 800 MHz Order, a condition that was adopted **after** the deadline already had passed for qualifying site-based stations for relocation to the ESMR band, and that was not supported by any articulated rationale.

AIRPEAK also asked the Commission to reconsider another change in the ESMR relocation rules. The 800 MHz Order had stated that qualified site-based licenses would be “converted to an EA-wide, incumbent-free license in the ESMR portion of the band.”⁶ By contrast, and again without explanation, the Supplemental Order determined that such a station could be relocated to the ESMR band, but would be “limited to the 40 dBu/V contour it provided as of the date the 800 MHz R&O was published in the Federal Register.”⁷

AIRPEAK first asked the FCC to clarify, at a minimum, that relocated stations would not lose rights they enjoy today. FCC Rule Section 90.693 allows 800 MHz site-based incumbents

551 *et seq.*, and fundamental notions of equity did not permit the Commission to adopt substantive modifications of the conditions it had established after the deadline for complying with them had passed.

⁵ The Opposition describes these changes as “carefully and thoughtfully articulated ESMR block eligibility criteria.” Opposition at p. 12. However, it cites no language in the Supplemental Order to support that characterization, nor could it. Whatever analysis the FCC conducted on these matters, it did so off the record. There literally is no discussion in the Supplemental Order providing a policy, technical or public interest justification for either change.

⁶ 800 MHz Order at ¶ 163.

⁷ Supplemental Order at ¶ 78.

to modify or add sites anywhere within their 22 dBu/V contour.⁸ Site-based facilities relocated to the ESMR band should not be deprived of that right.

Instead, it recommended that the FCC adopt a compromise between the 800 MHz Order, that had provided for site-based/EA exchanges on an unencumbered basis, and the Supplemental Order, that, without explanation, instead limited such exchanges to a 40 dBu/V contour footprint. The Company proposed that site-based licenses providing coverage to at least fifty percent (50%) of the EA population based on their 22 dBu/V contour be relocated to the ESMR band on an EA-wide basis. It pointed out that current FCC rules routinely consider one-third population coverage as demonstrative of satisfactory spectrum utilization and two-thirds coverage as conclusive evidence that the spectrum has been placed in productive use.⁹

II. NEXTEL'S OPPOSITION

Nextel's Opposition to AIRPEAK's Petition for Reconsideration is at least as illuminating for what it does not say as what it does. It does not dispute that both rule changes at issue were adopted **after** the deadline for qualifying site-based stations for relocation to the ESMR band. It does not say that licensees should or could have been on notice that overlapping 40 dBu/V contours would define site-based licenses integral to an ESMR network and eligible for relocation. It does not dispute that the FCC routinely uses a one-third and two-thirds population coverage standard as indicative of proper spectrum utilization throughout an EA.

Instead, the Opposition relies on an *ad hominem* attack on AIRPEAK, its qualifications,¹⁰ its practices and its motives. It describes AIRPEAK's Petition variously as a "self-serving

⁸ 47 C.F.R. § 90.693. Nextel persists in arguing that AIRPEAK has not presented any basis for this request. But the basis is the FCC rules themselves. Relocating to the ESMR band should not deprive site-based licensees of the rights they have today, in this case, the right to modify and relocate within their 22 dBu/V contour.

⁹ *See, e.g.*, 47 C.F.R. § 90.685(b).

¹⁰ AIRPEAK's qualifications as an ESMR have been fully addressed in the Company's filings with the Transition Administrator and need not be addressed again here.

proposal,”¹¹ a “brazen attempt to expand its license rights,”¹² and, without naming AIRPEAK directly, a “cynical effort[s]...to abuse 800 MHz reconfiguration to obtain more spectrum or more geographic coverage or what they may perceive as a better bargaining position in potential secondary market transactions.”¹³ It claims “that AIRPEAK’s recent build-out has been driven not by consumer demand but by a belated effort to dress up these site-based facilities for the sole purpose of persuading the Commission that these stations should be retuned to the ESMR block, where they could still be purchased by Nextel or another high-density cellular operator.”¹⁴

It is important to set the record straight. While it is abundantly apparent that Nextel does not intend to share any portion of the ESMR band with an entity other than SouthernLINC (a result it opposed throughout much of this proceeding), its misstatements about AIRPEAK and its iDEN network must be addressed.

First, AIRPEAK (previously Nevada Wireless) has owned and operated 800 MHz SMR systems in various markets since as early as 1986. It participated in FCC Auctions 16, 34 and 36 and was one of the very few successful bidders other than Nextel. Although its original facilities in the 1980s and 1990s were traditional, high-site analog stations, it took delivery of a digital, advanced technology iDEN (Harmony MSO) system in 2000, a system that is functionally identical to Nextel’s iDEN system, uses identical equipment, and has the same cellular architecture.

The Company has deployed its network in a number of the markets in which it holds EA authorizations and continues to build out in other markets – just as Nextel does.¹⁵ It has followed

¹¹ Opposition at p. 13.

¹² *Id.*

¹³ *Id.* at p. ii.

¹⁴ *Id.* at pp. 14-15.

¹⁵ If, as Nextel implies in the Opposition and has stated in its Opposition to AIRPEAK’s ESMR Election, an ESMR is only an ESMR on a geographic-specific basis based on its deployment at a particular moment in time, then Nextel has ESMR status in only a limited portion of the nation as evidenced by its own publicly available coverage map.

the deployment pattern that is used by all cellular architecture operations; cell sites are built first in population centers, and the network grows from the center out. It has done so in accordance with applications FCC requirements and has never failed to meet a Commission construction deadline.¹⁶

To date, the Company has invested more than \$18,000,000 in cellular architecture equipment and 800 MHz CMRS spectrum to construct and operate a network that provides advanced communications capabilities, sometimes in markets that, as yet, Nextel has elected not to serve. Contrary to Nextel's insinuation, it is not improper for a company to consider its future affiliation or acquisition as Nextel presumably has in its pending "merger" with Sprint. However, if AIRPEAK's intention was to secure a negotiating position, and Nextel has not presented a scintilla of evidence to support that assertion, it most certainly could have done so for a substantially smaller investment than it has made. The allegation that AIRPEAK is gaming the FCC's processes for the purpose of maneuvering a future sale to Nextel simply is a red herring intended to besmirch the Company's reputation with the FCC.

In fact, like Nextel, AIRPEAK operates a low-site cellular architecture network that it continues to expand.¹⁷ Like Nextel, the Company's network is fully integrated; it operates as a whole from a single network switch and cannot reasonably be subdivided into discrete geographic parcels. Like Nextel, the Company has experienced interference with public safety systems which it has corrected, but which it is obligated to avoid in the future. Like Nextel, in

There are vast areas of the nation in which Nextel is not offering any service to the public on its iDEN system, including areas in which AIRPEAK has deployed its network.

¹⁶ Contrary to Nextel's accusation, AIRPEAK's recent construction efforts are dictated by its upcoming construction deadlines, not some nefarious scheme to manipulate the FCC's processes for future economic benefit. Opposition at pp. 14-15.

¹⁷ While AIRPEAK does operate in more rural markets, its limited spectrum resources, by comparison to Nextel's, requires it to reuse channels with relative intensity. This, in turn, requires the use of low sites. In fact, AIRPEAK frequently is co-located with Nextel or other cellular carriers and may be at the lowest position on the site when its engineering needs so dictate.

accordance with the decisions reached by the FCC in this proceeding, the architecture of AIRPEAK's network requires that it relocate to the ESMR band.

Grant of AIRPEAK's limited Reconsideration Request would prevent it from being disadvantaged in that process. AIRPEAK has proposed certain rule changes that the Company believes will better effectuate the FCC's intention in this highly complex proceeding. Their approval will permit one of the very few entities other than Nextel and SouthernLINC that operates a cellular architecture network to relocate **certain** site-based stations to the ESMR band on a comparable basis, indeed on the same basis that **all** of Nextel's facilities will move to that band. Approval also would be consistent with the Commission's conclusion that "the overall interference environment at 800 MHz would improve were we to allow licensees such as Southern LINC to relocate their systems to the ESMR portion of the band where they have less potential for interference to public safety and other non-cellular 800 MHz band licensees."¹⁸

That these changes are consistent with the Company's interest does not mean that they are inconsistent with the public interest. The same is true of the many benefits Nextel will receive from the proceeding; they are not contrary to the public interest just because they also are advantageous to Nextel. In fact, none of Nextel's objections even suggest that the public interest would be harmed by grant of the Reconsideration Request.

The only issue relating to AIRPEAK in the Opposition is this: how much ESMR spectrum will Nextel retain in markets in which AIRPEAK also qualifies as an ESMR. But the Commission already has recognized that this band must accommodate both Nextel and other cellular architecture systems with the potential (and in AIRPEAK's case the certainty) for causing interference to other 800 MHz incumbents. The FCC noted that Nextel has additional

¹⁸ 800 MHz Order at ¶ 161.

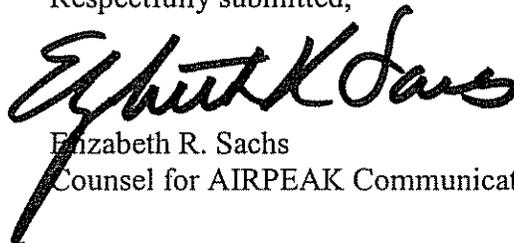
spectrum at 900 MHz and will be receiving spectrum at 1.9 GHz that will offset any shortfall.¹⁹ Having reached that conclusion, it is apparent that the FCC already has determined that a reduction in Nextel's ESMR band holdings is not inconsistent with the public interest

AIRPEAK requests that the FCC reconsider the two, limited issues raised herein and permit the Company to relocate the small number of its site-based facilities that do not meet the retroactively adopted 40 dBu/V contour overlap test. It also should be permitted to exchange site-based licenses already covering at least fifty percent (50%) of the population with EA-wide authorizations. This would more accurately replicate the current EA environment, since a significant number of incumbent, co-channel stations in AIRPEAK's EA markets do not appear to be constructed, operational stations entitled to protection. Moreover, it would be fully consistent with the FCC's existing definition of coverage that justifies EA-wide authority.

III. CONCLUSION

For the reasons detailed herein, AIRPEAK urges the FCC to grant its Petition for Reconsideration.

Respectfully submitted,



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¹⁹ *Id.* at ¶ 168.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 2nd day of May, 2005, caused to be mailed, first-class, postage prepaid a copy of the foregoing to the following:

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