

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

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

To: Michael J. Wilhelm, Chief  
Public Safety and Critical Infrastructure Division  
Wireless Telecommunications Bureau

**REQUEST FOR CLARIFICATION**

Respectfully submitted,

COMMUNICATIONS & INDUSTRIAL ELECTRONICS, INC.  
NORTH SIGHT COMMUNICATIONS, INC.

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Date: May 4, 2005

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## SUMMARY

Communications & Industrial Electronics, Inc., and North Sight Communications, Inc. (collectively, the “Incumbents”), through counsel and pursuant to Section 1.41 of the Commission’s Rules, 47 C.F.R. §1.41, hereby respectfully request clarification from the Commission regarding obligations imposed on Incumbents under the Commission’s December 22, 2004, Order in WT Docket No. 02-55 (the “Supplemental Order”), which modified the Commission’s earlier July 8, 2004, Order (the “Primary Order”, collectively with the Supplemental Order, the “Orders”).

In a press release dated April 21, 2005, the 800 MHz Transition Administrator (“TA”) invoked a requirement that all incumbent non-ESMR licensees in the cellular block must relocate to spectrum in the 854-862 MHz block. The Incumbents believe the TA’s interpretation that revised Section 90.614 of the Commission’s Rules, as published in Exhibit A of the Supplemental Order, imposing mandatory relocation obligations on the Incumbents is in error, in that it clearly runs counter to the intent of the Commission as expressed in the Orders.

As such, we respectfully request the Commission to issue an Order clarifying its intent on this provision and correcting the obvious and material interpretative error of the TA.

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**REQUEST FOR CLARIFICATION**

Communications & Industrial Electronics, Inc. ("C&I"), and North Sight Communications, Inc. ("North Sight", collectively with C&I, the "Incumbents"), through counsel and pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. §1.41, hereby

respectfully request clarification from the Commission regarding obligations imposed on Incumbents under the Commission's December 22, 2004, Order in WT Docket No. 02-55 (the "Supplemental Order"),<sup>1</sup> which modified the Commission's earlier July 8, 2004, Order (the "Primary Order", collectively with the Supplemental Order, the "Orders").<sup>2</sup> The Incumbents believe that the 800 MHz Transition Administrator's ("TA") interpretation that revised Section 90.614 of the Commission's Rules, as published in Exhibit A of the Supplemental Order, imposes mandatory relocation obligations on the Incumbents is in error, in that it clearly runs counter to the intent of the Commission as expressed in the Orders. As such, we respectfully request that the Commission issue an Order clarifying its intent on this provision and correcting the obvious and material interpretative error of the TA.

## **I. INTRODUCTION**

Both C&I and North Sight are incumbent 800 MHz SMR licensees and operators in the Commonwealth of Puerto Rico. The Incumbents are each licensees subject to the rebanding provisions of the Orders, and the Incumbents each participated as commenters in the rulemaking process which led to publication of the Orders.

North Sight is the C-Block Economic Area ("EA") licensee for the Puerto Rico-U.S. Virgin Islands EA 174, and is currently operating an iDEN-architecture cellular ESMR system serving customers on a combination of its wide-area EA channels and site-based

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<sup>1</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Supplemental Order and Order on Reconsideration*, 34 CR 871 (2004) (the "Supplemental Order").

<sup>2</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum and Order, and Order*, 19 FCC Rcd 14969 (2004) (the "Primary Order").

licenses held for frequencies below 862 MHz,<sup>3</sup> including current deployment of several “low sites” as defined by the Commission.<sup>4</sup> Although North Sight expects to meet all operational requirements of an “ESMR System”<sup>5</sup> in the near future as business and network capacity needs dictate, it cannot meet that definition today.<sup>6</sup>

C&I holds incumbent licenses in the 861-866 MHz Upper 200 block which were not relocated by the EA licensees during mandatory relocation of that band, and also holds site-based incumbent licenses in the 851-854 MHz channel block targeted for mandatory clearing to accommodate NPSPAC relocation.<sup>7</sup> C&I currently operates traditional, high-site SMR systems using this combination of frequencies.

As such, Incumbents are adversely impacted by the provisions of the Orders which, as interpreted by the TA, may require the Incumbents to face mandatory relocation of their systems without reimbursement or compensation, or alternatively would impose operating restrictions on licenses purchased at FCC auction without any such limitations. The Incumbents do not believe this was the Commission’s intended result, and the Incumbents believe that the TA’s interpretation of the Commission’s intent is in error.

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<sup>3</sup> Letter from Alan S. Tilles, Esq., counsel to North Sight Communications, Inc., *et al.*, to Robert B. Kelly, Office of the 800 MHz Transition Administrator, January 28, 2005 (on file with the Commission) (“North Sight Letter”).

<sup>4</sup> A site with “an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies.” 47 C.F.R. §90.7. North Sight currently operates with all parameters except 20 paired frequencies, but has sufficient spectrum needs to deploy such frequencies when operational needs dictate such capacity.

<sup>5</sup> An ESMR System is an SMR system employing an 800 MHz cellular system: “in the 806-817 MHz/851-862 MHz band, a cellular system is defined as a high density system which: (1) has more than five overlapping interactive sites featuring hand-off capability; and (2) any one of such sites has an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies.” 47 C.F.R. §90.7.

<sup>6</sup> North Sight Letter at 1.

<sup>7</sup> 47 C.F.R. §90.699.

## II. BACKGROUND

The rulemaking proceeding under WT Docket No. 02-55 to minimize harmful interference to 800 MHz public safety systems was among the most exhaustively pleaded and debated in Commission history, as the Commission and commenters sought to identify and protect the interests of the many current licensees in the band. Throughout the proceeding, many commenters sought to address, and the Commission sought to resolve, equitable treatment for EA licensees who hold current licenses awarded by the Commission through competitive bidding in Auctions 16 (“Upper 200” channels), 34 (“Lower 150” channels) and 36 (“Interleaved” channels). The two largest licensees, Nextel Communications, Inc. (“Nextel”) and SouthernLINC, were granted specific accommodation in the Orders, with other EA licensees (including North Sight) addressed as a class.

In the Supplemental Order, the Commission revised its decision on the relocation of EA licensees from the 851-862 MHz non-cellular block into the cellular block above 862 MHz, and made clear that these incumbents are permitted to request relocation into the cellular block, but “[a]ny licensee electing to relocate to the ESMR portion of the band is bound by the rules applicable to ESMR systems and may not operate non-ESMR systems in that portion of the band.”<sup>8</sup> The revised Section 90.614, as published in the Supplemental Order, reads as follows:

- The 806-824/851-869 MHz band (“800 MHz band”) will be divided as follows at locations farther then [*sic*] 110 km (68.4 miles) from the U.S./Mexico border and 140 km (87 miles) from the U.S./Canadian Border (“non-border areas”)
- (a) 800 MHz cellular systems – as defined in §90.7 – are prohibited from operating on channels 1-550 in non-border areas.

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<sup>8</sup> Supplemental Order at ¶80.

(b) Only ESMR systems – as defined in §90.7 – are permitted to operate on channels 551-830 in non-border areas.

(c) In the following counties and parishes, only ESMR systems – as defined in §90.7 – are permitted to operate on channels 411-830. [listing of counties and parishes effected by Nextel-SouthernLINC agreement omitted].<sup>9</sup>

This Rule section represents a change from the Rules adopted in the Primary Order, in which subsection (b) above read that “800 MHz cellular systems – as defined in §90.7 – are permitted” in the 800 MHz cellular block.<sup>10</sup> Based on the text of the Commission’s Order implementing the rule changes set forth in Appendix A, the Incumbents believed that the revised §90.614 was intended to apply to new operations in the cellular block, particularly since, in the reverse case, incumbent ESMR operators have the flexibility to remain in the non-cellular block on a non-interfering basis,<sup>11</sup> despite the prohibition against such operations in the plain text of Section 90.614(a) above.

The Incumbents simply did not believe that Section 90.614 was meant to be applied so literally, since: (i) The Commission stated in the Supplemental Order that incumbent licensees in the non-cellular block currently engaged in ESMR operations are afforded the option of “remaining on their EA Block(s) on a non-interference basis,”<sup>12</sup> even though this grandfathered exception is not referenced in Section 90.614 or anywhere else in the Rules; and (ii) Section 90.614 contains no phase-in date, so on its face the current operations of Nextel, SouthernLINC and other ESMR systems below 862 MHz would be illegal as of February 8, 2005. Given the obvious exceptions to the rule section not codified in the text, Incumbents believed that a similar grandfathered exception for

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<sup>9</sup> Id., Appendix A at 48.

<sup>10</sup> Primary Order, Appendix C at ¶28.

<sup>11</sup> Supplemental Order at ¶76.

<sup>12</sup> Id.

incumbent non-ESMR operations in the cellular block was similarly understood in the context of the Commission's Orders.

Furthermore, the relocation options for EMSR incumbents in the non-cellular block were only addressed in the Supplemental Order in response to comments from Nextel and others, so the omission of similar discussion of non-ESMR incumbents in the cellular block does not demonstrate that the Commission denied such relief, but rather only that the Commission did not receive comments on this issue following the Primary Order. The Incumbents did not comment previously on this issue because they believed the Commission's intent in the Supplemental Order was well understood.

Incumbents raise this Request for Clarification now because in a press release dated April 21, 2005, the TA invoked a requirement that all incumbent non-ESMR licensees in the cellular block must relocate to spectrum in the 854-862 MHz block.<sup>13</sup> Under this narrow interpretation by the TA, the Rules (as drafted) would prohibit **on an immediate basis** any operation of non-ESMR systems in the 861-866 MHz band, although there is overwhelming evidence in the Commission's own writings that the Commission intended neither the prohibition of non-ESMR use of these frequencies by incumbents nor the mandatory relocation of Upper 200 incumbent EA and site-based licenses. Therefore, we believe the TA is incorrect in its interpretation of Section 90.614(b), and we seek intercession from the Commission to correct this misinterpretation.

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<sup>13</sup> "Press Release: 800 MHz Transition Administrator Accepting EA Licensee Relocation Elections," 800 MHz Transition Administrator, April 21, 2005 (on file with the Commission).

### III. DISCUSSION

1. The text of the Order accompanying the Rule change in the Supplemental Order was targeted at licensees relocating into the 862-866 MHz band, not to incumbents in the band.

The Incumbents believe it is arguable that the plain meaning of the black-letter text of Section 90.614, devoid of any context, could lead to the interpretation of the section reached by the TA. However, a reading of the text of the Commission's Supplemental Order to which the revised rules are an Appendix easily leads to the opposite conclusion. Both the new Rule Sections 90.617(d) and 90.614(a) released in the Appendix to the Primary Order and the revised Rule Section 90.614(a) included in the Appendix of the Supplemental Order are clearly meant to apply prospectively both to incumbent licensees moving into new channel blocks and to licenses issued after the conclusion of rebanding in a NPSPAC region.

In the text of the Supplemental Order, the Commission sought to clarify three issues: (1) "the relocation of non-Nextel non-SouthernLINC EA licensees operating ESMR systems";<sup>14</sup> (2) "[r]elocating site based systems associated with a relocating ESMR EA licensee";<sup>15</sup> and (3) "[r]elocating non-ESMR EA licensees."<sup>16</sup> As to the last of these issues, the Commission was concerned with addressing Nextel's request for clarification "that *non-ESMR EA licensees on channels 1-120* could be relocated to comparable channels below 861.4 MHz only."<sup>17</sup> In addressing the first of these issues (the relocation of ESMR EA licensees operating between 854 MHz and 862 MHz) the Commission provided several options, including "remaining on their EA block(s) on a non-

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<sup>14</sup> Supplemental Order at ¶75.

<sup>15</sup> *Id.* at ¶78.

<sup>16</sup> *Id.* at ¶79.

<sup>17</sup> *Id.* (*emphasis added*).

interference basis;” however, nowhere in the accompanying rule sections in Appendix A is this present-use exception mentioned for incumbent ESMR licensees below 861 MHz.<sup>18</sup> Rather, the Commission is creating, in essence, a blanket waiver applying to the very limited number of incumbent ESMR operators in the cellular block, so it follows logically that a corresponding waiver was intended to grandfather the very small number of non-ESMR operators in the cellular block.

Therefore, the Commission never contemplated the relocation of non-ESMR Upper 200 incumbent licensees, and clearly intended that, like non-Nextel ESMR operations below 862 MHz, these operations would be grandfathered indefinitely if the incumbent licensee chose to remain in place.

2. The Commission did not provide for mandatory relocation or compensation of Upper 200 incumbent licensees in either the Primary Order or the Supplemental Order.

While the Commission outlined in reasonable detail the mandatory relocation of all other incumbent licensees affected by this process, it did not, in the text of either of the Orders, specifically delineate the purported mandatory relocation of all Upper 200 non-ESMR site-based and EA licensees. By contrast, the Commission dictates that “Nextel shuts down its General Category channels and relocates all non-Nextel General Category licensees”,<sup>19</sup> that “NPSPAC licensees relocate to six megahertz of spectrum in the former

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<sup>18</sup> There is a provision allowing current ESMR operators in Block A (861-862 MHz) to “continue to operate, if they so choose” on those channels in ESMR format (47 C.F.R. §90.617(e) as published in Primary Order Appendix C), but no mention of grandfathering ESMR operations below 861 MHz. By contrast, continued *non-cellular* SMR operation by EA licensees in Blocks G-V is specifically authorized and grandfathered after November 22, 2004. 47 C.F.R. §90.617(d), as published in Appendix C of the Primary Order.

<sup>19</sup> Primary Order at ¶198.

General Category space at Nextel's expense;"<sup>20</sup> and that "[n]o public safety system will be required to remain in or relocate to the Expansion Band."<sup>21</sup> The voluntary relocation of EA licensees in the Interleaved spectrum and the Expansion Band was also addressed at length, as discussed, *supra*.<sup>22</sup>

However, there is no provision in the Orders which would specifically provide for payment of relocation costs for incumbent Upper 200 licensees, save for a casual mention that "[a]ny remaining relocations necessary to effect complete reconfiguration of the band in that region are made at Nextel's expense, e.g. moving public safety systems out of the Expansion Band."<sup>23</sup> This possible interpretation conflicts with the decision that non-ESMR EA licensees relocating upward to the cellular block "will not be entitled in any event to costs associated with infrastructure, replacement of subscriber equipment, tower leases, or any other 'hardware related' expenses."<sup>24</sup> Therefore, because non-cellular block EA incumbents moving upward are not automatically entitled to full compensation, it is far from understood that current cellular block EA incumbents (such as North Sight) relocating downward to the non-cellular block would be entitled to full reimbursement of all relocation costs.

The Commission clearly does not take mandatory relocations lightly. Rather, it views mandatory rebanding as a "hardship" to be endured "as a necessary concession to the nation's overall Homeland Security obligations,"<sup>25</sup> to be limited with "a solution that is both equitable and imposes minimum disruption to the activities of all 800 MHz band

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<sup>20</sup> Id.

<sup>21</sup> Id. at ¶151.

<sup>22</sup> See also, generally, Primary Order at ¶¶159-169; Supplemental Order at ¶¶75-86.

<sup>23</sup> Primary Order at ¶198.

<sup>24</sup> Supplemental Order at ¶79.

<sup>25</sup> Primary Order at ¶339.

users.”<sup>26</sup> It is inconceivable that the Commission would have imposed such a significant burden on these Incumbents without a single mention of this obligation in either of the Orders, or the presentation of any rationale as to why such a move is necessary to further the public interest.

3. Upper 200 Incumbents are entitled to protection from EA licensees, and there is no reason to disturb those rules to accomplish the purposes of the Orders.

In the Commission’s Upper 200 Proceeding, EA licensees were granted the right to relocate incumbent licensees in their EA channel block on a mandatory basis if and only if the auction winner paid or reimbursed all reasonable cost of relocation and provided the licensee comparable facilities elsewhere in the 800 MHz band.<sup>27</sup> If any incumbent licensees were allowed to remain in place, then “[s]uch incumbents must be protected from harmful interference in accordance with the Commission’s rules by geographic area licensees. These limitations may restrict the ability of geographic area licensees to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license area.”<sup>28</sup> If the EA licensee was unwilling or unable to provide comparable facilities, then “the incumbent licensee may continue to operate its system on a primary basis in accordance with the provisions of [Part 90].”<sup>29</sup> In order to protect these incumbent licensees, the Commission imposed emissions mask limits to the “to the ‘outer’ channels included in an EA license and to spectrum adjacent to interior channels used by incumbent licensees,” and further reserved for itself the right to protect incumbent site-based licensees, as “when an emission outside of the authorized

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<sup>26</sup> Id. at ¶2.

<sup>27</sup> 47 C.F.R. §90.699.

<sup>28</sup> *Auction of 800 MHz Specialized Mobile Radio Service Licenses*, 13 FCC Rcd 1875 (1997) at 3.

<sup>29</sup> 47 C.F.R. §90.699(e).

bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.”<sup>30</sup>

C&I was an incumbent SMR licensee subject to mandatory relocation under these rules,<sup>31</sup> but Nextel and the other EA auction winners<sup>32</sup> chose not to relocate those licenses, thereby assuming the obligation to provide co-channel and adjacent-channel interference protection to C&I’s licenses. As such, Nextel and other EA licensees are already on notice and accepted as a condition of their EA licensee the need to provide protection from interference for these incumbent licensees. Therefore, to the extent that ESMR licensees cause harmful interference to these licensees, it is reasonable to expect that the ESMR operator should bear the responsibility imposed upon it by the Interference Abatement Rules and Procedures established by the Commission in the Primary Order.<sup>33</sup> Since C&I and other Upper 200 incumbent SMR licensees are not definitively entitled to relocation compensation under the Primary Order, it is only fair and reasonable that the EA licensees – who are in the best position to prevent interference, who purchased the EA license at auction with full knowledge of and subject to the primary licensee rights of incumbent licensees, and who had ample opportunity to cause the mandatory relocation of the incumbent licensee to alleviate the problem – should continue to bear the cost and responsibility for resolving the harmful interference if it occurs. This is not the harmful interference problem the Commission sought to solve in the Primary Order.

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<sup>30</sup> 47 C.F.R. §90.691.

<sup>31</sup> “An incumbent licensee [which] has obtained a license or filed an application on or before December 15, 1995.” 47 C.F.R. §90.693(a).

<sup>32</sup> In EA 174 (Puerto Rico-U.S. Virgin Islands), the EA licensees are: A-Block (851-816/860-861 MHz) – High Tech Communications Services, Inc. WPLM234; B-Block (816-818/861-863 MHz) – Nextel License Holdings 5, Inc. WPOH416; and C-Block (818-821/863-866 MHz) – North Sight WPLM205.

<sup>33</sup> See Primary Order at ¶¶115-141.

In the Primary Order, the FCC sought to meet goals including: “abating harmful interference currently being encountered by 800 MHz public safety systems”; “minimizing disruption to existing services”; “responsibly managing the spectrum involved”; and “providing additional spectrum rights for public safety.”<sup>34</sup> Nextel previously accepted the existence of these incumbent Upper 200 operations by choosing not to invoke its right of mandatory relocation, and none of these goals of the Commission are met by forcing such relocation of C&I by Nextel at this time.

4. Non-ESMR Upper 200 C-Block incumbents cannot reasonably be accommodated below 862 MHz because there is insufficient spectrum to accommodate their operations.

In the Upper 200 auction, North Sight was the only bidder nationwide other than Nextel to secure a “C-Block” license providing 3 MHz x 3 MHz block of contiguous spectrum.<sup>35</sup> Because of the size of this contiguous block, it will be impossible without substantial disruption to incumbent licensees to relocate North Sight’s license (representing 120 contiguous channels in the FCC’s band plan) below 862 MHz without causing dramatic disruption to other incumbent licensees. It is for this reason that the Wireless Telecommunications Bureau has advised that North Sight will remain on its currently authorized spectrum,<sup>36</sup> and we ask the Commission to formalize this well-reasoned staff decision.

Even if the TA’s interpretation of the rules is correct, it will be impossible to relocate North Sight to any comparable spectrum under the post-relocation band plan adopted by

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<sup>34</sup> Id. at ¶151.

<sup>35</sup> WPLM205, licensed for 818-821/863-866 MHz in EA 174 (Puerto Rico and U.S. Virgin Islands).

<sup>36</sup> Electronic mail message from Michael J. Wilhelm, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, to Alan S. Tilles, Esq., counsel to North Sight, August 16, 2004 (“Wilhelm Letter”).

the Commission. There are currently 430 channels eligible for SMR use under the Commission's rules. The EA licenses associated with these frequencies in EA 174 are held as follows:

<b>Licensee</b>	<b>Block</b>	<b># Channels</b>
<b>Preferred</b>	D, DD, E, EE, F	125
<b>Nextel</b>	FF	25
<b>Nextel</b>	G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V	80
<b>High Tech</b>	A	20
<b>Nextel</b>	B	40
<b>North Sight</b>	C	120

Preferred Acquisitions, Inc., holds EA authorizations for all of the channels in the 1-120 block, so they must be relocated to accommodate the NPSPAC block migration.<sup>37</sup> Preferred has elected to relocate to the cellular block,<sup>38</sup> but will be left with five additional channels (current channels 121-125) to accommodate, requiring further reconfiguration of the ESMR block. High Tech Communications Services, Inc., has not filed an election with the Commission as of this date, but presumably can remain in place in the Guard Band in either case with adjustments to the interference protection standards.

Thus, even after other EA incumbent licensees have been accommodated, it is not possible for North Sight to be relocated by Nextel on a channel-by-channel basis in the non-cellular block: if Nextel surrenders its 16 EA licenses in the 856-860 MHz band (for a total of 80 channels), as well as its Block FF license (25 channels); and the non-NPSPAC portion recovered from Preferred's Block F license (5 channels), the total

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<sup>37</sup> Even though there are no current NPSPAC operations in Puerto Rico, the NPSPAC block will be relocated to provide future continuity of nationwide operations and to facilitate standard public safety radio equipment for the band. Wilhelm Letter.

<sup>38</sup> Letter from Charles M. Austin, Preferred Communications Systems, to Robert Kelly, Esq., Office of the Transition Administrator, January 21, 2005 (on file with the Commission).

number of channels (110) is are still not enough spectrum to provide comparable capacity to North Sight. More importantly, **this spectrum does not represent comparable facilities because it is not contiguous.** In order to provide North Sight with comparable contiguous spectrum below 861 MHz, Nextel would have to relocate an additional 23 incumbent licensees from 60 non-SMR channels (which do not presently have geographic overlay licenses), disrupting public safety, critical infrastructure industries (CII) and private business users who otherwise would not be required to relocate their systems. Such a massive additional relocation would do nothing to further the Commission’s goal of minimizing harmful public safety interference, but would seriously violate the Commission’s equally important goal of minimizing disruption to life-safety operations.

In its auction of EA-wide licenses in the 861-866 MHz band, the Commission sought to allow “SMR licensees [to] have the opportunity to deploy a multiplicity of technologies; thus, our rules also will promote technical innovation.”<sup>39</sup> Consistent with this technology-neutral approach, a mix of ESMR and traditional SMR operators entered into and won the auction.

The Commission is now forcing incumbent EA licensees in the General Category and Interleaved spectrum blocks to make a decision going forward whether to operate non-cellular or ESMR systems through their selection of spectrum (i.e., whether to relocate to the ESMR band and be subject going forward to providing ESMR operations

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<sup>39</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act — Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 8 C.R. 2085 at ¶2.

exclusively),<sup>40</sup> but under the TA's interpretation North Sight realistically cannot make this election if it is denied the contiguous spectrum for which it previously paid fair value at auction. Additionally, incumbent ESMR operators in the non-cellular block are given the opportunity to remain on their current channels on a non-interference basis, an opportunity not provided to North Sight under the TA's erroneous interpretation.

#### **IV. CONCLUSION**

In the 800 MHz rebanding proceeding, the FCC sought to eliminate life-threatening harmful interference caused by the negative interaction of high-site public safety two-way radio systems with low-site commercial cellular systems in a manner which was unforeseen when rules governing this band were implemented. By contrast, it was clearly contemplated by the FCC that Nextel and other auction winners would share spectrum with any incumbent Upper 200 licensees whom the EA licensees had previously declined to relocate. Similarly, the FCC did not propose technology limitations upon Upper 200 EA licensees when their licenses were auctioned and issued, and to do so now without any guarantee of reimbursement would impose a difficult financial burden on these licensees.

In imposing relocation obligations upon various classes of licensees, the Commission sought to carefully delineate the rights and obligations of each licensee, and its failure to do so with respect to the purported mandatory relocation of Incumbents clearly demonstrates that it did not intend to impose such an obligation.

For all of these reasons, the TA's April 21, 2005, press release imposing mandatory relocation obligations on Incumbents focuses on a narrow interpretation of a

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<sup>40</sup> Supplemental Order at ¶¶76; 79 & 81.

single rule section and misinterprets the Commission's clear intent in this matter. Therefore, for the reasons set forth above, the Incumbents respectfully request that the Commission issue an Order on its own motion clarifying and correcting the obvious and material misinterpretation of this provision by the 800 MHz Transition Administrator.

Respectfully submitted,

COMMUNICATIONS & INDUSTRIAL  
ELECTRONICS, INC.  
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Date: May 4, 2005

**CERTIFICATE OF SERVICE**

I, Robert L. Ritter, an attorney in the law offices of Shulman, Rogers, Gandal, Pordy & Ecker, P.A., do hereby certify that I have on this 4th day of May, 2005, sent via First Class, United States Mail, postage prepaid, a copy of the foregoing "Request for Clarification" to the following:

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