

**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)

**REQUEST THAT CERTAIN INFORMATION SUBMITTED TO THE COMMISSION
BY 800 MHz TRANSITION ADMINISTRATOR, LLC
BE WITHHELD FROM PUBLIC INSPECTION**

800 MHz Transition Administrator, LLC (“TA”) hereby requests that the Commission withhold from public inspection: (1) all materials that the TA forwards to the Commission as part of the record of any TA mediation; (2) those portions of the TA’s Quarterly Progress Reports that address the resolution of specific disputes mediated by the TA; and (3) any information provided to the TA pursuant to a non-disclosure agreement that the TA subsequently forwards to the Commission.

The materials covered by this request contain commercial and financial information that is entitled to confidential treatment under the Freedom of Information Act (“FOIA”) for two separate reasons. First, disclosure of this information by the Commission would result in substantial competitive harm to licensees and vendors. Second, disclosure of this information by the Commission would impair the TA’s ability to mediate disputes and otherwise impede the efficient administration of the 800 MHz reconfiguration process. In order to complete reconfiguration in a timely and efficient manner, the TA will require access to significant amounts of confidential commercial and financial information belonging to licensees and vendors. In some cases, disclosure of this information may also raise security concerns.

Licensees and vendors will be reluctant to provide such information to the TA unless they have adequate assurance that, if the TA forwards this information to the Commission, it will continue to be treated as confidential.

Grant of this request will serve the public interest. First, it will eliminate the need for the TA to file a separate request for confidential treatment each time it submits material covered by this request to the Commission. Second, it will eliminate the need for the Commission to consider multiple, repetitive non-disclosure requests. Third, grant of this request will encourage licensees and other parties to submit confidential information to the TA, thereby facilitating the prompt and efficient completion of the 800 MHz reconfiguration process.

I. THE COMMISSION SHOULD ELIMINATE ANY UNCERTAINTY THAT WOULD THREATEN TO DELAY AND IMPEDE THE RECONFIGURATION PROCESS BY GRANTING CONFIDENTIAL TREATMENT TO SPECIFIC CATEGORIES OF RECONFIGURATION-RELATED INFORMATION

During the course of the reconfiguration process, the TA will receive significant amounts of confidential information from licensees and vendors. The TA will protect the confidentiality of this information while it is in its possession. The TA, however, will forward this information to the Commission, when requested or required. The TA is filing this request in order to assure licensees and vendors that, after the TA forwards their information to the Commission, it will continue to be treated as confidential.

The TA recognizes that Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, anticipates that parties will file a separate non-disclosure request each time they submit information for which confidential treatment is sought. The Commission, however, has noted that it is "possible to identify categories of information that are likely to fall within FOIA

Exemption 4.”¹ Indeed, the Commission has determined that “[i]dentifying such categories reduces administrative burdens on submitters and the Commission.”²

Consistent with this approach, the Commission has determined that materials that fall within six categories, which are listed in Section 0.457(d) of the Commission’s Rules, 47 C.F.R. § 0.457(d), will always be “accepted by the Commission as confidential because, on a generic basis, they have been found to contain confidential information and are exempt from disclosure under FOIA Exemption 4.”³ A party that submits such information to the Commission need not file a request for non-disclosure.⁴ Rather, such materials “are not routinely available for public inspection.”⁵

As demonstrated below, like the categories of information previously designated by the Commission, the categories of information for which the TA seeks confidential treatment are exempt from disclosure under FOIA Exemption 4. The Commission, therefore, should rule that it will accept information within these categories as confidential, on a “generic basis,” without requiring the TA to submit a separate confidentiality request each time it provides such information to the Commission. To facilitate this process, the TA further requests that the

¹ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24852 (¶ 60) (1998) (“*Confidential Information Order*”).

²*Id.*

³ *Id.* at 24830 (¶ 19). For example, the Commission has determined that financial reports submitted by broadcast licensees and programming contracts between content providers and multichannel video programming providers will always be deemed to fall within FOIA Exemption 4. *See* 47 C.F.R. § 0.457(d)(1)(i), (iv).

⁴ *See* 47 C.F.R. § 0.457(d)(1) (“If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459.”).

⁵ *Id.* at § 0.457(d)(1).

Commission waive the requirement contained in Sections 0.457(d)(2) and 0.459(a) of the Rules, to the extent that these provisions require a party seeking non-disclosure of materials not “specifically listed in § 0.457,” to make a separate filing each time the party submits material for which it seeks non-disclosure.⁶

Prompt action by the Commission is essential. Several major program participants already have expressed concern that sensitive information that they submit to the TA may ultimately be disclosed to the public. The TA has taken two significant actions to address these concerns. First, as the Commission suggested, the TA has entered into several non-disclosure agreements (“NDAs”) with parties required to submit significant amounts of highly sensitive information. Second, the TA has adopted a Confidentiality Policy, which will provide significant protection to confidential information, even in the absence of an NDA.⁷ These actions, however, cannot provide program participants with assurance that, if the TA provides information to the Commission, such information will continue to enjoy confidential treatment. Without such assurance, some parties will be reluctant to submit information to the TA.

The parties’ reluctance to disclose confidential information to the TA could have a significant adverse effect on the TA’s alternative dispute resolution process. Mandatory mediation for licensees in the first reconfiguration “wave” will begin on December 27, 2005. At

⁶ In the alternative, the TA requests that the Commission amend Section 0.457(d) of the Rules, by adding a new sub-section (vii) that provides that the three categories information covered by this request will be accepted on a confidential basis pursuant to FOIA Exemption 4. Because the Commission’s FOIA Rules concern its internal procedures, the Commission may amend these rules without conducting a notice and comment proceeding. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 20128, 20132 (¶ 7) (1999); *see also JEM Broadcasting Co. v FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994) (agency procedural rules not subject to notice and comment under the Administrative Procedure Act); *Aluminum Co. of America v. FTC*, 589 F. Supp. 169, 178 (S.D.N.Y 1984) (FOIA rules are procedural rules).

⁷ A copy of the TA’s Confidentiality Policy is attached as an Appendix.

that time, Sprint Nextel and “Wave 1” licensees that have not yet entered Frequency Reconfiguration Agreements will need to submit significant amounts of commercial and financial information to TA Mediators. Without this information, it will be difficult for TA Mediators to help the parties reach agreement during the thirty-working-day mediation period specified by the Commission. Indeed, in the absence of such information, TA Mediators may not be able to provide the Commission with a “recommended decision,”⁸ if the parties do not reach agreement by the end of the mediation period. Such a result would impede the ability of the TA to complete reconfiguration in a timely and efficient manner.

II. THE THREE CATEGORIES OF INFORMATION FOR WHICH THE TA SEEKS CONFIDENTIAL TREATMENT ARE SUBJECT TO NON-DISCLOSURE PURSUANT TO FOIA AND THE COMMISSION’S RULES

In the *800 MHz Report and Order*, the Commission directed the TA to submit various types of information. These include: Quarterly Progress Reports;⁹ Annual Reports;¹⁰ and “the entire record” of any disputes which the TA mediates, but does not resolve, during the course of band reconfiguration.¹¹ In addition, upon request, the TA is obligated to make its official reports and records available to the Commission.¹²

⁸ *Improving Public Safety Communication in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15071-72 (¶ 194) (2004) (“*800 MHz Report and Order*”).

⁹ *Id.* at 15073 (¶ 196).

¹⁰ *Id.*

¹¹ *Id.* at 15072 (¶ 194).

¹² *See Public Notice*, “Wireless Telecommunications Bureau Concurs With Search Committee Selection of a Transition Administrator,” 19 FCC Rcd 21923, 21924 (2004) (“*Public Notice*”).

The TA requests that the Commission withhold from public inspection three categories of information that the TA may submit to the Commission in connection with reconfiguration.

Specifically, the TA requests that the Commission withhold from public inspection:

- (1) all materials that the TA forwards to the Commission as part of the record of any TA mediation;
- (2) those portions of the TA's Quarterly Progress Reports that address the resolution of specific disputes mediated by the TA; and
- (3) any information provided to the TA pursuant to an NDA that the TA subsequently forwards to the Commission.¹³

Section 0.459(d)(2) of the Commission's Rules provides that the Commission will grant a request for non-disclosure "if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act."¹⁴ For purpose of this Request, the relevant provision is FOIA Exemption 4, which provides that an agency need not disclose "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."¹⁵

¹³ The TA recognizes that, pursuant to Section 0.459(d)(1) of its Rules, 47 C.F.R. § 0.459(d)(1), the Commission may "defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461." The TA believes that, in order to provide greater certainty to participants in the 800 MHz reconfiguration process, the Commission should grant this request at the present time. If the Commission chooses to defer action, however, the TA requests that the Commission confirm that the TA need not submit separate confidentiality requests each time that it submits materials that fall within the three categories specified in this Request. Under this approach, the Commission would deem each submission by the TA of information that falls within these categories to be made subject to this request for confidentiality, but would not rule on the request until such time, if ever, that the Commission receives a request for public disclosure.

¹⁴ 47 C.F.R. § 0.459(d)(2).

¹⁵ 5 U.S.C. § 552(b)(4).

In order to demonstrate that material falls within FOIA Exemption 4, a party first must show that the information constitutes either a “trade secret” or “commercial or financial information.” As the Commission has recognized, the “terms ‘commercial or financial’ are given their ordinary meaning.”¹⁶ They include, “business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition.”¹⁷

The party must then demonstrate that the material is “confidential.” In those cases – such as the present one – in which a party seeks non-disclosure of commercial or financial information, the information will be deemed confidential if disclosure is likely to “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁸ In order to make this showing, a party need not “prove disclosure certainly *would* cause it substantial competitive harm, but only that disclosure would ‘*likely*’ do so.”¹⁹ While a party seeking to make this showing must submit more than “conclusory or generalized allegations,” it need not submit “a sophisticated economic analysis.”²⁰ Alternatively, a party may demonstrate that information is confidential by showing that disclosure is likely to “impair the Government’s ability to obtain necessary information in the future”²¹ or that disclosure is

¹⁶ *Confidential Information Order*, 13 FCC Rcd at 24818 (¶ 3).

¹⁷ *Id.* at 24818 n.7 (citing *Landfair v. U.S. Dep’t of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986)).

¹⁸ *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁹ *McDonnell Douglas Corp. v. U.S. Dep’t of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (emphasis added).

²⁰ *Public Citizen Health Research Group v FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

²¹ *National Parks*, 498 F.2d at 770.

likely to “impair the effectiveness of a government program.”²² The Commission has recognized that it is appropriate to withhold an entire document from public disclosure where it cannot identify specific “factual portions that could be reasonably segregated and disclosed.”²³

The Commission has identified the information that a party must submit in order to demonstrate that the material falls within FOIA Exemption 4.²⁴ As demonstrated below, the materials for which the TA seeks non-disclosure fall squarely within this exemption. They are likely to contain commercial, financial, or other proprietary information, which cannot feasibly be segregated. Public disclosure of this information is likely to result in substantial competitive harm to Sprint Nextel, to individual licensees, and to vendors that participate in the reconfiguration program. Disclosure also would impair the ability of the TA to obtain information necessary to conduct the mediation process and complete reconfiguration in a timely and efficient manner.

²² *Allnet Communications Services v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992); *see Confidential Information Order*, 13 FCC Rcd at 24819 (¶ 4).

²³ *National Rural Telephone Cooperative*, Memorandum Opinion and Order, 5 FCC Rcd 502, 504 (¶ 15) (1990) (“*NRTC Order*”). Once the Commission has determined that material falls within Exemption 4, it will only disclose this information if a party makes a “persuasive showing.” *Confidential Information Order*, 13 FCC Rcd at 24831 (¶ 19); *see* 47 C.F.R. § 0.457(d)(2). Even if the Commission determines that disclosure is appropriate, the agency tries to “balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials” by using “special remedies such as . . . protective orders.” *Confidential Information Order*, 13 FCC Rcd at 24823-24 (¶ 9). The TA requests that the Commission confirm that, before releasing any information for which the TA has requested confidential treatment, the Commission will provide the TA with advance notice and a reasonable opportunity (in conjunction with the party that provided the information to the TA) to develop adequate remedies.

²⁴ *See* 47 C.F.R. § 0.459(b)(1)-(9).

A. The Commission Should Withhold From Public Inspection Information Contained in the Record of Any TA Mediation

In the *800 MHz Report and Order*, the Commission directed the TA “to mediate any disputes that may arise in the course of band reconfiguration.”²⁵ The Commission further provided that, if issues remain in dispute at the conclusion of the mediation period, the TA “shall forward [to the Commission] the entire record of any dispute issues, including such dispositions thereof that the Transition Administrator has considered.”²⁶

1. Specific information for which confidential treatment is sought (Rule 0.459(b)(1))

The TA requests that the Commission withhold from public inspection all information in the record of any TA mediation (“Record”). The Record consists of: the parties’ Proposed Resolution Memorandum (“PRMs”) (including the reply, if any) and any supplements or amendments thereto; any stipulations entered into by the parties; the Recommended Resolution and all notices or procedural orders issued by the TA Mediator; copies of, or references to, all TA Policies and information relied upon by the TA Mediator in the Recommended Resolution and not contained in the PRMs; and copies of proposed replies or amendments to the parties’ PRMs or Appendices that the TA Mediator did not permit or consider in preparing the Recommended Resolution.

²⁵ *800 MHz Report and Order*, 19 FCC Rcd at 15071 (¶ 194).

²⁶ *Id.* at 15072 (¶ 194); *see also id.* at 15076 (¶ 201) (“If disputed issues remain thirty days after the end of the mandatory negotiating period, the Transition Administrator shall forward the record to the Chief of the Public Safety and Critical Infrastructure Division, together with advice on how the matter(s) may be resolved.”).

2. Identification of circumstances giving rise to the submission (Rule 0.459(b)(2))

The TA's Alternative Dispute Resolution Plan ("ADR Plan") governs the procedures to be used in the event Sprint Nextel and individual licensees do not enter into a Frequency Reconfiguration Agreement within six months after the start of the applicable negotiation period. The ADR Plan also contains procedures for resolving other disputes that may arise in the course of reconfiguration.²⁷ Pursuant to the ADR Plan, unless otherwise directed by a TA Mediator, each party must submit a Proposed Resolution Memorandum. The party filing the initial PRM, typically Sprint Nextel, may also file a Reply. If the parties have not resolved their dispute by the end of the thirty-working-day mediation process, the TA Mediator is to prepare a Recommended Resolution of the factual and legal issues that remain in dispute. As required by the *800 MHz Report and Order*, the TA will promptly forward the Record to the Commission.²⁸

3. Degree to which the information is commercial or financial (Rule 0.459(b)(3))

The Record will contain a significant amount of commercial and financial information. In the course of mediating a Frequency Reconfiguration Agreement, for example, the relocating licensee will need to disclose information regarding its system, including: the locations in which it operates; the configuration of its backbone network; the number of wireless devices that it uses; the quality of its service; and whether it is planning to replace its existing equipment. The Commission has recognized that some licensees "regard [information about] their operating

²⁷ See ADR Plan at § 9.

²⁸ See *id.* at § 8(D)(9).

parameters as proprietary” and that it is appropriate to adopt procedures to preserve the confidentiality of this information.²⁹

In addition, licensees will need to disclose information regarding the costs that they believe are reasonable in order to ensure that the licensee will have “comparable facilities” following relocation. These costs include: inventorying subscriber equipment and infrastructure; evaluating frequency assignments (including use of technical consultants); retuning, reprogramming, or replacing equipment; filing license applications; installing, testing, and performing engineering work associated with reconfiguration; obtaining necessary legal services; preparing a statement of work and cost estimate; and performing reconfiguration. Because of the large volume of information to be provided to the TA, it is not feasible to identify and attempt to segregate the specific portions of those materials that contain confidential information.

The TA’s Recommended Resolutions will describe and assess relevant portions of the information provided by the parties. As a result, the Recommended Resolutions also are likely to contain a significant amount of commercial and financial information.

Requiring the TA to identify all confidential information within the Record, and to submit public and confidential versions of each Recommended Resolution to the Commission, would impose a significant burden. Indeed, this could impede the TA’s ability to submit the Record and Recommended Resolution promptly after the conclusion of the mediation period.

4. Degree to which the information concerns a service that is subject to competition (Rule 0.459(b)(4))

The information for which the TA seeks non-disclosure covers numerous services that are subject to competition. First, certain 800 MHz licensees are subject to competition in the provision of commercial wireless services. For example, as the Commission has previously

²⁹ *800 MHz Report and Order*, 19 FCC Rcd at 15039 (¶ 126).

recognized, providers of cellular and Specialized Mobile Radio (“SMR”) services are subject to effective competition.³⁰ Second, many 800 MHz licensees use private mobile services (sometimes known as business/industry land transportation (“B/ILT”) radio services) “to contribute to the production of some other good or service in the most efficient way possible.”³¹ These companies – which include manufacturers, video production companies, and land transportation providers – are often subject to significant competition. Third, many of the service providers that will help facilitate the 800 MHz reconfiguration – such as lawyers, consultants, engineers, and equipment vendors – provide services that are subject to significant competition.

5. Explanation of how disclosure could lead to substantial competitive harm (Rule 0.459(b)(5))

Disclosure of information contained in the mediation Record could lead to substantial competitive harm. First, in those cases in which a licensee provides a wireless service, disclosure of information regarding the means by which the licensee provides the service could enable competing wireless service providers – including those that will not be participating in the 800 MHz reconfiguration – to determine the licensee’s business strategy, thereby putting the 800 MHz licensee at a significant competitive disadvantage. Second, in those cases in which a licensee uses wireless services to provide other goods or services, disclosure of the means and extent to which a licensee uses wireless services could provide competitors with information about a licensee’s operations. Here, again, this could put the licensee at a significant competitive disadvantage. Third, to the extent information relates to the charges imposed by vendors for

³⁰ See *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20597, 20610, 20632-35 (¶¶ 27 & 86-90) (2004).

³¹ FCC website: <http://wireless.fcc.gov/services/ind&bus/about/> (viewed on December 23, 2005).

services provided to a licensee, disclosure of this information could enable the vendors' competitors to have a significant competitive advantage in seeking future business. Finally, disclosure of information contained in a Recommended Resolution regarding the costs that the TA finds reasonable in one mediation could deter vendors from engaging in vigorous price competition when seeking to provide services to other licensees.³²

**6. Measures taken to prevent unauthorized disclosure
(Rule 0.459(b)(6))**

The TA has taken measures to prevent unauthorized disclosure of information obtained in the course of the mediation process. The TA has adopted a Confidentiality Policy, which is attached. The Confidentiality Policy states that “the TA will automatically treat the Record of a TA mediation as Protected Confidential Information.”³³ The policy further provides that “[t]he TA will observe special procedures to protect from public disclosure any Confidential Information that constitutes Protected Confidential Information.”³⁴ In particular, the TA has stated that it will: (1) “physically segregate” ADR Record material “from other material in the TA’s possession”; (2) “restrict access” to this material “to authorized TA staff members”; and (3) “adopt special document destruction procedures.”³⁵

³² The Commission has recognized the substantial competitive harm that can be caused by releasing contractual information. *See NTRC Order*, 5 FCC Rcd at 503 (¶ 12) (Disclosure of contracts that carriers subject to competition were required to submit to the Commission “could result in substantial competitive harm. Release of the contracts at issue would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carriers’ negotiating posture . . . and might disrupt the carriers’ business relationships with [parties] currently under contract with the carriers.”).

³³ TA Confidentiality Policy at 5.

³⁴ *Id.* at 2.

³⁵ *Id.* at 7.

7. Extent of any previous disclosure (Rule 0.459(b)(7))

Consistent with the Confidentiality Policy described above, the TA does not anticipate that there will be any unauthorized public disclosure of the information contained in the Record. In the event the TA is aware of any unauthorized public disclosure, however, it will inform the Commission at the time it submits the material.

8. Period for which non-disclosure is sought (Rule 0.459(b)(8))

The TA requests that information not be disclosed publicly until at least three years after the conclusion of the 800 MHz reconfiguration process. Establishing a uniform disclosure date for all materials generated in the course of the mediation process will provide certainty and administrative simplicity. A three-year period is necessary to ensure that disclosure of information will not provide competitors with information that could give them an unjustified competitive advantage.

9. Other information (Rule 0.459(b)(9))

Grant of the TA's request is also justified because disclosure of the information would undermine the effectiveness of the 800 MHz reconfiguration process.³⁶ The Commission has emphasized the importance of this undertaking.³⁷ In order for the transition to be completed in a timely manner, it is necessary to ensure that Sprint Nextel and the other licensees enter into

³⁶ See *Confidential Information Order*, 13 FCC Rcd at 24819 (¶ 4) (recognizing that grant of a confidentiality request is appropriate where disclosure would have an adverse impact on a Commission program).

³⁷ See, e.g., *800 MHz Report and Order*, 19 FCC Rcd at 15128 (¶ 338) (“There may be no matter within our jurisdiction more crucial . . . than assuring that public safety communications systems are free from unacceptable interference and have adequate capacity. . . . [W]e thus would be derelict in our duty were we to ignore an opportunity – such as that represented by the 800 MHz band reconfiguration – that allows us to increase the reliability and capacity of the 800 MHz public safety communications systems.”).

Frequency Reconfiguration Agreements as promptly as possible. The parties must also be able to resolve promptly any other disputes that arise during the course of reconfiguration. The TA mediation process is designed to facilitate such negotiations. In order for the mediation process to be effective, however, both parties must disclose commercial and financial information to TA Mediators. Pursuant to the ADR Plan, parties that participate in mediation must also waive any rights they may have, under the Uniform Mediation Act or otherwise, to prevent the TA from disclosing information to the Commission.³⁸ If parties do not have adequate assurance that the Commission will give this information confidential treatment, they are less likely to provide it to the TA. This, in turn, would impair the ability of the TA Mediators to help the parties reach agreement. If the TA is not able to resolve a dispute within the thirty-working-day mediation period, the Commission may have to expend its resources to do so.

Public disclosure could also discourage vendors from engaging in vigorous price competition. Public disclosure of vendor's proposed charges also could deter some vendors from participating in the program, thereby reducing licensees' choices and raising prices.

In addition, disclosure of Recommended Resolutions could undermine the effectiveness of the 800 MHz reconfiguration process by raising the cost, thereby reducing the payment that Sprint Nextel may have to make to the U.S. Treasury. Rather than trying to control their costs, licensees would be likely to use costs that the TA finds are reasonable in one mediation as the "starting point" in negotiating their own Frequency Reconfiguration Agreement.³⁹ Finally, as the

³⁸ See ADR Plan at § 6.

³⁹ Providing confidential treatment to the TA's Recommended Resolution is also appropriate because the Commission previously has "exempt[ed] the 800 MHz Transition Administrator from the *ex parte* requirements with respect to presentations to the Commission and its staff regarding the 800 MHz reconfiguration." *Public Notice*, "General Counsel Modifies *Ex Parte* Rules for 800 MHz Transition Administrator," 19 FCC Rcd 24795, 24796 (2004) ("*Ex Parte Waiver*"). This includes the requirement that "written presentations" made to the Commission be

Commission has recognized, disclosure of “information relative to band reconfiguration could be sensitive from a security standpoint.”⁴⁰ For example, disclosure of operational information regarding in systems operated by public safety licensees, or the details about how and when those systems will be “cut over” to new frequencies, could raise significant law enforcement and national security concerns. “[P]rotecting . . . the nation’s communications infrastructure” is a key part of the agency’s Homeland Security Action Plan.⁴¹ Grant of this request will advance that important objective.

B. The Commission Should Withhold From Public Inspection Information Regarding Specific Disputes Contained in TA Quarterly Progress Reports

The Commission also has directed the TA to provide “quarterly progress reports to the Commission in such detail as the Commission may require.”⁴² The Quarterly Progress Reports are to include a “description of any disputes that have arisen and the manner in which they were resolved.”⁴³

The TA intends to provide aggregate information regarding the dispute resolution process in its Quarterly Progress Reports. To the extent that the TA includes information regarding the resolution of any specific dispute in a Quarterly Progress Report, the TA requests that the Commission withhold such information from public inspection until three years after the

included in the public record. 47 C.F.R. § 1.1206(b)(1). This waiver extends to presentations that the TA makes regarding “matters that are subject to arbitration.” *Ex Parte Waiver*, 19 FCC Rcd at 24796. The TA’s Recommended Resolutions plainly constitutes a “written presentation” regarding “matters that are subject to arbitration.”

⁴⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15078 (¶ 203).

⁴¹ FCC Homeland Security Action Plan at 1 (July 2003).

⁴² *800 MHz Report and Order*, 19 FCC Rcd at 15073 (¶ 196).

⁴³ *Id.*

completion of the 800 MHz reconfiguration process. Any information that the TA includes in a Quarterly Progress Report regarding the resolution of such disputes will be based on the materials provided by the parties during the course of the mediation process.

For the reasons set forth above, disclosure of this information could cause significant competitive harm, while undermining the effectiveness of the 800 MHz reconfiguration process. Consistent with Section 0.459(a) of the Commission's Rules, to the extent that the TA includes dispute-specific information in any Quarterly Progress Report, the TA will physically separate this information from the portions of the Quarterly Progress Report for which the TA does not seek confidential treatment.

C. The Commission Should Withhold From Public Disclosure Information That Is Subject to NDAs

The TA is obligated to retain information regarding reconfiguration and to make this information available, upon request, to the Commission. However, as the Commission has recognized, some of this information will be subject to NDAs between the TA and the licensee or vendor that provided the information.⁴⁴

1. Specific information for which confidential treatment is sought (Rule 0.459(b)(1))

The TA requests that the Commission withhold from public inspection all information that the TA has agreed to treat as confidential pursuant to an NDA.

2. Identification of circumstances giving rise to the submission (Rule 0.459(b)(2))

In order to fulfill its obligations, the TA will require access to significant amounts of information from major program participants – such as Sprint Nextel and the primary equipment vendors – throughout the reconfiguration process. In order to facilitate the free exchange of this

⁴⁴ See *Public Notice*, 19 FCC Rcd at 21924.

information, the TA may enter into NDAs with certain major program participants. The TA will only do so, however, when it determines “that doing so is essential to obtain access to sensitive information that the TA needs to fulfill its obligations.”⁴⁵ As described below, the TA will provide special protection to any information, properly designated as protected confidential information by the providing party, that is subject to an NDA. The TA will provide this information to the Commission, when required.

3. Degree to which the information is commercial or financial (Rule 0.459(b)(3))

The TA anticipates that the material covered by the NDAs will contain a significant amount of highly sensitive commercial and financial information. This information is likely to include: financial papers and statements; customer lists; research and development information; vendor information; product information; drawings; trade secrets; information regarding operating procedures; pricing information (including pricing methodologies); market strategies; customer relations information; information regarding future marketing or operating plans; and other information reasonably considered proprietary or confidential by the disclosing party.⁴⁶

4. Degree to which the information concerns a service that is subject to competition (Rule 0.459(b)(4))

The material covered by the NDAs will concern services that are subject to competition. The TA expects to enter into NDAs with 800 MHz licensees that are subject to competition in the provision of commercial wireless services. The TA also expects to enter into NDAs with major equipment manufacturers that provide services that are subject to significant competition.

⁴⁵ TA Confidentiality Policy at 3.

⁴⁶ In certain cases, information may also raise security concerns. *See, supra*, at 15-16.

5. Explanation of how disclosure could lead to substantial competitive harm (Rule 0.459(b)(5))

Disclosure of information provided to the TA pursuant to an NDA could lead to substantial competitive harm. In those cases in which a licensee provides a commercial wireless service, disclosure of confidential information regarding the licensee's finances, operations, and plans could enable competing commercial wireless service providers to determine the licensee's business strategy, thereby putting the 800 MHz licensee at a significant competitive advantage. Similarly, in those cases in which a vendor provides confidential information regarding its finances, operations and plans, disclosure could provide competitors with a significant advantage.

6. Measures taken to prevent unauthorized disclosure (Rule 0.459(b)(6))

The TA's Confidentiality Policy provides that "[t]o the extent provided by an NDA, the TA will treat information submitted pursuant to such NDA as Protected Confidential Information."⁴⁷ As explained above, the Confidentiality Policy provides that "[t]he TA will observe special procedures to protect from public disclosure any Confidential Information that constitutes Protected Confidential Information."⁴⁸

7. Extent of any previous disclosure (Rule 0.459(b)(7))

Pursuant to the Confidentiality Policy, the TA will adopt effective procedures to prevent unauthorized public disclosure of the information subject to an NDA. In the event the TA is aware of any unauthorized public disclosure, however, it will inform the Commission at the time it submits the material.

⁴⁷ TA Confidentiality Policy at 6.

⁴⁸ *Id.* at 2.

8. Period for which non-disclosure is sought (Rule 0.459(b)(8))

The TA requests that information not be disclosed publicly until at least three years after the conclusion of the 800 MHz reconfiguration. Establishing a uniform disclosure date for all materials submitted to the TA pursuant to an NDA will provide certainty and administrative simplicity. A three-year period is necessary to ensure that disclosure of information will not provide competitors with information that could give them an unjustified competitive advantage. Indeed, the TA intends to remain bound by the terms of any NDA for a period that, in certain cases, could last for up to four years from the date at which reconfiguration is completed.

9. Other information (Rule 0.459(b)(9))

Grant of the TA's request is also justified because disclosure of the information would undermine the effectiveness of the 800 MHz reconfiguration process. In order to fulfill its responsibilities, the TA must be able to obtain sensitive information from major program participants on an ongoing basis. The TA has made clear to program participants that, when required, it will provide this information to the Commission. If parties do not have adequate assurance that the Commission will give this information confidential treatment, they are less likely to provide it to the TA. If the TA is unable to obtain information from program participants because of concerns regarding confidentiality, the TA may not be able to complete the reconfiguration in a timely and efficient manner.

CONCLUSION

For the reasons specified herein, the TA respectfully requests, that the Commission:

(1) rule that it will withhold from public inspection: (a) all materials that the TA forwards to the Commission as part of the Record of any TA mediation; (b) those portions of the TA's Progress Quarterly Reports that address the resolution of specific disputes; and (c) any

information provided to the TA pursuant to an NDA that the TA subsequently forwards to the Commission;

(2) waive the requirement contained in Sections 0.457(d)(2) and 0.459(a) of the Rules, to the extent that these provisions require a party seeking non-disclosure of materials not “specifically listed in § 0.457,” to make a separate filing each time the party submits material for which it seeks non-disclosure; and

(3) confirm that, before releasing any information for which the TA has requested confidential treatment, the Commission will provide the TA with advance notice and a reasonable opportunity (in conjunction with the party that provided the information to the TA) to develop adequate remedies.

Respectfully submitted,

800 MHz TRANSITION ADMINISTRATOR, LLC

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Its Counsel

December 23, 2005

APPENDIX



Transition
Administrator

The Official Reconfiguration Manager

**CONFIDENTIALITY POLICY
FOR
800 MHZ TRANSITION ADMINISTRATOR, LLC**

Version 1.0

December 7, 2005



Transition
Administrator

The Official Reconfiguration Manager

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I. INTRODUCTION

This Confidentiality Policy establishes the procedures that 800 MHz Transition Administrator, LLC (“TA”) will use to protect from public disclosure Confidential Information that Stakeholders disclose to the TA. This Policy applies to TA Team Members and their employees, as well as to consultants, sub-contractors and advisors retained by the TA.

Any questions regarding the terms and implementation of this Confidentiality Policy should be directed to the TA General Counsel.

II. DEFINITIONS

As used in this Policy:

1. “Confidential Information”:

(a) includes –

commercially sensitive information (such as sales data, financial data, customer lists, technical information, operating procedures, marketing strategies, pricing methods, and future plans);

trade secrets;

privileged information; and

materials containing sensitive information potentially affecting national security;

(b) may be embodied as –

written information;

information transferred orally, visually or electronically; and

copies, abstracts, summaries, or analyses of such information; and

(c) does not include any information that –

becomes published or is in the public domain through other than an unauthorized disclosure by the TA;

is independently developed by the TA;

is received from a third party not under or in breach of an obligation of confidentiality; or

was previously known by the TA free of any obligation to maintain the confidentiality of such information.

2. “Disclosing Party” means a party, typically a Stakeholder, that provides information to the TA.
3. “NDA” means a non-disclosure agreement or similar contractual obligation between the TA and a Disclosing Party.
4. “Outside Party” means any party outside the TA, including the Federal Communications Commission (“FCC”), Stakeholders, and the media.
5. “Protected Confidential Information” means Confidential Information that is subject to an NDA or that the TA has designated as Protected Confidential Information.
6. “Stakeholder” means an Outside Party (other than the FCC) with a direct interest in the 800 MHz reconfiguration process, including Sprint Nextel, incumbent licensees, vendors, and similar interested parties.
7. “Written Material” means any information that is embodied in writing, whether in tangible or electronic format.

III. GENERAL POLICY

The TA recognizes that Disclosing Parties have a legitimate interest in protecting Confidential Information from public disclosure. The TA will not use any information, including Confidential Information, provided by Outside Parties for any purpose other than for fulfilling its responsibilities in connection the reconfiguration process. The TA does not intend to disclose Confidential Information to the public or to individual Stakeholders. The TA, however, will provide Confidential Information to the FCC when requested, when required, or when, in the sole judgment of the TA, such disclosure would facilitate the reconfiguration process. The TA will observe special procedures to protect from public disclosure any Confidential Information that constitutes Protected Confidential Information.

IV. MARKING REQUIREMENT FOR CONFIDENTIAL INFORMATION

Except as expressly provided in this Policy, Disclosing Parties that submit Written Material to the TA that contains Confidential Information should clearly mark the information “CONFIDENTIAL INFORMATION.” Disclosing Parties that provide Confidential Information

to the TA orally should indicate that the information is Confidential Information at the time they disclose it. The TA will assume no responsibility for protecting the confidentiality of any Confidential Information that does not comply with these requirements.

The TA reserves the right to deny confidential treatment to any information, even if marked “CONFIDENTIAL INFORMATION,” that does not satisfy the definition of Confidential Information contained in this Policy.

V. PROCEDURES FOR DESIGNATING CONFIDENTIAL INFORMATION AS PROTECTED CONFIDENTIAL INFORMATION

The TA has established four separate procedures by which it will designate Confidential Information as Protected Confidential Information.

A. Information That Will Always Be Designated as Protected Confidential Information

The TA will treat the following as Protected Confidential Information in all cases: (1) the Record of a TA mediation, as defined in the TA’s Alternative Dispute Resolution (“ADR”) Plan; and (2) any executed Frequency Relocation Agreement. A Disclosing Party need not request that the TA classify such information as Protected Confidential Information, and need not mark it as “CONFIDENTIAL”.

B. Information Submitted Pursuant to a Non-Disclosure Agreement

Throughout the reconfiguration process, the TA will require ongoing access to significant amounts of highly sensitive commercial or financial information from certain Stakeholders. In order to facilitate the free exchange of information, the TA may enter into NDAs with specific Stakeholders. The TA, however, will only enter an NDA when the TA determines that doing so is essential to obtain access to sensitive information that the TA needs to fulfill its obligations. Except where an NDA expressly provides otherwise, a Disclosing Party that has entered an NDA must clearly mark as “PROTECTED CONFIDENTIAL INFORMATION” any Written Material that it requests be classified as Protected Confidential Information.

C. Request to Treat Specific Confidential Information as Protected Confidential Information

A Disclosing Party that has not entered into an NDA may ask the TA to classify specific Confidential Information as Protected Confidential Information by filing a Request for Protected Confidential Treatment (“RPCT”) at the time it submits the material. The RPCT must: (1) specifically identify the material that the Disclosing Party requests be classified as Protected Confidential Information; (2) explain why the material falls within the definition of Confidential Information specified in this Policy; and (3) provide a compelling justification why the material should be given special confidentiality protection. The Disclosing Party must clearly mark as

“PROTECTED CONFIDENTIAL TREATMENT REQUESTED” any Written Material that it requests be classified as Protected Confidential Information. Where the Disclosing Party seeks Protected Confidential treatment for a limited amount of material within a document, the Disclosing Party may either place that material in a separate confidential appendix or provide redacted and non-redacted versions of the same document.

The TA generally will not act on requests for treatment of specific information as Protected Confidential Information until such time, if ever, as: (1) the FCC requests access to the material; (2) the TA determines that it must disclose the material to the FCC; or (3) the TA determines that, but for the Disclosing Party’s RPCT, it would disclose the material to an Outside Party. If, at that time, the TA determines, in its sole judgment, that the material should be classified as Protected Confidential Information, it will comply with the procedures specified in Section VI of this Policy.

D. TA Classification of Other Confidential Information as Protected Confidential Information

When appropriate, the TA General Counsel may classify other Confidential Information as Protected Confidential Information. In any case in which the TA makes this determination, it will mark (or direct the Disclosing Party to mark) the information as “PROTECTED CONFIDENTIAL INFORMATION.”

VI. DISCLOSURE OF CONFIDENTIAL INFORMATION (INCLUDING PROTECTED CONFIDENTIAL INFORMATION)

The following procedures govern the disclosure of Confidential Information (including Protected Confidential Information) by the TA.

A. Requests from Stakeholders, the Media, or Other Members of the Public

Any TA staff member who receives a request from a Stakeholder, the media, or other members of the public to disclose Confidential Information should direct the request to the TA General Counsel. The TA generally will deny any request by Stakeholders, the media, or other members of the public that seeks access to Confidential Information within the TA’s possession.

If the TA determines that disclosure would be appropriate, however, the TA will inform the Disclosing Party about the request. The TA will not provide the requested information to a Stakeholder, the media, or other members of the public unless the Disclosing Party provides its prior written consent.

B. Disclosure to the FCC

The TA General Counsel will be responsible for reviewing and approving the disclosure of any Confidential Information to the FCC. This includes both Confidential Information provided by Disclosing Parties and any Confidential Information contained in internal TA documents. Disclosing Parties should be aware that, at the conclusion of reconfiguration, the FCC may require the TA to deliver to the FCC all of the TA's Official Records, including Confidential Information contained in such records.

1. Disclosure of Confidential Information

The TA will provide Confidential Information to the FCC: (1) as required by the FCC's Orders; (2) when requested by the FCC; and (3) in any other situation in which the TA concludes, in its sole judgment, such disclosure would facilitate the reconfiguration process.

2. Disclosure of Protected Confidential Information

In any case in which the TA discloses Protected Confidential Information to the FCC, the TA will adopt the procedures specified in this Subsection VI.B.2. The TA, however, can make no assurances that the FCC will grant any request for confidential treatment.

a. ADR Record

As noted above, the TA will automatically treat the Record of a TA mediation as Protected Confidential Information. If the parties are not able to reach an agreement by the conclusion of the mediation period, the TA is required to forward the ADR Record to the FCC.¹ The TA will file a request, pursuant to the FCC's Rules, asking that the FCC treat this information as information that is not subject to public disclosure. The TA will further request that, if the FCC determines that this information should be disclosed, it provide advance notice to the TA, and a reasonable opportunity for the TA and/or the Disclosing Party to challenge the FCC's determination and/or negotiate an appropriate protective order.

¹ See 47 C.F.R. § 90.677(d). In order to facilitate this process, the parties to a mediation must execute a Waiver of Privilege and Confidentiality Form. This waiver is limited to disclosure by the TA to the FCC; it does not apply to disclosures by the TA to any other party. The FCC has made clear that, once the Record has been forwarded to the agency, "all questions of confidentiality, disclosure, and production of information are controlled by Commission and other applicable federal law." See 800 MHz Public Notice, 19 FCC Rcd at 21924.

b. TA Reports

The TA is required to file with the FCC Quarterly Progress Reports and Annual Reports (“TA Reports”).² The TA Reports generally will include only aggregated information regarding the reconfiguration process. If the FCC requests or the TA deems it appropriate, the TA Reports may include licensee-specific Protected Confidential Information, such as information regarding the resolution of individual disputes.³ If the TA includes Protected Confidential Information in a TA Report, it will publicly file a version of a report with the Protected Confidential Information in a separate appendix, accompanied by a request that the FCC treat this information as information that is not subject to public disclosure.⁴ The TA will further request that, if the FCC determines that this information should be disclosed, it provide advance notice to the TA, and a reasonable opportunity for the TA and/or the Disclosing Party to challenge the FCC’s determination and/or negotiate an appropriate protective order.

c. Information covered by an NDA

To the extent provided by an NDA, the TA will treat information submitted pursuant to such NDA as Protected Confidential Information. Consistent with its obligations, the TA will provide this information to the FCC when required, when requested, or when the TA determines, in its sole judgment, it is appropriate. To the extent required by the applicable NDA, the TA will notify the Disclosing Party before providing information to the FCC. The TA also will file a request, pursuant to the FCC’s Rules, asking that the FCC treat this information as information that is not subject to public disclosure. The TA will further request that, if the FCC determines that this information should be disclosed, it provide advance notice to the TA, and a reasonable opportunity for the TA and/or the Disclosing Party to challenge the FCC’s determination and/or negotiate an appropriate protective order.

d. Other Protected Confidential Information

The TA may determine that other Protected Confidential Information must or should be disclosed to the FCC. In such cases, the TA will file a request, pursuant to the FCC’s Rules, asking that the FCC treat this information as not subject to public disclosure. The TA will further request that, if the FCC determines that this information should be disclosed, it provide advance notice to the TA, and a reasonable opportunity for the TA and/or the Disclosing Party to challenge the FCC’s determination and/or negotiate an appropriate protective order.

² See 47 C.F.R. § 90.677(d).

³ *800 MHz Report and Order*, 19 FCC Rcd at 15073 (¶ 196) (Quarterly Reports to include a “description of any disputes that have arisen and the manner in which they were resolved”).

⁴ See 47 C.F.R. § 0.459.

C. Disclosure in Connection with Judicial and Other Governmental Proceedings

The TA will comply with any order by a court or other government authority, acting within the scope of its authority, requiring the disclosure of Confidential Information. To the extent feasible, the TA will notify the Disclosing Party of any such order.

VII. PROCEDURES FOR HANDLING CONFIDENTIAL INFORMATION

A. General Procedures

TA staff members should take reasonable precautions to protect Confidential Information from disclosure to other Stakeholders or the public. Each TA Member should apply at least the same standard of care that it routinely applies to protecting its own confidential information and, in any case, no less than a reasonable standard of care.

B. Special Procedures for Protected Confidential Information

When required by an NDA, when dealing with material that is part of an ADR Record, or in any other case in which the TA determines that the application of special procedures are appropriate, the TA will: (1) physically segregate Protected Confidential Information from other material in the TA's possession; (2) restrict access to Protected Confidential Information to authorized TA staff members; (3) adopt special document destruction procedures (such as the use of document shredding) applicable to Protected Confidential Information; or (4) take such other protective measures as the TA deems necessary.

VIII. DURATION OF CONFIDENTIAL TREATMENT

In any case in which a party has provided Protected Confidential Information to the TA pursuant to an NDA, the TA will treat the information as Protected Confidential Information in the manner provided for in this Policy for the period specified by the NDA. In all other cases, the TA will treat Confidential Information (including Protected Confidential Information) in the manner provided for in this Policy until 18 months elapses from the date on which the reconfiguration process concludes.

IX. ENFORCEMENT

TA Member Records Officers are responsible for training TA staff members regarding the appropriate handling and treatment of Confidential Information (including Protected Confidential Information) and should take affirmative measures to ensure compliance.

TA staff members or any other party with information regarding the potential mistreatment of Confidential Information (including Protected Confidential Information) should report such information to the TA General Counsel immediately. In the event that the TA becomes aware of a breach or potential breach of this TA Confidentiality Policy, the TA General Counsel will inform

the Disclosing Party of the matter, and the TA will take reasonable action to remedy the breach. TA staff members breaching this TA Confidentiality Policy may be subject to disciplinary action, up to and including termination of employment.

The TA will take appropriate steps to ensure that all of its subcontractors and related entities are aware of and comply with this TA Confidentiality Policy as a condition of their performing work for the TA.