FAIRFAX COUNTY

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January 12, 2006

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Federal Communications Commission
Office of the Secretary

Catherine W. Seidel
Acting Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55; Comments on Public Notice on Band Reconfiguration Negotiation and Mediation Obligations Issued on December 30, 2005

Dear Ms. Seidel:

On behalf of Fairfax County, Virginia, I am writing is support of the Petition for Reconsideration filed in the above-referenced proceeding by Robert H. Schwaninger on behalf of Schwaninger & Associates, P.C. That Petition was filed with the Bureau on January 3, 2006. Briefly stated, Mr. Schwaninger has asked the Wireless Telecommunications Bureau to reconsider a Public Notice issued by the Bureau on December 30, 005, which states that licensees "who fail to reach a mediated agreement must bear their own costs associated with further administrative or judicial appeals of band reconfiguration issues . . . ."

That statement in the Public Notice is inconsistent with the Federal Communications Commission's controlling orders in this proceeding. More specifically, the Public Notice cites Paragraph 194 of the *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, FCC 04-168, 19 FCC Rcd 14,969, 15,071-72 (adopted July 8, 2004), and we concede that Paragraph indicates that arbitration costs shall be shared by the parties, and it goes on to state that the parties may want to consider a less burdensome and expensive resolution of their disputes through alternative dispute resolution.

However, there are three reasons to conclude that this statement in the Public Notice is erroneous and that it has been overridden by a subsequent action by the Commission. First, Paragraph 15 of the *Supplemental Order and Order on Reconsideration*, FCC 04-294, 19 FCC RCD 25,120, 25,129 (adopted December 22, 2004) ("*Supplemental Order*") states that "[the Commission emphasizes] here that incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel."

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[Emphasis added] Second, in order to address any possible confusion on the scope of Nextel's cost obligations, Paragraph 70 of the *Supplemental Order*, 19 FCC Rcd at 25,150-51 reaffirmed its position that "Nextel must absorb all costs of band reconfiguration, including transactional costs . . . ." Third, having the County pay for these expenses is inconsistent with the entire scheme and purpose of this proceeding. In short, to the extent that one could have read Paragraph 194 as supporting a division of arbitration costs among the parties, it is clear that subsequent action taken by the Commission has overruled any argument in support of that position.

For those reasons, the County takes the position that any cost by a licensee reasonably incurred in the assertion of its rights in this proceeding, either by administrative appeal or otherwise, is an appropriate and lawful transactional cost that will be borne by Nextel and not the County. Moreover, it is important for the Wireless Telecommunications Bureau to act quickly to correct the Public Notice because, as the County has already learned, the mediator chosen by the Transition Administrator already has used this erroneous statement as a means of pressuring the County into accepting a mediated agreement when such an agreement is not appropriate at this time.

Thank you for considering our comments. If you have any questions, please feel free to contact me.

Sincerely,

Michael Long
Senior Assistant County Attorney

cc: Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, Federal Communications Commission
Anthony H. Griffin, County Executive, Fairfax County, and Chair, Chief Administrative Officers Committee, Metropolitan Washington Council of Governments ("MWCOG")
David J. Molchany, Chief Information Officer, Fairfax County
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