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

OPPOSITION OF SPRINT NEXTEL CORPORATION TO MRA PETITION FOR PARTIAL WAIVER AND/OR STAY

Sprint Nextel Corporation (Sprint Nextel) hereby opposes the Petition for Partial Waiver and/or Stay (Stay Petition) filed in the above-captioned proceedings on January 18, 2006 by Mobile Relay Associates (MRA). A year ago the Commission denied a similar request by MRA

and Skitronics, LLC to stay the 800 MHz band reconfiguration.[1] MRA's latest effort to stonewall the reconfiguration process offers nothing new. It should be summarily dismissed.

In determining whether to grant a stay request, the Commission considers the following factors:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

(2) Has the petitioner shown that without the requested relief, it will be irreparably injured?

(3) Would issuance of a stay substantially harm other parties interested in the proceedings?

(4) Is the grant of a stay in the public interest?[2]

MRA, once again, fails on all four counts.

In its latest request for a stay, MRA does not even mention the likelihood of its success on appeal, let alone demonstrate the "strong showing" required under this element. This alone warrants the denial of the Stay Petition. The Commission, in any event, already found in rejecting MRA and Skitronics' prior stay request that they "have failed to show that they would likely prevail on judicial review of the *800 MHz Report and Order*."[3]

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[1] *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Order, 20 FCC Rcd 641 (Wireless Tel. Bur. 2005) (*Order Denying First Stay Request*).

[2] *Comark Cable Fund III,* 104 F.C.C.2d 451, ¶ 9 (1985) (*citing Virginia Petroleum Jobbers Ass'n v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.,* 85 F.C.C.2d 973, 978 (1981)). Although MRA has also characterized its request as a petition for a "waiver" and cited the waiver standards set forth in section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, its petition is more appropriately viewed as a stay request since it seeks a delay in the effectiveness of the Commission's reconfiguration plan as applied to MRA pending the outcome of its appeal. Even if judged under the Commission's waiver standards, however, MRA's request should be denied for the reasons set forth below.

[3] *Order Denying First Stay Request* ¶ 8.

MRA also fails to demonstrate that it will experience irreparable harm in the absence of a stay. MRA claims in the instant petition that it will lose customers if it if required to retune its operations to new channels within the non-Enhanced Specialized Mobile Radio (ESMR) band and then subsequently is permitted to retune to the ESMR band if it prevails on appeal. As noted above, MRA is likely to lose its appeal; therefore its operations will only need to be retuned once. Even assuming, *arguendo,* that MRA were to prevail on judicial review, the Commission has already rejected MRA's customer-churn claims as "wholly speculative."[4] In denying MRA's prior stay request, the Commission stated:

> MRA's relocation will be conducted pursuant to long-established procedures combined with an additional layer of safeguards to minimize any disruption, perceived or actual, to MRA and its customers during the transition. ... We also find Movants' prediction of a mass exodus from their systems to Nextel's when band reconfiguration is underway to be speculative and unpersuasive. Movants have provided no support for their conjecture that Nextel might conduct a marketing program that would succeed in attracting Movants' customers who otherwise would not switch carriers. As Nextel points out, Movants offer localized, low-cost, traditional SMR dispatch services to small, regional businesses, whereas Nextel's high-density cellular network offers a broad range of nationwide and international wireless communications services to the general public. Moreover, Movants have not shown that they would lose a substantial portion of their customer base when they relocate to new facilities.[5]

MRA's instant petition offers nothing to rebut these findings. The Commission need not consider MRA's customer churn claim again – particularly when MRA has offered no new facts or changed circumstances not previously considered by the Commission.[6]

MRA glibly attempts to downplay the potential for harm to other parties if its Stay Petition is granted. MRA argues that its stay request is narrow and that it is not requesting a stay

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4 *Id.* ¶ 15. Only about one-half of MRA's channels need to be retuned from channels 1-120.

5 *Order Denying First Stay Request* ¶¶ 14-15.

6 *See Core Communications, Inc. v. Verizon Maryland Inc.*, 19 FCC Rcd 1935, ¶ 9 (Enf. Bur. 2004) (invoking "law of the case" doctrine under which courts and administrative agencies refuse to reopen issues already decided in the same proceeding).

of the Commission's 800 MHz reconfiguration of the Denver Economic Area (EA) as a whole.[7] But this is precisely what would happen if the Commission granted its request. Under the Commission's reconfiguration plan, none of the Denver area NPSPAC licensees can be retuned to their new channels in the reconfigured band until *all* incumbent licensees, including MRA, are retuned from channels 1-120. Delaying the retuning of MRA's systems will consequently delay completion of band reconfiguration throughout the Denver region. This will postpone resolution of the public safety interference problem in this region without any countervailing public benefit. On the contrary, the record in the 800 MHz reconfiguration proceeding contains extensive discussion on numerous incidents of interference to public safety communications systems in the Denver metropolitan area. The sooner 800 MHz band reconfiguration is completed in the Denver area, the faster this threat to reliable public safety communications will be alleviated. Thus, the public interest weighs heavily against the Commission granting MRA's instant petition for a stay.

MRA glosses over the length of the delay that would be caused by granting its request. The U.S. Court of Appeals for the D.C. Circuit will hear oral argument in MRA's case on February 3. The court can be expected to issue a decision sometime within the next three to six months. If, as is likely to be the case, the court affirms the Commission's decision, then a Commission decision now to stay the retuning of MRA's system will accomplish nothing, as MRA could have timely retuned without delaying relief for public safety communications systems. On the other hand, in the unlikely event MRA is successful on appeal, the Commission will have ample remedies at its disposal to make MRA whole and can consider them in the proceeding necessary to effectuate a court remand.

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[7] Stay Petition at 6.

MRA asserts in a footnote to the instant petition that it is now willing to convert its operations to ESMR technology by December 2010 – March 2011 if it is permitted to retune to the ESMR segment of the reconfigured band.[8] This assertion is lacking in both credibility and relevance. As an initial matter, the Commission has made clear that any licensee relocating to the ESMR band "may not operate non-ESMR systems in that portion of the band."[9] Even if its willingness to convert to ESMR technology is taken at face value, MRA cannot expect to wait another four to five years before implementing this conversion. Operating its high-site facilities in the ESMR band until 2010 or 2011 would only recreate the same conditions that gave rise to the 800 MHz interference problem in the first place. MRA's newly announced "willingness" to convert to ESMR technology if it retunes to the ESMR channel block is at best "the sleeves off its vest" and should have no decisional relevance on the instant Petition.

Moreover, as Sprint Nextel has previously explained and as the Commission recognized in denying MRA's first stay request, MRA lacks sufficient spectrum holdings to warrant the substantial capital investment needed to deploy an ESMR system.[10] It is far more efficient for it to continue to use its current high-site, low-density system to provide its "localized, low-cost, traditional SMR dispatch services to small, regional businesses."[11] Ironically, while the Stay Petition claims that multiple retunings will result in MRA losing its dispatch-service customers, a real risk to its business would be for it to convert its system to ESMR technology. Its existing

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[8] Stay Petition at 3 n.5.

[9] *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120, ¶ 81 (2004) ("*Supplemental Order*").

[10] *Order Denying First Stay Request* ¶ 9; Opposition of Nextel Communications, Inc. to Motion for Partial Stay, WT Docket No. 02-55, at 8-10 (Nov. 26, 2004); Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration, WT Docket No. 02-55, at 9-10 (April 21, 2005). It is significant that MRA holds no EA licenses in the 800 MHz band, having assigned the EA licenses it previously held to other licensees, including Sprint Nextel. These are not the hallmarks of a licensee contemplating converting its operations to an ESMR system.

[11] *Order Denying First Stay Request* ¶ 15.

customers would almost certainly have no interest in paying the higher subscription fees that would come from being serviced by a provider that, for some illogical reason, chose to deploy numerous, expensive base stations to operate a network that uses less than 2 MHz of spectrum.

The Commission's rules permit MRA flexibility to upgrade its facilities in the non-ESMR band if it chooses to do so. It may deploy digital facilities in that band. It can also "convert to low density cellular technology, which from an interference perspective is much more compatible with public safety systems."[12] Even if, notwithstanding its limited channel holdings, MRA is determined to deploy a high-density ESMR system some day, it may seek a waiver from the Commission to do so in the non-ESMR band.[13] MRA, for example, could at some point in the future seek to relocate to the 800 MHz Guard Band and request a waiver to upgrade its facilities (at its own cost) to a high-density ESMR system there based on a showing it would not cause interference to public safety systems in the band.[14]

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[12] *Order Denying First Stay Request* ¶ 9.

[13] *Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels,* Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 173 (2004) ("*800 MHz R&O*").

[14] In its negotiations with Sprint Nextel regarding a frequency relocation agreement, MRA has expressed interest in retuning its high-site operations in channels 1-120 to the Guard Band in the event it is not permitted to retune to the ESMR segment. The retuning of these operations to comparable high-site facilities would be funded by Sprint Nextel pursuant to the Commission's reconfiguration plan. MRA also has licensed 800 MHz channels that do not need to be retuned because they are in the interleaved spectrum. Sprint Nextel has no objection to MRA (at its own cost) relocating its interleaved channels to the Guard Band to the extent Guard Band spectrum is available, and operating either a high-site ESMR system or a high-density, low-site system with its limited channel holdings.

The immediate public interest priority, however, is retuning MRA's existing, non-cellular system from channels 1-120 to make way for Phase II NPSPAC system retuning in the Denver area. MRA's second stay request, just like its first, provides no basis to delay its retuning. Accordingly, the Commission should summarily deny MRA's instant petition.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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January 25, 2006

Certificate of Service

I, Charles W. Logan, hereby certify that on this 25th day of January 2006, I caused true and correct copies of the foregoing Opposition of Sprint Nextel Corporation to MRA Petition for Partial Waiver and/or Stay to be sent by electronic mail and regular, first-class mail to:

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