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

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 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

Sprint Nextel Corporation (Sprint Nextel) hereby opposes the Petition for Partial Waiver of Rebanding Rules (Waiver Petition) filed in the above-captioned proceedings on January 24, 2006 by Mobile Relay Associates (MRA). The Waiver Petition, following MRA's previous attempts to stay the rebanding process, represents yet another collateral attack on the

Commission's 800 MHz reconfiguration plan. MRA has a pending appeal before the U.S. Court of Appeals for the D.C. Circuit challenging the Commission's Report and Order in this proceeding and seeking the same relief that it now seeks in the form of a waiver request. MRA should not be allowed to waste scarce Commission resources by filing repetitive, frivolous pleadings raising many of the same issues that are now before the court. These repetitive filings are an abuse of the Commission's processes and should be summarily dismissed.

Contrary to MRA's assertions, grant of its waiver request would undermine the public interest and frustrate the purpose of the Commission's reconfiguration plan. The Commission's goals in reconfiguring the 800 MHz band are to remedy public safety interference, provide additional spectrum for public safety communications, and provide incumbent licensees with comparable facilities in the event they need to be retuned.[1] MRA's waiver request has nothing to do with these public interest objectives and would, in fact, undermine them. Under its waiver request, MRA would retune its high-site facilities to the Enhanced Specialized Mobile Radio (ESMR) channel block, thus recreating the incompatible mix of high-site non-cellular systems with low-site ESMR systems that gave rise to the 800 MHz interference problem in the first place.

Retuning MRA to the ESMR channel block is not necessary to provide it with comparable facilities. Less than half of MRA's channels need to be retuned at all, and these can be routinely retuned to the interleaved channels in the non-ESMR channel block in the reconfigured band. The retuning process will ensure that MRA receives the same geographic coverage and functionality that it enjoys today. This is all MRA is entitled to – nothing more,

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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,* Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶¶ 2, 4, 26 (2004) (*800 MHz R&O*).

nothing less. The Commission has rejected MRA's arguments to the contrary multiple times, and should do so again here.[2] After retuning, MRA can continue operating its business just as it does today, and can even upgrade its system to digital technology or deploy a low density ESMR system without any need for a waiver.

MRA has recently begun to claim a desire to convert its high-site, non-cellular facilities to a high-density ESMR system. MRA's claim, however, has more to do with litigation posturing than with a legitimate business plan to change its system architecture. MRA has operated a non-cellular system for years, and now, a year and a half after the FCC adopted the *800 MHZ R&O* and a little over a week before oral argument in its appeal, it suddenly announces its plan to convert to ESMR technology. It offers no specifics and no supporting declaration to back up this claim. The assertion also comes with a major caveat: MRA has indicated that it would not convert to ESMR technology until 2010 or 2011.[3] At the very least, this makes MRA's waiver request grossly premature. MRA also does not explain the reason for this long delay and ignores the fact that 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."[4] To permit

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[2] *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, ¶ 8 (Wireless Tel. Bur. 2005) (*Order Denying First Stay Request*) ("Movants participated in the rule making proceeding that led to the *800 MHz R&O* and the *800 MHz Supplemental Order* and their arguments, many of which are repeated in [a prior motion for stay filed by MRA and Skitronics, LLC], were fully considered but rejected as inconsistent with the Commission's interference abatement goals.").

[3] MRA Petition for Partial Waiver and/or Stay, at 3 n.5 (Jan. 18, 2006). All pleadings cited herein were filed in WT Docket No. 02-55.

[4] *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120, ¶ 81 (2004) (*Supplemental Order*).

otherwise would threaten to recreate the very type of interference problem this proceeding is designed to eliminate.

MRA's assertion that it will convert to ESMR technology lacks credibility. As Sprint Nextel has previously explained and as the Commission has recognized, MRA lacks sufficient spectrum holdings to warrant the substantial capital investment needed to deploy an ESMR system.[5] It is far more efficient for it to continue to use its current high-site system to provide its "localized, low-cost, traditional SMR dispatch services to small, regional businesses."[6] MRA's purported desire to switch to ESMR technology also cannot be squared with its oft-repeated (and misplaced) fear that it will lose customers when its system is retuned. MRA would face a far greater risk of losing customers in switching to ESMR technology than in being partially retuned within the non-ESMR channel block. Converting to ESMR would require a complete change of MRA's infrastructure and customer equipment; retuning within the non-ESMR block will not require customer equipment replacement.[7] MRA's existing customers also would almost certainly have no interest in paying the higher subscription fees that would be necessary to earn even a minimal return on investment given the costs of deploying a high-density cellular network with less than 2 MHz of spectrum.

The fact that MRA chose not to bid for the EA license in Denver provides further evidence that its newly-stated desire to convert to ESMR is just an eleventh-hour attempt to gain

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[5] *Order Denying First Stay Request* ¶ 9; Opposition of Nextel Communications, Inc. to Motion for Partial Stay at 8-10 (Nov. 26, 2004); Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration at 9-10 (April 21, 2005).

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

[7] The limited retuning of MRA's infrastructure required by the Commission's 800 MHz decisions will be essentially transparent to its customers, thereby belying MRA's oft-repeated "customer churn" assertions. Conversion to an ESMR system, in contrast, would require MRA to replace its network equipment and every one of its customers' radios.

a foothold in the ESMR channel block and then hope to make a profitable sale of these channels to Sprint Nextel. Any carrier with a serious desire to operate an ESMR network would have bid aggressively in the Commission's EA overlay license auctions. MRA holds *no* EA licenses in the 800 MHz band, having assigned the EA licenses it previously held to other licensees, including Sprint Nextel.[8] These are not the hallmarks of a licensee contemplating converting its operations to an ESMR system.

Even assuming, *arguendo,* MRA had a credible business plan to convert to ESMR technology, it was nonetheless within the Commission's authority to establish a cut-off date of November 22, 2004 (the Federal Register publication date of the *800 MHZ R&O*) in determining which entities are eligible to retune to the ESMR channel block.[9] There is no dispute that MRA operated a high-site, non-cellular site-based system as of that date, and therefore is not eligible for retuning to the ESMR band. Although MRA now claims that it expected to be able to convert to ESMR technology at some point in the future, the Commission's reconfiguration plan is not invalid merely because it upset this purported expectation.[10] The courts have made clear

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[8] In November 2002, MRA sold its EA licenses for block DD in EA 34 (Tampa, Florida) and block FF in EA 140 (Pueblo, Colorado) to Nextel.

[9] Indeed, the Commission could have established a cut-off date far earlier than publication of the Report and Order in the Federal Register. *See Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 165-67 (D.C. Cir. 2002) (upholding FCC order applying new restrictions on television local marketing agreements that were entered into after the adoption date of a Further Notice of Proposed Rulemaking previously issued in the proceeding).

[10] *See, e.g.*, *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.").

that Commission licensees have no vested right to an unchanged regulatory framework throughout their license terms.[11]

MRA also claims, without any supporting evidence, that it has more spectrum than some non-Sprint Nextel, non-SouthernLINC Economic Area (EA) licensees, which have the option of retuning to the ESMR channel block. The Commission should give no weight to MRA's unsupported assertion. Comparing the spectrum holdings of different site-based SMR licensees requires a careful and detailed analysis that takes into account the boundaries of specific site license coverage areas, overlay EA licenses, and other factors. MRA has not provided this analysis and has glossed over the fact that, unlike EA licensees, site-based licensees like MRA are limited to operations within a defined, limited service contour. MRA's site-specific licenses do not, either individually or collectively, cover the entire Denver EA. Most if not all of its licenses are outside the core population center in this market and are spread out piecemeal among the seven different tower sites MRA operates. Each of these sites has a different service area,[12] and the sites are up to 130 miles apart.[13] Although there is some overlap among these

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[11] *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding prospective regulations limiting multi-media ownership under the FCC's general rulemaking powers, including requirement for divestiture as a condition for license renewal); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking); *WBEN v. United States*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968) (upholding license modifications that limited predawn AM broadcasting rights of "daytimer" licensees that previously had some of the more ample privileges granted to "fulltimer" licensees).

[12] *See* Mobile Relay Associates, Tower Sites – Colorado Coverage Maps, *available at*: <http://mra.homestead.com/mra_site/03_colorado_coverage.html>.

[13] For example, MRA has a tower site in Fort Collins (Horsetooth Mountain) and another site in Colorado Springs (Cheyanne Mountain). These cities are approximately 130 miles apart.

sites, it does not appear accurate to conclude that MRA hold 2 MHz of 800 MHz spectrum across the Denver EA or even a substantial part of this EA.

MRA's effort to compare its site-based spectrum holdings to an EA licensee's spectrum holdings also misses an important distinction between site-based and EA licenses. SMR site-based licenses were initially used to provide traditional dispatch services, and, consistent with the needs of this type of service, were licensed on a transmitter-by-transmitter basis with a protected service area; MRA holds such licenses and continues to offer traditional dispatch service. Sprint Nextel, however, aggregated many of these licenses and with Commission authority began offering cell phone service comparable to the service provided by cellular and Personal Communications Service (PCS) licensees. In response to this innovation, and at the direction of Congress to establish regulatory symmetry among carriers offering comparable competitive services to the public at large,[14] the Commission adopted a new framework for SMR licensing which included assigning SMR licenses by EA geographic areas through the competitive bidding process. The Commission stated that this new framework would "promote competition" and provide auction winners "the opportunity to deploy a multiplicity of technologies."[15]

In recognition of this expectancy, the Commission has permitted EA licensees the option of retuning to the ESMR channel block in the 800 MHz reconfiguration process. Under the Commission's 800 MHz licensing structure, licensees that acquired EA licenses at auction

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[14] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6001, *et seq.*, 107 Stat. 312 (1993); *see also Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463, ¶ 2 (1995) (*SMR Order*).

[15] *SMR Order* ¶ 2.

obtained some reasonable expectation of being able to deploy a variety of different technologies, including ESMR technology. On the other hand, licensees like MRA that hold only site-based licenses in a market and have not taken the steps to acquire an EA license in that market, and that have in fact continued to operate traditional dispatch services using non-cellular technology, do not have such an expectation. The ESMR band eligibility criteria the Commission adopted in the *800 MHZ R&O* and *Supplemental Order* simply accommodates the legitimate, well-established differences between these two types of licensees.[16]

Contrary to its claims, MRA is not in a unique situation. There are hundreds of other 800 MHz licensees that need to be retuned but that are ineligible for relocation to the ESMR block under the criteria adopted in the *800 MHZ R&O* and *Supplemental Order*. The Commission was well justified in establishing these criteria. The Commission's relocation rules ensure these licensees receive comparable facilities so that their existing operations are not disrupted. The rules also provide non-ESMR band licensees flexibility to upgrade their facilities consistent with the Commission's goal of safeguarding public safety systems against interference.[17] At the same

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[16] The Commission expanded the ESMR band relocation rights in a number of respects in the Memorandum Opinion and Order in this proceeding. *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) (*MO&O*). Sprint Nextel has sought reconsideration of this decision. Petition for Reconsideration of Sprint Nextel Corporation (January 27, 2006).

[17] Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration at 9 (April 21, 2005). 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. 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. 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 channel block. 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

time, the Commission's decision established a cut-off date to provide a settled spectrum landscape and thereby promote an efficient, expeditious reconfiguration process. The relief MRA seeks would completely undercut this process and the Commission's relocation rules as other, similarly situated licensees seek the same relief. Commission precedent and practice is to deny waivers that would essentially nullify FCC rules.[18]

One other argument in MRA's waiver request warrants rebuttal. MRA claims, again without support, that it competes with Sprint Nextel "in the fleet-dispatch market within the Denver EA" and that grant of its request waiver would promote this supposed competition.[19] There is no such "market," however. Indeed, in denying a prior stay request filed by MRA, the Commission found that Sprint Nextel and MRA offer very different services: "[MRA] offer[s] 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."[20] Sprint Nextel has previously explained why it does not compete with MRA and why the Commission's rebanding plan will not harm competition.[21]

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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.

18 *See Application of Empire Broadcasting Co.*, Memorandum Opinion and Order, 62 F.C.C.2d 963, ¶ 7 (1977); *Application of Stereo Corporation*, Memorandum Opinion and Order, 61 F.C.C.2d 76, ¶ 6 (1976).

19 Waiver Petition at 5.

20 *Order Denying First Stay Request* ¶ 15.

21 *See* Opposition of Nextel Communications, Inc. to Motion for Partial Stay, at 8-9, 16-18 (Nov. 26, 2004).

MRA's request falls far short of demonstrating grounds for a waiver of the Commission's rules. Its petition is just its latest effort to sidetrack the Commission's reconfiguration plan for MRA's prospective pecuniary gain. The Commission should summarily dismiss the Waiver Petition.

Respectfully submitted,

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February 3, 2006

Certificate of Service

I, Charles W. Logan, hereby certify that on this 3rd day of February 2006, I caused true and correct copies of the foregoing Opposition of Sprint Nextel Corporation to MRA Petition for Partial Waiver of Rebanding Rules to be sent by electronic mail and regular, first-class mail to:

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