

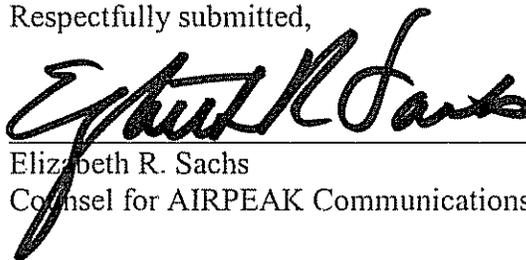
**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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 TO PETITION FOR RECONSIDERATION  
OF AIRPEAK COMMUNICATIONS, LLC**

Respectfully submitted,

By:



Elizabeth R. Sachs  
Counsel for AIRPEAK Communications, LLC

Lukas, Nace, Gutierrez & Sachs, Chartered  
1650 Tysons Blvd., Ste. 1500  
McLean, VA 22102  
(703) 584-8678

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## SUMMARY

The Commission should reaffirm the decisions adopted in the Memorandum Opinion & Order (“*MO&O*”) as they relate to the reconfiguration rights of Enhanced Specialized Mobile Radio (“ESMR”) licensees, including the definition of “800 MHz cellular systems” that will be eligible to operate in the ESMR band. It also should reaffirm the specific provisions applicable to certain of AIRPEAK’s site-based authorizations that were adopted in the *MO&O*.

The Petition for Reconsideration filed by Sprint Nextel Corporation (“Sprint Nextel”) does not provide justification for reversal of the *MO&O* in respect to these issues. It does not credit the FCC’s determination that the changes and clarifications adopted represent an appropriate balance between the Commission’s goals of alleviating unacceptable interference to public safety licensees while preserving the rights of and ensuring equitable treatment for other 800 MHz incumbents. The Petition overstates the spectrum/economic impact of the *MO&O* decisions *vis-à-vis* AIRPEAK on the “value for value” principle Sprint Nextel describes as underlying the instant proceeding. It even mischaracterizes the Commission’s position regarding what constitutes a “spectrum shortfall” in the ESMR band and how such shortfalls will be addressed. The FCC has stated that Sprint Nextel **must** surrender sufficient 800 MHz capacity to accommodate incumbents that qualify to move to the ESMR band and even has determined that any shortfall can be filled by Sprint Nextel shifting of its operations to its 900 MHz spectrum. There is no obligation for the FCC to either expand the ESMR band or direct a *pro rata* distribution of ESMR band channels to preserve Sprint Nextel’s current spectrum position in that band.

The decisions in the *MO&O* are grounded solidly in the public interest and should be reaffirmed.

AIRPEAK Communications, LLC (“AIRPEAK” or “Company”), by its attorneys and in accordance with Section 1.429(f) of the Federal Communications Commission (“FCC” or “Commission”) Rules and Regulations, respectfully submits its Opposition (“Opposition”) to certain aspects of the Petition for Reconsideration (“Petition”) filed by Sprint Nextel Corporation (“Sprint Nextel”) in respect to the Memorandum Opinion and Order adopted by the Commission in this proceeding.<sup>1</sup> Among other matters, the Petition requests reconsideration of issues that impact AIRPEAK as an Enhanced Specialized Mobile Radio (“ESMR”) licensee generally, as well as those that affect it individually to the extent the Commission made specific determinations regarding the Company’s 800 MHz relocation rights.

The Petition fails to explain why the *MO&O* should be reversed in respect to the issues challenged by Sprint Nextel. It overstates the spectrum/economic impact of the *MO&O* decisions *vis-à-vis* AIRPEAK on the “value for value” principle Sprint Nextel describes as underlying the instant proceeding. It even mischaracterizes the Commission’s position regarding what constitutes a “spectrum shortfall” in the ESMR band and how such shortfalls will be addressed. The FCC has stated that Sprint Nextel **must** surrender sufficient 800 MHz capacity to accommodate incumbents that qualify to move to the ESMR band and even has determined that “[T]he 800 MHz spectrum that Nextel loses in such a case may be compensated for by Nextel shifting some of its operations to its 900 MHz SMR frequencies.”<sup>2</sup>

AIRPEAK urges the Commission to reaffirm the *MO&O* in each of these areas for the reasons described herein.

## I. INTRODUCTION

It has been four and one-half years since Sprint Nextel (then Nextel Communications, Inc.) submitted its “White Paper” urging the Commission to realign the 800 MHz band to resolve

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<sup>1</sup> *Memorandum Opinion and Order*, WT Docket No. 02-55, 20 FCC Rcd 16015 (2005) (“*MO&O*”).

<sup>2</sup> *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) (“*800 MHz Order*”) at n. 543

interference being caused to public safety and other 800 MHz incumbents by the cellular systems operated by Sprint Nextel and other operators of cellular architecture networks.<sup>3</sup> In response to that filing the Commission has undertaken a band reconfiguration and spectrum exchange of unprecedented scope and complexity. The reconfiguration/exchange is consistent with the proposal advanced by Sprint Nextel and other parties in the proceeding<sup>4</sup> and has an FCC-determined value to Sprint Nextel of at least \$4.86 Billion dollars, the value of the unencumbered 10 MHz of spectrum in the 1.9 GHz band that will be made available to it as the result of this proceeding. Sprint Nextel agreed to that valuation, against which it will be credited for the 800 MHz spectrum it is surrendering, as well as the cost it incurs in reconfiguring its own network and the systems of other affected parties.

Sprint Nextel made an affirmative determination to accept this resolution presumably because it believed its shareholders, on balance, would be well-served by the outcome. As a skilled and experienced regulatory player, Sprint Nextel surely recognized that the Commission's decisions would be subject to challenges and might be adjusted and fine-tuned before the matter was fully and finally resolved. Indeed, Sprint Nextel itself has requested clarifications and reconsideration of the Orders in the proceeding, including the instant Petition.

This most recent complaint argues that the decisions in the *MO&O* are not necessary to meet the public interest objectives in the proceeding. It claims that the result of the *MO&O* is unfair to Sprint Nextel because expansion of ESMR reconfiguration rights generally, and the rights granted to AIRPEAK specifically, depart from the "value for value" analysis adopted by

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<sup>3</sup> See Promoting Public Safety Communications, Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs, submitted by Robert S. Foosner, Nextel Communications, Inc., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Nov. 12, 2001).

<sup>4</sup> Sprint Nextel and certain other parties, known collectively as the "Consensus Parties," submitted a series of comments in this proceeding that provided the framework for the solution adopted by the Commission.

the FCC in the original 800 MHz Order and the Supplemental Order in this proceeding.<sup>5</sup> Further, it alleges the 800 MHz Order provided that disagreements about channel allocations between Sprint Nextel and other licensees eligible to relocate to the ESMR portion of the 800 MHz band are to be resolved, first, by an expansion of the ESMR band and, if necessary, by a *pro rata* distribution of available channels.

As detailed herein, none of these Sprint Nextel claims are valid.

## II. **THE *MO&O* SHOULD BE REAFFIRMED IN RESPECT TO ITS DECISIONS *VIS-À-VIS* RELOCATION TO THE ESMR BAND.**

### A. The Cellular Architecture Definition in the *MO&O* Serves the Public Interest.

The genesis of this proceeding was the Commission's determination to separate public safety and similar systems in the 800 MHz band from cellular architecture networks that had been identified as the cause of interference to those operations. In furtherance of that objective, the FCC adopted a definition of systems that would be prohibited from operating in the non-ESMR portion of the band because of the interference potential.<sup>6</sup>

In the *MO&O*, the Commission clarified that it did not intend that definition also to serve the purpose of defining "800 MHz cellular systems" that would be permitted to operate in the ESMR portion of the band. Instead, the FCC confirmed its intention to use an "800 MHz cellular system" definition that parallels the Commission's "covered carrier" definition used to distinguish between types of Commercial Mobile Radio Service ("CMRS") systems for various regulatory purposes.<sup>7</sup> The *MO&O* defines such systems as those that use "multiple, interconnected, multi-channel transmit/receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-

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<sup>5</sup> 800 MHz Order, Supplemental Order and Order on Reconsideration, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) ("Supplemental Order") (collectively "Orders").

<sup>6</sup> 800 MHz Order at ¶ 172.

<sup>7</sup> *MO&O* at ¶ 8. See also, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion & Order, 12 FCC Rcd 22665, 22702-22704 (1997)

cellular technology.”<sup>8</sup> Sprint Nextel objects to this clarification on the basis that it will permit “low-density cellular systems and certain types of site-based stations licensed to non-ESMR EA licensees” to retune to the ESMR band, although doing so serves no public interest.<sup>9</sup>

AIRPEAK already operates a system that meets the “covered carrier” definition as well as the previous “high density” test and is unaffected by this change.<sup>10</sup> However, it is confused by Sprint Nextel’s assumption that the clarification will have anything other than a *de minimis* impact on its spectrum position. The rules already permit Economic Area (“EA”) licensees to relocate to the ESMR band, although only licensees that met the ESMR definition are permitted to exchange EA channels for unencumbered ESMR band frequencies.<sup>11</sup> Sprint Nextel seems to believe that the clarified definition in the *MO&O* will expand the universe of entities that qualify for that treatment.

The Company disagrees. It is doubtful that an EA licensee whose system failed to meet the “high-density” test will be able to demonstrate that it conforms to the 800 MHz cellular system definition. There are substantial costs associated with constructing and operating a network with the enumerated elements and deployment is not something that can be accomplished quickly or easily to take advantage of this clarification. There is no indication that the handful of licensees electing relocation to the ESMR band in response to the directive in the *MO&O*<sup>12</sup> have modified their previous elections and now are claiming ESMR status and the concomitant right to unencumbered ESMR band channels. At most, the rules adopted in the *MO&O* may permit the relocation of a small number of additional site-based licenses to the ESMR band, generally based on the existing contour. Given the very few incumbents electing to

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<sup>8</sup> *MO&O* at ¶ 8.

<sup>9</sup> Petition at 9.

<sup>10</sup> The Company also meets the “high-density” definition as documented in its original EA election filed with the Transition Administrator in January 2005.

<sup>11</sup> *Supplemental Order* at ¶ 77.

<sup>12</sup> *MO&O* at ¶ 9.

relocate at all, and the less populated markets in which they typically operate, Sprint Nextel's claim of economic disequilibrium appears substantially overstated.<sup>13</sup>

Conversely, however, the correction in the *MO&O* will provide technical flexibility for EA licensees that elect to relocate to the ESMR band conditioned, of course, on the obligations imposed in the *MO&O*.<sup>14</sup> It is not possible to know today what types of technology might be available in the future and the Commission properly has provided EA licensees with the same latitude in their selection as is available to other CMRS licensees.

Sprint Nextel is incorrect in its assertion that adoption of the clarification is unrelated to the Commission's policy goals in this proceeding.<sup>15</sup> It serves the important objective of ensuring the ongoing separation of traditional high-site and cellular architecture networks in this band with the twofold benefit of protecting public safety from future interference<sup>16</sup> without foreclosing the technical options available to EA licensees. It provides no "windfall" to licensees by increasing their spectrum rights, but rather preserves the opportunities inherent in their spectrum prior to this proceeding. The FCC's clarification strikes the appropriate balance among the various public interest objectives in this complex undertaking and should be affirmed.

B. The Relief Granted to AIRPEAK Does Not Undermine the "Value for Value" Arrangement Sprint Nextel Struck with the Commission.

Although Sprint Nextel agreed that AIRPEAK should be permitted to relocate to the ESMR band before adoption of the 800 MHz Order when it was attempting to quell objections to reconfiguration from 800 MHz incumbents,<sup>17</sup> it reversed that position once the 800 MHz Order

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<sup>13</sup> Some of the incumbents that elected relocation to the ESMR band specifically noted that their spectrum already is being used in the Sprint Nextel iDEN network pursuant to contractual arrangements. Their elections obviously will have no impact whatsoever on Sprint Nextel's spectrum position.

<sup>14</sup> *MO&O* at ¶¶ 26-27.

<sup>15</sup> Petition at 9.

<sup>16</sup> Sprint Nextel persists in claiming that AIRPEAK operates "low-density facilities that are compatible with public safety operations." *Id.* Of course, in support of that statement, Sprint Nextel cites only its own filings in this proceeding, none of which provides a scintilla of support for that claim. By contrast, AIRPEAK has documented the interference it already experienced with certain public safety incumbents, documentation Nextel has not refuted.

<sup>17</sup> See Reply Comments of the Consensus Parties, WT Docket No. 02-55 (filed Fed. 25, 2003).

was adopted. Since then, it has challenged AIRPEAK's ESMR qualifications at each and every opportunity and has opposed any regulatory action that would allow the Company to coexist with Sprint Nextel in the ESMR band.

The Petition is simply more of the same. Sprint Nextel has not presented any substantive basis for reversing the FCC's determinations on these points. Its objections are twofold. First, it claims that the decisions are not needed to reduce interference or otherwise benefit public safety systems.<sup>18</sup> Second, it complains that the relief granted in the *MO&O* "alters the relocation criteria [on which Sprint Nextel relied when it accepted the rights and obligations in this proceeding] and in doing so disregards the 'value for value' principle established in the Commission's prior orders."<sup>19</sup>

In fact, the *MO&O* contained a thorough analysis of each of the requests AIRPEAK had submitted, requests that sought collectively a modest accommodation in the treatment of certain of its site-based stations.<sup>20</sup> The Commission granted some, but not all, of the Company's requests, conditioned on AIRPEAK making certain additional showings. The amount of spectrum at issue on an absolute basis is minimal.<sup>21</sup> On a relative basis *vis-à-vis* Sprint Nextel's total spectrum holdings in the markets in question, it is *de minimis*.

AIRPEAK appreciates that Sprint Nextel never would have committed to resolve the public safety interference problem by moving out of the lower 800 MHz band unless it was able to secure for its shareholders a spectrum arrangement of comparable value. It unquestionably devoted considerable effort toward ensuring that it was getting a "value for value" exchange in the bargain it struck. It had a right to rely on those calculations, but surely understood that the regulatory landscape would not be absolutely fixed during the process. For example, one

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<sup>18</sup> Petition at 4.

<sup>19</sup> Petition at 6.

<sup>20</sup> *MO&O* at ¶¶ 12-22

<sup>21</sup> See Reply to Opposition to Request for Waiver filed by AIRPEAK on Apr. 4, 2005.

significant change has been the merger that resulted in the formation of Sprint Nextel Corporation, an entity with a greatly enhanced spectrum position by comparison with the Nextel Communications, Inc. holdings at the time the Orders were adopted. The Commission correctly rejected recommendations that it revisit its decisions in this proceeding in light of this improved spectrum position.<sup>22</sup> The same analysis applies to the other decisions in the *MO&O*.

Indeed, Sprint Nextel's outrage over the decisions in the *MO&O* that affect AIRPEAK is baffling. The total value of the 800 MHz/1.9 GHz spectrum exchange is a minimum of \$4.86 Billion dollars. The relief granted to AIRPEAK which Sprint Nextel describes as "disregarding" the valuation principle in this proceeding applies to only a very small number of stations in a handful of minor markets in the nation. These are channels in Reno NV and Kennewick/Pasco WA, not Los Angeles or New York City, and only a paltry number of them in comparison with Sprint Nextel's spectrum holdings. For the most part, the changes affect the sparsely populated areas outside these market centers. The total value of the AIRPEAK spectrum at issue is far less than one tenth of one percent of the \$4.86 Billion dollar value of the spectrum exchange. It simply is not credible that Sprint Nextel would have rejected the exchange proposal provided for in the 800 MHz Order and the Supplemental Order had it known that the *MO&O* would allow AIRPEAK a very modest change in its spectrum position.<sup>23</sup>

Finally, Sprint Nextel's argument that the FCC has delayed the reconfiguration process by modifying these rules is disingenuous, at least in respect to AIRPEAK.<sup>24</sup> The Company had attempted to engage Sprint Nextel in reconfiguration negotiations for two years before finally having a substantive meeting with them in June 2005. The reconfiguration proposal AIRPEAK was told to expect in two weeks took months to be presented and as described below, from

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<sup>22</sup> *MO&O* at ¶¶ 80-83.

<sup>23</sup> While AIRPEAK has not examined in detail the impact on Sprint Nextel from other 800 MHz incumbents impacted by the *MO&O*, based on the recent ESMR "re-elections" filed with the TA, Sprint Nextel's reaction seems wildly disproportionate.

<sup>24</sup> Petition at 10-12.

AIRPEAK's perspective was not a good faith offer. AIRPEAK has continued to make itself available for negotiations, both before and after the *MO&O*, but the parties are not close to reaching a resolution.

C. The Reconfiguration Rules Do Not Require a *Pro Rata* Distribution of ESMR Channels to Address ESMR Band Spectrum "Shortfalls".

The Petition states that the 800 MHz Order adopted two solutions if there was inadequate spectrum in the ESMR band to accommodate all eligible licensees in a given market: "(1) expanding the ESMR segment, and, in the event a channel shortfall remained, (2) distributing the available channels on a *pro rata* basis among licensees unless they reached an alternative agreement."<sup>25</sup> It claims the Commission stated that it "**would** invoke the second remedy if the parties failed to reach an agreement on the allocation of channels in the expanded band."<sup>26</sup> Sprint Nextel asks the FCC to reaffirm the "underlying principal that all affected licensees should be able to replicate their existing channel capacity, and that where this is not possible a *pro rata* apportionment is appropriate in any market where there are insufficient ESMR channels."<sup>27</sup>

Sprint Nextel's constricted interpretation of the Commission's decision is at odds with the basic predicate of this proceeding and with the express language of the 800 MHz Order. By definition, there is a spectrum "shortfall" for Sprint Nextel in each and every market in which an 800 MHz incumbent is able to claim even a single channel in the ESMR band, since each such channel is one that otherwise would have been available for Sprint Nextel's use. Sprint Nextel appears to be suggesting that in all such instances the Commission intended to and is obligated to, first, expand the ESMR band by an equal number of channels, and, if even that is not adequate, to divvy up the available channels on a *pro rata* basis.

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<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* (emphasis added)

<sup>27</sup> *Id.* at 13.

Yet there is nothing in the Orders to support that interpretation. Had the Commission intended to adopt an entirely fluid line of demarcation between the ESMR and non-ESMR portions of the 800 MHz band, one that would be determined on a market-by-market basis in response to the ESMR election process, it most assuredly would have stated that intention explicitly.<sup>28</sup> It did not. Indeed, under Sprint Nextel's theory, the TA should not have been permitted to make channel assignments until all ESMR relocation issues were resolved, since the possible expansion of the ESMR band could have an impact on incumbent channel assignments in any market.

AIRPEAK recognizes that the Commission reserved the right although not, as stated in the Petition, the obligation to direct a *pro rata* channel distribution in those rare instances in which there literally are ESMR band spectrum "shortfalls."<sup>29</sup> The Orders nowhere define what constitutes such a market, nor does the Petition, but it is reasonable to assume that it is one in which Sprint Nextel does not hold enough ESMR band channels to accommodate all relocating licensees. The markets in which Southern LINC and Sprint Nextel operate may be an example. Another is Puerto Rico where Sprint Nextel has only a limited spectrum position in the ESMR band and cannot clear enough frequencies to make room for all incumbents that qualify to migrate to that band segment.<sup>30</sup> In those instances, the Commission may elect to expand the ESMR band, direct a channel distribution, or both.<sup>31</sup>

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<sup>28</sup> Of course, any expansion of the ESMR band ultimately reduces the amount of additional spectrum available to public safety in that market. It is understandable why that result is preferable to Sprint Nextel, but it is not the resolution adopted by the FCC.

<sup>29</sup> *800 MHz Order* at ¶ 168. The Orders do not define and the Petition does not suggest how such a *pro rata* distribution would be calculated. AIRPEAK would note that the much delayed reconfiguration proposal with which it ultimately was presented by Sprint Nextel relied on a *pro rata* calculation that would have left AIRPEAK with a single ESMR band channel in Sacramento CA – a market in which it currently operates 76 channels in its ESMR network.

<sup>30</sup> See, Request for Clarification of Communications & Industrial Electronics, Inc., North Sight Communications, Inc., and Ragan Communications, Inc. filed on Jan. 27, 2006

<sup>31</sup> The language on which Sprint Nextel relies is optional, not mandatory. It states that such disputed matters "may" be resolved through a *pro rata* distribution of channels at the FCC's discretion.

But those are exceptional circumstances and do not represent the only, and certainly not the typical, resolution envisioned by the Commission. Although not mentioned in the Petition, Sprint Nextel surely is aware of the following language from the 800 MHz Order supporting the FCC's decision to provide operational flexibility in the 900 MHz band:

Moreover, as noted above, Nextel may have to share spectrum in the 816-824 MHz segment of the reconfigured band with other ESMR licensees. To the extent that such sharing may reduce the amount of 800 MHz spectrum available to Nextel, we believe we should provide the regulatory flexibility necessary for Nextel to make up the shortfall by using 900 MHz channels.<sup>32</sup>

In fact, the Commission expressly denied the Consensus Plan proposal whereby Sprint Nextel would relinquish its 900 MHz spectrum stating that "Nextel likely will need to use this spectrum to accommodate subscriber demand during 800 MHz band reconfiguration; and possibly thereafter."<sup>33</sup> The footnote accompanying that statement reads as follows:

Nextel's need for the 900 MHz spectrum may arise if there are two 800 MHz ESMR licensees in a market, e.g., Nextel and Southern LINC, and both cannot be accommodated in the 817-824 MHz / 862-869 MHz cellular-architecture spectrum segment. In that instance, Nextel **must** surrender the additional spectrum necessary to accommodate the non-Nextel cellular-architecture system. The 800 MHz spectrum that Nextel loses in such a case may be compensated for by Nextel shifting some of its operations to its 900 MHz SMR frequencies.<sup>34</sup>

Thus, it is clear that the Commission anticipated "shortfalls" when other licensees qualified for ESMR band spectrum and expressly contemplated that 900 MHz channels would provide a safety valve for Sprint Nextel under those circumstances. It specifically modified its rules to permit Sprint Nextel more flexible use of the 900 MHz band to make up that difference.

Sprint Nextel has taken full advantage of that greater regulatory flexibility. It has acquired a significant number of 900 MHz Business and Industrial/Land Transportation ("B/ILT") channels in certain markets around the country. It appears to be in the process of converting the acquired spectrum to commercial status and, presumably, integrating the channels

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<sup>32</sup> 800 MHz Order at ¶ 336.

<sup>33</sup> *Id.* at ¶ 207.

<sup>34</sup> *Id.* at n. 543 (emphasis added).

into its iDEN network – precisely as the Commission intended. However, to the best of AIRPEAK’s knowledge, Sprint Nextel has elected not to acquire any 900 MHz B/ILT channels in any of the markets in which the Company operates. That lack of interest is to be expected given the relatively small populations in these markets and Sprint Nextel’s already deep spectrum position. Its claim that the Commission nonetheless is obligated to expand the ESMR band or direct a *pro rata* channel distribution cannot be squared with the plain language of the 800 MHz Order or with any reasonable understanding of the spectrum policies adopted by the FCC in this proceeding.

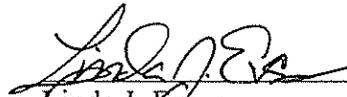
### **III. CONCLUSION**

The *MO&O* correctly clarified certain of the Commission’s earlier decision in respect to ESMR relocation rights and adopted reasoned, reasonable decisions regarding AIRPEAK’s specific requests. Those aspects of the *MO&O* should be reaffirmed promptly by the Commission.

**CERTIFICATE OF SERVICE**

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 23rd day of March, 2006, caused to be mailed, postage pre-paid, a copy of the foregoing Opposition to Petition for Reconsideration to the following:

Robert S. Foosaner  
Senior Vice President and Chief Regulatory Officer  
Lawrence R. Krevor  
Vice President, Government Affairs – Spectrum  
James B. Goldstein  
Director-Spectrum Reconfiguration  
SPRINT NEXTEL CORPORATION  
2001 Edmund Halley Drive  
Reston, VA 20191

  
\_\_\_\_\_  
Linda J. Evans