

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 Services)	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
)	
To: The Commission)	

OPPOSITION TO SPRINT NEXTEL PETITION FOR RECONSIDERATION

The Safety and Frequency Equity Competition Coalition ("SAFE"),¹ pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), by its attorney, hereby opposes the Petition for Reconsideration ("Petition") of Sprint Nextel Corporation ("Sprint

¹ SAFE members include Coastal SMR Network, LLC; A.R.C., Inc. d/b/a Antenna Rentals Corp.; Skitronics, LLC; Waccamaw Wireless, LLC; and CRSC Holdings, Inc.

Nextel”) filed on January 27, 2006, in the above-referenced proceeding. Essentially, the Sprint Nextel Petition seeks reversal of the Commission’s decision in the Memorandum Order and Opinion (“*MO&O*”)² to grant eligibility to certain 800 MHz SMR licensees, including SAFE’s members, for relocation to the new 800 MHz ESMR band segment. Sprint Nextel advocates a distorted and completely-unsupported notion that the entire 800 MHz ESMR band segment (862 MHz and above) was *exclusively* assigned to Sprint Nextel as part of a “value-for-value” rationale for determining Sprint Nextel’s economic obligations in the rebanding process. Sprint Nextel urges the Commission to reverse itself and do great harm to certain small, independent, regional Sprint Nextel competitors, including SAFE’s members, by stripping them of their hard-fought eligibility to relocate in the ESMR band segment.

The old adage, “two wrongs don’t make a right,” is apropos. If there is any validity to Sprint Nextel’s claim that the *MO&O* arbitrarily departed from the Commission’s value-for-value rationale, the appropriate remedy would be either to reduce Sprint Nextel’s economic obligations in some appropriate manner, or to increase incrementally the spectrum available in the ESMR band segment (to restore the “value”) by expanding its size proportionate to the number of channels vacated in other band segments by the newly-eligible licensees electing to relocate in the ESMR band segment.³ It is telling that these remedies are not mentioned in the Sprint Nextel Petition in connection with the alleged unfairness. Clearly, Sprint Nextel seeks a remedy that would harm its smaller, independently-owned, regional competitors.

² *Memorandum Opinion and Order*, WT Docket No. 02-55, FCC 05-174, released Oct. 5, 2005, as corrected by *Erratum*, released Nov. 25, 2005, DA-3061.

³ If the Commission’s initial estimate of the spectrum required to fully accommodate eligible licensees in the ESMR band segment ultimately proves to be too low, then the Commission might propose to adjust upwards the size of the ESMR band segment, by reducing the size of the guard band, or some other band segment. To the extent that certain licenses were to be accommodated in lower band segments, and those licensees have now elected to relocate to the ESMR band segment, there should be adequate spectrum in the lower band segments for reallocation to the ESMR band segment.

I. THE ESMR BAND WAS NOT EXCLUSIVELY ASSIGNED TO NEXTEL

The *Report and Order*⁴ in this proceeding did not *reassign* any portion of the 800 MHz band on an exclusive basis to any single licensee, including Nextel. The Commission *reallocated* the 800 MHz band to eliminate current and future interference to public safety communications systems. The *Report and Order* expressly noted that the Consensus Plan did not address “other CMRS cellular-architecture systems.”⁵ The Commission deemed the Consensus Parties’ proposal “too incomplete” because, among other things, it did “not address other similarly situated licensees.”⁶ The Commission began the process of addressing those needs in the transition plan initially adopted.

II. VARIATIONS IN THE AMOUNT OF 800 MHZ SPECTRUM AVAILABLE FOR NEXTEL WERE FORESEEABLE AT THE TIME THE TRANSITION PLAN WAS ADOPTED

The Commission faced an almost overwhelmingly-complex challenge to anticipate the spectrum needs of all the various classes and types of licensees in the 800 MHz band when it fashioned the initial 800 MHz transition plan.⁷ The Commission could not know, in advance of the licensee elections, which licensees would relocate to the specific band segments. The transition plan initially adopted in the *Report and Order* explicitly anticipated the accommodation of Nextel *and* other eligible licensees in the ESMR band segment. Indeed, the

⁴ Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004), as amended by Erratum, DA-04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459 19 FCC Rcd 21818 (2004).

⁵ *Report and Order* at ¶160.

⁶ *Id.* at ¶161.

⁷ The Commission appears to have made a reasoned attempt initially to apportion the spectrum among the various band segments to accommodate fully all eligible licensees in each segment. The fact that some licensees, such as Nextel and SouthernLINC, met the ESMR band-segment eligibility requirements by the effective date of the new rules gave the Commission some quantitative basis upon which to estimate the spectrum requirements for that band segment.

Commission provided “relocation options” for certain licensees.⁸ Given those options, it was entirely foreseeable that some other eligible non-Nextel licensees would relocate to the ESMR band segment. Moreover, it was entirely foreseeable that a consequence of the potential elections by the eligible non-Nextel licensees to relocate in the ESMR band segment would be a reduction in the amount of spectrum available for Nextel in that band segment.

III. FURTHER CHANGES TO THE TRANSITION PLAN WERE FORESEEABLE WHEN NEXTEL ASSUMED ITS FINANCIAL OBLIGATIONS, INCLUDING EXPANDED ELIGIBILITY CRITERIA FOR THE ESMR BAND SEGMENT

The probability of future clarifications, adjustments and fine-tuning of the initial transition plan by the Commission was entirely foreseeable. For example, certain 800 MHz EA licensees who operated ESMR systems as of the effective date of the *Report and Order* (November 22, 2004) were initially given eligibility to relocate to the ESMR band segment. However, subsequently, the Commission on its own motion, clarified and extended the eligibility criteria to include EA licensees who were not operating high-density cellular systems as of the effective date.⁹ Nextel accepted this and other changes to the transition plan in the *Supplemental Order* without subsequent objection.

When Nextel accepted its financial obligations under the amended transition plan (by supplying the required irrevocable letter of credit after the release of the *Supplemental Order*), it was already on notice that its rights in the ESMR band were non-exclusive, and that the amount of 800 MHz spectrum available for Nextel in the ESMR band segment was subject to change. Other non-ESMR, non-Nextel licensees were before the Commission with reconsideration petitions seeking to alter their eligibility for relocation to the ESMR band

⁸ *Id.* at ¶162.

⁹ Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) at ¶79.

segment. Simply put, Nextel assumed the risk that the 800 MHz ESMR band might have to accommodate other licensees in the relocation process, and that such accommodation might reduce the amount of 800 MHz spectrum available for Nextel's use. Therefore, the record does not support the notion that Nextel held a reasonable expectation of exclusivity in the ESMR band segment, and that Nextel has been treated unfairly as a result of the amended eligibility criteria for relocation into the ESMR band segment.

IV. THE COMMISSION'S DECISION SERVES THE PUBLIC INTEREST AND SHOULD NOT BE REVERSED

The Commission's decision to revise the eligibility criteria for the ESMR band segment, which is challenged by Sprint Nextel in the Petition, serves the public interest by accommodating current and prospective uses of the spectrum by various licensees with the goal of isolating incompatible uses of the spectrum to prevent interference to public safety communications systems. The *MO&O* justified the expanded eligibility as follows:

On reconsideration we conclude that by providing EA licensees the opportunity to relocate their associated site-based licenses in conjunction with their EA licenses if they elect to move to the ESMR band, we are evaluating their systems as a whole (even if portions thereof are licensed on a non-EA basis), and we will thereby achieve more effectively the goal of placing these licensees in a position comparable to that they currently occupy.¹⁰

The Commission's primary goal of alleviating current interference and preventing future interference to public safety communications systems in the 800 MHz band was not the sole objective of this proceeding; there were many other objectives. For example, the Commission sought to adopt "a spectrum management plan that provides additional spectrum for public safety and leaves Nextel and the other licensees in a comparable position to where they were before the band restructuring."¹¹ The Commission's expanded eligibility decision furthered

¹⁰ *MO&O* at ¶25.

¹¹ *Report and Order* at ¶80.

this goal by giving certain eligible 800 MHz EA licensees the option of relocating their entire communications systems to the ESMR band segment subject to certain specified conditions.¹² Moreover, the decision served the public interest by correcting certain inequities in the treatment of non-Nextel 800 MHz EA licensees, and eliminated unintended economic harm to certain small, independent, regional competitors of Nextel. In addition, the public interest was served by ensuring that certain participants in FCC Spectrum Auction Nos. 34 and 36, who purchased EA licenses to construct integrated high-density cellular systems using their pre-existing site-based licenses, were not unfairly deprived of the value of their spectrum investments.

Further *public interest* justifications for the *MO&O*'s expanded eligibility criteria are not required, because there is a separate and substantial *legal* justification for the revised eligibility requirement.¹³ The previous eligibility criteria were arbitrary and capricious in their treatment of certain 800 MHz EA licensees. The Commission's expanded eligibility decision eliminated this arbitrary and capricious feature of the transition plan.

V. CONCLUSION

Sprint Nextel was treated fairly by the Commission in this proceeding. The *Report and Order* did not grant Nextel an exclusive assignment of the entire ESMR band segment. In the initial transition plan, the specific amount of 800 MHz spectrum for Nextel was not guaranteed. At the time Nextel accepted its financial obligations, the initial transition plan had already been revised by the Commission on its own motion, and the eligibility criteria for relocation to the ESMR band segment have been expanded without subsequent objection by Nextel. It was entirely foreseeable that the Commission would make further adjustments to the

¹² Without this expanded eligibility, those licensees would suffer stranded investment with substantial parts of their integrated communications systems ineligible to convert to high-density cellular operation.

¹³ See 5 U.S.C. § 706(2)(A).

eligibility criteria for relocation to the ESMR band segment, especially in light of the pending Petitions for Reconsideration. The *MO&O*'s amended eligibility criteria are in the public interest and cure an unintentional legal infirmity in the transition plan.

Respectfully submitted,

SAFETY AND FREQUENCY EQUITY
COMPETITION COALITION ("SAFE")

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CERTIFICATE OF SERVICE

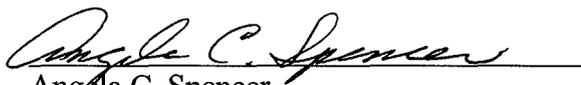
I, Angela C. Spencer, hereby certify that on this 23rd day of March, 2006, a copy of the foregoing Opposition to Petition for Reconsideration of Sprint Nextel Corporation, which was electronically filed on March 23, 2006, was served by first class United States mail, postage prepaid, addressed to:

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