

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
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocated Spectrum at 2 GHz for use by the Mobile Satellite Service	)	ET Docket No. 95-18
	)	

**REPLY COMMENTS  
OF THE  
ENTERPRISE WIRELESS ALLIANCE  
TO THE OPPOSITION OF SPRINT NEXTEL CORPORATION**

The Enterprise Wireless Alliance (“EWA” or “Alliance”) is pleased to provide the following Reply Comments in response to a single issue raised in the Opposition of Sprint Nextel Corporation (“Nextel”) in the above-entitled proceeding.<sup>1</sup>

In its Opposition, Nextel opposes the argument advanced by Puerto Rico SMR Petitioners and Schwaninger & Associates that an 800 MHz incumbent licensee is entitled to recover the costs incurred because of the Commission’s *de novo* review of a Recommended Resolution (“RR”) filed by a Transition Administrator (“TA”)-designated mediator in the event

---

<sup>1</sup> *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, WT Docket No. 02-55, 20 FCC Rcd 16015 (2005) (“MO&O”).

the incumbent and Nextel are unable to negotiate a Planning Funding Agreement or Frequency Reconfiguration Agreement, and any subsequent appeal of the FCC's determination.<sup>2</sup> Nextel asserts that the FCC already has imposed a disproportionate burden on Nextel by obligating it to fund the legal costs of incumbent licensees during the Alternative Dispute Resolution ("ADR") process.<sup>3</sup> It argues that if it also is responsible for post-ADR legal costs during an ongoing appeal process, there will be a disincentive for incumbent to reach resolution during ADR.<sup>4</sup>

Nextel cites to the Commission's December 30, 2005 Public Notice in support of its claim that the parties should bear their own costs once an RR has been forwarded to the Chief of the Public Safety and Critical Infrastructure Division ("PSCID") for *de novo* review.<sup>5</sup>

However the Public Notice itself is incorrect in relying on the language in paragraph 194 of the 800 MHz Report and Order,<sup>6</sup> to support its statement that, "...licensees who fail to reach a mediated agreement must bear their own costs associated [sic] all further administrative or judicial appeals of band reconfiguration issues, including *de novo* review by PSCID and appeal of any such review before an ALJ."<sup>7</sup> The paragraph cited specifically requires the parties to share the costs of "arbitration."<sup>8</sup> The "arbitration" process described is entirely distinct from TA mediation, automatic referral of all RRs to the Chief of the PSCID, and ultimate appeal to the full Commission or an administrative law judge ("ALJ"). The arbitration process requires mutual assent to a third-party, non-FCC or non-TA-affiliated arbitrator. By the express terms of

---

<sup>2</sup> Opposition at 6-7.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Wireless Telecommunications Bureau Reminds 800 MHz "Wave One" Channel 1-120 Licensees of Band Reconfiguration Negotiation and Mediation Obligations*, Public Notice, 20 FCC Rcd 2056 (DA 05-3355) (2005) ("Public Notice").

<sup>6</sup> *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) ("800 MHz Order")

<sup>7</sup> Public Notice at 2

<sup>8</sup> "Any party thereafter may seek expedited non-binding arbitration which must be completed within [30] days of the Transition Administrator's or other mediator's recommended decision or advice. The parties will share the cost of this arbitration." 800 MHz Order at ¶ 194, footnote omitted.

the 800 MHz Order, it is only in that instance that the FCC has required incumbents subject to 800 MHz reconfiguration to bear some portion of the reasonable, prudent and necessary costs they incur.

Any other interpretation would be contrary to the fundamental premise of this proceeding and would improperly skew the mediation process. An incumbent whose cost estimates are rejected by Nextel, thereby leading to a failure in the negotiation/mediation process, does not have an independent right to elect *de novo* review. Referral of the mediator's RR to the PSCID is automatic. Nextel has been aggressive in challenging incumbent cost estimates during the negotiation and mediation processes, and mediators have advised incumbents that a failure to reach a negotiated settlement will result in them paying their own costs should the matter be referred to the Commission. The prospect of having to do so could be decisional for incumbents, particularly public safety entities, which have no budget to support such an effort even if they are confident that their estimates are valid. It provides a significant negotiating advantage to Nextel, which is well-represented by both internal and external counsel. That cannot be the result intended by the FCC and is not the result required by the language cited in the Public Notice.

Indeed, the Supplemental Order in this proceeding confirms the position advanced by the petitioning parties.<sup>9</sup> In that document, the Commission reaffirmed its prior commitment to 800 MHz incumbents that they would not be required to assume any of the cost of reconfiguring their systems:

[w]e emphasize here that incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the costs of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel.<sup>10</sup>

---

<sup>9</sup> *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, 19 RCC Rcd 25120 (2004) (“Supplemental Order”).

<sup>10</sup> *Id.* at ¶ 15

The Commission has affirmed repeatedly that “the principle cost component [of 800 MHz reconfiguration] will be borne by Nextel, which will pay for all channel changes necessary to implement the reconfiguration.”<sup>11</sup> As long as the incumbent’s costs are reasonable, prudent and necessary, Nextel has an obligation to reimburse them. Nowhere in the 800 MHz Order, the Supplemental Order or the Memorandum Opinion and Order does it state, or even suggest, that this obligation ends at any particular stage of the negotiation or mediation process.<sup>12</sup>

This is not to say that Nextel should be obliged to fund bad faith appeals. Each of the Orders in this proceeding emphasizes that both parties must negotiate in good faith. The Commission has ample means of dealing with an incumbent that prosecutes an appeal without satisfying the good faith standard. However, the solution should not be to deny all incumbents, even those that have negotiated in good faith, the rights to which they unquestionably are entitled under the 800 MHz reconfiguration Orders. They are entitled to reimbursement of their costs, including their legal expenses triggered by the automatic *de novo* review process, as well as any subsequent appeal.

For the reasons detailed above, EWA urges the FCC to clarify its decision that 800 MHz incumbents who have negotiated in good faith are entitled to have all costs and legal expenses associated with the *de novo* review process by the PSCID (or further appeals to the full Commission or an ALJ) reimbursed by Nextel.

---

<sup>11</sup> 800 MHz Order at ¶ 178.

<sup>12</sup> The 800 MHz Order does specify that parties will bear their costs in “arbitration.” “Any party thereafter may seek expedited non-binding arbitration which must be completed within [30] days of the Transition Administrator’s or other mediator’s recommended decision or advice. The parties will share the cost of this arbitration.” *Id.* at ¶ 194, footnote omitted.

Respectfully submitted,

ENTERPRISE WIRELESS ALLIANCE

/s/ Mark E. Crosby  
President/CEO  
8484 Westpark Drive, Suite 630  
McLean, Virginia 22102  
(703) 528-5115

Counsel:

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

April 3, 2006

**CERTIFICATE OF SERVICE**

I, Linda J. Evans, secretary with the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 3rd day of April, 2006, caused to be mailed, postage pre-paid, a copy of the foregoing to the following:

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

  
Linda J. Evans