

**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 Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service	)	ET Docket No. 95-18
	)	

**SPRINT NEXTEL CORPORATION REPLY TO OPPOSITIONS**

Sprint Nextel Corporation ("Sprint Nextel") hereby replies to oppositions filed by a number of parties regarding Sprint Nextel's petition for reconsideration of the Memorandum Opinion and Order ("MO&O") in the above-captioned proceedings.<sup>1</sup> As set forth below, these oppositions have no merit.

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<sup>1</sup> *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"). See also Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) ("R&O"); Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) ("Supplemental Order").

**I. The *MO&O*'s Expansion of ESMR Band Retuning Rights Is Unnecessary and Contrary To the "Value for Value" Principle Established In the *R&O***

In the *MO&O*, the Commission modified its 800 MHz band reconfiguration plan to give Economic Area ("EA") and non-Enhanced Specialized Mobile Radio ("non-ESMR") licensees greater retuning rights. The *MO&O*, *inter alia*, broadened the definition of cellular systems eligible for retuning to the ESMR block, allowed non-ESMR EA licensees to retune their site-based stations to the ESMR band in certain circumstances, and granted a number of requests by AIRPEAK Communications, LLC ("AIRPEAK") to expand its retuning rights. Sprint Nextel asked the Commission to reconsider these decisions in its petition for reconsideration.<sup>2</sup>

A number of EA and non-ESMR licensees oppose Sprint Nextel's petition.<sup>3</sup> These parties do not dispute that under the *MO&O* Sprint Nextel will suffer a reduction in post-reconfiguration spectrum, and that the *MO&O* ignored the value-for-value analysis the Commission carefully followed in the *R&O* and *Supplemental Order* in defining Sprint Nextel's band reconfiguration obligations and the replacement spectrum it would receive. They nonetheless maintain that the Commission should uphold the *MO&O* based on three principle arguments, none of which has any merit.

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<sup>2</sup> See Petition for Reconsideration of Sprint Nextel Corporation (Jan. 27, 2006) ("Sprint Nextel Petition"). (Unless otherwise indicated, all petitions for reconsideration and other pleadings cited herein were filed in WT Docket No. 02-55.)

<sup>3</sup> Opposition to Petition for Reconsideration of AIRPEAK Communications, LLC (March 23, 2006) ("AIRPEAK Opposition"); Opposition to Sprint Nextel Petition for Reconsideration filed by Coastal SMR Network, LLC, *et al.* (March 23, 2006) ("Coastal Opposition"); Opposition to Sprint Nextel Corporation Petition for Reconsideration filed by Preferred Communications Systems, Inc. (March 23, 2006) ("Preferred Opposition"); Opposition to Nextel's Petition for Reconsideration filed by Charles D. Guskey (March 23, 2006) ("Guskey Opposition").

First, some of these parties attempt to minimize the impact of the *MO&O* on Sprint Nextel, downplaying the amount of spectrum Sprint Nextel would lose.<sup>4</sup> These scarce spectrum rights are important, however, and claims to the contrary are belied by the aggressive efforts these parties have made to lay claim to this spectrum by expanding their ESMR band retuning rights at Sprint Nextel's expense. AIRPEAK tries to depict the spectrum at issue as small potatoes by comparing it with Sprint Nextel's nationwide spectrum holdings. This is a misleading non sequitur. The spectrum rights Sprint Nextel holds in Massachusetts, for example, will be of no help in replacing the spectrum rights it would lose to AIRPEAK in Reno, Nevada under the *MO&O*. The loss of this spectrum could harm Sprint Nextel's ability to continue providing competitive, innovative services to its customers in the markets in question. The position advanced by AIRPEAK and others boils down to the bald, self-serving argument that the Commission should require large wireless carriers to relinquish spectrum to their smaller competitors simply because they are larger. The Commission's statutory duty, of course, is not to pick winners and losers in the marketplace, but to promote the public interest and maximize consumer welfare.<sup>5</sup>

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<sup>4</sup> See AIRPEAK Opposition at 4-7. AIRPEAK also claims that in a February 25, 2003 Consensus Party filing Sprint Nextel agreed that AIRPEAK should be retuned to the ESMR band. This is incorrect. In the Consensus Party filing cited by AIRPEAK (at page 28), the Consensus Parties agreed that non-Sprint Nextel EA licensees that had deployed *high-density* ESMR systems should receive contiguous spectrum in the lower portion of the ESMR band that is comparable to the existing white space on their current EA channels. This proposal clearly did not constitute an agreement on the part of Sprint Nextel that all of AIRPEAK's facilities were automatically eligible for retuning to the ESMR band, or that it was entitled to the expanded retuning rights set forth in the *MO&O*. It is misleading for AIRPEAK to suggest otherwise.

<sup>5</sup> See *Evaluation of the Syndication and Financial Interest Rules*, Second Report and Order, 8 FCC Rcd 3282, ¶ 42 (1993) ("Altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission."); *Review of the Prime Time Access Rule*, Report and Order, 11 FCC Rcd 546, ¶ 18 (1995) (The Commission's statutory duty is to promote its "'public interest' mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry.").

Second, these parties claim that when Sprint Nextel accepted the license modifications and rule changes adopted in the *R&O* and *Supplemental Order*, it should have somehow anticipated that the Commission would eight months later change the plan to Sprint Nextel's detriment.<sup>6</sup> This claim makes no sense. In accepting the reconfiguration plan adopted in the *R&O* and *Supplemental Order*, Sprint Nextel was not agreeing to any changes the Commission might make in the future, including changes that significantly reduce its spectrum holdings or increase its rebanding obligations. The claim advanced by these parties would turn Section 316 on its head and render meaningless the statutory notice and procedural requirements that govern FCC license modifications.

Finally, some parties opposing Sprint Nextel's petition attempt to reargue the merits of the Commission's 800 MHz reconfiguration plan, including the assignment of replacement spectrum to Sprint Nextel in the 1.9 GHz band.<sup>7</sup> These arguments have no place in oppositions to petitions for reconsideration of the *MO&O*. In any event, the Commission has already rejected these contentions in its prior orders.<sup>8</sup>

As even one of the parties opposing Sprint Nextel's petition acknowledges, "Sprint Nextel never would have committed to resolve the public safety interference problem by moving

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<sup>6</sup> See AIRPEAK Opposition at 2, 6; Coastal Opposition at 3-5. Coastal also claims that Sprint Nextel has taken the position that the Commission assigned the entire ESMR band exclusively to Sprint Nextel. Coastal Opposition at 2-3. Coastal's claim is a strawman. This is not Sprint Nextel's position. Sprint Nextel has agreed to share the ESMR band with facilities *eligible* to be returned to that band under the terms and conditions set forth in the *R&O* and *Supplemental Order*. It has, however, asked the Commission to reconsider the *MO&O*'s expansion of the types of facilities eligible to retune to the ESMR band.

<sup>7</sup> See Preferred Opposition at 4; Guskey Opposition.

<sup>8</sup> It is ironic and cynical for Preferred to argue (Preferred Opposition at 3) that Sprint Nextel's petition for reconsideration has created uncertainty when Preferred has repeatedly sought to stymie 800 MHz band reconfiguration by, at different times, seeking reconsideration of the Commission's reconfiguration plan, seeking to stay the plan, and, more recently, challenging the plan in the U.S. Court of Appeals for the D.C. Circuit.

out of the lower 800 MHz band unless it was able to secure for its shareholders a spectrum arrangement of comparable value.”<sup>9</sup> The *MO&O* undermined this important principle in expanding ESMR band retuning rights for no valid public interest reason. The Commission should therefore reinstate the ESMR band retuning rights established in the *R&O* and *Supplemental Order*.

## **II. The Commission Should Reject AIRPEAK’s Arguments Regarding Remedies for ESMR Channel Shortfalls**

The Commission should reject AIRPEAK’s arguments regarding remedies for channel shortages in the ESMR block. According to AIRPEAK, the Commission should rarely if ever respond to such shortfalls by either expanding the ESMR block or conducting a *pro rata* channel distribution. Rather, AIRPEAK asserts, the Commission should only apply those measures in markets “in which Sprint Nextel does not hold enough ESMR band channels to accommodate all relocating licensees.”<sup>10</sup>

AIRPEAK’s interpretation of the *R&O* is contrary both to the plain language of the order and sound public policy. Rather, the Commission’s language in the *R&O* indicates that these remedies (ESMR block expansion and/or *pro rata* channel distribution) may be utilized wherever there is insufficient ESMR spectrum to fully accommodate *all* affected licensees, including Sprint Nextel.<sup>11</sup> In contrast, under AIRPEAK’s approach, rather than apply these remedial

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<sup>9</sup> AIRPEAK Opposition at 6.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> In the *R&O*, the Commission discussed the application of these measures in the context of markets in which “there may be insufficient spectrum in the 816-824 MHz/861-869 MHz band segment to accommodate both *incumbent ESMR licensees already operating there* and new ESMR entrants migrating from the lower channels.” *R&O* ¶ 164 (emphasis added). The *R&O* also stated that “[p]arties are hereby put on notice that disputed matters concerning ESMR channels *in any area of the country*, including [SouthernLINC markets,] may be resolved by the Commission making a *pro rata* distribution of ESMR channels.” *R&O* ¶ 168 (emphasis added).

measures, the Commission would arbitrarily place the full burden of such shortfalls on Sprint Nextel, compelling it to surrender whatever ESMR block spectrum is necessary to accommodate EA licensees retuning to that band. Just like the *MO&O*'s expansion of ESMR band relocation rights, the imposition of this burden on Sprint Nextel would be grossly inequitable and contravene the "value for value" equation at the heart of the Commission's 800 MHz reconfiguration decision. The Commission should reject AIRPEAK's approach and confirm that it will apply the ESMR band expansion and *pro rata* distribution mechanisms where necessary to address a shortfall of ESMR channels to accommodate all eligible ESMR band licensees, including Sprint Nextel.<sup>12</sup>

The Commission should also dismiss AIRPEAK's argument that application of these measures is inconsistent with the Commission's decision in the *R&O* regarding the use of 900 MHz Business and Industrial Land Transportation ("B/ILT") pool channels. In that order, the Commission gave 900 MHz B/ILT licensees the flexibility to use their spectrum for Commercial Mobile Radio Service ("CMRS") operations and assign their licenses to CMRS providers,<sup>13</sup> thereby providing Sprint Nextel and other CMRS licensees the opportunity to acquire additional ESMR spectrum in the 900 MHz band through secondary spectrum market transactions.<sup>14</sup> Contrary to AIRPEAK's argument, the Commission did not establish this 900 MHz band flexibility as a substitute for distributing ESMR band channels on *pro rata* basis or expanding the ESMR band in the event of a shortfall of 800 MHz ESMR band channels.

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<sup>12</sup> In its filing, Preferred reiterates its opposition to the *pro rata* channel distribution mechanism and again asks the Commission to reconsider its adoption of that remedial measure. Preferred Opposition at 5-6. Significantly, however, it is clear that Preferred agrees with Sprint Nextel that the *R&O* permits broad application of this remedy.

<sup>13</sup> *R&O* ¶¶ 335-337.

<sup>14</sup> *Id.* ¶¶ 6, 147, 198, 336.

Rather, the Commission provided 900 MHz band flexibility to account for the fact that Sprint Nextel will undergo far more retuning and network reconfiguration than any other licensee during the 800 MHz rebanding process. Sprint Nextel will have to retune many of its 800 MHz facilities twice, efforts that will reduce Sprint Nextel's access to many of its 800 MHz channels during the transition to the reconfigured band. The flexibility the Commission established for the 900 MHz band enables Sprint Nextel to obtain "green space" channels in the 900 MHz band and thus help minimize disruption to its service during the band reconfiguration process, albeit at the cost of acquiring such licenses either at auction or in the secondary market.<sup>15</sup> In a number of markets, Sprint Nextel has in fact taken this opportunity to facilitate 800 MHz band reconfiguration, and it certainly should not be penalized for doing so – as would be the case under AIRPEAK's argument

The flexibility to acquire additional 900 MHz channels will also provide "white space" for licensees, including Sprint Nextel, that suffer a reduction in 800 MHz channels because of a shortfall of 800 MHz ESMR band channels and a resulting *pro rata* channel distribution. The Commission has to date been confronted with one such shortfall in the southeast, where it expanded the ESMR band and put *both* licensees in question (SouthernLINC and Sprint Nextel) on notice that it would consider a *pro rata* channel distribution if the parties failed to reach a channel sharing agreement.<sup>16</sup> AIRPEAK provides no public interest basis for not applying these

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<sup>15</sup> It should be noted that the Commission has yet to take the steps necessary to permit CMRS licensees full access to unused 900 MHz band channels. In particular, more than a year after initiating a rulemaking on the future use of this band, the Commission has yet to follow through on its proposal to auction 900 MHz white space for flexible use. *See Amendment of Part 90 of the Commission's Rules to Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 20 FCC Rcd 3814, ¶ 1 (2005).

<sup>16</sup> Sprint Nextel and SouthernLINC reached a channel distribution agreement for these markets, thus obviating the need for the Commission to invoke the *pro rata* distribution remedy.

remedies in other markets where there is a channel shortfall. If a *pro rata* distribution of ESMR band channels is necessary in other markets, the flexibility to acquire 900 MHz B/ILT spectrum could benefit *all* affected licensees.

### **III. The Commission Should Clarify Sprint Nextel's Discretion in Meeting the Interim Benchmark**

Only one party, Preferred, opposes Sprint Nextel's request that the Commission clarify that Sprint Nextel has discretion to identify which regions are subject to the interim, 18-month benchmark for 800 MHz rebanding.<sup>17</sup> In this lone opposition, Preferred fails to offer any legitimate reason why Sprint Nextel's request for clarification should not be granted. Contrary to Preferred's claims, Sprint Nextel does not seek to "become its own [Transition Administrator] for purposes of setting the schedule" or realize a "dramatic" revision of the rebanding process.<sup>18</sup> As Sprint Nextel explained in its Petition, the Transition Administrator's ("TA's") schedule was not developed for purposes of the 18-month benchmark, but rather for prioritizing the retuning negotiations progress. It does not account for the various factors that could make compliance impossible in a given region, such as incumbent hold-outs or unforeseen natural disasters. With discretion to identify the twenty regions subject to the interim benchmark, Sprint Nextel can respond in a reasonable, efficient manner to the unpredictable issues that are likely to arise in the complex markets disproportionately represented in Wave 1, while still complying with a benchmark that demonstrates substantial progress toward completing reconfiguration according to the Commission's mandated schedule.

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The threat of this remedy, however, gives parties a strong incentive to negotiate voluntary channel distribution agreements.

<sup>17</sup> Preferred Opposition at 6.

<sup>18</sup> *Id.*

Indeed, the circumstances surrounding Preferred itself highlight the need for this flexibility. Preferred has failed to meet its construction deadlines, and its 800 MHz EA licenses have therefore automatically cancelled and reverted to the Commission. Preferred has nonetheless requested a waiver and extension of the construction deadline for these EA licenses.<sup>19</sup> In addition, as noted above, Preferred has sought to impede band reconfiguration through stay requests and court challenges. Preferred's uncertain status as a licensee and disruptive filings could present significant obstacles to completing reconfiguration in regions where it held licenses, and provides one example of the unpredictable circumstances that can delay reconfiguration in particular NPSPAC regions.

Similarly, public safety agencies in the Washington, DC area are developing a regional reconfiguration plan that may not comport with the TA's reconfiguration timeline and could thus preclude completing reconfiguration in that region in accordance therewith. Given these challenges and uncertainty, the Commission should clarify that the TA's retuning prioritization schedule is not controlling for 18-month benchmark purposes, and that Sprint Nextel has discretion to meet the 18-month interim benchmark through any combination of completed Phase I retuning in at least twenty NPSPAC regions.

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<sup>19</sup> See Request for Waiver, Preferred Acquisitions, Inc., ULS File Nos. 0002408877 through 0002408914 (dated Dec. 1, 2005; filed Dec. 14, 2005; amended Dec. 22-23, 2005); Opposition of Sprint Nextel Corporation (Jan. 27, 2006).

#### IV. Conclusion

For the aforementioned reasons, the Commission should grant Sprint Nextel's petition for reconsideration of the *MO&O*.

Respectfully submitted,

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### Certificate of Service

I, Claudia Del Casino, hereby certify that on this 5th day of April 2006, I caused true and correct copies of the foregoing Opposition of Sprint Nextel Corporation to be mailed by first-class mail to:

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