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May 16, 2007

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: Notice of Oral Ex Parte Presentation
WT Docket No. 02-55
EX PARTE

Dear Ms. Dortch:

On May 15, on behalf of AT&T, Inc., Robert W. Quinn, Senior Vice President, Federal Regulatory and Brian Fontes, Vice President-Federal Relations met with Michelle Carey, Senior Legal Advisor to Chairman Kevin J. Martin and David Furth, Associate Bureau Chief, Public Safety and Homeland Security Bureau. The focus of the discussion was a review the ex parte filed by AT&T, Inc. on April 19, 2007, in WT Docket No. 02-55 addressing the delays in the 800 MHz re-banding plan resulting in continued interference with public safety services operating in the 800 MHz band.

In accordance with section 1.1206 of the Commission's rules, a copy of this notice is being filed via the Commission's Electronic Comments Filing System in the above referenced docket.

If you have any questions concerning this notice, please contact the undersigned.

Respectfully submitted,

Brian F. Fontes
Vice President, Federal Relations

Attachment: April 19, 2007 Ex Parte WT Docket No. 02-55

cc: Michelle Carey
David Furth

Brian Fontes
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April 19, 2007

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Docket No. 02-55

Dear Ms. Dortch:

AT&T Inc., on behalf of its affiliate, AT&T Mobility LLC (f/k/a Cingular Wireless LLC) ("AT&T") submits this *ex parte* presentation in order to support and advance the Commission's public safety and homeland security agenda. Under Chairman Martin's leadership, the Commission has made extraordinary progress on public safety and homeland security issues, advancing the objective set forth in the Communications Act to "promote safety of life and property through the use of wire and radio communication."[1] There is, however, one critical homeland security matter that now requires additional Commission attention: 800 MHz rebanding.

Nearly three years ago, under a prior Commission, an unprecedented arrangement was adopted to address "the ongoing and growing problem" of interference to public safety communications in the 800 MHz band.[2] The Commission made clear: "[t]he Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable."[3] Several parties submitted proposals to address the interference concerns, and the Commission chose a course based in large part on a Nextel Communications, Inc. ("Nextel") plan. The FCC required Nextel to reconfigure the band on a 36-month schedule and in return, Nextel received an up-front grant of 10 MHz of nationwide spectrum valued at $4.86 billion. The Commission emphasized that "[r]econfiguration of the 800 MHz band is essential to our goal of timely abating unacceptable interference to public safety" and other 800 MHz systems.[4] In accepting this deal, Nextel's CEO stated, "[w]e take the

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[1] 47 U.S.C. § 151.

[2] *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 F.C.C.R. 14969, 14971 (2004) ("*800 MHz Rebanding Order*"); *Supplemental Order and Order on Reconsideration*, 19 F.C.C.R. 25120 (2004) ("*Supplemental Order*"); *Memorandum Opinion and Order*, 20 F.C.C.R. 16015 (2005) ("*Memorandum Opinion and Order*").

[3] *800 MHz Rebanding Order*, 19 F.C.C.R. at 14971.

[4] *Id.* at 15085.

obligations and responsibilities that come along with this initiative seriously and *will meet all expectations fully.* Eliminating the dangerous problem of public safety interference is far too important to do anything less."[5]

Today – just past the midway point of the 36-month rebanding schedule – it seems that Nextel's successor entity, Sprint Nextel Corporation ("Sprint Nextel"), has pursued a different course requiring the Commission to change its approach as well. Whatever the merits of the original 800 MHz decision, this Commission now has sufficient information to recognize that the 800 MHz rebanding process is deeply flawed and there is a strong probability the 36-month schedule will not be met. Sprint Nextel will almost certainly come before the Commission to seek an extension of the 36-month deadline or an alteration of the terms of the *800 MHz Rebanding Order*. The Commission should carefully consider any such request and take steps now to ensure that the 800 MHz rebanding is completed as efficiently and as quickly as possible. As the Commission examines the landscape, several facts have become clear:

- The reconfiguration process is becoming more complicated, not less, and it is far behind schedule. More than 90 percent of the Sprint Nextel—NPSPAC (public safety) reconfiguration negotiations that should have concluded were forced into mediation and many remain mired in these difficult negotiations;

- No NPSPAC licensees have been relocated to their new frequencies, and the interference problem continues to put the lives of first responders and the public at risk;

- Sprint Nextel has expended more than $700 million thus far on reconfiguration, yet substantially less than 10 percent of the funds have been provided for public safety reconfiguration; and

- Meanwhile, as part of the 800 MHz rebanding decision, Nextel gained authority to consolidate its 800 MHz holdings into far more valuable contiguous spectrum. Nextel was given 10 MHz of nationwide spectrum at 1.9 GHz and, thus far, has spent $215 million[6] and assigned 45 full-time professionals[7] to relocate incumbent BAS licensees from the 1.9 GHz band. Sprint Nextel has also announced that it will invest billions of dollars in broadband network deployment in other spectrum (2.5 GHz) and has plans to initiate 2.5 GHz incumbent license reconfiguration in more than 100 of the 493 BTAs nationwide – all while public safety expresses concern about the adequacy of Sprint Nextel's resources devoted to 800 MHz.

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[5] Letter from Tim Donahue, President and Chief Executive Officer, Nextel Communications, Inc., to Michael K. Powell, Chairman, FCC, WT Docket No. 02-55 (filed Feb. 7, 2005) (emphasis added).

[6] 800 MHz Transition Administrator, Supplement to Quarterly Progress Report for the Quarter Ended December 31, 2006, at 2 (dated Mar. 20, 2007) ("Supplemental Quarterly Report") *filed as an attachment to* Letter from Steven F. Lederman, Counsel to the 800 MHz Transition Administrator, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-55 (filed Mar. 20, 2007).

[7] Sprint Nextel BAS Relocation Report, WT Docket No. 02-55, at 2 (filed Mar. 7, 2007).

It is clear that the reconfiguration process is not moving ahead as the Commission envisioned. Public safety leaders have publicly expressed their deep concern with the current state of rebanding. The taxpayer, who lost out on billions of dollars of revenue that would have resulted from auctioning the 1.9 GHz spectrum awarded to Nextel, instead is subsidizing a delayed and bureaucratic transition process that lacks appropriate accounting controls. And, all 800 MHz CMRS carriers (including AT&T) are stuck with the slow pace of rebanding even as they are required to devote significant resources to remedying instances of interference as they occur.[8] The more quickly rebanding occurs, the fewer instances of interference will result – and cellular carriers can devote those resources elsewhere.

In adopting the *800 MHz Rebanding Order,* the Commission observed that the public safety interference problem "will only increase in severity as private, public safety and commercial use of the 800 MHz band intensifies,"[9] and it recognized the overwhelming significance of delay. Commissioner Copps noted that the country was now looking "to get on with the job of putting this plan into action. Time and delay are not our friends here."[10] Commission Adelstein observed, "[i]t is especially important that we put in place an appropriate mechanism to ensure that all necessary resources are provided to meet the needs of public safety agencies, and that any incentives to limit assistance are minimized."[11] Importantly, the Commission gave itself tools to address unexpected changes in circumstances – it expressly retained the authority to impose additional requirements on Nextel, to engage in enforcement action, and to pursue license revocation.[12] AT&T urges the Commission to utilize that authority as appropriate and put the 800 MHz proceeding back on the right track. Specifically, the Commission should:

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[8] The *800 MHz Rebanding Order* contained a near-term solution to address interference as it arises, imposing substantial interference abatement requirements on all 800 MHz CMRS carriers even though the Commission concluded that the 800 MHz interference "stems primarily from the operations of Nextel," *800 MHz Rebanding Order*, 19 F.C.C.R. at 14972. The Commission applied "strict responsibility for eliminating unacceptable interference to the ESMR or cellular telephone operator(s) implicated in the interference occurrence, and assign[ed] joint responsibility to all involved commercial operators if unacceptable interference results from a combination of signals from multiple systems." *Id.* at 14976. To resolve complaints of interference, licensees are required to: respond to public safety-related complaints within 24 hours, and all others within 48 hours; conduct interference analyses; "provide all test equipment (and technical personnel skilled in the operation of such equipment) necessary to determine the most appropriate means of timely eliminating the interference"; and take all "appropriate means of timely eliminating the interference" which may include measures at the cell site such as modification of antenna pattern, height and orientation, ERP limitation, limits on use of low elevation sites, filtering, or rechannelization. *Id.* at 15042-45, 15201. And in extreme cases, cellular licensees may be compelled "to immediately discontinue operation, pending the identification and application of corrective measures" upon the filing of an affidavit by a public safety licensee. *Id.* at 15044. AT&T acknowledges that these obligations will continue even after rebanding is completed, but the Commission adopted the reconfiguration to substantially reduce the likelihood of such instances. *Id.* at 14972 n.46.

[9] *Id.* at 14978.

[10] Separate Statement of Commissioner Michael J. Copps, *800 MHz Rebanding Order*, 19 F.C.C.R. at 15223.

[11] Separate Statement of Commissioner Jonathan S. Adelstein, *800 MHz Rebanding Order*, 19 F.C.C.R. at 15224.

[12] *800 MHz Rebanding Order*, 19 F.C.C.R. at 15130.

- Adopt a clear condition that Sprint Nextel must vacate the General Category Channels 1-120 no later than other incumbents as part of Stage 1 relocation (except for SouthernLINC). Concern exists that Sprint Nextel has a continuing interest in remaining on its General Category Channels in light of spectrum constraints on its iDEN network, thereby slowing the NPSPAC reconfiguration process.[13] Requiring Sprint Nextel to vacate the spectrum on a timely basis will serve to ensure that its interests are properly aligned with swift and complete NPSPAC reconfiguration. Further, in NPSPAC Regions where Sprint Nextel states that non-Sprint Nextel and non-SouthernLINC incumbents have already vacated the General Category Channels 1-120, the Commission should adopt a fast track schedule for Sprint Nextel to leave that spectrum;

- Adopt additional interim benchmarks for NPSPAC reconfiguration *and* require automatic payments by Sprint Nextel to the U.S. Treasury similar to those adopted in Consent Decree proceedings if Sprint Nextel does not meet them;

- Revise the conditions attached to the grant of the 1.9 GHz spectrum such that Sprint Nextel gains rights to the spectrum on a NPSPAC Region-by-NPSPAC Region basis only after it successfully completes 800 MHz rebanding in the relevant Region;

- Consider whether enforcement action and monetary forfeitures against Sprint Nextel are appropriate for failure to comply with the 18-month interim benchmark;

- Consider initiating an inquiry into whether Sprint Nextel has engaged in "utmost good faith" during negotiations, as required by the Commission; and

- Order an accounting to ensure that reconfiguration monies spent – taxpayer dollars in effect – are done so prudently.

A Review of Rebanding

In August 2004, the FCC released the *800 MHz Rebanding Order* calling for a reconfiguration of the 800 MHz band to separate public safety from other licensees in that band, including Nextel. Nextel agreed to be responsible for reconfiguring the 800 MHz band according to a 36-month schedule and gave back some spectrum in the 800 and 700 MHz bands. In return, Nextel received a grant of 10 MHz of nationwide spectrum in the 1.9 GHz band, valued at $4.86 billion. Today, Sprint Nextel (as Nextel's successor) is responsible for the full cost of reconfiguration in the 800 MHz band and the clearing of incumbents in the 1.9 GHz band. If the cost of reconfiguration, combined with the value of the returned spectrum, is less than $4.86 billion, Sprint Nextel must pay the difference to the U.S. Treasury. Sprint Nextel is responsible for all reconfiguration costs in excess of that amount.[14]

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[13] Donny Jackson, *Sprint Nextel: We Will Not Delay NPSPAC Rebanding,* MOBILE RADIO TECHNOLOGY (Apr. 6, 2007) *available at* http://mrtmag.com/rebanding/news/sprint_npspac_rebanding_040607/.

[14] *800 MHz Rebanding Order*, 19 F.C.C.R. at 14976-14978, 15112.

Reconfiguration Obligations and Consequences. The rebanding process primarily involves a two-stage reconfiguration: 1) the planning and relocation of incumbents operating on General Category Channels 1-120 to alternate spectrum; and 2) the planning and relocation of NPSPAC licensees operating on other 800 MHz frequencies to this vacated portion of the band. Nextel and other ESMR carriers ultimately move to the former NPSPAC frequencies. The Commission stated, "[t]o ensure timely completion, we require Nextel to meet both an interim benchmark and a final benchmark."[15] By December 27, 2006 (18 months after the reconfiguration start date), [16] Nextel was required to meet an interim benchmark by "relocat[ing] all but Nextel and SouthernLINC incumbents from Channels 1-120 in the first twenty NPSPAC Regions that the Transition Administrator has scheduled for band reconfiguration."[17] The Commission also required Nextel to initiate negotiations with all NPSAC licensees in those Regions according to specific requirements.[18] With regard to the final benchmark, the Commission stated, "[w]e are committed to having band reconfiguration completed through a phased transition process within thirty-six months of release of a Public Notice announcing the start date of reconfiguration," or by June 26, 2008.[19] Notably, the Commission identified obligations and consequences for failure to meet rebanding obligations:

- The Commission reserved the right "in its discretion" to impose on Nextel additional conditions it "deem[s] necessary to ensure reconfiguration of the 800 MHz band."[20]

- With regard to the 18-month interim benchmark, the Commission stated: "If Nextel fails to meet this interim benchmark, for reasons that Nextel, with the exercise of due diligence, could reasonably have avoided, the Commission may consider and exercise any appropriate enforcement action within its authority, including assessment of monetary forfeitures or, if warranted, license revocation."[21]

- The Commission stated clearly that "[t]he overriding requirement of our framework is the good faith requirement,"[22] and that "[a]ll parties, including Nextel, are held to a high standard of utmost good faith in their transactions" with licensees, with the Transition Administrator, and with the Commission.[23]

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[15] *Id.* at 14987.

[16] The *800 MHz Rebanding Order* was released August 6, 2004 but rebanding – and the 36-month timetable – was not triggered until June 27, 2005. *See Wireless Telecommunications Bureau Approves The Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan*, WT Docket No. 02-55, *Public Notice*, 70 FR 21786 (April 27, 2005).

[17] *Supplemental Order*, 19 F.C.C.R. at 25143.

[18] *Id.*

[19] *800 MHz Rebanding Order,* 19 F.C.C.R. at 14986.

[20] *Id.*

[21] *Id.* at 15130.

[22] *Id.* at 15077.

[23] *Id.* at 15075.

- Finally, with regard to the 36-month benchmark, the Commission determined that "[i]f Nextel fails to meet this benchmark, for reasons that Nextel could reasonably have avoided, the Commission will determine whether forfeitures should be imposed and/or whether Nextel licenses, including, but not limited to, its 1.9 GHz licenses, should be revoked."[24]

Sprint Nextel's Course of Action. Four months after the Commission released the *800 MHz Rebanding Order*, Nextel announced its plan to merge with Sprint.[25] In its February 2005 merger application, Nextel and Sprint stated, "[i]f the proposed merger is approved, the combined company will maintain this strong commitment to address public safety interference in the 800 MHz band. As specified in the Merger Agreement for this transaction, the merged company will accept the obligations enumerated in these conditions."[26] In August 2005, the Commission granted the merger.[27]

In December 2005, less than six months into rebanding, Sprint Nextel asked the Commission to readjust the previously established start date so that the reconfiguration would be extended by eight months.[28] Six public safety groups opposed the extension request, noting that "[b]and reconfiguration must be kept on a tight schedule to eliminate dangerous interference to public safety systems as quickly as possible."[29] These same six public safety groups wrote the Commission soon after expressing their "grave concern" regarding rebanding and their frustration with the process, citing "the lack of timely responses from Sprint Nextel to Request for Planning Funding" and "an apparent lack of personnel resources devoted by Sprint Nextel to the process," among many concerns.[30] The Commission summarily rejected Sprint Nextel's blanket request.[31] Subsequently, these public safety groups again were compelled to observe that "Sprint Nextel needs to provide sufficient and appropriate resources to engage in meaningful negotiations with licensees."[32]

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[24] *Id.* at 14987, 15130.

[25] News Release, Sprint Nextel Corp., Sprint and Nextel to Combine in Merger of Equals (Dec. 15, 2004), *available at* http://www2.sprint.com/mr/news_dtl.do?id=5080 ("Sprint Nextel Merger News Release").

[26] Applications of Nextel Communications, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0002031766, *et al.*, at 63 (filed Feb. 8, 2005) ("Applications of Nextel and Sprint for Transfer of Control").

[27] *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002031766, et al.*, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 F.C.C.R. 13967, 14035 (2005).

[28] Letter from Lawrence R. Krevor, Vice President, Sprint Nextel, to Catherine W. Seidel, Acting Chief, WTB, FCC, WT Docket 02-55 (filed Dec. 1, 2005).

[29] Letter from Gregory S. Ballentine, President, APCO International *et al.*, to Catherine W. Seidel, Acting Chief, WTB, FCC, WT Docket 02-55, at 2 (filed Dec. 6, 2005).

[30] Letter from Gregory S. Ballentine, President, APCO International *et al.*, to Catherine W. Seidel, Acting Chief, WTB, FCC, WT Docket 02-55, at 1-2 (filed Jan. 12, 2006).

[31] Letter from Catherine W. Seidel, Acting Chief, WTB, FCC, to Lawrence R. Krevor, Vice President, Sprint Nextel, WT Docket No. 02-55, 21 F.C.C.R. 686 (2006).

[32] Letter from Wanda McCarley, President, APCO International, *et al.*, to Catherine W. Seidel, Acting Chief, WTB, FCC, WT Docket No. 02-55 (filed Apr. 11, 2006).

Planning funds – deemed "essential" by the Transition Administrator ("TA")[33] – have been a major stumbling block in moving the rebanding process forward. As a leading public safety advocate explained, "[i]nitially, public safety agencies did not get timely responses from Nextel after submitting their requests for planning funding. Then Nextel sought far greater detail for cost estimates. At the same time, Nextel was battling major service/equipment vendors regarding their cost estimates. Beyond the disputed level of detail, Nextel also took what many considered to be unreasonable approaches to proposed planning activities, services and costs."[34] In May 2006, the TA set up a Fast Track option to facilitate fund disbursement and the planning process.[35] At the time, the TA anticipated the new process would capture "well over 50 percent of the public safety entities who may require planning funding."[36] Unfortunately, the TA reported that as of December 31, 2006, only 21 percent of requests for planning funding submitted since June 15, 2006 were eligible for the Fast Track option.[37]

More generally, Sprint Nextel has pursued an uncompromising strategy in its dealings with public safety. Sprint Nextel required all public safety licensees to enter non-disclosure agreements ("NDAs") that prohibited licensees from sharing information with one another regarding terms and conditions of their planning and relocation agreements.[38] One high-ranking Sprint Nextel official explained Sprint Nextel's view as follows: "[t]he concept is that that's an individual negotiation.... [I]f I go to one party and that party gets this deal with me, the 2nd party will want to work from that deal at the beginning and then prices just escalate versus dealing with reality."[39]

In January 2007, the Commission stepped in and concluded that Sprint Nextel's NDA requirement "impede[d] the good faith obligations the Commission imposed upon both Sprint and incumbent licensees" and allowed public safety licensees to exchange information regarding

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[33] *Most Public Safety Licensees Still Not Seeking Planning Reimbursement from Sprint Nextel*, COMMUNICATIONS DAILY, June 2, 2006, at 4-5.

[34] Robert Gurss, *Rebanding Troubles*, PUBLIC SAFETY COMMUNICATIONS, March 2006, at 1, *available at* http://www.apcointl.org/about/911/downloads/Rebanding_Troubles.pdf.

[35] Press Release, 800 MHz Transition Administrator, Public Safety Leadership and Sprint Nextel Announce Fast Track Option for Planning Funding (May 23, 2006), *available at* http://www.800ta.org/content/PDF/press_releases/05_23_06.pdf.

[36] *Public Safety to Get Cash Faster for 800 MHz Rebanding*, COMMUNICATIONS DAILY, May 24, 2006, at 8-9.

[37] *See* 800 MHz Transition Administrator, Quarterly Progress Report for the Quarter Ended December 31, 2006, at 13-14 (dated Feb. 19, 2007) ("Dec. 31, 2006 Progress Report") *filed as an attachment to* Letter from Steve F. Lederman, Counsel to the 800 MHz Transition Administrator, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-55 (filed Feb. 20, 2007).

[38] *See Improving Public Safety Communications in the 800 MHz Band*, Order, 22 F.C.C.R, 172, 173 (PSB 2007) ("*January 2007 Order*").

[39] *Sprint Nextel to Ask FCC to Freeze 800 Rebanding Timetable*, COMMUNICATIONS DAILY, Sept. 21, 2006, ("*Sprint Nextel to Ask FCC to Freeze 800 Rebanding Timetable*").

terms negotiated with Sprint Nextel.[40] With elimination of the NDA language, the FCC anticipates "increasing both the efficiency and speed of the rebanding process."[41]

Despite these recent efforts by the TA and the Commission to facilitate the reconfiguration process, Sprint Nextel continues to expect delay. Last fall, a high-ranking Sprint Nextel official said the company would seek an "extended freeze," perhaps two years, stating that "public safety just isn't ready." Without an extension, he added, "there will be some very negative results."[42] As recently as March 1, 2007, Sprint Nextel's SEC filings reflect the company's view that it will not complete rebanding within the 36-month period.[43]

On February 15, 2007, several public safety groups together with Sprint Nextel asked the Commission to direct the TA to develop "specific benchmarks to complete reconfiguration of the NPSPAC channels (601-720)" in order to "facilitat[e] the success of Phase II of the 800 MHz reconfiguration project."[44]

The Current State of Rebanding

Rebanding is dramatically behind schedule. The rebanding process primarily involves a two-stage reconfiguration: 1) the planning and relocation of incumbents operating on General Category Channels 1-120 to alternate spectrum; and 2) the planning and relocation of NPSPAC licensees operating on other 800 MHz frequencies to this vacated portion of the band. As discussed below, both the relocation of incumbent General Category licensees *and* the planning and negotiation for moving the NPSPAC licensees are far behind.

With respect to the General Category incumbents, the 18-month interim benchmark required Sprint Nextel to relocate all but its own and SouthernLINC operations from Channels 1-120 "in the first twenty NPSPAC Regions that the Transition Administrator has scheduled for band reconfiguration" by December 26, 2006.[45]

It is indisputable that Sprint Nextel failed to comply with this requirement. The TA divided the NPSPAC Regions into four "waves" in order of priority. Wave 1 – the first scheduled for rebanding – consisted of 15 Regions identified as those with "the highest interference complaints per million pops and highest population."[46] Sprint Nextel itself acknowledges, "Phase

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[40] *January 2007 Order*, 22 F.C.C.R. at 173.

[41] *Id.* at 174.

[42] *Sprint Nextel to Ask FCC to Freeze 800 Rebanding Timetable.*

[43] Sprint Nextel Corp., SEC Form 10-K, at 13 (filed March 1, 2007) ("Sprint Nextel 2006 10-K").

[44] Letter from Wanda S. McCarley, President, APCO International, *et al.*, to Kevin J. Martin, Chairman, FCC, at 1-2 (dated Feb. 15, 2007) *filed as an attachment to* Letter from Robert M. Gurss, Director, Legal & Government Affairs, APCO International, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-55 (filed Feb. 15, 2007).

[45] *Supplemental Order*, 19 F.C.C.R. at 25143. In January 2006, Sprint Nextel filed a Petition for Reconsideration asking the Commission to clarify that Sprint Nextel has the discretion to identify which 20 Regions are subject to the benchmark. APCO filed a June 2006 *ex parte* letter in support of this position.

[46] Regional Prioritization Plan of the 800 MHz Transition Administrator, WT Docket 02-55, at 21 (filed Jan. 31, 2005).

I retuning was completed prior to December 26, 2006 in seven of the 15 Wave 1 regions."[47] It went on to claim that the retuning process was "nearly complete" in six of the remaining eight Wave 1 Regions and that only "substantial progress" had been made in the two others.[48] The Wave 1 Regions where relocation has *not* been completed include much of the Eastern Seaboard — New England (including Boston), New York City (including New Jersey and Connecticut), Eastern Pennsylvania (including Philadelphia), the Washington D.C. area (including Maryland and northern Virginia), and the remainder of Virginia — as well as the Chicago and northern California Regions. As a result, the relocation process has not been completed on time for at least eight of the most significant of the first 20 Regions, as required by the interim benchmark.

The 18-month interim benchmark also required Sprint Nextel to show it was moving forward with NPSPAC negotiations. Specifically, the benchmark required Sprint Nextel to initiate retuning negotiations with all NPSPAC licensees in those Regions by December 26, 2006. It defined "initiate" to require, at a minimum, contacting the NPSPAC licensee in writing, and with at least one substantive oral two-way communication. The Commission required evidence that the retuning negotiations commenced in the form of a written communication from the NPSPAC licensee.[49] There is substantial doubt whether Sprint Nextel timely "initiated" retuning negotiations with all NPSPAC licensees in the first 20 NPSPAC Regions scheduled for reconfiguration, in accordance with the interim benchmark. For example, the TA indicates that in an unstated number of cases, "action was initiated by the licensees and not Sprint [Nextel]" despite the fact that the benchmark expressly required Nextel to "initiate" negotiations.[50] Thus, in these instances, Sprint Nextel did not meet the Commission's carefully crafted standard that required it to be an activist reconfiguration partner in reaching out to public safety.

Even more troubling, NPSPAC planning and reconfiguration are woefully behind. The FCC has been forced to extend negotiation period dates on several occasions. Almost every NPSPAC license negotiation is being forced into mediation. In Wave 1, 323 of 364 (88 percent) of Sprint Nextel-NPSPAC negotiations could not be resolved according to the voluntary and then mandatory negotiation schedules and were sent to the TA for mediation.[51] Wave 2 is even worse, as 224 of 226 (99.1 percent) negotiations were sent to mediation.[52] Moreover, public safety has expressed its frustration with the "lawyer-heavy" mediation process, as a leading public safety

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[47] Letter from Lawrence R. Krevor, Vice President, and James B. Goldstein, Director, Sprint Nextel, to David L. Furth, Associate Chief, PSB, FCC,WT Docket No. 02-55, at 2 (filed Jan. 26, 2007) ("Sprint Nextel Report").

[48] *Id.* at 3, 4.

[49] *Supplemental Order*, 19 F.C.C.R. at 25143.

[50] Letter from Brett Haan, 800 MHz Transition Administrator, LLC, to David Furth, Associate Chief, PSB, FCC, at 2 n.5 (dated Mar. 20, 2007) *filed as an attachment to* Letter from Steve F. Lederman, Counsel to the 800 MHz Transition Administrator, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-55 (filed March 20, 2007); Sprint Nextel Report at 8 (indicating that in some cases "the incumbent licensees themselves" have been responsible for initiating the negotiating process by submitting a funding request to the TA).

[51] *See* Dec. 31, 2006 Progress Report at 13-14.

[52] *See id.* at 14.

advocate noted that one mediation case involved $176 in dispute and protested, "they're spending dollars to save nickels."[53]

Last month, the TA announced an optional plan intended to speed reconfiguration of public safety subscriber equipment – not infrastructure – prior to completing all negotiations with Sprint Nextel.[54] While this new option offers a streamlined path to press ahead with the initial "touch" for subscriber equipment, it still requires public safety licensees to execute a Frequency Relocation Agreement with Sprint Nextel, and it does not alter the protracted negotiations and mediations over infrastructure reconfiguration issues.[55]

Negotiation delays could be related to Sprint Nextel's commercial spectrum needs. Sprint Nextel has acknowledged, "we must cease using portions of the surrendered 800 MHz spectrum before we are able to commence use of replacement 800 MHz spectrum, which has contributed to the capacity constraints experienced on our iDEN network," particularly in more capacity constrained markets.[56] In the 2004 *Supplemental Order,* the Commission modified the 18-month interim benchmark to allow Nextel to continue its operations on the General Category Channels as long as reconfiguration negotiations are in process. The Commission, however, rejected Nextel's blanket request to operate on all vacated channels below 817 MHz/862 MHz during rebanding because it "could provide Nextel an incentive to delay completing band reconfiguration for as long as possible."[57] Despite that Commission admonition, it appears that Sprint Nextel's continued operations on its frequencies place its interests squarely in conflict with reconfiguring the band as quickly as possible. A Sprint Nextel executive was recently quoted saying, "[e]very one of those retunes requires a channel swap with us to perpetuate it, and we have to balance those out, so we're not swapping everything out at the same time and can't run our network. There's some hard work to do in planning, coordinating, and scheduling, and it hasn't really been done."[58] Indeed, it appears that Sprint Nextel views NPSPAC licensee readiness to relocate as just one factor in the timing for reconfiguration, as the executive stated further, "[i]t was never a retune-whenever-you-feel-like program; it was always all about [spectrum] swaps."[59] In other words – as Sprint Nextel itself concedes – it will not vacate the spectrum until its commercial needs are satisfied regardless of the readiness of NPSPAC licensees or the reconfiguration schedule.

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[53] Donny Jackson, *Joint Letter Shed Light on Rebanding Problems*, MOBILE RADIO TECHNOLOGY (Mar. 1, 2007) *available at* http://mrtmag.com/commentary/newsletters/rebanding-problems-sprint-030107/.

[54] Press Release, The TA Launches Subscriber Equipment Deployment Initiative to Expedite Reconfiguration Implementation Activities (Mar. 22, 2007) *available at* http://www.800ta.org/content/PDF/press_releases/03_22_07.pdf.

[55] Transition Administrator, Subscriber Equipment Deployment FAQs, *available at* http://www.800ta.org/content/faqs/subscriber_equipment.asp.

[56] Sprint Nextel 2006 10-K at 13.

[57] *Supplemental Order,* 19 F.C.C.R. at 25144 (citation omitted).

[58] Donny Jackson, *Rebanding Falls Further Behind*, MOBILE RADIO TECHNOLOGY (Mar. 1, 2007) *available at* http://mrtmag.com/policy_and_law/mag/radio_rebanding_falls_further/index.html.

[59] Donny Jackson, *Sprint Nextel: We Will Not Delay NPSPAC Rebanding,* MOBILE RADIO TECHNOLOGY (Apr. 6, 2007) *available at* http://mrtmag.com/rebanding/news/sprint_npspac_rebanding_040607/.

The Commission should ensure that rebanding does not languish because of Sprint Nextel's commercial spectrum interests. To that end, the Commission should adopt a clear condition that Sprint Nextel must vacate its General Category Channels no later than other incumbents as part of Stage 1 (except for SouthernLINC) to ensure Sprint Nextel has the appropriate incentives to reconfigure the band as quickly as possible.[60] In NPSPAC Regions where Sprint Nextel states that non-Sprint Nextel and non-SouthernLINC incumbents have already vacated the General Category Channels 1-120, the Commission should adopt a fast track schedule for Sprint Nextel to leave that spectrum.

Sprint Nextel's Responsibility to the Taxpayer. In granting Sprint Nextel the 10 MHz of nationwide spectrum at 1.9 GHz, the Commission decided to forego an auction and the resulting revenues in favor of a unique public interest need – to resolve 800 MHz interference. The Commission set up a "value for value" exchange in which Sprint Nextel must provide value equal to $4.86 billion – the assessed value of the 10 MHz of spectrum – through relinquishing spectrum, paying for the 800 MHz reconfiguration (which includes its own internal costs) and 1.9 GHz band clearing, and if necessary, a cash payment to the U.S. Treasury. In effect, the taxpayer is funding the 800 MHz and 1.9 GHz reconfigurations, because Sprint Nextel's "payment" for the 10 MHz of spectrum goes toward the cost of rebanding rather than payments to the U.S. Treasury.

As of December 31, 2006, Sprint Nextel asserts it has incurred $721 million for reconfiguration costs.[61] Thus far, it appears that approximately 80 percent of the funds expended have been devoted to Sprint Nextel's internal costs of rebanding (approximately $400 million)[62] and BAS relocation from the 1.9 GHz band (approximately $215 million),[63] a necessary pre-requisite before Sprint Nextel can use the 1.9 GHz band. The record shows, however, that Sprint Nextel thus far has asked the TA to assess only $61.8 million for purposes of determining whether those costs are creditable against payment Sprint Nextel would otherwise make to the U.S. Treasury.[64] The TA asserts it is "in discussions" with Sprint Nextel regarding the review schedule.[65] In addition, the TA has spent over $64 million for public safety outreach, stakeholder relationship building, legal costs and other activities.[66] In contrast, significantly less than 10

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[60] Like Sprint Nextel, SouthernLINC has been permitted to remain on its General Category Channels until NPSPAC reconfiguration. While forcing Sprint Nextel to vacate the spectrum promptly ensures that its interests are not at cross-purposes with swift reconfiguration, SouthernLINC is not involved in the NPSPAC negotiations. Absent any compelling reason otherwise, there is no reason to require SouthernLINC to vacate the spectrum until necessary for NPSPAC reconfiguration.

[61] *See* Sprint Nextel 2006 10-K at 14.

[62] This sum is derived from the total Sprint Nextel expenditure less what the TA and other relevant parties have classified as incumbent licensee reconfiguration costs, planning costs, TA fees and expenses, and BAS relocation costs. *See* Dec. 31, 2006 Progress Report, at 5, 15; Sprint Nextel BAS Relocation Report, WT Docket No. 02-55 (filed Mar. 7, 2007); Supplemental Quarterly Report at 2.

[63] *See* Supplemental Quarterly Report at 2.

[64] *Id.* at 1. The TA states it does not review the BAS relocation costs.

[65] *Id.* at 2.

[66] *See* Dec. 31, 2006 Progress Report at App. 10.

percent has been devoted to public safety reconfiguration.[67] The Commission should ensure that money that in effect may be taxpayer money should be subject to regular monitoring; reconfiguration costs should not remain unaccounted for until reconfiguration is concluded. It should order an accounting forthwith.

What the Commission Should Do

The Commission should ensure the rebanding process moves forward without delay and hold Sprint Nextel accountable.

First, the Commission should adopt a clear condition that Sprint Nextel must vacate the General Category Channels 1-120 no later than other incumbents as part of Stage 1 relocation (except for SouthernLINC); in NPSPAC Regions where Sprint Nextel asserts non-Sprint Nextel, non-SouthernLINC incumbents have already vacated the spectrum, the Commission should adopt a fast track schedule for Sprint Nextel to leave that spectrum.[68] The Commission has an opportunity to align Sprint Nextel's incentives appropriately to ensure rapid reconfiguration. This action is needed in light of the delays in rebanding and questions whether Sprint Nextel's commercial spectrum needs are affecting the timing of reconfiguration.

Second, in response to the joint public safety-Sprint Nextel letter of February 15, 2007, the Commission should direct the TA to adopt additional interim benchmarks to ensure that NPSPAC reconfiguration occurs in a timely and efficient manner.[69] The Commission, however, should adopt automatic payments requiring Sprint Nextel to make payments to the U.S. Treasury if it fails to comply with any benchmark. The Commission has previously recognized the value of automatic payments to meet benchmark requirements in matters of public safety.[70]

Third, the Commission should also revise the 1.9 GHz spectrum grant and provide Sprint Nextel the right to operate on the spectrum on a NPSPAC Region-by-NPSPAC Region basis – once Sprint Nextel completes reconfiguration in a NPSPAC Region, it will receive 1.9 GHz spectrum rights covering that NPSPAC Region area.[71] Again, this will ensure that Sprint Nextel's top priority is NPSPAC reconfiguration.

Fourth, the Commission should consider whether enforcement action and monetary forfeitures against Sprint Nextel are appropriate for failure to comply with the 18-month interim

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[67] The TA has provided aggregate data for both non-public safety and public safety incumbent reconfiguration costs that total $48.6 million as of December 31, 2006 – only part of which can be attributable to public safety given the efforts Sprint Nextel has necessarily committed to reconfiguring non-public safety incumbents. *See* Dec. 31, 2006 Progress Report at 5.

[68] The Commission reserved authority to adopt new conditions as it deems necessary to complete reconfiguration. *See 800 MHz Rebanding Order*, 19 F.C.C.R. at 15130.

[69] Again, the Commission reserved authority to adopt new conditions as it deems necessary to complete reconfiguration. *See id.*

[70] *See T-Mobile, USA Inc.*, File No. EB-02-TS-012, *Order*, 18 F.C.C.R. 15123 (2003).

[71] Again, the Commission can act here under its reserved authority. *See 800 MHz Rebanding Order*, 19 F.C.C.R. at 15130.

benchmark.[72] Just 7 of the 15 Wave 1 Regions were completed – and not a single Region on the Eastern Seaboard from Maine to Virginia met the benchmark.

Fifth, the Commission should consider whether to initiate an inquiry into whether Sprint Nextel has met the "high standard of utmost good faith" in its dealings with public safety.[73] The joint public safety letters reflect deep-seated frustration with Sprint Nextel's practices during the rebanding process. Moreover, the Commission itself concluded that the NDA requirement imposed by Sprint Nextel "impede[d] the good faith obligations the Commission imposed upon both Sprint and incumbent licensees."[74]

Finally, the Commission should order an accounting to ensure that monies Sprint Nextel will seek to classify as creditable – taxpayer dollars in effect – are monitored regularly and used prudently.[75]

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If you have any questions regarding this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/

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cc: The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Michelle Carey
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Aaron Goldberger
Angela Giancarlo
Chief Derek Poarch
David Furth

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[72] *Id.*

[73] *Id.* at 15075. While the order asserts that parties should first bring "good faith" disputes to the TA, *id.* at 15077, the Commission's reserved authority to adopt new conditions as it deems necessary to complete reconfiguration, *id.* at 15130, provides ample authority to initiate an inquiry here.

[74] *January 2007 Order*, 22 F.C.C.R. at 173 (citation omitted).

[75] Again, the Commission reserved authority to adopt new conditions as it deems necessary to complete reconfiguration. *See id.*

CERTIFICATE OF SERVICE

I, Vernell V. Garey, hereby certify that on this 19th day of April 2007, copies of the foregoing letter were served by first class United States mail on the following:

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/s/
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