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Federal Communications Commission
Office of the Secretary

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

In the Matter of	)	
	)	WT Docket 02-55
Improving Public Safety Communications In the 800 MHz Band	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
Amendment of Part 2 of the Commission's Rules 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

To: The Commission

STATE OF INDIANA, ET AL.
PETITION FOR RECONSIDERATION

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Table of Contents

Summary . . . . . .

Overview 1

Completion of Planning 3

Frequency Reconfiguration Agreements 7

Change Notice Process 10

Rebanding Implementation 12

Conclusion 13

Attachment: The Rebanding Experience, Negotiating the Agreements

List of Petitioners

Summary

The Commission's Public Notice is an unlawful action, having failed to be brought following required notice and comment rule making in accord with the mandates of the Administrative Procedures Act. Upon reconsideration, the Public Notice should be set aside as internally inconsistent, not reflective of actual events and challenges faced by public safety entities, and entirely unhelpful to the process. It is an obvious attempt to vent the Commission's frustrations with the time required to complete rebanding. However, the creation of interim deadlines and processes will not result in a faster rebanding by overburdened incumbent licensees. Rather, it will create additional obligations that are not reflective of the challenges and resources which exist.

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State of Indiana, et al.[1] ("Petitioners"), by and through counsel, hereby respectfully request reconsideration of the Commission's Public Notice, FCC Announces Supplemental Procedures and

[1] A list of Petitioners is attached hereto.

Provides Guidance For Completion Of 800 MHz Rebanding, *Public Notice*, FCC 07-168 (released September 12, 2007) (*Public Notice*). In support of their request, Petitioners state the following:

Although Petitioners recognize that the Commission is frustrated with the progress of rebanding the 800 MHz band (a feeling that is shared by incumbent licensees across the Nation) the *Public Notice* places an unlawful and unfair burden on affected licensees and does nothing to substantively streamline the process other than articulate unworkable dates for planning. The *Public Notice* evinces a lack of appreciation and understanding of the duties foisted upon licensees and the challenges presented to licensees in complying with the Commission's Orders under Docket WT 02-55. The *Public Notice* is an obvious attempt at legislation borne of shared frustration that will unnecessarily and improperly cause parties to move too quickly for no shared purpose other than in satisfaction of the Commission's newly created guidelines.

Insofar as the *Public Notice* is an unlawful attempt to create substantive rules without required notice and comment, the *Public Notice* is wholly ultra vires and a continuing violation of the Administrative Procedures Act.[2] *See*, 5 U.S.C.§553. As any reviewing court would quickly agree, the Commission's deadlines seek to either add new burdens on negotiating parties or alter without comment the deadlines created under the Commission's former Orders[3], and thus are

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[2] *See*, earlier filed Petition For Partial Reconsideration by City of Boston, et al.

[3] Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004), *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004).

improper attempts at legislation without necessary due process.[4] This attempt to superimpose a new process within the original and wholly unrealistic three-year timetable for completion of rebanding is without any balancing of the injury to be suffered by public safety entities. What is woefully obvious is that the Commission's three-year timetable for rebanding will not be met and the *Public Notice* does nothing in recognition of this reality. Instead, it attempts draconian, unrealistic and improper intrusion into the original process without even a shred of equity.

The *Public Notice* is bereft of any justification for its release. Merely attempting to expedite the process without any concurrent statement of the costs to public safety entities from this bare imposition of will, does nothing to support any lawful justification of the newly imposed deadlines. Nor is there any indication that the Commission first queried affected licensees to determine whether the deadlines were rational or achievable. Instead, the deadlines are asserted without the benefit of comment that should have been allowed prior to the issuance of this legislation. Accordingly, upon reconsideration the Commission must set aside the *Public Notice* as wholly inequitable and unlawful.

Completion of Planning

As the Commission will soon recognize following receipt of the data being gathered by the Transition Administrator, many licensees will not meet the deadlines articulated within the *Public Notice*. Licensees' inabilities to meet the deadlines do not arise out of a lack of good faith or any dilatory activity. Many of the activities in which licensees must engage take an inordinate amount

[4] Indeed, the *Public Notice* is not yet effective as it has not been published in the Federal Register for thirty days in accord with federal law, therefore, the first deadline, October 15, 2007, is improper on its face.

of time to accomplish given the limited resources of public safety entities. Stated directly, rebanding is not and cannot be the highest priority of public safety employees whose first priority must be protection of life and property. Nothing within the *Public Notice* recognizes this obvious fact, therefore, for that reason alone the *Public Notice* is fatally flawed in nearly every respect. The Commission cannot expect to legislate by fiat the activities of local governments without any recognition of the challenges faced by public safety entities in taking on the burdens of rebanding. Such efforts by the Commission are wholly inappropriate and unwelcome.

In an effort to assist the Commission in understanding more thoroughly the challenges faced by public safety entities in performing their rebanding duties, attached hereto and incorporated herein is a clear articulation of those challenges and the various forces aligned against public safety entities in their efforts. As the Commission will quickly discern, delays in planning are often caused by persons other than the public safety entities, including the Commission itself. The Commission places little emphasis on the effect of third party vendors, most notably radio manufacturers, and the delay in public safety entities' obtaining necessary goods and services from these overtaxed manufacturers. Nothing in the Commission's *Public Notice* recognizes the basic underlying fact that there simply does not exist sufficient qualified persons, either employed as internal personnel or as consultants, vendors and contractors, to complete rebanding within the three-year timetable. And nothing in the *Public Notice* will change that fact.

Finally, and of great, practical significance, the Commission is demanding that public safety entities enter into private contracts within a given time frame, without articulating what authority is

granted the Commission by Congress to demand this activity without notice and comment. The planning phase requires that public safety entities enter into a private contract with Sprint Nextel. Usually planning requires that private contracts between and among public safety entities and vendors must be negotiated and approved by local boards and officials. Often local governments must engage in procurement processes, including requests for proposals and bidding, to fulfill local laws. These processes occur under law and the Commission has no authority to usurp those processes. Yet, by the creation of those deadlines within the *Public Notice* the Commission is either ignoring state and local law or is attempting to impose its regulatory powers on those processes. The Commission simply does not have the authority to take such actions.

Taking the simplest of examples, if a necessary vendor is required[5] to perform required services (most often Motorola) then a public safety licensee must negotiate an acceptable planning agreement with Motorola and await Motorola's performance under that agreement. While that negotiation is taking place, the process must wait forward movement and Motorola is under no contractual duty or regulatory duty to hire additional personnel or hurry the process to meet any of the Commission's expectations or the public safety licensee's desires. It is a private contract negotiation and the Commission's authority does not extend so far as allowing it to dictate when and under what terms the parties might agree.

Following the parties having entered into a planning agreement, a local government's position and leverage are not demonstrably improved. Although a local government may cajole,

[5] Often to avoid invalidating existing warranties on equipment.

complain, and even threaten a breach of contract suit if Motorola's performance is materially delayed, the fact is that the affected local government is at the mercy of Motorola's resources in completing necessary tasks. Motorola is also at the mercy of the availability of qualified personnel to perform the tasks. Therefore, even if Motorola's efforts are performed entirely in good faith, the myriad demand for services from it and its local service shops is such that delays are not only likely, they are inevitable. Accordingly, it does no good for the Commission to release its *Public Notice* when the Commission fully knows that essential persons, third party vendors, are unaffected by the Commission's action and cannot be made to work faster in delivering necessary goods and services to affected licensees.

Had the Commission taken the lawful step of requesting comments to its proposed deadlines, it would have received unanimously negative responses from Sprint Nextel, licensees, and vendors. The responses would not be reflective of a lack of effort by affected parties. Indeed, a substantial amount of effort has been expended by all parties. What the Commission would have instead witnessed are comments that reflect reality, not arbitrariness. The Commission's frustration, standing alone, is an insufficient justification for its *Public Notice*, particularly in view of the fact that the Commission lacks lawful authority to impose its new deadlines.

Accordingly, for the reasons provided above and to reflect the real challenges of rebanding articulated herein, Petitioners respectfully request that upon reconsideration the Commission set aside its newly created timetables and return to the timetables produced under its Rebanding Orders

following notice and comment. The *Public Notice* is not helpful to the process. Instead, it is creating chaos among an already beleaguered public safety community.

Frequency Reconfiguration Agreements

Although the entrance into Frequency Reconfiguration Agreements (FRA) is due to the Commission's Orders, the contents of those agreements and the manner into which they are entered continues to be a product of private contract negotiation between a licensee and Sprint Nextel. One essential element of that negotiation is the time required to negotiate a deal and have that deal approved by the parties pursuant to local law. The deal can be complex, involve other non-licensee agencies, and require substantial review from a host of manufacturer, third party entities. The Commission's *Public Notice* recognizes none of this.

A single FRA can easily involve hundreds of thousands of dollars, the activity of dozens of persons, and the coordinated effort between the negotiating parties to arrive at an agreement which is consistent with the Commission's Orders and the obligations upon the parties created under other laws. The task is not so simple as the Commission's absurd 30-day time period might suggest. Were it so simple, the Public Safety and Homeland Security Bureau would have been able to publish decisions on matters taken up to it within thirty days of receipt of parties' statements of position and accompanying recommended resolution from TA mediators. The Bureau has not been able to accomplish this feat even when there was involved only a handful of issues. Therefore, by what measure does the Commission believe that the negotiating parties can act within thirty days on the

entire panoply of issues that are presented in good faith negotiations? The Commission's own record demonstrates clearly that the new deadline is arbitrary and capricious.

Having never participated in even a single negotiation of an FRA, nor having accepted even a single comment from affected parties, the Commission's new time lines are without any factual support and are wholly without merit. Even under the more streamlined methods of the former 800 MHz rebanding, parties often took greater than thirty days to negotiate an agreement. The amount of time required to negotiate a final agreement was not due to a lack of effort by the parties, but the realities associated with the task, including the required participation by third party vendors. There is no automatic or mechanical means for producing an agreement arising from arms length negotiations and nothing stated by the Commission in its *Public Notice* relieves the parties of any necessary activities attendant to producing such a document.

Petitioners respectfully challenge the Commission to support its time lines by a showing of when the Federal Communications Commission has entered within 30 days into an arms length agreement with a vendor, which process mirrored the one imposed on public safety licensees by the *Public Notice*. Petitioners aver that if the FCC were to view first its own procurement processes, it would quickly determine that the agency is demanding that local governments perform in a manner which would be deemed impossible by the FCC in its own dealings. Therefore, it is entirely inappropriate for the Commission to demand a level of performance from licensees that the agency itself is unable to perform. Again, the record shows that the Commission is being wholly draconian and arbitrary in its efforts to bully public safety entities to perform at unrealistic speed.

Finally, the *Public Notice* states that "disputes" that are separating the parties be submitted to the PSHSB, *Public Notice* at 2. This statement is, at best, naive. The amount of time required to negotiate an agreement often does not involve disputes between the parties. Rather, it involves the collection of additional data, ongoing negotiations with third party vendors, queries to the Transition Administrator, and a host of other unavoidable circumstances that do not resound in disputes between the parties, but rather the nature of the arms length negotiation and the processes which underlie the effort. So, if the Commission were to receive the following "disputes", how would it resolve them? (1) the agreement must be approved under local law requiring that the final, proposed agreement be voted upon by a local board; (2) the agreement is dependent upon the gathering of information by a third party vendor that has been delayed due to adverse weather conditions or lack of available personnel; (3) the issue of whether a particular radio unit must be retuned or replaced is being determined by the manufacturer and the parties are awaiting that necessary information for completion of the agreement; (4) the FRA's completion is dependent on receipt of additional information from another licensee operating an interoperable system, and the parties are awaiting that information to determine estimates of internal personnel time to accomplish necessary interoperability efforts; or (5) the parties have not been able to identify available personnel to assist in the rebanding effort due to the high demand for such services, and thus no estimates of costs of obtaining necessary goods and services is yet possible.

The foregoing is only the barest sampling of the issues confronting the negotiating parties. It does not even address the issues arising when a licensee is occupying leased tower space, with limited enclosure space which exacerbates the problems faced by the parties. These issues are not

disputes. They are problems that must be worked through by licensees with the assistance of Sprint Nextel. And the FCC is wholly incapable of solving these problems by issuance of a decision by the PSHSB. Instead, each must be worked through with patience and diligence to achieve the stated objective of the Commission's rebanding Orders, to cause a nearly seamless rebanding of affected systems in a manner that is transparent to end users.

Nor does the Commission possess the authority to dictate the contents of the FRAs to cause a relieving of the foregoing problems. The Commission's authority does not extend to third party vendors. The Commission's authority does not extend to the activities of third party tower or building owners. The glaring and undeniable fact is that neither the licensee nor Sprint Nextel nor the Transition Administrator nor the Commission can force third parties to participate in the rebanding effort in a manner that reflects the Commission's timetable within the *Public Notice*. That the Commission has failed entirely to take into account this fact demonstrates with utmost clarity the arbitrary and unrealistic nature of the *Public Notice*. For the foregoing reasons and for good cause shown, Petitioners request that, upon reconsideration, the *Public Notice* timetables related to negotiation of an FRA be set aside in their entirety.

Change Notice Process

For many of the same reasons that the Commission's time table for FRAs is wholly inappropriate and not reflective of reality, the Commission's position on Change Notices within the *Public Notice* are equally flawed. First, the Commission does not possess the authority to dictate the basis for a Change Notice that is contrary to the objectives set forth in its Orders. The relevant

orders, indeed the *Public Notice*, state that the objective is a cost neutral outcome for public safety entities, allowing for reimbursement of all "reasonable, prudent and necessary costs regardless of when such costs are incurred," *Public Notice* at 6. Therefore, the Commission's statement that, "Licensees may not use the Change Notice process to recover costs that were reasonably foreseeable during planning or FRA negotiations"[6] is at odds with the overall objective and creates a wholly inconsistent position by the Commission.

Indeed, the Commission's Orders have created the need for Change Notices and the likelihood that Change Notices will be required to complete a rebanding. The Commission earlier demanded that an FRA will reflect estimates of the "minimum" costs of rebanding. Placing licensees to the burden to estimate only minimum costs sets up the circumstances where the most likely outcome are actual costs in excess of the estimated minimums and reimbursement of those actual costs requires that the parties enter into an amendment pursuant to a Change Notice. Had the Commission not placed the burden on licensees to certify to "minimum" costs prior to the commencement of planning or implementation, then licensees would have been able to provide cost estimates that were more in tune with the realities and vagaries of this process.

Since the Commission's statements within the *Public Notice* are couched as "guidance", licensees cannot be certain as to what the Commission intended beyond its unlawful creation of additional time lines without the required benefit of notice and comment. However, what is wholly clear is that the Commission's "guidance" is without regard to its stated primary objectives contained

[6] *Public Notice* at 3.

within its earlier Orders and the *Public Notice*, thus, it is a material shift in the language of the original legislation and could not withstand judicial scrutiny. Insofar as the Commission's new time line would alter or modify unlawfully the specific terms of existing private agreements entered into between licensees and Sprint Nextel, the Commission is attempting to exercise authority over private contracts which the Commission does not possess and did not earlier create for itself, if possible, within its Orders.

Rebanding Implementation

Any suggestion by the Commission that a licensee go at risk, for costs associated with pre-contractual activities that might be subject to reimbursement following the parties' entrance into an FRA, are rejected. The Commission's suggestions often include a licensee taking actions that are not yet agreed to between the parties, including reimbursement of the costs arising therefrom. It is inappropriate and outside of the norms of contract performance to suggest that a party perform under a supposed agreement that remains undrafted and unexecuted. Accordingly, insofar as any suggestions made by the Commission would place public safety licensees at economic peril, they should be rejected upon reconsideration. Any similar suggestions that would require licensees to enter into contracts with third party vendors in mere hopes of obtaining later reimbursement from Sprint Nextel for the cost of such contract should also be rejected upon reconsideration.

Further, it escapes the Commission's notice that were licensees to act in anticipation of reimbursement in the manner suggested by the Commission, the licensee is not merely placing itself at undo risk, but the licensee is financing that risk by prepayment of such costs. The Commission's

Orders do not contemplate such prepayment by licensees and, in fact, discourage actions which might result in licensees financing such efforts. For the Commission to suggest that licensees take such steps, which may concurrently violate procurement processes under local law, bespeaks of the Commission's naive approach to rebanding and the dynamics involved in causing local governments to enter into private agreements to reach the objectives of a federal agency.

Conclusion

Despite the Commission's frustration which is, in actuality, the result of its creation of an initially unrealistic time table for completion of rebanding, the time lines and statements within the *Public Notice* are wholly unlawful, inappropriate, inequitable, and not reflective of reality or the complexity of this process. The statements within the *Public Notice* often contradict the Commission's Orders or attempt to change the substantive legislation created by the FCC pursuant to notice and comment, therefore, they are entirely noncompliant with the mandates of the Administrative Procedures Act. For these reasons and for the reasons stated above, the *Public Notice* should be set aside in its entirety, as it has provided nothing in support of the process other than

arbitrary deadlines that serve no purpose other than to vent the Commission's frustration without regard to the injury to be suffered by licensees that try to comply with the deadlines.

Respectfully submitted,
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The Rebanding Experience
Negotiating the Agreements

Although the Commission's *Public Notice* suggests that incumbents have been dilatory in their collective or individual approaches to rebanding, the reality of the circumstances are quite different. The Commission's decision evinces little knowledge and even less appreciation of the challenges associated with rebanding a public safety radio system. However, despite the Commission's lack of practical knowledge, the Commission decided to force the illusion of progress by threatening incumbent licensees with draconian deadlines that place an enormous burden on public safety entities without recognizing the concurrent threat upon continuous operations of vital communications systems.

Limited Resources

The Commission's decision fails entirely to consider what its rebanding orders mean to public safety entities. Most public safety agencies operate their radio systems via the hard work and dedication of a handful of radio professionals per city or state. These persons are responsible for assuring that fleets of radios operated by police, fire, hospital and emergency personnel are kept working, day in and day out. As the Commission acknowledged in its past Orders, many of these radios are aged and require additional maintenance due to the harsh conditions under which the radios are operated. That constant care that systems and end user units require cause radio personnel to spend countless hours, often involving overtime, just to keep up. And it is into this environment that the task of rebanding is thrust.

There is no easy cure for the lack of personnel employed by public safety entities. The pool of available technicians is scarce across the Country and hiring additional personnel for rebanding alone is impractical and costly. Therefore, local governments must rely on their existing personnel to stretch to meet this additional, enormous task of rebanding up to thousands of radios. Those handfuls of dedicated professionals must now somehow find time in their already busy schedules to focus on the task of rebanding and commence assembling the people, assistance, and internal cooperation to cause the rebanding project to move forward.

One thing is certain, it is never be easy and it comes at times when the public safety radio professional can justify spending time on rebanding, rather than taking care of the next, inevitable emergency situation. Protecting local citizens must be the first priority for all of these professionals because to act otherwise would be to place at risk the very public safety these professionals have sworn to support. Certainly the Commission's decision should have fully recognized the need to prioritize its mandates behind those of keeping safe our citizens. Unfortunately, there is nothing in its*Public Notice* that suggests that the agency deems its agenda secondary in importance to the provision of basic public safety operations.

Education

Although the Commission may be fully aware of the history of its decisions in WT 02-55 and the various mandates created thereunder, the typical radio professional is not as well versed. Each affected rf engineer must become familiar with hundreds of pages of Commission Orders, TA guidelines, mediation methods, newly created (and often revised) forms, and constant changes in interpretations of the duties associated with rebanding. Only after educating themselves, are they prepared to meet the challenges created by the Commission to remedy the interference to public safety radio caused by the operation of Nextel's radio system.

But it is not only radio professionals who must become educated. To take appropriate action, some level of education is required for local legal counsel, so that counsel can appreciate the nature of the contracts into which the local government entity will enter. Local counsel will also be required to determine what actions are required under local law, such as meetings, votes, requests for proposal, etc., that are mandated by state and local law to participate in rebanding. On average, it appears that even a single, medium sized City's rebanding efforts will require that between four and twenty persons will need some level of understanding as to what is required to participate in rebanding.

Planning To Plan

Prior to an incumbent licensee's submission of a Request For Planning Funding, the incumbent must plan to plan. It must determine what resources will be required to complete the planning functions. The incumbent may reasonably deem that it simply does not have the resources available to accomplish a required inventory of all affected infrastructure and end user radios and the accessories for each. For, to complete a reasonable plan that also includes the ability to identify which radios will be retuned and which must be replaced, requires a rather extensive inventory to assure that pursuant to its later negotiations with Nextel, the public safety entity does not short itself in any way.

It is at this stage that many public safety incumbents have sought out the assistance of vendors of various services to assist in the effort. Project management duties, planning functions, and legal counsel are not unusual temporary additions to the project to bring expertise to the activity that would otherwise be lacking. Although vendors of these services are available, each available, qualified vendor is likely providing similar services to over a dozen other incumbents. In the case of Motorola, that vendor is providing services to hundreds of other incumbents. Therefore, the demand for services has created a great shortage of talent and time available to apply to incumbents' needs. Vendors too are budgeting personnel and the natural and practical effect has been delay in the delivery of necessary goods and services. Unnoted in the Commission's decision is any recognition of this problem and, in fact, the decision appears to dismiss entirely this very real circumstance.

What is even more startling in the Commission's decision is the implication that incumbents can somehow relieve the shortage via contract language. However, before a vendor begins the provision of services, the public safety licensee must first negotiate and enter

into a contract with its vendors. Such contracts may be further guided by local laws related to minority hiring or the need to issue requests for proposals, which may require publication for some time. Other problems may also arise in the identification of available vendors for services, which delay the process to assure compliance with local law. During this period, the Commission's alleged "cure," of incumbents' pressuring the vendors, is without meaning since the relevant vendors have not yet entered into contracts with the licensees. Said simply, the incumbent licensee is not in a position to take a hard stance to enforce the terms of a contract that does not yet exist.

Due to the nature of local laws and procedures, some licensees' processes will require months to select vendors and enter into contracts with each necessary source of services. During this time, the licensees are not being dilatory or recalcitrant in their reactions to rebanding obligations. To the contrary, they are expending copious amounts of time and resources simply to place themselves in a position to reasonably perform under the Commission's Orders, while concurrently protecting their rights and the ultimate outcome of the rebanding efforts.

After each vendor is selected, the incumbent must await the creation of the contracts from each vendor that will reflect each's participation in planning. An incumbent cannot begin the preparation of the RFPF until such time as the incumbent is made aware of the estimated costs of each vendor's services, which estimated costs will be incorporated into the RFPF along with internal personnel time expended in the licensee's participation in planning. Discussions among vendors and incumbents go on in earnest to determine what services will be required and what contributions will be made by the licensee's personnel. These discussions regarding divisions of labor can sometimes take a few weeks to sort out. However, once accomplished, a licensee has a basis for preparation of the RFPF.

Preparation of the RFPF

Following the foregoing, the incumbent has most of the information gathered to commence the preparation of the RFPF. However, now that information must be made to conform to the form created by the Transition Administrator. It is generally known that the RFPF form does not fit all or even most of the methods of planning that incumbents understand to be a practical approach to rebanding. No matter, the incumbent will make the numbers fit the boxes and lines on the TA's form and submit same after having it reviewed by legal counsel. If the Commission does not understand why the document requires review by counsel, then the Commission is ignoring the certifications that exist or are implied in the submission of the form.

To make certain that all planning costs are properly captured on the RFPF usually requires review of the documents by all vendors and the incumbent. It is not unusual for the incumbent to involve more than one person, and perhaps a small committee, to consider whether all of the estimated planning efforts and dollars are reflected on the RFPF. As the Commission would want to the incumbent to take seriously its duty to submit a properly completed form, that diligence requires that licensees involve those persons whose

experience, knowledge and participation are required to assure a properly prepared initial filing in this matter.

It is also at this stage that the issue of "gold plating" first arises. The Commission has made it quite clear in its Orders that incumbents are to be vigilant in their efforts to assure that vendor costs are reasonable. Therefore, incumbents must challenge or question the estimates provided by vendors to determine whether the estimated or quoted costs reflect the licensee's duties under rebanding, or whether some amount of the costs are overstated. To fulfill properly its duty to the Commission, each incumbent must be prepared to question vendor costs and to await a reply or further negotiation to assure fidelity to the Commission's processes. This effort can sometimes delay the final preparation of the RFPF for an additional month, while vendors and incumbents work out the details of vendor estimates, but such is required under the Commission's Orders.

Such discussions may also involve interdepartmental inquiries within a local government. If, for example, the RFPF captures internal personnel costs in education, participation in vendor selection, cooperation in determining the hourly personnel costs of relevant personnel, determining availability and levels of supervisory time, etc., then the discussions of what will ultimately be certified as the minimum reasonable costs of planning may often involve protracted inquiries and discussions to determine the estimates of internal personnel time that will be incorporated within the RFPF. Again, incumbents are required to make informed and reasonable estimates of costs, therefore, despite the natural delay in obtaining all of the answers to the myriad questions that must be lofted, such is the manner by which incumbents must act to comply with the Commission's Orders.

What is noteworthy is that all of the above activity, often involving dozens of manhours by each involved person, occurs prior to the submission of the RFPF. That is, an incumbent can expend well over 100 hours just getting to the point at which an RFPF is submitted, and neither the Transition Administrator, Sprint Nextel, or the Commission is aware that the activity is going on. And, as of that date, none of the incumbent's internal personnel time is compensated by Sprint Nextel. At the earliest stage of this process all actions taken by the incumbent are self-financed and self-staffed by persons who must fit in their participation while accomplishing the more important job of being a public safety professional. Petitioners are unaware of a single incumbent that has obtained fully reimbursement from Sprint Nextel for the actual amount of internal personnel time expended prior to the submission of an RFPF, for the reasons stated below.

Submission of the RFPF and the Immediate Aftermath

After submitting the RFPF to the Transition Administrator, the incumbent waits until the Transition Administrator certifies the RFPF and its contents, and forwards the document to Sprint Nextel for its examination. The amount of time that this activity requires is not completely known to incumbents. Although the Transition Administrator will often inform incumbents as to the date upon which its certification occurred, the average time for this process is not known. However, the time taken by the Transition Administrator prior to informing an incumbent of the certification has varied greatly over the course of the

rebanding effort. Such notification to the incumbent has been observed to have been received by incumbents as soon as a few weeks following submission of the RFPF and in some cases, notification has taken over a month.

Following the Transition Administrator's certification of the RFPF, the incumbent awaits Sprint Nextel's assignment of a deal manager to handle the negotiations of the Planning Funding Agreement. Although such assignments usually take only a few weeks to materialize, there are cases where the identity of the deal manager was not made known to an incumbent for months. The deal manager may be a Sprint Nextel employee or an independent contractor. The deal manager is usually handling several negotiations at the same time and often deal managers also participate in ongoing training, seminars and meetings with other deal managers to keep abreast of changing circumstances or additional knowledge gained as the process has continued. If the deal manager gets sick or goes on vacation, additional delays may occur since the matter is rarely assigned to another deal manager who would be required to get up to speed on the nature and course of the negotiations.

If the existing time period for voluntary negotiations has not expired, thus sending the parties to mediation, Sprint Nextel and the incumbent will begin the job of discussing the Planning Funding Agreement and associated schedules. These negotiations can occur smoothly (a rare occurrence) or they happen in fits and starts as Sprint Nextel makes inquiry after inquiry, some of which require additional meetings and conferences with vendors and internal personnel. In between responses to Sprint Nextel inquiries, often seeking a greater breakdown or granulation of information that has been compiled into larger numbers to fit the Transition Administrator's RFPF form, a week or more may pass as the incumbent comes up in the queue for that deal manager who is rotating among deals, trying to keep up. During this process, the Sprint Nextel deal manager is further attempting to understand the particular challenges arising out of this unique incumbent's system. Therefore, the incumbent spends nearly as much time explaining the particulars of their system to Sprint Nextel as it spends explaining the cost estimates associated with the PFA. Depending on the complexity of the system, this effort can easily carry over into the mediation period.

Mediation of the Planning Funding Agreement

If the parties, as is often the case, do not fully agree on the contents of the PFA, the matter is sent to mediation. This potential is even more likely if the incumbent is not represented by qualified legal counsel since the parties will be discussing the terms and conditions of the PFA and not just cost estimates. Qualified, experienced telecommunications counsel will likely have negotiated a "template" agreement with Sprint Nextel with which that counsel feels comfortable for offering to its clients.

It is important to note that the parties start with Sprint Nextel's standard agreement if no alternative template exists. Sprint Nextel's standard agreement is extremely pro-Sprint Nextel, as is to be expected. Therefore, if an incumbent commences negotiations without an alternative template, the negotiations over the terms and conditions can be quite

lengthy. Suggestions of proposed changes to the agreement are outside the authority of a deal manager and must be referred to other persons on Sprint Nextel's legal team. Other suggested changes require the involvement of Sprint Nextel's finance department, supervisors and others who must be consulted prior to accepting the proposal, rejecting the proposal, or suggesting a further alternative for the incumbent's review. This process of negotiations, given the multi-layers of oversight within Sprint Nextel, can take weeks or even months to arrive at mutually accepted language for that incumbent's PFA.

Meanwhile, the parties are now reacting not only to one another, but to the mediator. The mediators come in a variety of types and levels of expertise. Some are extremely helpful in expediting the process. Others are not. For examples, some mediators spend an inordinate amount of time debating with the incumbent over contract language or estimated costs. Instead of facilitating greater discussion between the parties, some mediators place themselves between the parties and act moreover like judges than mediators. This does not expedite the process. Rather, it creates another layer of negotiation with a person who is, in fact, not a party to the contract and, therefore, not properly positioned to even commence these discussions. This status is lost on some mediators who will pound an incumbent with question after question that reveal that the mediator has lost sight of their role.

This situation is made worse when those same mediators expose their lack of knowledge regarding telecommunications. One mediator infamously asked an incumbent why they could not just have all 2,500 mobile and portables brought to a single parking lot and get the whole job done in one day. When the incumbent reacted with stunned silence, the mediator took that to mean that the incumbent was not being fully forthcoming and suggested that the incumbent may not be acting in good faith.

But even if the problems with some mediations are not as extreme as the foregoing example, the number of problems caused by mediations gone off-track are not anomalies. The good mediators will accept an explanation as to why their understanding of a given situation is not accurate. However, others cling to the notion that their understanding is either correct or is not subject to challenge by the incumbent. There are many, many examples of mediations that have spun out for months because the mediator could not be made to understand that a particular idea was unworkable or outside of the laws of physical science as applied to rf engineering. The time spent explaining intermodulation studies, combiner loss, multi-coupler capacity, etc. to mediators has lengthened the process. Ultimately, over time, mediators become increasing adept at dealing with a vernacular and area of law in which many had little or no experience or training.

Further complicating the process is the lack of knowledge by some of the legal counsel are involved in the process. With all due respect, Sprint Nextel's outside counsel employs a number of deal attorneys who started with limited or no experience in the area of telecommunications. This is wholly understandable as no law firm likely was stocked with sufficient experienced telecommunications counsel to supply to this process. And although one can be certain that each of these attorneys has the capacity and competency to apply

their ability to become adept in this area of law, inexperienced counsel have sometimes created understandable delays in the process, owing to the need to sometimes provide protracted explanations to both educate and negotiate.

When the above instances arise, incumbents often offer an explanation of the matter to deal counsel. However, since the deal counsel is sometimes unsure as to whether the incumbent's explanation is accurate or intended to gain an advantage in negotiations, the explanation given by the incumbent is nonetheless either rejected or subject to further inquiry by the deal counsel to make sure that no disadvantage to Sprint Nextel will result from accepting the incumbent's explanation. Meanwhile, the mediator cannot alleviate this problem, since the mediator often has less knowledge than Sprint Nextel's deal counsel. Although these situations are less frequent when Sprint Nextel's deal manager is on a mediation call and can confirm or reject an incumbent's explanation, correspondence between counsel for Sprint Nextel and incumbent's counsel can be fraught with delay as each issue, question, technical response, etc. must be referred back to the Sprint Nextel deal manager or his supervisor prior to the incumbent's obtaining a response.

To be fair, many deals have taken additional time due to the inexperience of local counsel, particularly when local counsel's efforts are not augmented by qualified, telecommunications counsel. Local counsel has rarely dealt with issues arising under the rules and policies of the Commission and many simply do not fully understand the rights and duties of their licensee. It is more than daunting for an attorney to have to learn on-the-fly not only the contents of the Commission's Orders, but also the vernacular and basic rf engineering required to be known to effectively negotiate a deal with Sprint Nextel. Sprint Nextel is patient with such persons, but it is also under pressure to complete the transactions in a timely manner. Again, understandable and foreseeable delay in the process should be recognized by the Commission and this natural condition should not be viewed as incumbent delay, but simply an understandable byproduct of the Commission's Orders and the process.

Therefore, with a dynamic that includes inexperienced mediators and legal counsel, the parties press on in mediation. And the history of these mediations has been too often painful. Sprint Nextel deal managers are trained to challenge every line item, every calculation, every estimate, every proposed change to terms and conditions, every proposed time line, etc. Mediations have bogged down for a month over a single $75 item. One mediation was extended out for weeks as the parties debated whether the incumbent's use of legal counsel to negotiate a deal was appropriate, or whether the incumbent must personally appear in mediation conferences. Infamously, one issue in dispute that made it all the way to the Commission for determination involved two hours of a vendor's time. If the Commission finds these problems surprising, they should not. It was the Commission that emphasized that the contracts between incumbents and Sprint Nextel reflect estimates of the minimum costs of rebanding, not the reasonable costs which would be later reconciled following planning and the calculation of those costs, as spent. But estimates of minimum costs. And the Transition Administrator was charged with the duty of assuring that only minimum costs would be approved. Accordingly, a shared

agenda was created between Sprint Nextel and the Transition Administrator, to drive down the estimated costs appearing in the PFA.

This push back by Sprint Nextel to estimated costs creates a bunker mentality in the minds of incumbents. This defensive posture is exacerbated when either a mediator or a Sprint Nextel representative goes farther toward suggesting that the incumbent is either acting in bad faith or is misrepresenting the facts. Oddly, Sprint Nextel more rarely implies this condition than mediators who have little else with which to threaten incumbents. During one mediation, the entire negotiation process came to a halt after a mediator suggested that the incumbent might be acting in bad faith. Although the mediator was obviously employing this tactic to shake an incumbent off of a given point and move the matter forward, the opposite effect was achieved. The matter stopped dead until the mediator could find a way to retract their statement and recover some semblance of neutrality in the mediation. And later, the incumbent's position was adopted into the contract. Therefore, not only was the incumbent not acting in bad faith, but Sprint Nextel recognized the acceptability of the incumbent's position, despite the defamatory comments made by the mediator.

The problems with mediations and negotiations have become common knowledge throughout the industry and within the Commission. It is commonly believed that the cost of fulfilling the Commission's mandate regarding certification of minimum costs has often caused the cost of negotiations to exceed the amounts in dispute. Dozens of teleconferences, emails, scheduling orders, demands for even more specific information, etc. result in the expenditure of time for both parties, time that is paid for with rebanding dollars. This condition was foreseeable by the Commission, but it chose instead to take a simplified approach to the challenges of parties in negotiating a deal that was to reflect minimum costs, rather than reasonable costs. The process has reaped what the Commission sowed, acrimony and distrust between Sprint Nextel, incumbents, mediators, vendors, and the Transition Administrator. If the Commission hoped for a cooperative, efficient effort among all to achieve rebanding, it insured that it would never happen, by focusing on its ultimate collection of funds for the U.S. Treasury and giving that greater priority than the needs of the affected parties.

To be sure, many incumbents and Sprint Nextel deal managers have attempted to rise above petty disputes that delay the process and do no good for either side. However, the specter of a possible denial by the Transition Administrator of a given line item is often felt in the negotiations, guiding Sprint Nextel to question and question and seek justification after justification for every dollar estimated. Is it any wonder that the process is delayed and frustrated by this process? And the Commission's recent decision does nothing to solve the problem. It merely tries to speed the process by setting arbitrary and impractical deadlines that have no basis in reality or fact.

Proposed Resolution Memorandum

Given the acrimonious nature that many mediations create, it is not surprising that the parties are often stepping toward written positions regarding issues in dispute. In one