

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Improving Public Safety Communications in	)	WT Docket No. 02-55
the 800 MHz Band	)	
	)	
New 800 MHz Band Plan for Puerto Rico and	)	
the U.S. Virgin Islands	)	

**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Lawrence R. Krevor

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August 2, 2010

**TABLE OF CONTENTS**

SUMMARY .....i

I. BACKGROUND.....1

II. CTO AND SMARTCOMM LACK STANDING TO CHALLENGE THE *PUERTO RICO ORDER* .....3

III. CTO AND SMARTCOMM’S REQUEST TO EXPAND THE ESMR BAND IS UNWARRANTED.....5

IV. PREFERRED’S SITE LICENSES HAVE ALMOST ALL BEEN CANCELLED .....9

V. PREFERRED, LIKE ANY OTHER EA-BASED LICENSEE SEEKING TO RELOCATE TO THE ESMR BAND IS ONLY ENTITLED TO ITS EA WHITE SPACE .....10

VI. SMARTCOMM’S AND PREFERRED ATTACKS ON SPRINT NEXTEL ARE ABSURD.....11

VII. CONCLUSION .....13

## SUMMARY

Sprint Nextel Corporation (“Sprint Nextel”) hereby files this Opposition to three Petitions for Reconsideration each dated July 22, 2010: (1) a joint Petition by Preferred Communications Systems, Inc., Preferred Acquisitions, Inc. and Charles D. Guskey (collectively “Preferred”); (2) a Petition by Concepts to Operations (“CTO”); and (3) a joint Petition by Smartcomm, LLC, Kenneth Fry and Preferred Spectrum Investments, LLC (collectively “Smartcomm”) all in response to the Public Safety and Homeland Security Bureau’s (“Bureau”) *Third Report and Order* in this proceeding.

Two of the Petitioners, neither of whom are even 800 MHz licensees in Puerto Rico, do not have standing and their Petitions should be summarily dismissed. The third Petitioner, Preferred, misrepresents its licensing status before the Bureau and raises issues that have been fully considered and resolved by the full Commission. None of the Petitioners presents any compelling reason to overturn the Bureau’s rational construction of the 800 MHz band plan for Puerto Rico. For all of these reasons, the Federal Communications Commission (“FCC” or “Commission”) should immediately dismiss and/or reject the Petitions and clear the way to complete 800 MHz band reconfiguration in Puerto Rico without further delay.

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**I. BACKGROUND**

The *Puerto Rico Order* adopted an 800 MHz band plan for the Puerto Rico NPSPAC Region (Region 47), including an allocation for the “new” NPSPAC band at 851-854 MHz, a traditional “interleaved” band allocation, and slightly modified

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<sup>1</sup> See Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Third Report and Order and Third Further Notice of Proposed Rule Making*, \_\_\_ FCC Rcd \_\_\_, DA 10-695 (PSHSB April 26, 2010) (“*Puerto Rico Order*”).

Expansion Band and Guard Band allocations.<sup>2</sup> The *Puerto Rico Order* also clarified how it would direct the 800 MHz Transition Administrator to apportion spectrum in the 800 MHz “ESMR band” between 862-869 MHz given the need to potentially accommodate as many as three Economic Area (“EA”) licensees.<sup>3</sup> The *Puerto Rico Order* established an eighteen month transition period to complete 800 MHz band reconfiguration in the Puerto Rico NPSPAC Region, including a 90-day mandatory negotiation period for remaining incumbents.<sup>4</sup> This eighteen month transition period is already underway.

Three parties filed Petitions for Reconsideration of the *Puerto Rico Order*. Two of the Petitioners, neither of whom are even 800 MHz licensees in Puerto Rico, do not have standing and their Petitions should be summarily dismissed. The third Petitioner, Preferred, misrepresents its licensing status before the Bureau and raises issues that have been fully considered and resolved by the full Commission. None of the Petitioners presents any compelling reason to overturn the Bureau’s rational construction of the 800 MHz band plan for Puerto Rico. For all of these reasons, the Federal Communications Commission (“FCC” or “Commission”) should immediately dismiss the Petitions and clear the way to complete 800 MHz band reconfiguration in Puerto Rico without further delay.

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<sup>2</sup> The *Puerto Rico Order* adopted a 0.5 MHz increase in the Expansion Band (860 - 861.5 MHz) and corresponding 0.5 MHz decrease in the Guard Band (861.5 - 862 MHz) as necessary to accommodate all 800 MHz operators in Puerto Rico. *Puerto Rico Order* at ¶ 6.

<sup>3</sup> *Puerto Rico Order* at ¶ 13.

<sup>4</sup> *Puerto Rico Order* at ¶ 18.

## II. CTO AND SMARTCOMM LACK STANDING TO CHALLENGE THE *PUERTO RICO ORDER*

CTO and Smartcomm lack standing to challenge the Bureau's *Puerto Rico Order* and therefore, their Petitions should be dismissed. Neither CTO nor Joint Petitioners Smartcomm, LLC, Kenneth Fry or Preferred Spectrum Investments, LLC are 800 MHz licensees *anywhere* in Puerto Rico, and therefore none has the requisite standing to participate in this proceeding. In addition, Smartcomm should be barred from filing a Petition for Reconsideration when it failed to participate in the notice and comment period of this proceeding where comments were filed nearly two years ago.<sup>5</sup>

Smartcomm, LLC states that it is "interested" in applying for licenses and "advising licensees" seeking to acquire spectrum in the 800 MHz Expansion Band and Guard Band.<sup>6</sup> Smartcomm's Vice President is Pendleton Waugh, a convicted felon, calling into question whether it can ever obtain its own FCC license. Additionally, Smartcomm's "advise" appears to be a business-model based on seeking investors to pay Smartcomm thousands of dollars upfront to apply for 800 MHz spectrum on the investors behalf (where an FCC application and coordination fee will only be about \$300.00) years from now when 800 MHz spectrum is vacated by Sprint Nextel at the conclusion of 800

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<sup>5</sup> CTO participated in this proceeding during the comment period but only through the filing of an actual 800 MHz licensee, Preferred. CTO did not file its own individual comments. CTO holds no 800 MHz licensees in the U.S., including Puerto Rico, and does not appear to represent an actual 800 MHz licensee in Puerto Rico who might have an interest in the Bureau's *Puerto Rico Order*.

<sup>6</sup> Smartcomm Petition at page 5.

MHz band reconfiguration.<sup>7</sup> Another “party” to the Smartcomm Petition is Preferred Spectrum Investments, LLC. (“PSI”). PSI’s listed address is the same business address in Phoenix, AZ as Smartcomm, and presumably employs in a leadership capacity, Mr. Waugh, a convicted felon. PSI does not hold any 800 MHz licenses. It is unclear what PSI’s relationship to Preferred is other than it may be a litigant against Preferred in the Delaware Courts.

The third party to the Smartcomm filing is Mr. Kenneth Fry, a *former* 800 MHz licensee in Puerto Rico.<sup>8</sup> Mr. Fry, however, assigned his license to Preferred in 1999. It is unclear given these facts, especially given that Mr. Fry’s former license expired in May 2009 and was cancelled by the FCC in August 2009 what possible interest Mr. Fry has in the band plan and reconfiguration of *existing* 800 MHz licenses in Puerto Rico.

A second Petitioner who lacks standing to file a Petition for Reconsideration is CTO. CTO is an engineering consultant not an 800 MHz licensee. CTO’s only 800 MHz client in Puerto Rico appears to be Preferred, who has filed its own Petition. While CTO did participate earlier in this proceeding, it was only under the auspices of Preferred not on an individual basis. Further, CTO’s Petition raises nothing new – it summarizes the alternative band plan Preferred submitted and merely suggests that the FCC “consider the

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<sup>7</sup> Ironically, the filing of Smartcomm’s Petition and resulting delay it will cause to 800 MHz band reconfiguration in Puerto Rico will significantly delay access to Sprint Nextel’s potential vacated interleaved band spectrum both for public safety and for the commercial interests Smartcomm alleges to represent.

<sup>8</sup> Mr. Fry does hold a single channel GX license in the 800 MHz interleaved band in South Florida. It is unclear, however, how Mr. Fry maintains operations on an 800 MHz system in Florida when his listed business address is in New Jersey. In any event, Mr. Fry currently holds no 800 MHz licenses in Puerto Rico, the subject of this proceeding.

plan proposed by CTO . . . instead of the TA Plan adopted by the Bureau.”<sup>9</sup> To be considered, a Petition for Reconsideration must be more than a mere duplication of positions that the Bureau did not find compelling on its initial review.<sup>10</sup> CTO has provided no new facts, evidence or justifications warranting reconsideration, therefore its Petition should be dismissed.

### **III. CTO AND SMARTCOMM’S REQUEST TO EXPAND THE ESMR BAND IS UNWARRANTED**

After soliciting comments on a proposed band plan for Puerto Rico in 2008, the Bureau’s *Puerto Rico Order* rationally decided to adopt the 800 MHz Transition Administrator’s proposed band plan for 800 MHz band reconfiguration in Puerto Rico. The Puerto Rico band plan is entirely consistent with the majority of the United States 800 MHz band plan by relocating NPSPAC licensees to the lowermost portion of the 800 MHz band, creation of a Expansion and Guard Band with only a slight size deviation from the standard U.S. band plan, and a 14 MHz ESMR segment. The Bureau’s band plan minimizes impact to existing 800 MHz licensees by not requiring licensees between 854-860 MHz to modify their facilities.

CTO and Smartcomm seek to enlarge the ESMR band in Puerto Rico even though this approach was already rejected by the Bureau. Smartcomm, who failed to participate earlier in this proceeding, argues that the Bureau fails to treat Puerto Rico as the Bureau

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<sup>9</sup> CTO Petition at page 4.

<sup>10</sup> *See 800 MHz Second MO&O*, 22 FCC Rcd at 10487 ¶ 54 ([i]t is well established that the Commission does not grant reconsideration for the purpose of allowing a petitioner to reargue matters already presented, considered, and disposed of by the Commission.” Otherwise, the Commission ““would be involved in a never-ending process of review that would frustrate the Commission’s ability to conduct its business in an orderly fashion.””

treated the Southeastern United States (“SoCo Territory”) where the Commission did expand the ESMR band to accommodate Sprint Nextel and SouthernLINC.<sup>11</sup> Smartcomm fails to acknowledge, however, that there are key differences between the circumstances facing the Commission in 2004 regarding the SoCo Territory and today in Puerto Rico.<sup>12</sup> Most notably, in the SoCo Territory, the Commission was faced with attempting to accommodate the spectrum needs of two *operating* ESMR providers. Today in Puerto Rico, while there are three EA licensees (*i.e.*, three ESMR eligibles), none of the three licensees (including Sprint Nextel) currently provide ESMR services in the 800 MHz band. Another key related difference is that in the SoCo Territory in 2004, Sprint Nextel’s ESMR network served almost 20 million customers across the country and SoCo’s ESMR network served over 200,000 subscribers in the SoCo Territory. Both parties demonstrated to the Commission that a reduction in spectrum capacity for either carrier along the lines of what would be required to fit both carriers in 14 MHz ESMR band would be significantly detrimental to their customers. Today in Puerto Rico, the three “would-be” ESMR licensees serve nowhere near the same number of customers<sup>13</sup> and would have a far greater ability to design ESMR networks from scratch for the expected spectrum capacity they will have.

The major flaw with Smartcomm’s and CTO’s request to enlarge the ESMR band is that it would displace and require relocation of more 800 MHz incumbent licensees,

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<sup>11</sup> Smartcomm Petition at page 2.

<sup>12</sup> Notably, Smartcomm is factually incorrect on page of the Smartcomm Petition. Sprint Nextel held and still holds more 800 MHz spectrum than SouthernLINC in the SoCo Territory.

<sup>13</sup> Preferred provides no service whatsoever in Puerto Rico or anywhere in the U.S.

creating additional, not less disruption in the 800 MHz band, and with no added benefits. Preferred, the only Petitioner with 800 MHz licenses in Puerto Rico actually supports retention of the standard sized ESMR band.<sup>14</sup> As the licensee responsible for retuning 800 MHz incumbent licensees, Sprint Nextel did not and does not support an expanded ESMR band in Puerto Rico because it would add costs and complexity to 800 MHz rebanding and because it would harm public safety operators who would lose spectrum under Smartcomm and CTO's ill-considered proposal.<sup>15</sup>

In addition, expansion of the ESMR Band in Puerto Rico isn't necessary no matter the ultimate outcome of Preferred's EA licenses. North Sight is entitled to approximately 120 channels based on its current EA license holdings, Preferred *could* receive as many as 125 channels based on its current EA holdings, and Sprint Nextel will receive 35 channels. That encompasses the 280 channels in the ESMR band in Puerto Rico.<sup>16</sup> Of course, Preferred's EA – ESMR allotment could be zero if its EA licenses are cancelled, which is still a possible outcome in the pending Enforcement Bureau

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<sup>14</sup> Preferred Petition at page 23. Preferred raises its own objections to the distribution of spectrum *within* the ESMR band, however, it agrees that the size of the ESMR can remain at 14 MHz. Without explanation, Preferred's position on reconsideration deviates from its position earlier in this proceeding.

<sup>15</sup> CTO and Smartcomm appear to support a plan whereby the less-than-full new NPSPAC band would be "packed" with existing 25 kHz public safety licensees from the existing 800 MHz interleaved portion of the 800 MHz band. This would then potentially create more spectrum for non-public users higher in the interleaved band and a larger ESMR band. What CTO and Smartcomm fail to address is the added costs and complexity involved in packing public safety licensees, why public safety should lose spectrum or why ESMR interests should take higher precedence than public safety licensees.

<sup>16</sup> As discussed further below neither North Sight nor Preferred are entitled to wholly clear EA spectrum.

proceeding, or if Preferred is not granted a construction waiver for its EA licenses.<sup>17</sup> In that case, Sprint Nextel would reclaim the 125 channels it must make available to Preferred under the pro rata distribution adopted in the Bureau's *Puerto Rico Order*.<sup>18</sup> If Preferred's licenses are cancelled, with just North Sight and Sprint Nextel to fit within the ESMR band there would be no need to expand the ESMR band as both licensees would receive comparable spectrum allocations to what each has today.

Sprint Nextel is required to make the largest sacrifice of any 800 MHz licensee in Puerto Rico. Based on its 800 MHz spectrum holdings Sprint Nextel would normally be entitled to 165 channels in the 800 MHz ESMR band segment.<sup>19</sup> Sprint Nextel, however, has agreed to make much of this spectrum available to EA licensees eligible to retune to the ESMR band in Puerto Rico. At the same time, Sprint Nextel is also entitled to reclaim its full ESMR-band allotment in the event that Preferred and/or North Sight fail to meet the Commission's requirements in fully building out an ESMR system. This same rule applies to other parts of the U.S. where EA licenses have elected to retune to the ESMR band at their own expense.<sup>20</sup> The Puerto Rico ESMR band should be treated no differently.

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<sup>17</sup> *Puerto Rico Order* at ¶12.

<sup>18</sup> *Puerto Rico Order* at ¶14.

<sup>19</sup> *Puerto Rico Order* at ¶¶13-14. Contrary to Smartcomm's arguments at page 13 of the Smartcomm Petition, Sprint Nextel is entitled to 165 channels in 800 MHz rebanding. In the absence of Preferred it would receive 160 channels (of 280 ESMR band) channels. Because the Bureau requires Sprint Nextel to accommodate the other EA-ESMR eligibles first, Sprint Nextel's initial channel allotment is reduced to 35 channels.

<sup>20</sup> See *800 MHz Memorandum Opinion and Order* at ¶27. A handful of EA licensees in the U.S. have elected to retune to the ESMR band and are already subject to

#### **IV. PREFERRED'S SITE LICENSES HAVE ALMOST ALL BEEN CANCELLED**

The main point of contention for the Preferred Petition is that Preferred's "site-licenses" are somehow not being adequately accounted for in the *Puerto Rico Order*. Preferred fails to understand, however, that all but one of the 800 MHz "site licenses" held by Preferred have expired and have been cancelled, in most cases over a year ago.<sup>21</sup> Thus, any "rights" Preferred may have had at one point have all been extinguished by its own failure to maintain its licenses. Thus, the Bureau has made no error in the *Puerto Rico Order* in laying out the general allocation of the three EA licensees for the ESMR band in Puerto Rico.

In addition to Preferred's site licenses cancelling over a year ago, Preferred fails to understand that its "site licenses" are only entitled to be retuned to the ESMR band if it can demonstrate that its site licenses were an integrated part of its operating EA licensed based system as of November 22, 2004.<sup>22</sup> Preferred is utterly incapable of demonstrating this for three reasons. First, Preferred's site licenses have cancelled and therefore Preferred cannot demonstrate that the channels are currently part of an integrated system. Second, even if Preferred had not allowed its site licenses to expire in 2009, its entire inventory of site licenses went unconstructed and non-operational for years prior to 2004

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this same rule if they fail to deploy a compatible ESMR system. Puerto Rico EA licensees seeking to deploy ESMR systems should be treated no differently than other licensees in the mainland U.S.

<sup>21</sup> The only valid FCC license on the FCC's ULS database held by Preferred is WCFG599 (854.6375 MHz). Sprint Nextel has identified over 75 GX licenses formerly licensed to Preferred in Puerto Rico which have all expired and/or been cancelled.

<sup>22</sup> *800 MHz Supplemental Order* at ¶ 79.

and therefore cancelled as a matter of law.<sup>23</sup> Third, to have an integrated EA and site specific based system warranting relocation, the FCC's rules require that the *EA based system* was operational in 2004, which Preferred's system was (and still is) not. For all these reasons, any appeal of the *Puerto Rico Order* based on Preferred's perceived rights based on its site based licenses can be rejected.

**V. PREFERRED, LIKE ANY OTHER EA-BASED LICENSEE SEEKING TO RELOCATE TO THE ESMR BAND, IS ONLY ENTITLED TO ITS EA WHITE SPACE**

Preferred's Petition reargues settled ground on the treatment of its EA-based licenses. Preferred seeks unencumbered relocation to the ESMR band, despite the fact that its (unconstructed) EA licenses have been encumbered by third-parties for years. Preferred's own filings demonstrate channel-by-channel that Preferred does not hold entirely clear spectrum today.<sup>24</sup> Thus, if its EA licenses are entitled to retune to the ESMR band, it is rightly entitled only to the same level of cleared spectrum that it had as of November 22, 2004.<sup>25</sup> This same rule applies to North Sight and Sprint Nextel in Puerto Rico.

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<sup>23</sup> January 5, 2009 Deposition of Charles Austin, In the Matter of Preferred Communications Systems, Inc. *et al.*, Docket No 07-147 at Page 171.

<sup>24</sup> See Attachment E to Preferred Petition.

<sup>25</sup> Much of the "encumbrances" on Preferred's EA licenses listed on Attachment E were the site licenses held by Preferred that it let expire in 2009. Sprint Nextel does not argue that Preferred is entitled to the "white space" created by the cancellation of its own site licenses in its own EA license blocks. Sprint Nextel does object to the concept Preferred appears to be advocating that it should receive clear EA spectrum and additional channels based on its site licenses.

These concepts are well settled in 800 MHz band reconfiguration.<sup>26</sup> Just recently, the Bureau reaffirmed these basic principles for EA licensees in its *Colorado CallComm* decision.<sup>27</sup> Smartcomm's and Preferred's attempt to re-litigate these issues should be summarily rejected.

## **VI. PETITIONER'S ATTACKS ON SPRINT NEXTEL ARE ABSURD**

Smartcomm and Preferred make other attacks on Sprint Nextel in their appeal of the *Puerto Rico Order* all of which are unfounded. Smartcomm and Preferred both complain that Sprint Nextel's long-existing site licenses in Puerto Rico should not be permitted to continue to encumber Preferred's EA licenses upon relocation to the ESMR band. Smartcomm and Preferred fail to accept, however, that Preferred is not entitled to clear 800 MHz spectrum – it is encumbered today by Sprint Nextel's site licenses. Upon relocation, Preferred would have access to the same spectrum it has today,

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<sup>26</sup> Improving Public Safety Communications in the 800 MHz Band, *800 MHz Supplemental Order* and Order on Reconsideration, 19 FCC Rcd 25120 (2004) at ¶ 79 (A non-ESR licensee relocating to the ESMR band receives “only the analog of comparable facilities, the same unencumbered area that it had before it relocated, i.e., its ‘white area.’ We emphasize that ‘white area’ the non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the ‘white area’ that existed before it relocated and which it had on the date the 800 MHz R&O was published in the Federal Register.”); *See also* Improving Public Safety Communications in the 800 MHz Band, *800 MHz Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005) at ¶¶ 23-35.

<sup>27</sup> In the Matter of Colorado CallComm, Inc. and Sprint Nextel Corporation, *Memorandum Opinion and Order*, DA 10-502 at ¶ 2 (PSHSB released March 26, 2010).

assuming that its licenses aren't revoked or cancelled for failure to meet applicable construction requirements.<sup>28</sup>

In fact, Preferred makes the nonsensical argument that Sprint Nextel has somehow already lost its 800 MHz spectrum in Puerto Rico. Sprint Nextel has spectrum below 862 MHz today, including an EA license as well as numerous site licenses. A good portion of this spectrum is being used to accommodate other incumbent licensees in its retuning efforts. Any remaining spectrum between 854-862 MHz will eventually be returned to the Commission for relicensing by public safety. Until further progress is made in rebanding in Puerto Rico, however, Sprint Nextel is not required to vacate this spectrum. Preferred fails to understand (or recognize) this key aspect of rebanding.

Preferred also re-raises an issue that has been well settled by the Commission. Preferred appears to raise on appeal whether Sprint Nextel should have received 10 MHz of 1.9 GHz spectrum as part of the comprehensive 800 MHz band reconfiguration solution in 2004 when Sprint Nextel holds less 800 MHz spectrum in Puerto Rico than it held in other parts of the U.S. Sprint Nextel received 10 MHz of 1.9 GHz replacement spectrum *nationwide* based upon a variety of factors, including Sprint Nextel's commitment to perform 800 MHz rebanding across the U.S, making its spectrum available to do so and funding the nationwide initiative. The fact that Sprint Nextel had

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<sup>28</sup> Typically, Sprint Nextel negotiates with a relocating EA licensee to remove the Sprint Nextel site license encumbrances in exchange for the relocating EA licensee receiving less total (but cleared) channels. In other words, Preferred may receive more cleared spectrum than it is *entitled to* but less total discrete channels than it has today. These agreements, which have been approved by the 800 MHz TA in the past would appear to resolve Smartcomm's and Preferred's concerns. Such an agreement, however, must be mutually agreed upon.

comparatively less 800 MHz spectrum in Puerto Rico is irrelevant to its 10 MHz 1.9 GHz license in Puerto Rico.

The reality is that since the adoption of the *800 MHz Report and Order* in 2004, Sprint Nextel has not only facilitated retuning of nearly 1200 Phase I licensees, but also more than 500 Phase II licensees. Overall, over 70% of all non-border licensees have completed rebanding across the US and work is now well underway in the US – Canada Border Area as well. Sprint Nextel is fully performing its end of its commitment to the Commission and public safety community.

Preferred's complaints about Sprint Nextel's receipt of 1.9 GHz spectrum are absurd. *In the 1.9 GHz band, Sprint Nextel and the BAS broadcasters have completed the 1.9 GHz transition, including the relocation of all BAS broadcasters in Puerto Rico.* Given these facts, it strains credibility to argue that Sprint Nextel should somehow lose access to its recently cleared 1.9 GHz spectrum.

## **VII. CONCLUSION**

For the reasons stated herein, the Bureau should immediately dismiss and/or reject the three Petitions for Reconsideration filed in this proceeding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, James B. Goldstein, hereby certify that I have, on this 2nd day of August 2010, caused to be delivered by electronic mail, a copy of the foregoing Opposition to Petitions for Reconsideration to the following:

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