

**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)
)

PETITION FOR DECLARATORY RULING

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Executive Summary

Sprint Nextel Corporation (“Sprint”) has substantially completed reconfiguring the 800 MHz Land Mobile Radio Band in the United States. Over 99% of all non-border U.S. and U.S. - Canada border area public safety incumbents have executed Frequency Reconfiguration Agreements (“FRA”) with Sprint to retune their systems and over 80% of them are operating on their new channel assignments in the reconfigured 800 MHz band.

Sprint has spent more than \$3.1 billion to carry out its responsibilities under the Commission’s 800 MHz Reconfiguration Plan and is contractually committed to spend at least \$309 million more to complete this project consistent with the Commission’s 800 MHz Reconfiguration Orders.¹ Importantly, every cost estimate, term and condition contained in each executed FRA has been reviewed and approved by the 800 MHz Transition Administrator (“TA”) – the entity created by the Federal Communications Commission (the “Commission”) to oversee day-to-day 800 MHz Reconfiguration activities. When added to the Commission-determined \$2 billion value of the 800 MHz spectrum Sprint contributed to make 800 MHz Reconfiguration possible, Sprint’s expenses and contributions far exceed the Commission-determined \$4.8 billion value of the 1.9 GHz “G Block” “replacement” spectrum the Commission assigned to Sprint in exchange for its financial and spectrum contributions to carrying out the Reconfiguration Plan. As a result, Sprint does not and will not owe an “anti-windfall” payment to the U.S. Treasury under the terms and provisions of the Commission’s 800 MHz Reconfiguration Plan.

¹ In addition, Sprint estimates that licensees not currently under a TA-approved contract, including those impacted by the delayed Mexican border area band plan, will add an additional approximately \$147 million to these commitments.

In this Petition for Declaratory Ruling, Sprint asks the Commission to confirm that it will not have to make an anti-windfall payment. Although the Commission's Public Safety and Homeland Security Bureau ("PSHSB") recently extended until July 1, 2013 the formal cost "true-up" required by the Commission's Reconfiguration Plan – so as to include in the "true-up" the additional payments and expenses Sprint will incur – Sprint respectfully submits that the anti-windfall "true-up" can be conducted now based on the extensive cost and payment information already available to the TA and the Commission. This information will confirm that Sprint's actual and projected payments in support of 800 MHz Reconfiguration significantly exceed the Commission's anti-windfall payment threshold.

This Petition also requests that upon concluding that no anti-windfall payment is required, the Commission advance the public interest by simplifying and streamlining certain aspects of this project to best facilitate completing 800 MHz Reconfiguration. For example, some of the record-keeping requirements the TA imposes on 800 MHz public safety incumbents will no longer be necessary once the anti-windfall payment determination is completed. Similarly, the TA will no longer need some of the post-retuning audit and documentation processes it currently requires if no further accounting is needed for anti-windfall payment purposes. Eliminating unneeded administrative and record-keeping burdens would free all parties to focus their resources on bringing 800 MHz rebanding to a successful conclusion as expeditiously as possible.

Sprint also respectfully requests that the Commission eliminate the minimum amount of the Letter of Credit ("LOC") it requires Sprint to maintain to backstop its relocation funding obligations. The Commission has never had to draw on the LOC to fund 800 MHz Reconfiguration, as Sprint has over the past seven years timely paid the retuning expenses of

nearly 1,800 public safety and other incumbent 800 MHz band licensees. With the non-border and U.S. – Canada border area reconfiguration nearly complete, the Commission should eliminate the current \$850 million LOC “floor” to reflect the well-documented projected remaining 800 MHz reconfiguration costs of approximately \$457 million, and continue to authorize quarterly reductions consistent with Sprint’s ongoing expenditures. Sprint and the TA have accurately identified the remaining retuning expenses Sprint is required to fund based on the remaining outstanding payments under executed Planning Funding Agreements (“PFAs”) and/or FRAs, plus an allowance based on the TA’s now comprehensive funding metrics database to cover all remaining licensees, including those in the U.S. – Mexico border, that have not yet executed either PFA and/or FRA agreements with Sprint.

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Frequency Reconfiguration Agreements (“FRAs”) with Sprint to fund their reconfiguration costs; in fact, over 80 percent of them have already transitioned to and are operating on their new 800 MHz channel assignments. This substantial reconfiguration progress has already minimized the risk of harmful interference among public safety and CMRS systems in much of the nation.

The Commission’s 2004 *800 MHz Report and Order* required that Sprint make an “anti-windfall payment” to the U.S. Treasury of any shortfall between the value of the 10 MHz of 1.9 GHz replacement spectrum the Commission assigned to Sprint in this proceeding, valued by the Commission at \$4.86 billion,⁵ and the sum of the value of the 800 MHz spectrum Sprint contributed to support reconfiguration, valued by the Commission at \$2.059 billion,⁶ and Sprint’s costs in carrying out the *800 MHz Report and Order*, including Sprint’s costs in carrying out 800 MHz Reconfiguration and in clearing the 1990 – 2020 MHz Broadcast Auxiliary Service (“BAS”) incumbents⁷ to make that spectrum block available for Sprint and for Mobile Satellite Service (“MSS”) licensees.⁸

Sprint’s expenses in carrying out 800 MHz Reconfiguration include retuning over two-thousand 800 MHz commercial, private land mobile and public safety incumbents from their channel assignments under the old 800 MHz band plan to their new channel assignments in the reconfigured band plan. It includes Sprint’s expenses to relocate nearly one-thousand 1.9 GHz BAS incumbents, less any reimbursement paid by new entrants to the cleared former BAS

⁵ See *800 MHz Report and Order* ¶ 297.

⁶ *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 ¶ 36 (2004) (*800 MHz Supplemental Order*).

⁷ See *800 MHz Report and Order* ¶ 330.

⁸ See *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, ___ FCC Rcd ___, WT Docket 12-70, FCC 12-151 ¶¶1-2(2012) (Order permitting terrestrial mobile broadband in the cleared BAS spectrum).

spectrum.⁹ It also includes Sprint's expenses for funding the ongoing operations of the TA, the bank and trustee fees Sprint pays to maintain the 800 MHz Letter of Credit ("LOC"), and Sprint's administrative costs of supporting and administering 800 MHz band reconfiguration, including negotiating, executing and closing Planning Funding Agreements ("PFAs"), FRAs and Change Orders with affected incumbents. Sprint's internal network costs to retune its 800 MHz spectrum to the 800 MHz ESMR block between 862 – 869 MHz, as required by the reconfigured 800 MHz band plan, are also eligible to be counted in the anti-windfall payment calculation.¹⁰

Sprint's total eligible 800 MHz reconfiguration costs including both spectrum and funding contributions already exceed the value of the \$4.8 billion of 1.9 GHz replacement spectrum assigned to Sprint under the Commission's Reconfiguration plan. Thus, as detailed fully in Appendix A, Sprint has already spent more than \$2.8 billion to implement the Commission's 800 MHz Reconfiguration Plan which, combined with its \$2 billion spectrum contribution, eliminates any basis for an anti-windfall payment.

⁹ Because Sprint received 10 MHz of spectrum in the 1.9 GHz band (1910-1915 MHz/1990-1995 MHz), the Commission's *800 MHz Report and Order* required Sprint to fund and support the relocation of Broadcast Auxiliary Service (BAS) licensees from the 1990 – 2025 MHz spectrum block to the Commission's revised BAS band plan at 2 GHz. Sprint and BAS licensees completed the BAS relocation process in 2010; Sprint has received partial reimbursement for its clearing expenses. Sprint was also required to reimburse a portion of UTAM's costs to clear the 1910-1915 MHz spectrum of unlicensed PCS incumbents prior to 2004. These two categories of Sprint expenses (less the partial reimbursement) are detailed in Attachment A.

¹⁰ The Commission also specified that Sprint may include, for purposes of calculating whether a windfall payment is required, certain capacity-site build costs to allow Sprint the ability to adequately maintain its network performance during those periods when Sprint's spectrum position would be lessened as the reconfigurations took place. Such expenses have not yet been submitted to the TA for review, as Sprint believes that the administrative costs for the TA to review them for credit would exceed any benefit, given the significant amount Sprint has already spent and is still required and estimated to spend, in excess of the \$2.8 billion.

Accordingly, Sprint respectfully requests that the Commission, based on the expense and payment information already available to the TA and the Commission, expeditiously take such actions as are necessary to declare that Sprint will not be required to make an anti-windfall payment.¹¹ Sprint further requests that the Commission, consistent with its past orders, expeditiously review and adjust its 800 MHz reconfiguration program rules and guidelines to reflect this determination.

Sprint also respectfully requests that the Commission reduce the required minimum amount of the 800 MHz Band Reconfiguration LOC from \$850 million to \$457 million – a well-supported and highly reliable estimate of the remaining costs (as of December 31, 2012) for licensees to complete their reconfigurations.¹² The Commission should direct the PSHSB and the TA to continue to calculate the remaining necessary funding, using the same methodology, on a quarterly basis to further adjust (reduce) the LOC to reflect on-going reconfiguration progress and Sprint’s continuing payment of actual reconfiguration expenses.

¹¹ Sprint petitions the Commission to take the actions requested herein pursuant to its authority to issue declaratory rulings or, in the alternative, to address informal requests for action. 47 C.F.R. § 1.2 (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty”); 5 U.S.C. § 554(e) (“The agency, with like effect as in the case of other orders and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty”); 47 C.F.R. § 1.41 (informal request for Commission action); *Improving Public Safety Communications in the 800 MHz Band*, Fourth Memorandum Opinion and Order, 23 FCC Rcd 18512, ¶ 38 (2008) (granting prior Sprint request for informal action regarding true-up process). To the extent necessary, Sprint Nextel requests a waiver of the Commission’s existing rules and orders in order to modify the Commission’s 800 MHz Band Reconfiguration process and achieve the public interest benefits described in this petition. 47 C.F.R. § 1.925(b)(3).

¹² Sprint notes that it would continue to cover incumbent relocation costs even in the very unlikely event the LOC fell below the remaining eligible costs. The LOC is a back-up to Sprint’s ongoing regulatory obligation to provide funding for the eligible costs of retuned incumbents. Additionally, the Tri-Party Agreement allows for increases in the LOC if such increases are deemed necessary.

The actions Sprint requests herein will promote the public interest by enabling the Commission to streamline administration of its 800 MHz band reconfiguration program in light of the substantial progress achieved over the past seven years. It will relieve public safety licensees of significant, unnecessary burdens. Public safety licensees are today subject to an extensive TA-conducted audit and reporting program as to their labor costs and equipment purchases and Sprint's payment of each such retuning expense. A declaratory ruling that Sprint has no anti-windfall payment liability would enable the Commission to streamline such record keeping and audit requirements, thus allowing public safety operators to focus their resources on their primary public safety mission. It would also enable the Commission to refocus the TA's energies on driving the remaining incumbent retunes to completion rather than pursuing audit and cost efforts that will no longer be necessary upon Commission confirmation that Sprint owes no anti-windfall payment. The TA's time and energy is better spent in expediting negotiations with public safety incumbents in the U.S. – Mexico border region and in facilitating executing FRAs with the remaining non-border area incumbents. That, in turn, will enable Sprint and public safety licensees to focus their resources and efforts on retuning the remaining incumbents and thereby minimizing the risk of harmful interference to mission-critical public safety mobile communications.

I. SPRINT WILL NOT OWE AN ANTI-WINDFALL PAYMENT

A. Background

In the license modifications adopted in the *800 MHz Report and Order*, the Commission assigned Sprint spectrum at 1910-1915/1990-1995 MHz to compensate Sprint for its financial and spectrum contributions to the Commission's reconfiguration plan. The Commission valued

this 1.9 GHz spectrum at \$4,855,548,000.¹³ Because the Commission viewed this arrangement as akin to a value-for-value exchange executed through a license modification, it included a provision to ensure that the value of the 1.9 GHz spectrum licensed to Sprint did not exceed the value of Sprint’s financial and spectrum contributions to the 800 MHz reconfiguration plan. Under the Commission’s “true-up” process, Sprint would make an “anti-windfall” payment to the U.S. Treasury if the 1.9 GHz spectrum valuation exceeded the total of:

- (i) The value the Commission attributed to the 800 MHz spectrum Sprint would vacate to effectuate band reconfiguration (\$2,059,000,000);
- (ii) The expenses paid by Sprint to reconfigure the 800 MHz band (including the costs for reconfiguring incumbent systems, the costs of reconfiguring Sprint’s iDEN network, additional capacity for the iDEN network to enable acceptable ongoing network performance during reconfiguration, Sprint’s internal expenses to manage the 800 MHz relocation program, the TA’s expenses, and the cost of maintaining the letter of credit);
- (iii) The expenses paid by Sprint to relocate Broadcast Auxiliary Service licensees from the 1.9 GHz PCS G Block downlink, less any *pro rata* reimbursement Sprint receives from Mobile Satellite Service (“MSS”) licensees for clearing BAS incumbents; and
- (iv) Sprint’s reimbursement to UTAM for its clearing costs related to the 1.9 GHz PCS G Block uplink at 1910-1915 MHz.¹⁴

Simply put, Sprint would owe an anti-windfall payment to the U.S. Treasury only if the expenses enumerated in (ii)-(iv) are less than \$2,796,548,000, i.e., the “break-even amount.”¹⁵

Under the *800 MHz Report and Order*, Sprint and the TA were required to conduct an “accounting” of the expenses listed above within six months of June 26, 2008, the original deadline for completing band reconfiguration.¹⁶ In 2008, the Commission extended this true-up

¹³ See *800 MHz Report and Order* ¶ 297.

¹⁴ See, e.g., *800 MHz Report and Order* ¶¶ 240, 249, 297, 298, 329; *800 MHz Supplemental Order* ¶36.

¹⁵ On the other hand, Sprint remains responsible for 800 MHz reconfiguration costs in excess of \$4.8 B; i.e., incumbent retuning expenses in excess of \$2,796,548,000.

¹⁶ *800 MHz Report and Order* ¶ 330.

deadline, and delegated authority to the PSHSB to grant further such extensions.¹⁷ The PSHSB has extended the “true-up” calculation eight times, most recently in an order extending the deadline to July 1, 2013.¹⁸ As discussed above, Sprint submits that its aggregate expenses pursuant to the Commission’s 800 MHz Reconfiguration Plan significantly exceed the “break-even amount” and thus warrant the Commission conducting an anti-windfall assessment now in an expeditious and cost-effective manner.

B. Reliable, Accurate Information Confirms Sprint Will Not Owe An Anti-Windfall Payment

With the completion of a substantial portion of Sprint’s duties under the *800 MHz R&O*, the record in this proceeding demonstrates that Sprint will not owe an anti-windfall payment. As explained in detail in Appendix A, Sprint has already spent or has contractually committed to spend at least the following amounts in meeting its rebanding obligations:¹⁹

- \$1.98 billion already spent or to be spent to fund 800 MHz incumbent relocations, including the purchase of replacement radios for incumbent licensees, all pursuant to TA-approved FRAs and PFAs;
- \$342 million spent on Sprint’s own program and network costs;
- \$259 million already spent on TA fees;
- \$246 million already spent on LOC fees; and
- \$595 million spent on BAS relocation (after reimbursement from MSS licensees).

¹⁷ The Commission extended the deadline in light of unanticipated circumstances beyond Sprint’s control which prevented completion of 800 MHz reconfiguration and the BAS transition according to the Commission’s original timetable. *Improving Public Safety Communications in the 800 MHz Band*, Fourth Memorandum Opinion and Order, 23 FCC Rcd 18512, ¶ 12 (2008) (*2008 Order*).

¹⁸ *Improving Public Safety Communications in the 800 MHz Band*, Order, WT Docket No. 02-55, DA 12-2070 (released November 27, 2012).

¹⁹ All amounts reflected are as of December 31, 2012.

In sum, Sprint has spent or committed to spend more than \$3.4 billion to date in support of 800 MHz Reconfiguration and BAS Relocation, substantially more than the \$2.8 billion anti-windfall break-even amount. When this amount is added to the projected costs of completing the rest of 800 MHz reconfiguration, including reconfiguration in the U.S. – Mexico border areas, Sprint’s expenditures pursuant to 800 MHz Reconfiguration as required by the Commission’s orders will exceed the anti-windfall payment break-even amount by more than \$750 million.²⁰

1. *The rebanding expenditure data is highly reliable given the extensive third-party oversight and Sprint’s incentives to minimize costs*

The 800 MHz band reconfiguration program has been subject to unprecedented oversight by the Commission, the PSHSB and independent third parties, including the TA. This oversight, the structural financial incentives inherent in the program, and Sprint’s own financial incentives ensures that Sprint’s expenditures in implementing 800 MHz and BAS band reconfigurations are legitimate and creditable in the true-up process.

TA Oversight of 800 MHz Rebanding Costs. The *800 MHz R&O* described the TA as the “project manager” of 800 MHz rebanding, and required the TA to review all incumbent relocation cost estimates “to ensure that the estimate does not exceed the cost of providing comparable facilities.”²¹ The TA and the PSHSB have developed and established highly detailed licensee rebanding cost metrics that “provide an important set of benchmarks for assessing the reasonability of costs.”²² Taking into account these metrics and each incumbent’s particular

²⁰ As noted above, this amount excludes any costs for additional capacity sites Sprint deployed between 2004 and 2012 for which Sprint is entitled to apply for credit against an anti-windfall payment.

²¹ *800 MHz Report and Order* ¶ 198; Appendix E - Annex E.

²² *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 22 FCC Rcd 9818, ¶ 12 (2007) (*2007 Order*). See also < <http://www.800ta.org/content/reporting/metrics.asp> >.

circumstances, the TA reviews *every* PFA and *every* FRA to ensure that incumbent relocation costs are “reasonable and prudent.” As the TA has described, “[f]or each reconfiguration task and associated cost” set forth in an FRA, “the TA will review the details provided to determine whether the tasks identified and the associated costs are reasonable and prudent expenses directly related to the retuning of an 800 MHz system.”²³ Thus, TA approval of a PFA or FRA should be *prima facie* evidence that the expenses and work activities set forth therein are eligible retuning expenses under the Commission’s reconfiguration program and are “reasonable and prudent.” The Commission’s 800 MHz orders, rules and policies should not be construed or contorted to require any additional TA audit or other TA activity to “validate” whether Sprint’s funding of such costs is eligible for inclusion against a possible anti-windfall payment.

The Commission can take additional comfort in crediting Sprint’s expenses in supporting incumbent retuning against the anti-windfall payment contingency by the fact that nearly every 800 MHz FRA has been subject to a mediation process conducted by a TA-appointed mediator that encompassed even closer scrutiny of retuning costs. In addition, a significant number of incumbents dissatisfied with the outcome of mediation sought *de novo* review by PSHSB. The Bureau has in turn issued orders providing further guidance as to the types of retuning expenses that are “reasonable and prudent” for purposes of 800 MHz Reconfiguration.²⁴

²³ TA, *800 MHz Band Reconfiguration – Reconfiguration Handbook* at 80 (Jan. 19, 2011), available at: < http://www.800ta.org/content/resources/Handbook_v4.0.pdf >. See also *800 MHz R&O* ¶ 198.

²⁴ See, e.g., *In the Matter of Illinois Public Safety Agency Network and Nextel Communications, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 11459 (2012); *In the Matter of State of Indiana and Nextel Communications, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 11469 (2012); *In the Matter of Port Authority of New York and New Jersey and Nextel Communications, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 1888 (2012); *In the Matter of County of Hinds, Mississippi and Sprint Nextel Corporation*, Memorandum Opinion and Order and Order on Reconsideration, 26 FCC Rcd 1043 (2011).

Moreover, the full Commission has defined what its “minimum necessary” cost standard means for “determining whether rebanding costs are acceptable and therefore entitled to be credited by Sprint against its windfall payment obligation”:

[T]he term ‘minimum necessary’ cost does not mean the absolute lowest cost in all circumstances. Rather, the term refers to the minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner. We do not expect Sprint to insist on reducing rebanding costs to their lowest possible level if the costs savings it seeks to achieve come at the expense of a reasonable, prudent, and timely approach toward accomplishing the rebanding task in question.²⁵

In other words, the Commission has found that that the “reasonable and prudent” cost standard for determining what Sprint should pay for the specific rebanding work of an incumbent or its contractors and consultants takes into account the overall goals of 800 MHz band reconfiguration – elimination of interference, minimization of burdens on public safety and a seamless transition for public safety operations – *rather than the absolute minimum cost*.²⁶ As the Commission noted, “Achieving these goals may require greater expenditure than the minimum cost required to accomplish a task if these goals were not considered.”²⁷

For example, the Commission has clarified that it is appropriate for Sprint to agree to (and the TA to approve) payment of disputed costs where such payment would avoid greater expense to negotiate and/or mediate the dispute and would further the goal of timely and efficient rebanding.²⁸ The Commission thus has articulated an 800 MHz retuning cost standard

²⁵ 2007 Order ¶¶ 3, 6.

²⁶ 2007 Order ¶ 8.

²⁷ 2007 Order ¶ 9.

²⁸ 2007 Order ¶ 10. On the other hand, the Commission also made clear that both licensee “goldplating” and “rubber stamping” of proposed costs by Sprint and the TA are impermissible. Incumbent licensees are responsible for demonstrating that their retuning costs do not exceed the minimum cost necessary to accomplish rebanding in a reasonable, prudent and timely manner; *i.e.*, Sprint should not accept nor should the TA approve higher costs if a lower-cost alternative is

that provides Sprint and incumbent 800 MHz retunees the flexibility to implement rebanding in a reasonable, prudent fashion taking into account both “minimum necessary cost” and the Commission’s broader 800 MHz Reconfiguration public policy and programmatic goals.

The same standard should apply in an anti-windfall payment true-up; there is no public policy basis for requiring Sprint to fund incumbent reconfiguration under one standard and applying a different standard to crediting its expenses against the windfall payment requirement. *All incumbent relocation costs already approved by the TA as reasonable and prudent should be credited to Sprint in the anti-windfall payment true-up.*²⁹ Sprint should consequently be credited with the full amount it has spent or is contractually committed to spend in support of 800 MHz incumbent reconfiguration pursuant to TA-approved FRAs and PFAs, including expenditures Sprint has made for replacement equipment necessary to implement retuning under TA-approved FRAs.³⁰

clearly available and offers comparable facilities, unless other programmatic goals warrant that additional expense, as discussed above. *See 2007 Order* ¶ 11.

²⁹ Review of Sprint’s 800 MHz expenditures was performed not only by the TA upon initial review of a given PFA or FRA; the TA and Commission have also approved Sprint’s actual cash expenditures through 20 reductions in the 800 MHz Letter of Credit. The Commission set the initial LOC at \$2.5 billion, but permitted the TA, with FCC staff approval, to reduce this amount periodically to reflect Sprint’s ongoing payments of 800 MHz relocation costs. To date, these LOC reductions total \$1.641 billion leaving the current LOC at \$859 million. The TA and the Commission staff approved these 20 reductions because they represented legitimate costs Sprint has already incurred in carrying out its 800 MHz rebanding obligations. The FCC staff and TA-approved LOC reductions therefore provide a highly reliable and conservative estimate of Sprint’s 800 MHz creditable costs to date. Combining the approved LOC reductions total with Sprint’s BAS relocation costs (\$595 million) and other creditable costs – TA fees (\$259 million), LOC fees (\$246 million), and Sprint internal network costs and program costs (\$342 million) – yields a total of \$3.083 billion, well in excess of the \$2.797 billion break-even amount.

³⁰ In accordance with Sprint’s obligations to provide comparable equipment to the licensees and to take all steps reasonable and prudent steps necessary to complete reconfiguration as cost-effectively and expeditiously as possible, Sprint entered into bulk purchase agreements for replacement equipment from the three major suppliers of equipment to public safety agencies which, in some cases, required equipment to be purchased prior to Sprint and the licensees

Oversight of BAS Costs. Sprint’s BAS relocation expenditures have been subject to close scrutiny by an independent third party, the national auditing firm of KPMG LLP, which concluded that Sprint’s representation of these expenditures as accurate “is fairly stated, in all material respects, based on the criteria established” in the *800 MHz Report and Order*.³¹ The Commission has recognized that Sprint’s third-party audited expense statements, along with the requirement that Sprint share copies of BAS FRAs with other 2 GHz new entrants subject to cost-sharing obligations, “will help ensure that the [BAS] relocation costs are legitimate.”³² All of Sprint’s BAS relocation costs – \$595 million (net of the MSS reimbursement) – are legitimate and should be credited in the true-up.

Sprint’s Incentives. Putting aside the extensive financial oversight by third parties, Sprint has strong incentives to limit its 800 MHz and BAS relocation expenditures to reasonable, prudent costs. Sprint acknowledged years ago that it would likely spend more than the \$2.8 billion break-even amount in funding 800 MHz and BAS band reconfiguration.³³ This recognition gave Sprint an *added* financial incentive to minimize rebanding costs consistent with its obligations under Commission orders, because Sprint’s financial obligation is not limited to \$2.8 billion but is uncapped.³⁴ As the Commission has stated in the context of BAS relocation, “in negotiating the frequency relocation agreements, Sprint had every reason to keep the

completing their FRA negotiations. The TA has reviewed the contracts with the manufacturers as well as all purchases made for replacement equipment under the contracts.

³¹ See Letter from Trey Hanbury, Sprint, to Marlene Dortch, FCC Secretary, Attachment at 2, WT Docket No. 02-55 (Oct. 5, 2011).

³² *Improving Public Safety Communications in the 800 MHz Band*, Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, 25 FCC Rcd 13874, ¶ 69 (2010) (*2010 BAS Relocation Order*).

³³ See Sprint, Annual Report (SEC Form 10-K), at 13 (Feb. 29, 2008); Letter from Lawrence Krevor, Sprint, to Marlene Dortch, FCC Secretary, at 7 (June 25, 2008).

³⁴ *800 MHz Report and Order* ¶ 179.

frequency relocation costs low” given that Sprint would be funding these costs out of its own pocket.³⁵ Thus, Sprint has no incentive to permit gold plating by incumbent licensees and no incentive to pay more than a licensee is entitled to receive to achieve comparable facilities. These factors further ameliorate the need for additional audit or examination of Sprint’s expenses for anti-windfall payment determination.

2. *Delaying a “true up” assessment until the completion of 800 MHz band reconfiguration does not help achieve any Commission goal*

The Commission need not wait for additional retuning activities, incumbent closing certifications, or further documentation to complete the true-up process; the necessary data is available *now*. Nor should the Commission require that the TA verify and audit every dollar Sprint spends to implement the 800 MHz reconfiguration plan. *The only relevant issue raised by the anti-windfall true-up provision is whether Sprint’s expenses pursuant to and in accordance with this program have or will exceed the \$2.8 billion break-even amount, not the precise amount by which it will be exceeded.*³⁶ Whatever that precise amount may be, the information set forth in Appendix A demonstrates that Sprint will exceed the break-even amount by hundreds of millions of dollars. Indeed, if there is any risk of error, it is that the tabulation of costs in Appendix A significantly *understates* the amount of money Sprint will ultimately spend to complete 800 MHz band reconfiguration, since the calculation does not include any costs for licensees not under contract (or any administrative costs) after December 31, 2012.

³⁵ 2010 BAS Relocation Order ¶ 69.

³⁶ In Appendix A, Sprint demonstrates that it has spent more than \$3.1 billion to date and has contractual agreements to spend at least \$309 million more under TA approved FRAs. While the \$309 million in commitments have not yet been paid, they are costs Sprint is legally obligated to pay if invoiced by the licensee. In looking at historical results for the 72% of contracts that have already closed in the Reconfiguration program, over 90% of the contract values, as amended, have been paid; therefore, it is reasonable to assume that at least 90% of these costs will ultimately be paid by Sprint.

Further delaying a declaration of no anti-windfall payment would thus serve no legitimate purpose and would be contrary to the Commission’s prior orders, which anticipated completing a true-up before the end of rebanding. In its 2008 order, the Commission expressly declined to postpone the true-up until the conclusion of band reconfiguration, reasoning that indefinitely delaying the true-up would create unnecessary uncertainty. The Commission stated that “it is possible that Sprint could incur sufficient rebanding costs before rebanding is complete to eliminate the possibility of a windfall payment, in which case there would presumably be no need to wait until rebanding completion to conduct the true-up.”³⁷ In a 2010 order, the Commission reiterated that the true-up “could occur before the 800 MHz realignment is complete” given that the “expected relocation costs for the 800 MHz transition are so large that Sprint does not now expect to make an anti-windfall payment.”³⁸ That time is now.

The *800 MHz Report and Order* provides that the TA should use estimates to conduct the true-up in the event band reconfiguration has not been completed by the true-up deadline.³⁹ This mechanism – which is delineated in greater detail in the Tri-Party Agreement among Sprint, the TA, and the LOC trustee – *requires* the TA to complete the true-up using such estimated costs rather than waiting for closing certifications from all licensees being retuned and the completion of an audit of all costs.⁴⁰ The Commission should instruct the PSHSB and the TA to initiate this

³⁷ *Improving Public Safety Communications in the 800 MHz Band*, Fourth Memorandum Opinion and Order, 23 FCC Rcd 18512, ¶ 11 (2008).

³⁸ *Improving Public Safety Communications in the 800 MHz Band*, Fifth Report and Order, 25 FCC Rcd 13874, ¶ 7 & n. 12 (2010).

³⁹ *800 MHz Report and Order* ¶ 332.

⁴⁰ Tri-Party Agreement § 3.10(b). Section 3.10(b)(x) of the Tri-Party requires the TA to conduct a “Final Amount” reconciliation once rebanding is completed and the TA has received closing certifications from all remaining retuned licensees regarding the completion of their reconfigurations and the sums paid for their reconfiguration work. *See also 800 MHz Report and Order* ¶ 330. The Commission should waive any provision in either its prior orders or in the Tri-

process and expeditiously conduct the true-up assessment based on the cost data set forth in Appendix A.⁴¹

C. Conducting the True-Up Assessment Now Will Allow the Commission to Streamline Rebanding and Ease Unnecessary Burdens on Public Safety Licensees and on Sprint

A declaratory ruling directing the TA to complete the true-up assessment based on the cost information set forth in Appendix A will serve the public interest by establishing certainty. It will also significantly reduce the need for Sprint and public safety licensees to continue to comply with burdensome post-retuning documentation and auditing procedures related to the true-up. For example, after a public safety licensee completes its retuning, it currently must undergo the TA's Actual Cost Reconciliation, which requires the agencies to dedicate scarce resources to reviewing and documenting every hour worked (by day, by person, by task) and every dollar spent in accordance with the TA-approved FRA or PFA.⁴² Any variations from the cost estimates set forth in its FRA and any PFA, regardless of total magnitude, must be explained and documented in detail by the licensee. Sprint also must dedicate staff resources to this process as well as funding the expenditures of the TA's auditing process.

As noted above, the TA performs extensive reviews of all PFAs and FRAs prior to their execution specifically for the purpose of ensuring that costs are reasonable and prudent and do not include any licensee "goldplating." The TA should continue to play an important role in overseeing FRAs and PFAs and guiding incumbents as to reasonable and prudent cost requests in

Party Agreement requiring any such "Final Amount" reconciliation or any requirement that the true-up be supported by certifications from *all* licensees that retune their systems. As described above, even without certifications from all licensees, there is currently more than sufficient information in the record to conduct an accurate, and final, true-up.

⁴¹ While the Tri-Party Agreement calls for a 6-month period to calculate the Anti-Windfall estimate, we believe that more than sufficient information readily exists such that a 60-day period to conduct the estimate is more than reasonable.

⁴² See < http://www.800ta.org/content/resources/ACR_Fact_Sheet.pdf >.

negotiations, but its multiple review processes are redundant and unwarranted, since Sprint's expenditures will clearly exceed the break-even amount. The proposed declaratory ruling will thus enable the Commission (or the PSHSB) to streamline the post-retuning and closing procedures⁴³, thereby significantly reducing the financial and staff resources public safety licensees (and Sprint) must dedicate to post-retuning activities. This streamlining will allow the parties to focus on completing the remaining incumbent relocations and bringing 800 MHz reconfiguration to a successful conclusion.

II. THE COMMISSION SHOULD REDUCE THE LOC MINIMUM BELOW \$850 MILLION

The *800 MHz Report and Order* required Sprint to obtain an irrevocable LOC in the amount of \$2.5 billion to secure its obligation to fund 800 MHz band incumbent relocations.⁴⁴ In its *800 MHz Supplemental Order*, the Commission provided that the TA, after receiving Commission concurrence, may direct the LOC trustee to reduce the LOC on a quarterly basis to reflect the payments Sprint has made to fund incumbent relocations.⁴⁵ The Commission stated, however, that in no event shall the value of the LOC fall below \$850 million.⁴⁶ Consistent with this order, the LOC has been reduced over the years to reflect Sprint's substantial reconfiguration payments. The LOC amount currently stands at \$859 million.

⁴³ It should be noted that nothing in this request is intended to modify any of the requirements and obligations of either Sprint or an incumbent licensee contained in individual PFAs or FRAs, as amended, and the schedules thereto.

⁴⁴ *800 MHz Report and Order* ¶¶ 182, 325. In its *800 MHz Supplemental Order*, the Commission clarified that draws on the LOC are only necessary in the event Sprint fails to make a payment required under the Commission's orders to implement 800 MHz band reconfiguration. *800 MHz Supplemental Order* ¶¶ 15-17. Sprint has never failed to make a required payment.

⁴⁵ The TA also has the authority to require Sprint to increase the LOC amount in the event rebanding cost projections exceed the current LOC amount. Such a scenario is unlikely and has not occurred to date.

⁴⁶ *800 MHz Supplemental Order* ¶ 18; *800 MHz Report and Order* ¶ 183.

Although the *800 MHz R&O* established an \$850 million “floor” for the LOC, it also provided a mechanism for eliminating the floor and reducing the LOC further in the event border area band reconfiguration was not completed according to the Commission’s initial rebanding schedule. Accordingly, the Commission established a process for using cost estimates both to conduct the true-up and to lower the LOC below \$850 million. In particular, the *800 MHz R&O* states that:

the Transition Administrator shall estimate how much completing [800 MHz] reconfiguration will cost. Within thirty days of the completion of this estimate [Sprint] shall elect to either extend the life of the letter(s) of credit or secure a separate letter of credit to cover the costs of border area reconfiguration.⁴⁷

The Tri-Party Agreement implements this aspect of the *800 MHz Report and Order*, requiring the TA to estimate how much it will cost to complete reconfiguration of the “Remaining Licensees” (the “Estimate”).⁴⁸ After completion of the true-up confirming that Sprint does not owe an anti-windfall payment, the TA must notify the LOC trustee and Sprint “that any letters of credit in excess of the Estimate may be cancelled.”⁴⁹

In addition to conducting the true-up using the estimates in Appendix A, the Commission should implement the provisions in the *800 MHz Report and Order* and Tri-Party Agreement to reduce the LOC below \$850 million. As described above, Sprint’s role in implementing band

⁴⁷ *800 MHz Report and Order* ¶ 332.

⁴⁸ Tri-Party Agreement § 3.10(b)(ix). Section 3.10(b) of the Tri-Party Agreement defines “Remaining Licensees” to mean licensees (both border licensees as well as non-border areas as designated by Commission order) that have not submitted to the TA a certification that all necessary reconfiguration work has been completed for the licensee and that the licensee has agreed with Sprint on the total costs paid for such reconfiguration. The Commission should clarify that the term “Remaining Licensees” means only those licensees that have not completed the retuning of their systems. A licensee that has completed retuning should *not* be considered a “Remaining Licensee” even if it has not yet completed the TA’s reconciliation, closing and certification process.

⁴⁹ Tri-Party Agreement § 3.10(b)(ix) (as long as the Letter of Credit amount is “not less than the Estimate, any other Trust Assets shall be returned by the [LOC] Trustee to” Sprint).

reconfiguration in non-border areas is substantially complete. The LOC floor of \$850 million far exceeds the estimated cost of \$457 million to complete reconfiguration for the remaining incumbents that must be retuned, as detailed in Appendix B. Sprint accordingly requests that the Commission direct the TA and LOC trustee to reduce the LOC to \$457 million. The Commission should also require, consistent with current practice, that the LOC be calculated quarterly and adjusted down as Sprint continues making rebanding payments and licensees complete the negotiations of their PFAs or FRAs (including any amendments, change orders or close-out adjustments), and to the extent necessary delegate authority to the PSHSB to do so.⁵⁰

As explained above, Sprint's proposed reduction of the LOC is consistent with the Commission's prior orders. The \$850 million "floor" no longer serves a public interest purpose because it far exceeds the amount necessary to secure the funding necessary to complete the remaining 800 MHz system reconfigurations. Maintaining this floor and prohibiting further reductions of the LOC will only serve to impose significant unwarranted financial burdens on Sprint. Sprint spends approximately \$1,200 daily in carrying costs for every \$10 million included in the LOC amount.⁵¹ Reducing the LOC to \$457 million, with subsequent reductions to reflect future rebanding payments or adjustments to estimates, will thus serve the public

⁵⁰ Sprint recognizes, of course, that the TA has the right to increase the LOC amount if necessitated by revised cost projections. Given, however, the reliability of the current cost metrics and cost projections based on hundreds of PFAs and FRAs, Sprint submits that this contingency is very unlikely.

⁵¹ Said another way, the approximately \$402 million of excess LOC requirements has already cost Sprint in excess of \$17 million for just 2012, or in excess of \$88 million over the life of the program.

interest by reducing unnecessary financial burdens while at the same time ensuring that sufficient funds are irrevocably available to complete 800 MHz rebanding.⁵²

III. CONCLUSION

The Commission has consistently sought to promote an efficient reconfiguration plan that avoids imposing unnecessary burdens and costs on licensees.⁵³ The Commission should continue to ensure an efficient reconfiguration process as Sprint and incumbent licensees near completion of 800 MHz non-border area reconfiguration and continue to make strong rebanding progress in the border regions. It can do so by conducting an anti-windfall payment true-up now using the cost information set forth in Appendix A, and thus confirm that Sprint will not owe an anti-windfall payment. The Commission should also confirm that the LOC may be reduced below the current \$850 million “floor” and be adjusted down as the final stage of 800 MHz rebanding progresses. Both steps are consistent with the Commission’s prior orders and

⁵² See *800 MHz Report and Order* ¶ 183 (“allowing reductions in the letter(s) of credit will relieve [Sprint] of an unnecessary financial burden and ... [Sprint] may use the monies freed by the reduction to improve or expand its network, including its operations in the 1.9 GHz band”).

⁵³ See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 22 FCC Rcd 9818, ¶ 9 (2008).

will significantly reduce unnecessary costs and burdens for Sprint and public safety licensees without jeopardizing the integrity or completion of the Commission's 800 MHz Reconfiguration Plan.

Respectfully submitted,

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Appendix A

Appendix A - 800 MHz Report & Order Spending Inception-to-Date through December 31, 2012
(\$s in Millions)

	Cash Expenditures Through December 31, 2012	Payments Due to Licensees Under TA- Approved Contracts	Total Anti-Windfall Estimate as of December 31, 2012 ⁽¹⁾
800 MHz Incumbent Reconfiguration Costs:			
Licensee Costs under TA-Approved PFA or FRA contracts	\$ 771.8	\$ 309.1 ⁽²⁾	\$ 1,078.9
Equipment Costs to Fulfill Licensee Contracts	864.0		864.0
Equipment Manufacturer Software Development Costs	<u>37.4</u>		<u>37.4</u>
800 MHz Incumbent Reconfiguration Costs	<u>1,673.2</u>	<u>309.1</u>	<u>1,980.3</u>
Sprint Nextel Costs:			
Sprint Letter of Credit Fees	246.2		246.2
Sprint Internal and External Labor	181.9		181.9
Sprint Incumbent-Related Costs	10.3		10.3
Sprint Network Costs	<u>149.8</u>		<u>149.8</u>
Total Sprint Nextel Costs	<u>588.2</u>		<u>588.2</u>
TA Fees	<u>258.7</u>		<u>258.7</u>
Total Costs associated with 800 MHz Reconfiguration	<u>2,520.1</u>	<u>309.1</u>	<u>2,827.2</u>
1.9 GHz Relocation Costs:			
Gross paid per KPMG statement (excluding UTAM payment)	717.0		717.0
UTAM payment	13.0		13.0
Less amounts received from MSS Licensees	<u>(135.0)</u>		<u>(135.0)</u>
Net 1.9 GHz Relocation Costs ⁽³⁾	<u>595.0</u>		<u>595.0</u>
Total Costs Expended, or Contracted to be Expended, in Accordance with the 800 MHz Report and Orders	<u>\$ 3,115.1</u>	<u>\$ 309.1</u>	<u>\$ 3,422.2</u>

(1) Does not include any estimate of costs associated with licensees that are not currently under contract or TA, Sprint, or LoC fees that have already been, or would be expected to be incurred, after September 30, 2012

(2) While these costs have not yet been paid, they are costs Sprint is legally obligated to pay if invoiced by the licensee. In looking at historical results for the 72% of contracts that have already closed, over 90% of the contract values, as amended, have been paid; therefore, it is reasonable to assume that at least 90% of these costs will ultimately be paid by Sprint.

(3) As noted in the 800 MHz Transition Administrator's Quarterly Progress Report for the Quarter Ended September 30, 2012, Sprint has spent \$610.4 million on the 1.9 GHz Relocation Program; however, Sprint notes that certain of these costs were incurred after the final KPMG report was issued. Therefore, Sprint has elected to not include those post-report cash expenditures in this analysis.

Appendix B

Appendix B - 800 MHz Report & Order Projected Remaining Letter of Credit Balance as of December 31, 2012
(\$s in Millions)

Open Commitments under Existing TA-approved contracts	\$ 309.1
Estimated Remaining Contracts to be Negotiated:	
All licensees except those impacted by Mexican border band plan ⁽¹⁾	24.9
Mexican border public safety licensees ⁽²⁾	107.9
Mexican border GB/ILT licensees ⁽³⁾	<u>14.6</u>
Total Estimated Remaining Required for the Letter of Credit, as of 12/31/12	456.5
Letter of Credit as of 12/31/12	<u>858.5</u>
Letter of Credit Reduction	<u>\$ 402.0</u>

(1) All but one of these licensees in this category have provided at least cost estimates, and 85% of the dollars have been fully negotiated and were in the approval process as of 12/31/12

(2) Estimated using TA-published metrics, including \$3 million for PFAs

(3) Estimated using long-standing averages based on costs per gross channel to be retuned