December 21, 2005

Ms. Catherine W. Seidel
Acting Chief Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Status of 800 MHz Rebanding (WT Docket 02-55)

Dear Ms. Seidel:

RCC Consultants, Inc. ("RCC"), by this letter and the accompanying memorandum, respectfully offers to the Federal Communications Commission (the "Commission") a perspective upon the process of reconfiguring the 800 MHz Band (the "800 MHz Rebanding") that is materially different from that set forth in either:

- The Quarterly Report of the 800 MHz Transition Administrator (the "TA") which was submitted to the Commission on November 10, 2005 (the "TA's Report"); or

- The comments filed with the Commission on December 1, 2005, by Sprint Nextel Corporation ("Sprint Nextel") with respect to both the TA's Report and "generally on the status of the 800 MHz band reconfiguration" (the "Comments").

RCC has been deeply involved in the 800 MHz Rebanding in its role as engineering consultants to a substantial number of 800 MHz public safety licensees and, as a product of that involvement, has gained an understanding of the 800 MHz rebanding as that process has been experienced by 800 MHz public safety licensees. RCC has committed substantial resources of its own to understanding the 800 MHz Rebanding as reflected in 18 detailed studies of aspects thereof. (For a list of those studies, the Commission is respectfully referred to Appendix 1 to the accompanying memorandum.) RCC believes that sharing that experience and that understanding with the Commission may be valuable and may enable the Commission to appreciate that:

- The different pictures of the 800 MHz Rebanding offered in the TA's Report and the Comments are certainly incomplete and in certain respects inaccurate and possibly misleading;

- While deeper involvement by the Commission and greater regulatory oversight is, as Sprint Nextel suggests in the Comments, plainly called for, effective involvement and oversight require that the Commission be given a more complete and accurate picture of the status of the 800 MHz Rebanding than either the TA or Sprint Nextel seems inclined to provide; and

RCC Consultants, Inc.
100 Woodbridge Center Drive, Suite 201, Woodbridge, New Jersey 07095-1125, Telephone 732-404-2400, Fax 732-404-2585

- The difference between the realities of the 800 MHz Rebanding and the pictures of the status of the 800 MHz Rebanding offered in the TA's Report and the Comments raises very starkly the question whether the respective interests and approaches of the TA and Sprint Nextel have caused the 800 MHz Rebanding to become detached from the central regulatory purpose of the Commission in ordering that the intended result of the proceeding: is the improvement of public safety communications.

RCC believes that the ancient wit and wisdom reflected in the Greek myth of 'Pandora's Box' offers an insight useful both in understanding why such different pictures of the 800 MHz Rebanding have emerged and in pointing the way toward a cure for the dismal realities of the 800 MHz Rebanding viewed from the standpoint of 800 MHz public safety licensees for which the improvement of their wireless communications was the reason the Commission devoted such great effort and energy to WT Docket 02-55.

By the filing of the Comments, Sprint Nextel assumed the role of Pandora opposite the TA in the role of Epimetheus, who in the myth was Pandora's husband and who counseled her against opening the box left with them by Mercury. The TA's Report may be viewed as a skilled effort to keep the realities of the 800 MHz Rebanding in a closed and sturdy box and thus out of sight, and the filing of the Comments by Sprint Nextel may be viewed as lifting the lid on that box, although only slightly and highly selectively. Pandora, like Sprint Nextel, raised the lid to have one little peep at the contents of the box, but, when the box of the mythical Pandora was opened, out flew all the diseases, sorrows, vices, and crimes that afflict poor humanity which Jupiter had malignantly crammed into the box.

While the TA would have preferred that the box of grim 800 MHz Rebanding realities not be opened at all and while Sprint Nextel would prefer that only a small and carefully selected portion of the dreary contents be viewed, RCC has long wondered whether and when the box would or should be opened wide and the entire contents made accessible. RCC has been concerned that, unless and until the box of dismal 800 MHz Rebanding realities is well and truly uncovered, it will be difficult or impossible for the Commission to have a complete picture of both the distressing realities that afflict 800 MHz licensees, particularly public safety licensees, and the reasons why the high hopes and great expectations engendered in those licensees by the Commission's ordering the 800 MHz Rebanding have been displaced by the distressing realities.

800 MHz public safety licensees have been quite hesitant to criticize publicly the TA or Sprint Nextel, and understandably so, given the power of the TA and Sprint Nextel over those licensees and the manner of their exercise of that power in the 800 MHz Rebanding. RCC believes that acquiescing in the closure or in only one partial opening of the box of 800 MHz Rebanding realities is not or is no longer wise and takes heart in the experience of Pandora who opened her box a second time, and it was well for her that she did, for the gods, with a sudden impulse of compassion, had concealed among the evil spirits one kindly creature, Hope, whose mission was to heal the wounds inflicted by her fellow prisoners. [H.A. Guerber, *The Myths of Greece and Rome* (London 1907)]

RCC submits this letter and its enclosure to open wide the box of 800 MHz Rebanding realities in the expectation that the Commission, once knowledgeable of the distressing contents of that

box, will be able to alter those realities and restore Hope to the 800 MHz public safety licensees for the improvement of their communications.

Indeed, RCC believes that the box of 800 MHz Rebanding realities was filled by both the TA and Sprint Nextel when they lost sight of the central purpose of the Commission to improve public safety communications and harnessed the 800 MHz Rebanding to purposes of their own.

RCC respectfully submits that the TA seems never to have understood or internalized that the central purpose of the Commission in ordering the 800 MHz Rebanding was "**Improving Public Safety Communications in the 800 MHz Band**," the title of the leading docket (WT Docket 02-55) in the *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, July 8, 2004, pursuant to which the 800 MHz Rebanding was decreed by the FCC (the "*July 2004 Report and Order*").

Thus, notwithstanding the clearly expressed purpose of the Commission, the TA, in its Interim Status Report of April 28, 2005, described its mission in relation to the 800 MHz Rebanding as follows:

> "Mission: The TA's mission is to carry out the duties described in the *800 MHz Order* to facilitate the timely completion of the 800 MHz band reconfiguration. The TA will treat all stakeholders fairly, manage stakeholder communications, provide financial oversight and alternative dispute resolution, and work with the FCC to oversee a smooth reconfiguration process." (At pp.1-2)

Apparently from the outset, the TA did not regard its making a contribution to the achievement of the central regulatory purpose of the Commission in relation to the 800 MHz Rebanding – the improvement of public safety communications – as an element of its own mission.

As is more fully explained in Section II.A of the enclosed memorandum, the early-expressed insensitivity of the TA to the central regulatory purpose of the Commission and its failure to align its own mission with the mission of the FCC in relation to the 800 MHz Rebanding have borne fruit in the TA's administration of that process. The TA has been insensitive not only to the central purpose of the Commission in relation to the 800 MHz Rebanding, but also to the means provided by the Commission for the achievement of that purpose without harm to 800 MHz licensees in general and 800 MHz public safety licensees in particular.

Instead of measuring its contribution to the 800 MHz Rebanding by its contribution to the improvement of public safety communications, the TA has:

- Placed the highest value upon adherence or the maintenance of the appearance of adherence to its ill-considered schedule for the 800 MHz Rebanding (the "Regional Prioritization Plan" or "RPP");

- Identified the public interest not as framed by the Commission in terms of the "improvement of public safety communications," but, rather, in terms of protecting the

residual interest of the United States Government in any unused portion of the minimum financial commitment of Sprint Nextel to the 800 MHz Rebanding; and

- Wasted time and money on the preparation of policy statements that have no more than the slightest relationship to the improvement of public safety communications, if indeed any at all.

Instead of administering the 800 MHz Rebanding in a manner consistent with the means provided by the Commission for the achievement of its central purpose for the 800 MHz Rebanding without harm to 800 MHz licensees in general and 800 MHz public safety licensees in particular, the TA has:

- Expressed and demonstrated seriously inadequate sensitivity to the risk of disruption of the operations of mission critical public safety radio systems in the course of the physical rebanding process;

- Included some glaring flaws and gaps in the RPP which could threaten the maintenance of important public safety operations and inter-operations and could fail to provide certain 800 MHz public safety licensees with the means to maintain comparable facilities;

- Failed to address or to address timely certain critical issues brought to the attention of the TA;

- Avoided decision and evaded responsibility in relation to critical matters;

- Brought the soul of an accountant to the 800 MHz Rebanding as expressed in excessive concern with matters concerning reconciling the costs of the process and with preparations to investigate the possibility of fraud or waste by agencies charged with the protection of life and property;

- Asserted authority beyond the extent necessary to provide reasonable supervision of the 800 MHz Rebanding and beyond the measure of authority the Commission likely thought appropriate for the TA;

- Adhered so rigidly to the RPP that it is forcing 800 MHz licensees into a flawed mediation process prematurely as a result of ignoring, among other factors, the failure of the planning funding process which failure is the responsibility of the TA and Sprint Nextel and in no event the responsibility of 800 MHz public safety licensees; and

- Exercised its purported authority in an arbitrary and capricious manner to promulgate rules and rulings that are inconsistent with the central regulatory purpose of the Commission.

Sprint Nextel has been more sensitive than the TA to creating the appearance that the interests of Sprint Nextel are aligned with the central regulatory purpose of the Commission in improving

public safety communications. In his February 7, 2005, letter to then Chairman Powell, Tim Donahue, the President and Chief Executive Officer of Nextel Communications, Inc. (a predecessor of Sprint Nextel, "Nextel") stated the acceptance of Nextel of "the responsibilities, obligations, license modifications, and conditions" of the *July 2004 Report and Order* and indicated that "Nextel stands shoulder to shoulder with public safety and the Federal Communications Commission" and "commends the Commission for establishing a reconfiguration plan that will help ensure effective public safety radio communications in the 800 MHz band."

As is more fully explained in Section II.B of the memorandum, RCC respectfully submits that, notwithstanding its public embrace of public safety and the improvement of public safety communications, Sprint Nextel's actions in connection with the 800 MHz Rebanding are understandable only in relation to two purposes: (i) not spending more than the minimum financial commitment made by Sprint Nextel to the Commission which expressly refused Sprint Nextel's efforts to secure the protection of a cap upon its financial exposure and (ii) assuring Sprint Nextel that it receives the 1.9 GHz spectrum it was conditionally granted by the Commission in exchange for its financial commitment, its spectrum give-ups, and the timely completion of the 800 MHz Rebanding.

The critique of the actions of the TA and Sprint Nextel in relation to the 800 MHz Rebanding summarized above and detailed in the enclosed memorandum proceeds upon the understanding of RCC, apparently not shared by either the TA or Sprint Nextel, that:

- Nowhere in the *July 2004 Report and Order* (or any subsequent pronouncement of the Commission) did the Commission declare it to be the primary purpose or even a secondary purpose of the Commission that (a) Nextel secure spectrum in the 1.9 GHz band or (b) Nextel be protected in certain respects in relation to its funding obligations with respect to the 800 MHz rebanding process or (c) the United States Government receive compensation for the 1.9 GHz spectrum to be received by Nextel; and

- Each of (a) the granting of spectrum to Nextel, (b) the establishing of rules relating to Nextel's funding obligations, and (c) the providing for the possibility that the government would receive compensation was a <u>means</u> deemed by the Commission to be necessary to create a rebanding process that would serve the Commission's primary purpose: Improving Public Safety Communications in the 800 MHz Band.

These points are each explicitly and implicitly made in the *July 2004 Report and Order*, as the enclosed memorandum amply establishes in Section I.A.4.

RCC respectfully submits that that Hope in relation to the 800 MHz Rebanding lies in the return of the 800 MHz Rebanding to its original purpose and to the Commission-established means for the achievement of that purpose.

RCC further respectfully submits that only the Commission's more active role in the 800 MHz Rebanding can reestablish its original goal, reorient the focus of the TA, and redirect the actions of Sprint Nextel, all with a view to placing the 800 MHz Rebanding upon a foundation which is

both firmer than the foundation the TA has been able to build and firm enough to be protected against undermining by Sprint Nextel. By so doing, the Commission will, in the view of RCC, be itself assured and be able to assure all concerned that the implementation of the 800 MHz will, in truth and in fact, lead to the improvement of public safety communications.

The specific suggestions of RCC in these respects are set forth in Part III of the enclosed memorandum. As therein stated, while RCC believes that a change in the schedule is required, RCC does not believe that the serious problems facing the 800 MHz Rebanding will be solved by the simple expedient of a schedule extension. Such an extension, while it would relieve, and perhaps quite properly, the anxieties of Sprint Nextel in relation to its earning the right to its expected grant of 1.9 GHz spectrum, would not, standing alone, solve any of the serious problems that face 800 MHz licensees in general and 800 MHz public safety licensees in particular. RCC respectfully submits that certain general and specific instructions (proposed in Part III of the enclosed memorandum) should be issued by the Commission to the TA and Sprint Nextel in order to rededicate the 800 MHz Rebanding to improving public safety communications. Such rededication has been for some time necessary, but is only now possible because the box of 800 MHz Rebanding realities is finally open, and its contents cannot be ignored.

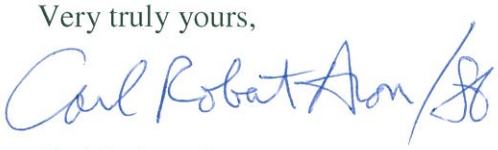
RCC is very much aware of the effect of delay in the implementation of the 800 MHz Rebanding. Any deferral of the resolution of the interference issues that have so clearly and adversely affected public safety operations in the 800 MHz band is tolerable if and only if the problems which can be resolved by serious work during the period of deferral are more serious in their effect upon public safety operations than the continuation of the problem of interference. RCC believes that the threat to public safety operations from an ill-considered or improper implementation of the 800 MHz Rebanding are very much larger than the problems created for public safety licensees by their having to face continued interference for a longer than hoped for period of time.

Moreover, RCC believes that, whether authorized by the Commission or not, the 800 MHz Rebanding will, in fact, be delayed because of existing problems and the pace of the making of required agreements between Sprint Nextel and 800 MHz licensees. RCC respectfully submits that any delay in the 800 MHz Rebanding should be authorized by the Commission and that any delay authorized by the Commission should be used for proper and productive objectives and not granted without accompanying requirements that such delay serve primarily, if not solely, the achievement of the purpose of the Commission in ordering the 800 MHz Rebanding: Improving Public Safety Communications in the 800 MHz Band.

RCC hopes that this letter and the enclosed memorandum engage your interest and that you will view RCC's efforts in those respects as serious and useful contributions to the understanding of the Commission of the state of the 800 MHz Rebanding and to providing the Commission for its consideration a series of specific suggestions for rededicating that proceeding to is original intention and stated purpose: "**Improving Public Safety Communications in the 800 MHz Band**."

RCC would be pleased to have the opportunity to discuss these matters with you and appropriate members of your staff in person or to respond in writing to any questions you or your staff may have as a result of the review of this submission. Should the Commission determine to formalize the consideration of the issues presented in the TA's Report, the Comments, or this submission of RCC by opening an opportunity for public comment upon the schedule for the 800 MHz Rebanding and the problems that have arisen in relation thereto, you have the assurance of RCC that it will participate actively in the Commission's proceeding and that it will continue to try to make constructive contributions to the achievement of the Commission's critical purpose in ordering the 800 MHz Rebanding.

Very truly yours,



Carl Robert Aron
Executive Vice President and Chairman of the Rebanding Support Group
RCC Consultants, Inc.

Attachment

Memorandum of RCC Consultants, Inc.,

on the

Disturbing Factual Realities of the 800 MHz Rebanding

December 21, 2005

Table of Contents

I. Executive Summary

A. Introduction and Background

In this memorandum, RCC Consultants, Inc. ("RCC"), seeks to offer the Federal Communications Commission (the "Commission") certain insights into the realities of the process of reconfiguring the 800 MHz Band (the "800 MHz Rebanding") that are not provided in either:

- The Quarterly Report of the 800 MHz Transition Administrator (the "TA") which was submitted to the Commission on November 10, 2005 (the "TA's Report"); or
- The comments filed with the Commission on December 1, 2005, by Sprint Nextel Corporation ("Sprint Nextel") with respect to both the TA's Report and "generally on the status of the 800 MHz band reconfiguration (the "Comments").

RCC brings to this memorandum the perspective and experiences of 800 MHz public safety licensees which well know how far the 800 MHz Rebanding has departed from the course set by the Commission and how different the realities of the 800 MHz Rebanding are from the pictures drawn in the TA's Report and the Comments.

This memorandum expresses the great differences which RCC has with both the TA and Sprint Nextel concerning the state of the 800 MHz Rebanding, and RCC believes that this memorandum establishes that both the TA and Sprint Nextel must rethink their approach to the 800 MHz Rebanding and make substantial adjustments thereto.

Because RCC doubts such required adjustments will be made *sua sponte*, RCC offers some suggestions that the Commission might consider implementing in order to provide such regulatory force and such serious oversight as is necessary or proper to redirect the 800 MHz Rebanding toward its intended objective: Improving Public Safety Communications.

In a memorandum concerning the unfolding of the 800 MHz Rebanding, one would not have thought it necessary to draw attention to the clearly stated purpose of the Commission in ordering that proceeding or to the clearly stated means provided by the Commission for the achievement of that purpose. That intuition is, however, entirely misplaced in relation to the 800 MHz Rebanding.

However counterintuitive it may be, RCC respectfully submits that all or substantially all of the many troubles plaguing that proceeding have their origin in a loss of focus upon or an intentional departure from:

- the central purpose of the Commission in ordering the 800 MHz Rebanding; or
- the means provided by the Commission for the achievement of that purpose,

on the part of critical participants in the 800 MHz Rebanding, and, in particular, the TA and Sprint Nextel.

1. The Central Purpose of the Commission Needs Reemphasis

Because of that loss of focus or intentional departure from the central purpose of the Commission in ordering the 800 MHz Rebanding, a restatement of the objective of the Commission and the means provided by the Commission for the achievement of those objectives as an introduction to a discussion of the distressing realities of the 800 MHz Rebanding seems both necessary and appropriate.

As the title of the leading docket (WT Docket 02-55) in the *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, July 8, 2004, pursuant to which the 800 MHz Rebanding was decreed by the FCC (the "*July 2004 Report and Order*") demonstrates, the issue being addressed by the FCC was "**Improving Public Safety Communications in the 800 MHz Band**."

Repeatedly in the course of the *July 2004 Report and Order* (and subsequent pronouncements of the FCC), the FCC made clear beyond peradventure or doubt that it was acting in order to assure that public safety agencies had wireless communications systems that were reliable and robust in order to support responses to public safety emergencies. For example, the FCC wrote: "The Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." *July 2004 Report and Order*, ¶ 1, p. 3.

The FCC also plainly stated that the *July 2004 Report and Order* was for the purpose of "fulfilling the Commission's obligation to 'promote safety of life and property through the use of wire and radio communication.'" *July 2004 Report and Order*, ¶ 1, p. 3. (Citing FCC Strategic Plan FY2003-FY2008, p.5 [2002])

The FCC additionally made clear that a specific purpose of the July 2004 Report and Order was "to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band." *July 2004 Report and Order*, ¶ 1, p. 3.

The FCC wrote that "[t]hroughout this proceeding, we have sought a solution to the interference problem that achieves the following paramount goals:

- a solution that abates 'unacceptable interference' caused by ESMR and cellular systems to 800 MHz public safety systems;
- a solution that is both equitable and imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and Business, Industrial and Land Transportation (B/ILT) systems;
- a solution that results in responsible spectrum management; and
- a solution that provides additional 800 MHz spectrum that can be quickly accessed by public safety agencies and rapidly integrated into their existing systems." *July 2004 Report and Order*, ¶ 2, pp. 4-5

2. The Means Provided to Achieve the Commission's Objective Needs Reemphasis

Because of the above-referred-to loss of focus or intentional departure from the means provided by the Commission for the achievement of its central purpose in ordering the 800 MHz Rebanding, a restatement of those means as a part of an introduction to a discussion of the distressing realities of the 800 MHz Rebanding seems both necessary and appropriate.

In ordering the 800 MHz Rebanding, the Commission sought not only to achieve its objective of improving public safety communications, but also to do no harm to 800 MHz licensees in general, or 800 MHz public safety licensees in particular, in the process of achieving that objective. Accordingly, the Commission provided certain clear protections to licensees:

- Protection against more than minimal disruption in the physical rebanding process;

- Protection against a licensee's having radio facilities after the completion of the physical rebanding process that are not at least comparable to the radio facilities of the licensee before the commencement of the physical rebanding process; and

- Protection against a licensee's bearing any of the costs of the 800 MHz Rebanding.

These protections were established in the clearest of terms in the *July 2004 Report and Order*.

a. The avoidance of disruption during the Physical Rebanding Process

The right to uninterrupted or at most minimally disrupted operations during the physical rebanding process is established in the *July 2004 Report and Order* in which the Commission made repeated references thereto.

In order to effectuate the new 800 MHz band plan, the Commission established "a transition mechanism by which … there is minimal disruption to the operations of all affected 800 MHz incumbents during the transition period …" *July 2004 Report and Order*, ¶ 4, pp. 5-6 (Emphasis supplied.)

The Commission wrote that "[t]hroughout this proceeding, we have sought a solution to the interference problem that achieves the following paramount goals," including "a solution that … imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and Business, Industrial and Land Transportation (B/ILT) systems." *July 2004 Report and Order*, ¶ 2, pp. 4-5 (Emphasis supplied.)

The Commission recognized that the 800 MHz Rebanding "raises significant transition issues, particularly with respect to the relocation of public safety and other non-cellular licensees from old to new frequency assignments" and was "sensitive to the concerns raised about service and operational disruption" and "committed to ensuring that the band reconfiguration process does not result in degradation of existing service or an adverse effect on public safety communications and operations." *July 2004 Report and Order*, ¶ 26, p. 18 (Emphasis supplied.)

The Commission, in establishing the final "Commission Band Plan," took into account "five principal components," one of which was "[t]the extent to which incumbents would be treated most fairly, including the degree of disruption associated with channel changes, the ability to provide relocated incumbents with truly comparable spectrum and minimum interruption of critical public safety and CII communications." *July 2004 Report and Order*, ¶ 149, p. 80 (Emphasis supplied.)

The Commission referred to the development of a "Commission Band Plan" that was "consistent with our goals in this proceeding," including "minimizing disruption to existing services." *July 2004 Report and Order*, ¶ 151, p. 82 (Emphasis supplied.)

Finally and quite importantly, the Commission wrote that "[i]f the reconfiguration of a licensee will entail a significant interruption of service during the relocation process, Nextel will fund the installation of a redundant system." *July 2004 Report and Order*, ¶ 201, p. 109 (Emphasis supplied.)

b. The assurance of comparable facilities in the long run

The right to at least comparable facilities after the physical rebanding process is completed is established in the *July 2004 Report and Order* in which the Commission also made repeated references thereto.

The Commission "assign[ed] financial responsibility to Nextel for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities, i.e., systems with comparable technological and operational capability." *July 2004 Report and Order*, ¶ 11, p. 9 (Emphasis supplied.)

The Commission further decreed that "Nextel is obligated to ensure that relocated licensees receive at least comparable facilities when they change channels." *July 2004 Report and Order*, ¶ 178, p. 96

The Commission adopted rules with a view to ensuring "that relocating licensees receive 'comparable facilities' on their new frequency assignments, whether this requires retuning existing equipment or providing replacement equipment." *July 2004 Report and Order*, ¶ 26, p. 18

The Commission, in establishing the final "Commission Band Plan," took into account "five principal components," including "[t]the extent to which incumbents would be treated most fairly, including … the ability to provide relocated incumbents with truly comparable spectrum." *July 2004 Report and Order*, ¶ 149, p. 80 (Emphasis supplied.)

Finally and most importantly, the Commission wrote that "[a]ll relocating licensees shall be relocated to comparable facilities. Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs." *July 2004 Report and Order*, ¶ 201, p. 109 (Emphasis supplied.).

c. All costs to be borne by Nextel Communications Inc. (a predecessor of Sprint Nextel)

The Commission established a general rule that all costs of a licensee's participation in the 800 MHz Rebanding are to be paid by Nextel. The Commission referred to and repeated that rule time and again in the *July 2004 Report and Order*.

In order to effectuate the new 800 MHz band plan, the Commission established that "the associated reconfiguration costs are funded." *July 2004 Report and Order*, ¶ 4, pp. 5-6 (Emphasis supplied.)

The Commission declared that it "assign[ed] financial responsibility to Nextel for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities…" *July 2004 Report and Order*, ¶ 11, p. 9 (Emphasis supplied.)

The Commission similarly stated: "Under the band reconfiguration plan, the principle cost component will be borne by Nextel, which will pay for all channel changes necessary to implement the reconfiguration." *July 2004 Report and Order*, ¶ 178, p. 96

The Commission clearly and purposively imposed the full cost of the 800 MHz Rebanding upon Nextel without any limitation upon the obligation of Nextel and rejected Nextel's effort to have a cap on its obligation. "Nextel has committed to pay up to $850 million for retuning and replacement expenses associated with its own relocation and the related relocations discussed in this *Report and Order*, an amount it claims is sufficient to cover all such costs. We do not believe, however, that Nextel should be able to cap its obligation to pay relocation costs, because doing so could leave public safety and other relocating entities without the means to complete the relocation process in the event that Nextel's estimates prove low and relocations costs exceeded any such cap. Therefore, we decline to 'cap' Nextel's obligations at $850 million or any other amount but instead require Nextel to pay all costs of band reconfiguration, as defined in this *Report and Order*." *July 2004 Report and Order*, ¶ 29, p. 19 (Emphasis supplied.)

The general rule was established by the Commission with full knowledge that underwriting the costs of the 800 MHz Rebanding could be very high as a result of the fact that "band reconfiguration may require extensive replacement of existing 800 MHz band public safety equipment" or otherwise. *July 2004 Report and Order*, ¶ 24, p. 17

The Commission expressly noted that "[b]and reconfiguration will be costly." *July 2004 Report and Order*, ¶ 177, p. 96

Finally and most importantly, the Commission in its *Supplemental Order and Order on Reconsideration* (WT Docket 02-55) (December 22, 2004) (the "*December 2004 Supplemental Order*") reiterated the general rule that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel." ¶15, p.10 (Emphasis supplied.)

3. Loss of Focus and Intentional Departures from the Declared Central Purpose of the Commission and its Approved Means of Achieving that Purpose

RCC respectfully submits that, as noted in the covering letter to this memorandum, the TA seems never to have understood or internalized that the central purpose of the Commission in ordering the 800 MHz Rebanding was "**Improving Public Safety Communications in the 800 MHz Band**." Notwithstanding the clearly expressed purpose of the Commission, the TA, in its Interim Status Report of April 28, 2005, described its mission in relation to the 800 MHz Rebanding as follows:

> "Mission: The TA's mission is to carry out the duties described in the *800 MHz Order* to facilitate the timely completion of the 800 MHz band reconfiguration. The TA will treat all stakeholders fairly, manage stakeholder communications, provide financial oversight and alternative dispute resolution, and work with the FCC to oversee a smooth reconfiguration process." (At pp.1-2)

Apparently from the outset, the TA did not regard its making a contribution to the achievement of the central regulatory purpose of the Commission in relation to the 800 MHz Rebanding – the improvement of public safety communications – as an element of its own mission, which it identified entirely in procedural terms ("timely completion," "treat … fairly," "dispute resolution," and "smooth … process").

As is more fully explained in Section II.A of this enclosed memorandum, the early-expressed insensitivity of the TA to the central regulatory purpose of the Commission and its failure to identify its own mission with the mission of the Commission in relation to the 800 MHz Rebanding have borne fruit in the TA's administration of that process. The TA has been insensitive not only to the central purpose of the Commission in relation to the 800 MHz Rebanding, but also to the means provided by the Commission

for the achievement of that purpose without harm to 800 MHz licensees in general and 800 MHz public safety licensees in particular.

Instead of measuring its contribution to the 800 MHz Rebanding by its contribution to the improvement of public safety communications, the TA has:

- Placed the highest value upon adherence or the maintenance of the appearance of adherence to its ill-considered schedule for the 800 MHz Rebanding (the "Regional Prioritization Plan" or "RPP");

- Identified the public interest not as framed by the Commission in terms of the "improvement of public safety communications," but, rather, in terms of protecting the residual interest of the United States Government in any unused portion of the minimum financial commitment of Sprint Nextel to the 800 MHz Rebanding; and

- Wasted time and money on the preparation of policy statements that have no more than the slightest relationship to the improvement of public safety communications, if indeed any at all.

Instead of administering the 800 MHz Rebanding in a manner consistent with the means provided by the Commission for the achievement of its central purpose for the 800 MHz Rebanding without harm to 800 MHz licensees in general and 800 MHz public safety licensees in particular, the TA has:

- Expressed no sensitivity to or at most modest concern with the risk of disruption of the operations of mission critical public safety radio systems in the course of the physical rebanding process;

- Included some glaring flaws and gaps in the RPP which could threaten the maintenance of important public safety operations and inter-operations and could fail to provide certain 800 MHz public safety licensees with the means to maintain comparable facilities;

- Failed to address or to address timely certain critical issues brought to the attention of the TA;

- Avoided decision and evaded responsibility in relation to critical matters;

- Brought the soul of an accountant to the 800 MHz Rebanding as expressed in excessive concern with matters concerning reconciling the costs of the process and with preparing to investigate the possibility of fraud or waste by agencies charged with the protection of life and property;

- Asserted authority beyond the extent necessary to provide reasonable supervision of the 800 MHz Rebanding and beyond the measure of authority the Commission likely thought appropriate for the TA;

- Adhered so rigidly to the RPP that it is forcing 800 MHz licensees into a flawed mediation process prematurely as a result of ignoring, among other factors, the failure of the planning funding process which failure is the responsibility of the TA and Sprint Nextel and in no event the responsibility of 800 MHz public safety licensees; and

- Exercised its purported authority in an arbitrary and capricious manner to promulgate rules and rulings that are inconsistent with the central regulatory purpose of the Commission.

As noted in the covering letter to this memorandum, Sprint Nextel has been more sensitive than the TA to creating the appearance that the interests of Sprint Nextel are aligned with the central regulatory purpose of the Commission in improving public safety communications. In his February 7, 2005, letter to then Chairman Powell, Tim Donahue, the President and Chief Executive Officer of Nextel Communications, Inc. (a predecessor of Sprint Nextel, "Nextel") stated the acceptance of Nextel of "the responsibilities, obligations, license modifications, and conditions" of the *July 2004 Report and Order* and indicated that "Nextel stands shoulder to shoulder with public safety and the Federal Communications Commission" and "commends the Commission for establishing a reconfiguration plan that will help ensure effective public safety radio communications in the 800 MHz band."

As is more fully explained in Section II.B of this memorandum, notwithstanding its public embrace of public safety and the improvement of public safety communications, Sprint Nextel's actions in connection with the 800 MHz Rebanding are understandable only in relation to two purposes: (i) not spending more than the minimum financial commitment made by Sprint Nextel to the Commission which expressly refused Sprint Nextel's efforts to secure the protection of a cap upon its financial exposure and (ii) assuring Sprint Nextel that its receives the 1.9GHz spectrum it was conditionally granted by the Commission in exchange for its financial commitment, its spectrum give-ups, and the timely completion of the 800 MHz Rebanding.

4. The Need to Resist the Intrusion of Spurious Purposes into the 800 MHz Rebanding

The critique of the actions of the TA and Sprint Nextel in relation to the 800 MHz Rebanding summarized above and detailed in this memorandum proceeds upon the understanding of RCC, apparently not shared by either the TA or Sprint Nextel, that nowhere in the *July 2004 Report and Order* (or any subsequent pronouncement of the Commission) did the Commission declare it to be the primary purpose or even a secondary purpose of the Commission that (a) Nextel secure spectrum in the 1.9GHz band or (b) Nextel be protected in certain respects in relation to its funding obligations

with respect to the 800 MHz rebanding process or (c) the United States Government receive compensation for the 1.9GHz spectrum to be received by Nextel.

Each of (a) the granting of spectrum to Nextel, (b) the establishing of rules relating to Nextel's funding obligations, and (c) the providing for the possibility that the government would receive compensation was a means deemed by the Commission to be necessary to create a rebanding process that would serve the Commission's primary purpose: Improving Public Safety Communications in the 800 MHz Band.

These points are each explicitly and implicitly made in the *July 2004 Report and Order*. The Commission thus noted that the grant of 1.9 GHz spectrum to Nextel was not an end in itself, but rather "[i]n recognition of the public interest benefit derived from robust and reliable public safety communications coupled with the spectrum rights Nextel will surrender as well as the financial commitments that Nextel will incur in connection with band reconfiguration." *July 2004 Report and Order*, ¶ 5, pp. 6-7

That the Commission granted the 1.9 GHz spectrum to Nextel only to facilitate a solution to a public safety issue and not as a purpose of the Commission or end in itself is clear from the condition of the grant. "Nextel will receive rights to the 1.9 GHz band spectrum conditioned on its meeting the obligations imposed by this *Report and Order*, and on its payment to the U.S. Treasury of any difference between the value of the 1.9 GHz band spectrum rights and Nextel's costs incurred in reconfiguring the 800 MHz band and clearing the 1.9 GHz band." *July 2004 Report and Order*, ¶ 34, pp. 20-21

That facilitative intent (as opposed to purposive intent) of the Commission in granting 1.9 GHz spectrum to Nextel was expressly stated by the Commission which asserted that "[a]llocating spectrum to establish a long-term solution to the public safety problem and support the associated rebanding is a valid use of spectrum in the public interest." *July 2004 Report and Order*, ¶ 82, p. 52

The Commission similarly noted that the creation of the residual interest of the United States Government in the reconciliation of the "value for value" exchange with Nextel was not the purpose of the 800 MHz Rebanding, but rather simply necessary "[t]o ensure that by these actions Nextel, other licensees and the public are treated equitably, and that Nextel does not realize any windfall gain." *July 2004 Report and Order*, ¶ 5, p. 7

That the Commission did not have as its purpose in the 800 MHz Rebanding the creation of that residual interest is clear from the Commission's assertion that it was not obligated to maximize the return to the United States Treasury. "The Commission has determined that the public interest required the dedication of new spectrum to addressing the 800 MHz interference problem, and the 1.9 GHz spectrum is uniquely suited to that purpose. Those are public interest judgments for the Commission to make, and they are not changed by the possibility of a greater dollar recovery for the government from auctioning the 1.9 GHz spectrum." *July 2004 Report and Order*, ¶ 86, p. 53

For the avoidance of any doubt with respect to its purposes in the 800 MHz Rebanding, the Commission stated that "[t]he totality of the actions we take today are based on

unique and compelling public interest considerations in the record before regarding the serious and continuing public safety interference problems in the 800 MHz band. These considerations require that we take the most effective actions, in the short-term and long-term, to promote robust and reliable public safety communications in the 800 MHz band to ensure the safety of life and property." *July 2004 Report and Order*, ¶ 7, p. 7

5. The Commission as the only Hope for the 800 MHz Rebanding

RCC respectfully submits that that the hopes of 800 MHz public safety licensees for the 800 MHz Rebanding depend upon the return of that process to its original purpose and to the means of achievement of that purpose provided by the Commission. RCC further respectfully submits that only the Commission can, by a more active role in the process, reestablish its original goal, reorient the focus of the TA, and redirect the actions of Sprint Nextel, all with a view to putting the 800 MHz Rebanding upon a more firm foundation than the TA has been able to build and that Sprint Nextel will be unable to alter and, thereby, to assure the improvement of public safety communications.

B. RCC's Recommendations to the Commission

RCC believes that the 800 MHz Rebanding can, should, and must be reset upon its original course and rededicated to achieving the Commission's stated primary objective: Improving Public Safety Communications. To that end, and as is more fully explained in Part III of this memorandum, RCC respectfully recommends to the Commission that the Commission should:

- Issue general instructions to the TA and Sprint Nextel for the purpose of emphasizing that the primary purpose of the Commission in ordering the 800 MHz Rebanding was to improve public safety communications and that the Commission has subordinated all other matters concerning the 800 MHz Rebanding to that primary purpose;

- Issue specific instructions to the TA that its periodic reports shall focus primarily upon the manner in which the administration of the 800 MHz Rebanding has worked to improve public safety communications and the extent to which the financial resources of Sprint Nextel and the compensated efforts of the TA have been applied to that purpose;

- Issue specific instructions to the TA that it should address directly, effectively, transparently, and cooperatively (i) each of the issues identified in this memorandum as requiring attention and (ii) each other issue affecting the achievement of the central purpose of the Commission in ordering the 800 MHz Rebanding which have arisen or hereafter arise and provide reports upon and opportunities for comment on the progress of the TA in providing solutions to those issues;

- Issue specific instructions to the TA that it must secure a periodic external expert review of its efforts to address (i) each of the issues identified in this memorandum and (ii) each other issue affecting the achievement of the central purpose of the Commission in ordering the 800 MHz Rebanding which have arisen or hereafter arise and accept the recommendations of the expert with respect thereto or show good cause to the Commission why those recommendations should not be accepted;

- Issue general instructions to the TA that it must reconsider the RPP in light of the problems created thereby and the issues that remain unsolved in relation thereto and present for public comment and review by the Commission of a revised schedule within a specified period of time;

- Issue specific instructions to the TA that it must secure a periodic external expert review of the proposed revised schedule and accept the recommendations of the expert with respect thereto or show good cause to the Commission why those recommendations should not be accepted;

- Issue specific instructions to the TA that it must afford Sprint Nextel an opportunity to review the proposed revised schedule and address its ability to comply therewith;

- Revise in an appropriate manner the obligations of Sprint Nextel, the satisfaction of which are conditions precedent to its receipt of the intended grant of 1.9GHz spectrum;

- Issue specific instructions to the TA and Sprint Nextel that they must forthwith provide a fully effective means of supplying planning funds to all affected 800 MHz licensees requiring or desiring such funding pursuant to which all licensees, wherever located, could commence planning for the 800 MHz Rebanding as promptly as possible and place themselves in a position to adapt to a new schedule that would seek to make up for the time lost as a result of missteps to date;

- Issue specific instructions to the TA and Sprint Nextel that the required means of providing planning funding shall not include any reference to an ‘at risk rule’ or any other means, device, or instrumentality to discourage or disenable any 800 MHz public safety licensee from undertaking the planning for the 800 MHz Rebanding which in the judgment of that licensee is necessary or proper for the performance of its public safety obligations;

- Issue specific instructions to the TA to revise the RPP to eliminate the procedural gaps present therein.

- Establish by appropriate means the oversight by the Commission of the 800 MHz Rebanding on an active basis designed to assure that the primary purpose of the

Commission to improve public safety communications guides all actions of all concerned with the implementation of the 800 MHz Rebanding;

- Provide appropriate sanctions for the failure to meet the instructions and directions of the Commission; and

- Require that an individual be appointed to act in the role of Chief Executive Officer for the 800 MHz Rebanding in order to provide the leadership, judgment, vision, understanding, purpose, and drive which, RCC respectfully submits, this Memorandum will show have been absent in the process to date and are sorely needed.

II. Factual Realities in Detail

RCC respectfully submits that this Part II will:

- Show the extent two which two critical participants in the 800 MHz Rebanding (the TA and Sprint Nextel) have departed or been detached from the central purpose of the Commission in ordering the 800 MHz Rebanding: Improving Public Safety Communications;

- Explain the effect upon the 800 MHz Rebanding as it relates to 800 MHz public safety licensees of that departure and detachment from the Commission's central purpose; and

- Identify the lesser contributions of other participants in the 800 MHz Rebanding to the troubles now disrupting the smooth implementation of the orders of the Commission.

This Part II comprises three sections as follows:

- Factual Realities and the TA's Report (§II.A);
- Factual Realities and the Comments (§II.B); and
- Further Factual Realities (§II.C).

A. Factual Realities and the TA's Report

RCC respectfully submits that 800 MHz public safety licensees have many well-grounded reasons for concern with and disappointment in the administration of the 800 MHz Rebanding by the TA. There is substantial evidence that:

- Instead of measuring its contribution to the 800 MHz Rebanding by its contribution to the improvement of public safety communications, the TA has:

- Placed the highest value upon adherence or the maintenance of the appearance of adherence to its ill-considered RPP;

- Identified the public interest not as framed by the Commission in terms of the "improvement of public safety communications," but, rather, in terms of protecting the residual interest of the United States Government in any unused portion of the minimum financial commitment of Sprint Nextel to the 800 MHz Rebanding; and

- Wasted time and money on the preparation of policy statements that have no more than the slightest relationship to the improvement of public safety communications, if indeed any at all.

- Instead of administering the 800 MHz Rebanding in a manner consistent with the means provided by the Commission for the achievement of its central purpose for the 800 MHz Rebanding without harm to 800 MHz licensees in general and 800 MHz public safety licensees in particular, the TA has:

- Expressed and demonstrated seriously inadequate sensitivity to the risk of disruption of the operations of mission critical public safety radio systems in the course of the physical rebanding process;

- Allocated resources to tasks and projects which, even if implemented with complete success, would not contribute to improving public safety communications;

- Included some glaring flaws and gaps in the RPP which could threaten the maintenance of important public safety operations and inter-operations and could fail to provide certain 800 MHz public safety licensees with the means to maintain comparable facilities;

- Failed to address or to address timely certain critical issues brought to the attention of the TA;

- Avoided decision and evaded responsibility in relation to critical matters;

- Brought the soul of an accountant to the 800 MHz Rebanding as expressed in excessive concern with matters concerning reconciling the costs of the process and with preparations to investigate the possibility of fraud or waste by agencies charged with the protection of life and property;

- Asserted authority beyond the extent necessary to provide reasonable supervision of the 800 MHz Rebanding and beyond the measure of authority the Commission likely thought appropriate for the TA;

- Adhered so rigidly to the RPP that it is forcing 800 MHz licensees into a flawed mediation process prematurely as a result of ignoring, among other factors, the failure of the planning funding process which failure is the responsibility of the TA and Sprint Nextel and in no event the responsibility of 800 MHz public safety licensees; and

- Exercised its purported authority in an arbitrary and capricious manner to promulgate rules and rulings that are inconsistent with the central regulatory purpose of the Commission.

In this Part II.A, RCC provides some of the evidence available to support those concerning conclusions. That evidence tends plainly to offer a picture of the state of the 800 MHz Rebanding that is in material respects different from that offered in the TA's Report. While the TA's Report hints at some, but by no means all, of the problems

affecting the 800 MHz Rebanding, that report does not analyze the problems, identify the causes thereof, or offer substantive solutions thereto. Sprint Nextel recognized the superficial nature of at least one aspect of the TA's Report when, in the Comments, it was noted that: "…the TA advised the Commission … that a 'significant number' of Wave 1 incumbents may not complete their negotiations with Sprint Nextel … by the end of the mandatory negotiation period. … The TA provided no factual explanation for this expected outcome." (Emphasis supplied.) Other examples of failures of analysis, cause identification, and solution provision are discussed below.

To the extent that the TA's Report fails to identify clearly or at all (i) the problems which the TA has itself created for the 800 MHz Rebanding and (ii) the other problems which trouble the successful implementation of the 800 MHz Rebanding which were not created by the TA, but which the TA has not apparently recognized and addressed, the effective attention of the Commission cannot thereby be drawn to those problems. The process of problem identification was tentatively and selectively commenced by Sprint Nextel in the Comments, which, even with their limitations and interested perspective, made an important contribution. The process of problem identification requires substantial contributions from others concerned with the 800 MHz Rebanding. RCC hopes that the observations of this Part II.A are viewed by the Commission as a constructive contribution to that process by a concerned party.

This Part II.A comprises eight sections as follows:

- Questionable allocation, indeed Perverse Allocation, of Financial Resources (§II.A.1);
- Certain Material Flaws in the RPP (§II.A.2);
- Departing from Commission Policy and Exceeding Delegated Authority (§II.A.3);
- Issues Not Addressed by the TA (§II.A.4);
- Failure of Required Leadership (§II.A.5);
- Resultant Cynicism (§II.A.6);
- Consequences of Cynicism (§II.A.7); and
- Situation Serious, but Not Hopeless (§II.A.8).

1. Questionable Allocation, indeed Perverse Allocation, of Financial Resources

RCC respectfully suggests that the allocation of financial resources in the 800 MHz Rebanding as reflected in the TA's Report raises serious questions concerning the priorities of the TA and whether sufficient resources have been applied to the improvement of public safety communications. Evidence bearing upon that question is offered in the following two sections:

- Actual allocation of financial resources (§II.A.1.a); and
- Misallocation of financial resources and effort (§II.A.1.b).

a. Actual allocation of financial resources

The following figures (all through September 30, 2005) from the TA's Report raise important issues:

- Sprint Nextel incurred approximately $325 million in internal costs for relocating its systems in the 800 MHz band;

- Sprint Nextel estimates that it has incurred approximately $41 million in costs associated with the reconfiguration of the 1.9 GHz band;

- The TA earned $20,823,214 in fees and incurred $1,138,612 in expenses in connection with its administration of the 800 MHz Rebanding for a total of $21,961,826;

- Of the fees of the TA, $1,674,226 were earned in relation to efforts expended in "Financial Management";

- Sprint Nextel and incumbent licensees executed reconfiguration contracts pursuant to TA-approved cost estimates totaling $1,851,223; and

- Of the $1,851,223 in TA-approved cost estimates, $420,968 has been paid by Sprint Nextel.

The TA's Report does not appear to disclose either (i) the total of planning funding costs that have been agreed to between Sprint Nextel and 800 MHz licensees and approved by the TA or (ii) of that amount, how much has actually been disbursed to the licensees.

However, the implications of those figures that have been made available are quite remarkable:

- Of the total known costs of the 800 MHz Rebanding (approximately $389.8 million), only $1,851,223 or 0.46% has been committed to 800 MHz licensees for their costs;

- Of the amount committed to 800 MHz licensees, 26% or 0.11% of total known costs has actually been paid;

- Sprint Nextel has incurred costs for relocating its systems in the 800 MHz band and for reconfiguring the 1.9 GHz band that are 197.71 times the amount committed by Sprint Nextel with the approval of the TA to 800 MHz licensees;

- The TA has earned in fees 11.25 times the amount approved and committed to 800 MHz licensees for planning or reconfiguration, and, if the TA has been paid these fees, then the TA has received 49.47 times the amount received by 800 MHz licensees; and

- The fees earned by the TA in relation to financial management equal approximately 90% of the amount approved and committed to 800 MHz licensees for planning and reconfiguration and are 3.98 times the amount actually received by 800 MHz licensees.

The last and worst possible outcome for the 800 MHz Rebanding would be its transformation into a scandal and yet the potential for such transformation would clearly be present if the allocation of financial resources as described in the TA's Report continues.

Through September 30, 2005, for every $1.00 committed for 800 MHz licensees' rebanding costs $.90 has been earned by the TA for financial management, presumably the effort to assure that moneys spent on licensees' costs are proper. Is there any evidence at all that savings due to financial management are greater than the costs of financial management? The TA's Report provides no information on this point, but clearly suggests that its financial scrutiny will continue whether it produces net savings or not. Indeed, the TA's Report indicates that it will increase its financial scrutiny efforts: "During this quarter, the TA's fraud, waste and abuse working group developed recommended steps to address potential fraud or other illegalities in the reconfiguration program. The TA will continue to monitor potential fraud, waste and abuse throughout the life of the program and will implement anti-fraud measures in the upcoming quarter and beyond." (Emphasis supplied.)

Without some evidence that such efforts are productive and measured, a reasonable person might wonder in whose interest or for what purpose those efforts are planned for the upcoming quarter and beyond. The appearance of questionable purpose or effectiveness can only be overcome by serious evidence of the need for such efforts and the productivity thereof. The TA's Report offers no enlightenment in relation to these concerns.

In addition, unless the financial management efforts are demonstrably required, productive, and measured, serious questions can be raised respecting:

- whether some or all of the money spent on financial management would better serve 'improving public safety communications' if it were provided to 800 MHz public safety licensees to plan and implement the 800 MHz Rebanding properly; and

- whether the time spent upon financial management serves only or primarily to delay the receipt of funds by 800 MHz public safety licensees and other 800 MHz licensees and thereby extends the period during which 800 MHz public safety licensees are subject to harmful interference.

The TA's Report sheds no light upon these queries.

Finally, it should be noted that, while many users of 800 MHz public safety radio systems are, in fact, law enforcement officers, the TA is not. Did the Commission really intend to authorize the TA to "address potential fraud or other illegalities in the reconfiguration process" perpetrated by public safety agencies? Is there any serious potential at all for fearing fraud or other illegalities on the part of public safety agencies? Does not the interest of Sprint Nextel in minimizing its expenditures in connection with the 800 MHz Rebanding when combined with:

- what must be the presumed integrity of 800 MHz public safety licensees (a presumption which, for that matter, should be applied to all 800 MHz licensees, but applied *a fortiori* to 800 MHz public safety licensees) and

- appropriately reasoned and measured review by the TA which reflects that presumption of integrity,

provide adequate protection to the process without the creation of a fraud squad by the TA? If those factors do not, in the view of the TA, provide adequate attention, then the TA must view 800 MHz public safety licensees as a class as possible con artists. Although that view appears to be held by the TA because only such a view would explain the need so clearly felt by the TA to "address potential fraud or other illegalities in the reconfiguration process" and make no exception for or differentiation of 800 MHz public safety licensees and the officers and other personnel thereof, it is difficult to image that the TA would actually give voice to that implicit view. It need hardly be said that giving voice to the view that 800 MHz public safety licensees and their officers and other personnel need to be scrutinized as potential scammers or con artists would transgress more than the vague boundaries of political correctness. Giving voice to such a view would offend the most conventional and established standards of decency.

RCC respectfully submits that it is more than unlikely that the concerns of the Commission with respect to the proper administration of the 800 MHz Rebanding ever extended to the possibility that 800 MHz public safety licensees would use the 800 MHz Rebanding to run a scam or play a confidence game. If there is reason to believe that any participant in the 800 MHz Rebanding has engaged, is engaged, or is about to engage in running a scam or playing a confidence game, the TA will have to look in quarters occupied by participants other than 800 MHz public safety licensees.

These questions and issues respecting the allocation of financial resources may, unless those questions are answered and the answers acted upon, open the 800 MHz Rebanding to scrutiny of a different and hostile kind by persons whose primary purpose is not remotely related to improving public safety communications. The protection of the 800 MHz Rebanding against appearances that would invite such scrutiny is surely the responsibility of the TA, but, instead of providing that protection, the TA has contributed to the creation of such appearances and, by so doing, diluted the commitment of certain concerned participants to the 800 MHz Rebanding and, therefore, the effectiveness of the effort to improve public safety communications. (For further discussion of the development of cynicism on the part of certain concerned participants and the

consequences thereof, the Commission is respectfully referred to Sections II.A.6 and 7 of this memorandum.)

b. Questionable Allocation of financial resources and effort

Certain efforts undertaken by the TA seem to have little or no relationship to improving public safety communications and may even be counterproductive in relation thereto. Three examples are provided in the following sections:

- Website/Material Use Policy (§II.A.1.b(i));
- Educational Reimbursement Policy (§II.A.1.b(ii)); and
- Incumbent Labor Rate Reimbursement Policy (§II.A.1.b(iii))

(i) Website/Material Use Policy

One example of such an effort is the TA's *Website/Material Use Policy*, which provides that:

- No party can reproduce materials on the TA's web site or other written materials of the TA without the prior written consent of the TA;

- A request for such consent must be made in writing to the TA at least ten business days before the intended date of reproduction and should identify the applicant, specify the type of use, and the place of intended reproduction;

- No party desiring to establish a link to or to frame materials on the TA's web site without providing five days' written notice of the intended linking or framing;

- The notice of intent to link or frame should identify the applicant, specify the type of use, and the place of intended linking or framing; and

- The right to deny any party the right to link or frame is reserved by the TA which will consider whether the linking or framing is in keeping with the mission of the TA.

The assertion by the TA of:

- Proprietary rights to materials prepared not at its expense, but, rather, with what are clearly public moneys (moneys paid by Sprint Nextel in exchange for rights to 1.9 GHz spectrum provided by the Commission under certain conditions);

- The right to limit by prior restraint the ability to reproduce materials prepared by the TA, an ability necessary to enable submissions to the Commission which comment upon the actions of the TA and proper to enable licensees to refer conveniently to such materials;

- The right to scrutinize the purpose of a party in reproducing or linking to materials of the TA; and

- The power to promulgate the vague (inconsistent with the mission of the TA) standard for scrutinizing requests for permission to link or fame

is, RCC respectfully submits, without foundation.

Neither the Commission nor any other branch of the federal government, to the knowledge of RCC, asserts such rights or seeks to impose such restraints with respect to quotation from or reproduction of its publications. What possible interest can the TA legitimately have in restricting quotation or reproduction of all or part of its materials or the linking thereto? Did the Commission really intend to authorize the TA to exercise censorship powers the Commission itself does not exercise or even assert? Is it a proper exercise of the delegated powers of the TA to enable itself to avoid or frustrate effective criticism by denying linking for purposes which the TA in its sole discretion deems improper in relation to its mission? This last question is particularly relevant because the TA did not include improving public safety communications anywhere in its mission statement.

The web site policy of the Commission does not appear to include any restrictions on downloading materials, but, rather, focuses its concern with unauthorized usage upon efforts to alter the information on the Commission's web site: "Unauthorized attempts to upload information or change information on FCC servers are strictly prohibited and may be punishable by law, including the Computer Fraud and Abuse Act of 1986 and the National Information Infrastructure Protection Act." Moreover, the Commission does not require identification or other information from a user of its web site as a condition to downloading or copying material therefrom: "The FCC collects no personal information about you when you visit our website unless you specifically and knowingly choose to provide such information to us." http://www.fcc.gov/webpolicies.html The TA's *Website/Material Use Policy* is inconsistent with the web site policy of the Commission in every material respect.

Presumably, the TA has been or will be paid for the preparation of its *Website/Material Use Policy* and expects to be paid for reviewing requests for reproduction and notices of linking and framing. Does any improvement of public safety communications result directly or indirectly, actually or potentially, or hypothetically or theoretically from such efforts on the part of the TA? Can it not be far more persuasively shown that free and unlimited access to the materials of the TA would generally tend to assist in the improvement of public safety communications? If the answer to this last question is 'No,' then far more serious questions are raised than those posed here by RCC.

As anyone deeply involved in the 800 MHz Rebanding surely knows, copies of materials from the TA's web site circulate daily, and no one seriously involved with the 800 MHz Rebanding is likely to believe emails with attachments from the TA's web site are held unsent pending receipt of approval from the TA sometime after ten business days notice

is given to the TA by the intended sender of the email which notice provides to the TA an explanation for the intended use of the TA's written material as an email attachment.

The promulgation of policies that are facially objectionable, routinely violated, and unenforced and unenforceable is surely a waste of effort and financial resources and does nothing to improve public safety communications or increase the credibility of the 800 MHz Rebanding.

(ii) Educational Reimbursement Policy

Another example of an unproductive and possibly counterproductive effort by the TA is the TA's *Educational Reimbursement Policy* which seems more effective in discouraging efforts of 800 MHz licensees to learn about the 800 MHz Rebanding and making work for the TA than in providing protection against claims for educational expenditure which are improper.

The hurdles that the TA places between an 800 MHz licensee and its recovery of educational expenses are substantial and, in certain instances, discouragingly inscrutable particularly for the staff of public safety agencies which have more important responsibilities both generally and in relation to the 800 MHz Rebanding than parsing policies of the TA, which include:

- A condition for cost recovery to the effect that licensees must attend only educational "events or substantial agenda components [which] would not have occurred 'but for' the need to educate those licensees affected by the 800 MHz Reconfiguration." (Emphasis in original.)

- A warning that "TA approval of an event does not constitute a guarantee that a licensee will be reimbursed for all costs associated with the event."

- A requirement that "the licensee must demonstrate that the attendee(s) would not attend the event 'but for' reconfiguration and the associated educational component.

Could the TA have discouraged more effectively the efforts of 800 MHz licensees to learn about the 800 MHz Rebanding than by its combination of a double 'but for' test and a warning respecting the risk of non-recovery?

The people who are responsible for 800 MHz public safety radio systems are generally overworked and likely underpaid. In the aggregate, those people have not earned more than $20 million through September 30, 2005, as a result of the 800 MHz Rebanding. It is almost certainly true that such people have earned and will earn very little or nothing at all 'but for' the 800 MHz Rebanding.

Indeed, for those people, the 800 MHz Rebanding is an additional burden and, more importantly, a source of serious risk to the operation of the public safety radio systems for

which they are responsible. Those people and the public safety officers who rely upon those systems are properly concerned that someone may die if the physical rebanding process goes awry at a time when an emergency takes place which requires uninterrupted access to those systems. Many public safety officers who rely upon those systems are deeply concerned about the possible disruption of radio communications during the physical rebanding process. Public safety officers routinely risk their lives in the service of the public and often rely for their survival upon a radio sure to work in an emergency. Those people ought not to have to consider or concern themselves with double 'but for' tests and like sources of discouragement to their efforts to learn whatever they can to avoid loss of their own lives and the lives and property of the citizenry they serve as a result of a failed reconfiguration or the degradation of public safety radio system performance during the physical rebanding process.

Is the Commission truly concerned that the overworked personnel responsible for public safety radio systems have spare time to waste on "Rebanding Cruises" or other hypothetical junkets minimally related to the very real responsibilities of those personnel? Has the TA properly exercised its delegated authority by promulgating double 'but for' tests and otherwise discouraging efforts of public safety personnel to familiarize themselves with the challenges of the 800 MHz Rebanding? Cannot the judgment of public safety officials and personnel be relied upon in this respect without realistic fear of impropriety?

Presumably, the TA has been or will be paid for the preparation of its *Educational Reimbursement Policy* and expects to be paid for reviewing requests for such reimbursements. Does any improvement of public safety communications result from such efforts on the part of the TA? Does the TA seriously believe that attendance of public safety personnel at educational events is subject to abuse? Can it not be far more persuasively shown that encouragement of such attendance would generally tend to assist in the improvement of public safety communications?

The TA's *Educational Reimbursement Policy* not only discourages what should be encouraged, but its implementation also represents a questionable allocation of financial resources. This questionable allocation of resources is compounded by the elaborate procedure the TA has established with respect to approval by the TA of submissions by "800 MHz Event Hosts," including:

- The preparation and presentation to the TA by 800 MHz Event Hosts of "a formal '800 MHz Education Proposal' … in advance of the educational event, clearly articulating the expected benefits, invited attendance" etc., etc., etc.

- The review of the formal 800 MHz Education Proposal by the TA and, if appropriate, the approval of the event for reimbursement.

Does this procedure really make any contribution to improving public safety communications? Is this procedure truly necessary, useful, or proper in relation to the 800 MHz Rebanding? Given the limited time available to public safety personnel, the

absence of evidence of risk of abuse by public safety personnel, and the doubtful personal benefit to public safety personnel of attending presentations on the 800 MHz Rebanding, what end exactly is served by this policy?

(iii) Incumbent Labor Rate Reimbursement Policy

Another policy of the TA is the *Incumbent Labor Rate Reimbursement Policy* of October 26, 2005 (the "Labor Rate Policy"). That policy corrects, without acknowledgment, an error of the TA in earlier prohibiting the recovery of overtime costs and overhead costs incurred by 800 MHz licensees in relation to internal staff. In both the *Reconfiguration Handbook (1st Release)* (April 21, 2005) and the *Reconfiguration Handbook (Rev. 1.1)* (June 3, 2005), it was written:

> "E***stimate the amount of time and associated cost your internal personnel will spend on planning.***
>
> "If your internal personnel will perform planning activities, estimate the amount of hours those personnel will spend at regular time and overtime. Also, determine the hourly cost of those personnel. To determine the hourly cost, you will need to know:
>
> - Hourly rate of each person performing planning activities. You should obtain this rate from your Human Resources or Payroll organization.
> - To determine the hourly rate of a salaried employee, divide the employee's salary by 2,080 hours."

The effect of that provision, which has not been amended since publication, was that overtime costs and overhead costs could not be recovered.

It appears that the primary purpose of the Labor Rate Policy was to overturn *sub silentio* the error that appeared in the handbooks and still does. The Labor Rate Policy makes no reference to the change made thereby, but, rather, states that "[t]he following incumbent personnel internal labor rates are reimbursable (subject to criteria defined in this policy) when incurred to support 800 MHz reconfiguration during regular business hours or overtime hours…" as if overtime costs and overhead costs were always recoverable (which they were not) and that all that the Labor Rate Policy wrought that was new was a distinction between "[p]reviously established market based rates when they can be substantiated" and "[a]ctual cost [including the costs of overtime] plus reasonable overhead, when market rates cannot be substantiated."

A direct explanation that the TA's view of the recovery of overtime costs and overhead costs had been corrected together with an amendment to the *Reconfiguration Handbook (Rev. 1.1)*, which is presently available on the website of the TA, would have been helpful and would avoid the presently outstanding inconsistency between the Labor Rate Policy and the *Reconfiguration Handbook (Rev. 1.1)*.

The lack of clarity in the Labor Rate Policy is not limited to its effect upon the recovery of overtime costs and overhead costs. In the Labor Rate Policy, the TA then set forth rules applicable to both market-based reimbursement and cost-based reimbursement. The Labor Rate Policy seems to employ a certain improper interchangeability between the terms "rates" and "costs." The Labor Rate Policy establishes that "[i]ncumbent internal labor incurred to support 800 MHz reconfiguration is reimbursable at established market based rates … subject to the following criteria:

- "The rates … are based on established market based bill rates that the licensee currently charges for similar work. …
- "The costs are incremental to the licensee, i.e., the costs would not have been incurred "but for" the FCC mandate to reconfigure 800 MHz systems." (Emphasis added.)

Rates are different from costs. If the licensee has market-based rates for the labor of its internal personnel, there is no reason to believe that those rates are the same as the costs to the licensee of providing its personnel to work at those rates. Indeed, it seems likely that a rational licensee would make its personnel available for third-party work if and only if the rates the licensee could charge for the efforts of its personnel were greater than the cost to the licensee of providing such personnel to such third-parties. If the rates are not the same as the costs, then what costs must be 'incremental' to the licensee? Can rates, as opposed to costs, be incremental in the sense referred to by the TA?

The issue here is not only one of linguistic ambiguity, but is also one of principle. The *July 2004 Report and Order* speaks in terms of the recovery of the costs of licensees incurred in connection with the 800 MHz Rebanding. To the extent that the market-based rates produce more than costs, there is a reasonable question whether the recovery from Sprint Nextel should be based upon costs (lower) rather than rates (higher).

RCC respectfully submits that the Labor Rate Policy:

- is inconsistent with all of the efforts of the TA to limit recovery by licensees to costs properly incurred in connection with the 800 MHz Rebanding;
- does more to augment confusion than add certainty to the 800 MHz Rebanding;
- lacks the candor and clarity of purpose to be expected of the TA;
- is in error; and
- will not prove to be useful in improving public safety communications.

The TA's Report refers to having fulfilled more than 230 requests for printed copies of one or the other version of the *Reconfiguration Handbook*, all copies of which are inconsistent with the Labor Rate Policy as respects the recovery of overtime costs and overhead costs. How many copies have been downloaded from the TA's web site and

reproduced (contrary to the *Website/Material Use Policy*) is unknown, but those copies too are inconsistent with the Labor Rate Policy in the same respects.

The TA's Report does note that: "An expanded and updated version [of the *Reconfiguration Handbook*] will be available in the upcoming quarter." The TA will likely remedy that inconsistency in the new version of the *Reconfiguration Handbook*, but the TA's Report neither specifies any undertaking in this respect nor, in its reference to the Labor Rate Policy, indicates the change in position made thereby.

It would have been helpful if the Labor Rate Policy (and the TA's Report) expressly explained that the TA's position in relation to overtime and overhead costs set forth in the Labor Rate Policy was a correction of the TA's position on that subject set forth in the currently distributed and available version of the *Reconfiguration Handbook*. Errors on the part of the TA are inevitable and understandable. Correction by the TA of its errors is simply admirable. Obscuring corrections and extending inconsistencies in policy are troubling.

***

The TA's Report notes that: "TA policy documents addressing specific issues continue to be developed and published by posting on the TA's website as they become available. … The TA maintains an ongoing policy formulation and review process to accommodate stakeholder feedback and to identify and address other policy needs and lessons to be learned. As policy needs are identified, draft guidance is prepared and reviewed with appropriate stakeholders before release. The TA expects to publish additional policy guidance in the upcoming quarter."

Serious questions are certainly raised by §§II.A.1.b(i)-(iii) of this memorandum, above, and §§II.a.3.a-c of this memorandum, below, respecting whether the self-confident and unqualifiedly positive picture of policy-making by the TA presented in the TA's Report is well founded.

In view of the TA's Report as it relates to policy development and publication, it might be instructive to learn, for example, what stakeholder feedback or policy needs led to the TA's adoption of the *Website/Material Use Policy* and which "appropriate stakeholders" reviewed the TA's *Website/Material Use Policy* before release and what comments they made upon that policy.

2. Certain Material Flaws in the RPP

RCC respectfully suggests that, in certain material respects, the efforts of the TA to date have not provided a structure, organization, or process that serves the improvement of public safety communications well. The greatest impact of the TA upon the 800 MHz Rebanding is almost certainly in relation to the structuring and scheduling of the process in the RPP. The RPP is, however, flawed in certain material respects. Among those respects is the creation by the RPP of certain procedural gaps which have resulted and

will result in serious problems for the administration of the 800 MHz Rebanding. Those procedural gaps in the RPP are the subject of the following two sections:

- Gaps in the RPP and their consequences (§II.A.2.a); and
- Ineffective gap-filling by the TA (§II.A.2.b).

a. Gaps in the RPP and their consequences

The procedural gaps in the RPP have their origin in a certain focus of the TA in its creation of the RPP, *i.e.*, a focus upon the channels upon which the *infrastructure* of the licensees depends. The focus of the TA in the RPP upon *infrastructure* created a de-emphasis on the part of the TA upon *subscriber units* in the RPP. The effect of that de-emphasis was to create certain procedural gaps in the RPP, *i.e.*, the failure to make provision for certain 800 MHz Public Safety Licensees to participate effectively in the 800 MHz Rebanding and enable those licensees to be identified by the TA, to be given an opportunity to seek planning funding, and to be afforded a place in the schedule set forth in the RPP to file a rebanding plan and a rebanding estimate;

The TA is aware of certain, buts perhaps not all, procedural gaps in the RPP. Most of the procedural gaps in the RPP have their effect in terms of making interoperability more difficult to maintain during the physical rebanding process. The TA has sought to remedy those procedural gaps placing obligations upon 800 MHz public safety licensees which have interoperability arrangements with the 800 MHz public safety licensees affected by the procedural gaps. However, the gap-plugging approach adopted by the TA does not solve all of the problems created by the procedural gaps affecting interoperability.

Most of the procedural gap problems arise from the structure of the RPP with its geographic division of the country into four waves, each comprised of two stages:

- Stage 1 for the reconfiguration of Lower 120 Channels; and

- Stage 2 for the reconfiguration of (i) NPSPAC Channels and (ii) channels in the Expansion Band as to which the licensee has not exercised and will not exercise its option to remain in the Expansion Band (Expansion Band Channels).

The required analysis of the procedural gap problems is quite intricate and beyond the scope of the main body of this memorandum. This section II.A.2.a will summarize the results of the required analysis, for which the Commission is respectfully referred to Appendix 2 where that analysis is set forth in detail.

In the formulation of the RPP, the TA, in effect, provided that the determination whether and when an 800 MHz licensee is affected by the 800 MHz Rebanding is to be made primarily by reference to whether the channels upon which that licensee's fixed radio infrastructure operates are subject to mandatory or optional retuning and where the radio system is geographically located by the structure of the RPP.

The RPP is driven by a combination of (i) the channels upon which the licensee's radio *infrastructure* operates and (ii) geography. The RPP assumes or appears to assume that the 800 MHz Rebanding has effects (i) only upon licensees with affected channels in use *in the radio system infrastructure* and (ii) then only at the times provided in the RPP. The RPP makes no provision or inadequate provision to address either (i) the effect of the 800 MHz Rebanding upon certain radio system infrastructure that does not require retuning or (ii) the effect of the 800 MHz Rebanding upon the subscriber units of an 800 MHz licensee when that effect is not associated with a substantially contemporaneous retuning of the licensee's infrastructure either because (a) the licensee has no infrastructure subject to retuning or (b) certain of the effects of the 800 MHz Rebanding upon subscriber units under RPP are separated in time from some of the effects of the 800 MHz Rebanding upon the licensee's infrastructure (and certain other effects upon the licensee's subscriber units).

The consequences of these failures of the RPP to make provision to protect all 800 MHz licensees affected by the 800 MHz Rebanding include:

- Failure of certain licensees affected in relation to their infrastructure or their subscriber units or both by the 800 MHz Rebanding to be identified pursuant to the procedure of the RPP and potential consequent unavailability of protections afforded by the 800 MHz Rebanding;

- Failure to afford certain licensees affected by the 800 MHz Rebanding an opportunity to seek planning funding under the schedule provided in the RPP and possible consequent inability of those licensees to make proper plans to maintain comparable infrastructure facilities and avoid more than minimal disruption of radio system operations during the physical rebanding process; and

- Failure to provide certain licensees affected by the 800 MHz Rebanding with a place in the schedule set forth in the RPP to file a rebanding plan and a rebanding estimate and possible consequent inability to maintain comparable facilities or avoid more than minimal disruption of radio system operations during the physical rebanding process.

b. Ineffective gap-filling by the TA

The TA has recognized some of the procedural gap problems created by the RPP and has sought to address those problems recognized, but not others. The problems created by the procedural gaps in the RPP for the maintenance of comparable infrastructure facilities by certain 800 MHz public safety licensees are simply not addressed anywhere by the TA.

The problems created by the procedural gaps in the RPP for the maintenance of interoperability of subscriber units are partially, but not effectively addressed by the TA. The approach of the TA to plugging those procedural gaps has been to fill those gaps

with obligations imposed upon the interoperability partners of those 800 MHz public safety licensees which are adversely affected by the shortcomings of the RPP. The TA's gap-filling efforts have been set forth in four pronouncements which are examined in detail in Appendix 2. The four pronouncements are consistent in that each of them expressly or implicitly requires 800 MHz public safety licensees:

- To define the interoperability environment in which they operate;
- To include subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's inventory of subscriber units;
- To include the effort necessary to retune (or replace) subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's rebanding plan;
- To include the cost of retuning (or replacing) subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's rebanding estimate; and
- To be generally responsible for the coordination of the maintenance of interoperability arrangements by keeping interoperability partners and the TA informed of all relevant considerations.

These requirements (collectively, the "TA's Interoperability Maintenance Requirements") are, in the view of RCC, neither sufficient nor practical and do not effectively overcome the defects of the RPP as it relates to the maintenance of interoperability for subscriber units.

A complete analysis of the insufficiency and impracticality of the TA's Interoperability Maintenance Requirements is set forth in Appendix 2. It does not appear that the TA made any comparable analysis because the TA's Interoperability Maintenance Requirements do not reflect certain critical distinctions which if not made lead inevitably to insufficiency and impracticality. Those distinctions are:

- First, the distinction among:
    - Subscriber units which operate on the radio system of a particular 800 MHz Public Safety and which belong to that Licensee ("Home-based Subscriber Units");
    - Subscriber units which:
        - operate on the radio system of a particular 800 MHz Public Safety licensee,

- do not belonging to that licensee, and
- are programmed to treat the radio system of that licensee as their home system ("Others' Home-based Subscriber Units"); and

- Subscriber units which:
  - operate on the radio system of a particular 800 MHz Public Safety licensee,
  - do not belonging to that licensee, and
  - are programmed to treat a radio system other than that of that licensee as their home system ("Other's Subscriber Units Based Elsewhere"); and

- Second, the distinction between:
  - "Bilateral Interoperability Arrangements": those involving interoperability only between two 800 MHz public safety radio systems; and
  - "Multi-lateral Interoperability Arrangements": those involving interoperability among three or more 800 MHz public safety radio systems.

Those distinctions facilitate analysis, and, as shown in Appendix 2, enable the following conclusions to be drawn with respect to the insufficiency and impracticality of the TA's Interoperability Maintenance Requirements for the many public safety radio systems that employ Motorola infrastructure (and, in certain instances, EDACS infrastructure from M/A-COM):

- While it might be proper and practical for an 800 MHz public safety licensee ("Licensee No. 1") with infrastructure included in a particular stage and wave of the RPP to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of Licensee No. 1, it is neither proper nor practical for Licensee No. 1, as demanded by the TA's Interoperability Maintenance Requirements, to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of another 800 MHz public safety licensee ("Licensee No. 2," an interoperability partner of Licensee No. 1) which has infrastructure which is unaffected by that stage and wave of the RPP and which has subscriber units that do not, in any sense, owe their primary ability to operate to Licensee No. 1.

- Licensee No. 1 cannot properly or practically, despite the demands and sanctions of the TA's Interoperability Maintenance Requirements, command that Licensee No. 2 place its subscriber units at the disposal of Licensee No. 1 and delegate to

Licensee No. 1 the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the interoperability partner or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of Licensee No. 2.

- The subscriber units of Licensee No. 2 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain under the control of Licensee No. 2, despite the demands of the TA's Interoperability Maintenance Requirements, or there will be a serious risk of disruption to the public safety operations of Licensee No. 2.

- Therefore, the placing of any responsibility upon Licensee No. 1 for the retuning of subscriber units which are either (i) Home-based Subscriber Units in relation to Licensee No. 2 or (ii) Others' Subscriber Units Based Elsewhere which have the system of Licensee No. 2 as their home, in accordance with the demands of the TA's Interoperability Maintenance Requirements, could not possibly be, even with the sanction of the TA, proper or practical.

- Even if, contrary to fact, it would be proper or practical for Licensee No. 1 with no Multi-lateral Interoperability Agreements only one Bilateral Interoperability Agreement (with Licensee No.2 which also has only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of subscriber units which are either (i) Home-based Subscriber Units in relation to Licensee No. 2 or (ii) Others' Subscriber Units Based Elsewhere which have the system of Licensee No. 2 as their home, it would be entirely impractical for each and every 800 MHz public safety licensee which is a party to Multi-lateral Interoperability Agreements and which has infrastructure included in a particular stage and wave of the RPP to take responsibility for the maintenance of interoperability of Home-based Subscriber Units and Others' Subscriber Units Based Elsewhere of each and every 800 MHz public safety licensee which is a party to Multilateral Interoperability Agreements and which does not have infrastructure included in the particular stage and wave of the RPP.

- If all 800 MHz public safety licensees which have infrastructure included in a particular stage and wave ("Affected Licensees") and which had Multi-lateral Interoperability Agreements with another 800 MHz public safety licensee with no such infrastructure (the "Unaffected Licensee") took responsibility for the maintenance of interoperability of Home-based Subscriber Units and Others' Subscriber Units Based Elsewhere of the Unaffected Licensee, then all Affected Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

- The complications shown in the immediately preceding case would rise exponentially if, instead of one Unaffected Licensee, there were multiple Unaffected Licensees.

The gaps in the RPP are not theoretical, but are, rather, quite real as the experience of RCC in certain critical areas of the country has clearly demonstrated.

The TA's Report notes that: "In the upcoming quarter, the TA will establish a working group to focus on mutual aid and interoperability issues. The TA anticipates meeting with key constituents in the licensee and vendor communities to establish recommendations and guidelines for maintaining critical communications during reconfiguration." That note neither acknowledges the problems for the maintenance of interoperability created by the TA in the RPP nor communicates any sense of urgency in relation to the problems which face 800 MHz public safety licensees now and may not be relieved by the issuance some time in the future of recommendations and guidelines. The TA has already sought to address the maintenance of interoperability through its above-discussed gap-filling methods, but those methods are not effective, and the effectiveness of future recommendations and guidelines cannot be assured without first acknowledging existing problems with specificity, which the TA's Report fails to do and thus presents a picture of the state of the 800 MHz Rebanding not truly reflective of problems confronting 800 MHz public safety licensees..

3. Departing from Commission Policy and Exceeding Delegated Authority

RCC respectfully suggests that the TA appears to have departed in certain of its other pronouncements and policy statements from clear Commission policy in relation to the 800 MHz Rebanding and to have exceeded its delegated authority by certain of its declarations of policy. Some of the evidence that bears upon that conclusion is provided in the following four sections:

- TA's guidance on transaction costs (§II.A.3.a);
- TA's promulgation of "at risk" rule (§II.A.3.b);
- TA's record retention requirements (§II.A.3.c); and
- TA's alternative dispute resolution plan (§II.A.3.d).

a. TA's guidance on transaction costs

The TA's *Cost Classification Policy* of October 26, 2005, had two purposes:

- To address "the distinction between the terms hard costs and transactional costs as used by the FCC"; and

- To explain the special scrutiny that will be given to transaction costs.

RCC is here concerned only with the latter purpose and respectfully submits that the TA failed to give effect to certain concerns and distinctions made by the Commission that bear directly upon the special scrutiny that will be given by the TA to transactions cost.

In the view of RCC, the critical text in considering the scrutiny of transaction costs is the Commission's *December 2004 Supplemental Order*, which the TA addressed in the Cost Classification Policy as follows:

> "The *Supplemental Order* contained several provisions designed to safeguard against excessive claims for transactional costs associated with band reconfiguration. In prior reconfiguration proceedings, the FCC adopted rules … which limited an incumbent licensee's reimbursement for transactional costs to two percent of the hard costs involved. In the 800 MHz reconfiguration, the FCC declined to apply [a] … cap on transactional costs, noting that with respect to public safety entities, 'outside costs could raise the transactional cost above two percent of the 'hard costs.' The FCC stated, however, that, 'the two-percent restriction in the rule provides a useful guideline for determining when transactional costs are excessive or unreasonable' and directed the TA 'to give a particularly hard look at any request involving transactional costs that exceed two percent' of the hard costs involved. Thus, licensees can receive reimbursement for transactional costs exceeding the two percent threshold, but the FCC required that, 'in the vast majority of cases, the party requesting transactional costs in excess of two percent will have to meet a high burden of justification.' Applying the 'hard look' requirement is part of the TA's oversight role in the 800 MHz reconfiguration as 'a watchdog over excess transactional costs and "goldplating."'"

To implement the hard look requirement, the TA adopted the following statement of policy:

> "In carrying out the 'hard look' required by the FCC, the TA shall require any party requesting payment or reimbursement of transactional costs that exceed two percent of hard costs to articulate its request with clarity in a cost estimate and to be able to provide documentation and supporting data to justify the request. The cost estimate submitted must clearly delineate whether each cost or activity listed is a hard cost or transactional cost based upon the categorizations in this Cost Classification Policy. The TA shall review requests for payment or reimbursement of transactional costs that exceed two percent of hard costs during the TA's review of Frequency Reconfiguration Agreements. If the TA's review indicates the need for additional support or justification, or that a cost estimate is otherwise deficient, the licensee will be so informed and will be required to furnish additional supporting documentation and data as well as a revised cost estimate. If the TA denies all or a portion of a request for payment or reimbursement of transactional costs, the TA will issue a letter to the applicant stating with clarity and precision its findings and the reasons for its decision.
>
> "The TA recognizes that the two percent transaction cost threshold may be difficult to meet for certain small reconfigurations where basic transactional costs will be proportionally greater than in larger reconfigurations. When the TA takes a hard look at transactional costs exceeding two percent during its review of

> Frequency Reconfiguration Agreements, the TA will take into account that transactional costs in small reconfigurations may be disproportionate. The TA may request additional supporting documentation and data or justification from a licensee during the TA's review of the Frequency Reconfiguration Agreement or when the TA conducts an audit of the amount expended at the conclusion of system reconfiguration."

The problems raised by the *Cost Classification Policy* fall into the following categories:

- The failure of the TA to make a distinction between public safety entities and other 800 MHz licensees in the application of the hard look at transaction costs (§II.A.3.a (i)); and

- The practicality or impracticality of estimating or controlling transaction costs (§II.A.3.a (ii)).

(i) Public Safety Licensees vs. Other Licensees

In its discussion of the hard look and the need therefor, the Commission appears to have made a distinction in relation to the application of the hard look between 800 MHz Public Safety Licensees and other 800 MHz Licensees subject to the 800 MHz Rebanding. The TA points out the relevant language in the FCC's order, but did not address the meaning of that language in detail or clarify the implications thereof.

The language of the Commission in the *December 2004 Supplemental Order* is as follows (with footnotes interleaved in the text and emphasis supplied to the critical phrase):

> "Although we recognized that band reconfiguration to resolve the unacceptable interference would be costly, [*800 MHz R&O*, 19 FCC Rcd 15064 ¶ 177] we were concerned that sole reliance upon Enhanced Best Practices would entail a continuing expense that would eventually eclipse the high initial cost of band reconfiguration. [*Id*.] To address cost reimbursement issues we adopted rules that tracked rules the Commission has successfully used to accomplish previous band reconfigurations. [*800 MHz R&O,* 19 FCC Rcd 15048 ¶ 148 & n.398 *citing* 47 C.F.R. § 90.699(d).] We note, as one party has pointed out, [*Shulman Rogers Comments* at 10.] that there is a conflict between the statement in the *800 MHz R&O* that Nextel must absorb all costs of band reconfiguration, including transactional costs, and the provision in existing rule Section 90.699(c), which we incorporated by reference in the *800 MHz R&O*, which limits transactional costs to no more than "2% of the hard costs involved." [47 C.F.R. § 90.699(c).] We resolve that conflict in favor of the statement in the text of the 800 MHz R&O, but believe that the two-percent restriction in the rule provides a useful guideline for determining when transactional costs are excessive or unreasonable and charge the Transition Administrator to give a particularly hard look at any request involving transactional costs that exceed two percent. We believe that, in the vast

> majority of cases, the party requesting transactional costs in excess of two percent will have to meet a high burden of justification. However, we decline to use two percent as a fixed limit in the knowledge that, particularly with respect to public safety entities, outside expertise may be required in the negotiation of agreements and in analysis of 'comparable facilities' proposals. We can foresee that such outside costs could raise the transactional cost above two percent of the 'hard costs.' [47 C.F.R. § 90.699(c).] Moreover, the instant band reconfiguration process is distinguished from others in which Section 90.699(c) applied, by the presence of the Transition Administrator which serves, *inter alia*, as a watchdog over excess transactional costs and "goldplating." We were clear in the *800 MHz R&O* that parties must submit disputes involving cost allocations to the Transition Administrator for resolution. [*800 MHz R&O,* 19 FCC Rcd 15064, ¶ 178] In the event that the Transition Administrator is unable to resolve the dispute the matter will be referred to the Wireless Telecommunications Bureau for *de novo* review. [*800 MHz R&O,* 19 FCC Rcd 15064, 15071-73 ¶¶ 178, 194-197.] These provisions should provide a sufficient safeguard against excessive claims for transactional costs associated with band reconfiguration." *Supplemental Order*, ¶70, at pp.31-32.

The plain language of the FCC clearly distinguishes 800 MHz public safety licensees from other 800 MHz licensees in relation to scrutinizing the amount of transaction costs. The TA, while noting the language of the FCC in this respect, does not seek to give effect thereto in any manner in the *Cost Classification Policy*, but, rather, appears to ignore the implications thereof. The TA did treat one special case for which the two percent of hard costs guidance for transaction costs might prove difficult (the case of "certain small reconfigurations"), but that case had not been raised by the Commission. The TA did not, however, address the special case of 800 MHz public safety licensees in relation to the application of scrutiny to transaction costs which case was identified by the Commission.

The failure of the TA to give effect to the clear distinction made by the Commission does not extinguish that distinction. The TA could, and in the view of RCC should, have recognized that distinction in its *Cost Classification Policy*, but choose not to do so. The significance of that lack of guidance in relation to the recovery of transaction costs by 800 MHz public safety licensees is not theoretical. Concerns on the part of 800 MHz public safety licensees regarding the recovery of transaction costs may regrettably discourage such licensees from engaging adequate legal, consulting, and other support to enable such licensees properly to protect in negotiation and, if necessary, litigation their rights in relation to the 800 MHz Rebanding, including their right to the avoidance of more than minimal disruption of radio system operations during the physical rebanding process and the right to facilities after the completion of the physical rebanding process which are in all material respects comparable to the facilities in use before the commencement of the physical rebanding process.

Those rights have been accorded, as has been established in Part I of this memorandum, the highest status by the Commission in its relevant reports and orders. In reviewing a submission of an 800 MHz Public Safety Licensee (either a request for planning funding

or a rebanding estimate) that includes a request for the reimbursement or payment of transaction costs in connection with the 800 MHz Rebanding, it is critical that the TA understand, appreciate, and, most critically, give effect to the primary purpose of the Commission in ordering the 800 MHz Rebanding – improving public safety communications – and the subordination by the Commission of all other matters concerning the 800 MHz Rebanding to that primary purpose. *July 2004 Report and Order*", ¶ 1, p. 3; ¶ 2, pp. 4-5; ¶ 4, pp. 5-6; ¶11, p. 9; ¶ 26, p. 18; ¶ 149, p. 80; ¶ 151, p. 82; ¶ 178, p. 96; and ¶ 201, p. 109. This critical responsibility has not been fulfilled by the TA in relation to the *Cost Classification Policy* and its application to 800 MHz public safety licensees.

The TA does not appear to have recognized that a restrictive view of the recovery of transaction costs by 800 MHz public safety licensees could discourage such licensees from obtaining the legal, consulting, and other support necessary and proper to negotiate to secure those licensees' rights to the avoidance of more than minimal disruption to the operations of public safety radio systems and to the provision of comparable facilities to 800 MHz public safety licensees. The TA entirely failed to acknowledge the special status of 800 MHz public safety licensees in relation to the application of scrutiny to transaction costs and provided no guidance whatever for giving effect to that distinction in the process of negotiations between 800 MHz public safety licensees and Sprint Nextel.

In the experience of RCC, a number of 800 MHz public safety licensees have been, in particular, very hesitant to engage FCC counsel out of concern for not recovering legal fees as transaction costs, and, therefore, the discouragement suggested above is quite real and in no sense theoretical.

RCC respectfully submits that:

- instead of facilitating the 800 MHz Rebanding, the *Cost Classification Policy* may well augment, rather than diminish disputes; and

- instead of furthering the central purpose of the 800 MHz Rebanding by giving effect to the distinction the Commission recognized between 800 MHz public safety licensees and other 800 MHz licensees, the Cost Classification Policy will likely impede and seems already to have impeded the achievement of that purpose.

(RCC believes that the TA could have made an appropriate analysis and given effect to the distinction the Commission recognized between 800 MHz public safety licensees and other 800 MHz licensees. The Commission is respectfully referred to Appendix 3 to this memorandum where that analysis is provided together with a suggested method for properly giving effect to that distinction.)

(ii) Practicality vs. Impracticality in Estimating/Controlling Transaction Costs

The problems created by the *Cost Classification Policy* are not limited to the TA's failure to give effect to the distinction between 800 MHz public safety licensees and other 800 MHz licensees subject to the 800 MHz Rebanding made by the Commission in relation to the application of scrutiny to transaction costs.

Transaction Costs, to be recovered, must have been included in either or both of (i) a request for planning funding or (ii) a rebanding estimate, unless the licensee is able to revisit the matter of transaction costs after those documents have been shown to reflect transaction costs inadequately. The TA has provided no protection for licensees in this respect, and Sprint Nextel will likely resist efforts either to preserve the right to reopen transaction costs or to succeed in recovering transaction costs not included in a request for planning funding or a rebanding estimate even if some reopening window is preserved.

The problem is that, at the time of the preparation of the request for planning funding or the rebanding estimate, it is likely to be impossible or impractical to estimate transaction costs with any serious degree of accuracy. The source of the problem is the fact that the licensee has no basis for knowing whether Sprint Nextel will accept the licensee's request for planning funding or its rebanding estimate without difficulty or whether the licensee faces a protracted negotiation which may fail and be followed by a protracted litigation and appeal.

The *Cost Classification Policy* is, in this respect, flawed as it requires: "All licensee reconfiguration costs must be included in a Request for Planning Funding or a Cost Estimate and are subject to negotiation with Sprint Nextel and approval by 800 MHz Transition Administrator, LLC." That requirement does not address the problem of costs not subject to estimation, and, except for the true-up process which is not well defined and provides little by way of assurance for licensees, there is no process or procedure established in the *Cost Classification Policy* (or elsewhere) to address the reimbursement of costs not practically capable of estimation at the time of the request for planning funding or the submission of the rebanding estimate.

b. TA's promulgation of "at risk" rule

In both the *Reconfiguration Handbook (1st Release)* (April 21, 2005) and the *Reconfiguration Handbook (Rev. 1.1)* (June 3, 2005), the TA states that costs incurred by an 800 MHz licensee in connection with the 800 MHz Rebanding before an agreement is reached with Sprint Nextel with respect to planning funding or with respect to reconfiguration itself (and approved by the TA) are 'at risk.'

RCC respectfully submits that the purported "at risk" rule was adopted by the TA without public notice or opportunity for interested parties to be heard, extends beyond the guidance which the TA is empowered by the Commission to provide, and the "at risk" rule is arbitrary, capricious, and made in pursuance of a misconception of the applicable proper public policy.

In complete contradiction to the purpose of the Commission to improve public safety communications, the direct effect of the "at risk" rule is to force public safety licensees to choose between (a) abbreviating the time they have available to assure that they properly prepare for the 800 MHz Rebanding and, by so doing, avoid the disruption of the

operation of public safety radio systems and assure public safety licensees of comparable facilities after the Physical Rebanding Process or (b) subjecting themselves to the risk of not recovering the costs of their preparation efforts.

The "at risk" rule serves to:

- afford protection to Sprint Nextel on the matter of its obligation to pay the costs of the 800 MHz Rebanding and to give that protection precedence over the maintenance of the availability, capacity, and functionality of public safety radio systems, which precedence is directly contrary to the public policy expressed by the Commission in the *July 2004 Report and Order*;

- impose an entirely improper chilling effect upon 800 MHz public safety licensee's undertaking necessary preparations for the 800 MHz Rebanding; and

- enable the TA and Sprint Nextel to hold the risk of not recovering costs *in terrorem* over the heads of public safety agencies and, thereby, discourage, even disable, risk averse funds-limited agencies from taking required action necessary to protect the public interest.

RCC respectfully submits that, for the reasons stated:

- the "at risk" rule of the TA does not serve, and indeed conflicts with, the primary purpose of the Commission in ordering the 800 MHz Rebanding: improving public safety communications;

- the "at risk" rule reflects an improper prioritization of objectives by the TA which has focused entirely too much effort on reviewing or controlling the costs of the 800 MHz Rebanding and not nearly enough effort to mitigate and to make funds readily available to mitigate the risks of the 800 MHz Rebanding to the uninterrupted performance of mission-critical public safety radio systems;

- the "at risk" rule is not a neutral or equitable principle as its benefit is entirely one-sided serving the interest of Sprint Nextel directly at the expense of 800 MHz licensees and, in particular, 800 MHz public safety licensees and, for that reason, tends to undermine the critical appearance of disinterestedness on the part of the TA;

- given that the "at risk" rule disserves the central purpose of the Commission in ordering the 800 MHz Rebanding, that rule cannot be saved by seeking to justify it by any purported benefit it may have in protecting the residual financial interest of the United States Government in the funds committed by Sprint Nextel to the 800 MHz Rebanding because the Commission gave no priority at all to such protection, but rather only an assurance of equitable treatment; and

- therefore, the "at risk" rule should be forthwith abolished.

c. TA's record retention requirements

The TA's Guidance Regarding Transition Administrator's Review rights [sic] of Licensee Records as Provided for in Nextel/Licensee Reconfiguration Contracts" (the re in the July 25, 2005, letter of the TA to Allen S. Tilles, Esq., the "Guidance on Review Rights") is another problematic pronouncement by the TA and raises questions respecting the TA's exceeding its delegated authority;

The Guidance on Review Rights was issued in response to an enquiry posed by a lawyer to the TA by which the lawyer sought "guidance regarding the TA's request that reconfiguration contracts include a provision regarding TA review and audit of licensee records after the closing of a transaction. In particular, that provision states:

> **"Review Rights:** In order to enable the Transition Administrator to comply with its audit obligations under the Order, Incumbent agrees to maintain records and other supporting evidence related to the costs that Incumbent has expended in connection with the Reconfiguration contemplated by this Agreement and that Nextel has paid or will pay to Incumbent pursuant to this Agreement. Incumbent agrees to maintain such records and make them reasonably available to the Transition Administrator for review or reproduction until eighteen (18) months after the date of Incumbent's executed Completion Certification required by this Agreement or for a longer period if Incumbent, for its own purposes, retains such records for a longer period of time. As used in this provision, 'records' includes books, documents, accounting procedures and practices and other data regardless of type and regardless of whether such items are in written form, in the form of computer data or in any other form."

The TA's position was that its authority to require such a provision in the reconfiguration contracts is found in the Commission's orders in relation to the 800 MHz Rebanding.

The TA's assertion of its review rights was said to be grounded in their serving the public interest: "To promote accountability over the reconfiguration process, the TA needs to be able to confirm the amounts and recipients of all funds expended by Nextel as proper and correct. This will deter potential fraud, waste and abuse. It will also promote fairness among all reconfiguring licensees and help to ensure that reconfiguration is conducted in the most cost efficient and timely manner possible. Without access to these records post-closing, it will be more difficult and time consuming for the TA to conduct its review of submitted reconfiguration contracts, audit the amounts expended for licensee reconfigurations or to address situations in which indications of fraud, waste or abuse are identified post-closing."

Finally, in summarizing its position on review rights, the TA asserted that requiring that the Nextel/Licensee contracts include these review rights will promote fairness, deter

potential fraud, waste and abuse, and enable the TA to most effectively fulfill its responsibilities as the manager of the reconfiguration process.

The problems raised by the Guidance on Review Rights relate to its application to 800 MHz public safety licensees and, more specifically, whether the TA has been delegated the authority by the Commission to assert the review rights as the TA has done in order to address potential fraud or other illegalities in the reconfiguration process perpetrated by public safety agencies, which are state, county, or municipal government agencies. The Guidance on Review Rights raises a series of questions, including:

- Whether the sources of authority relied upon by the TA in relation to its issuance of the Guidance on Review Rights truly support the assertion of that authority by the TA over public safety agencies;

- Whether, given the availability of the records of Sprint Nextel and the TA itself and given the authority of the TA to require supporting documentation in connection with its review of any agreements between licensees and Sprint Nextel, the imposition by the TA of further obligations upon licensees in the manner provided for in the Guidance on Review Rights is a necessary or proper exercise of the power delegated by the Commission to the TA;

- Whether issues of federalism are raised by the Guidance on Review Rights when applied to state, county, and local government agencies; and

- Whether the assertion by the TA of the power to investigate state, county, and local government agencies with respect to "potential fraud, waste or abuse regarding a transaction" in the manner provided in the Guidance on Review Rights exceeds the authority delegated to the TA by the FCC.

RCC will not seek to answer those questions in this memorandum as it believes that the Commission is far more familiar than RCC with these issues and that RCC has no useful contribution to be made thereto beyond raising the issues which RCC understands are of concern to certain 800 MHz public safety licensees.

d. TA's alternative dispute resolution plan

The *Alternative Dispute Resolution Plan for the 800 MHz Transition Administrator, LLC* of November 14, 2005 (the "Resolution Plan") is both flawed and applied with inappropriate rigidity, perhaps, to create the appearance of proper compliance with the RPP.

Of the flaws in the Resolution Plan, RCC respectfully submits that the plan:

- Carries forward the failure of the TA in the *Cost Classification Policy* to recognize the distinction between 800 MHz public safety licensees and other 800 MHz licensees in relation to the hard look at transaction costs, including the costs of participation of 800 MHz licensees in the dispute resolution process, in excess of two percent of hard costs;

- Fails to recognize that the dispute resolution process will likely address most frequently disputes which, at bottom, are about the propriety of the incurrence by 800 MHz licensees and the reimbursement thereof by Sprint Nextel of certain hard costs, which fact injects an element of circularity into the relationship between the hard look and the Resolution Process;

- Ignores that the hard look may operate to discourage 800 MHz licensees from making proper claims for hard costs and defend those costs in the dispute resolution process out of fear that the costs of that defense may not be recoverable, a result that is inconsistent with improving public safety communications;

- Provides determinations in relation to the burden of proof and the burden of persuasion which are inconsistent with Commission policy as shown in Appendix 4 to this memorandum; and

- Reflects the self-interest of the TA and ignores the conflict of interests implicit in the TA's requiring 800 MHz licensees to sign a waiver that protects the TA, acting as mediator, from being called as a witness or being subject to a subpoena for records in any proceeding of any nature, which waiver would operate to disable any licensee from effectively challenging the TA, acting as mediator, upon the grounds of bias, conflict of interest, or like basis.

RCC respectfully submits that, in addition to the flaws in the Resolution Policy, that policy as applied to a number of 800 MHz public safety licensees known to RCC makes little or no sense. In an effort that may be designed to maintain the appearance of compliance with the RPP, the TA has sent letters to a number of 800 MHz licensees to the effect that if they have not submitted signed reconfiguration agreements with Nextel to the TA by December 26, 2005, those licensees will find themselves in the mediation process.

Several 800 MHz public safety licensees in Stage 1 of Wave 1 which received a copy of that letter had submitted planning funding requests which were never acted upon by Sprint Nextel. For that reason, those licensees have been unable to carry out necessary reconfiguration planning. Without the completion of reconfiguration planning, the entry by a licensee into a reconfiguration agreement with Sprint Nextel is a very risky undertaking because the licensee has, absent planning, no sound basis for the estimation of rebanding costs reimbursement of which is a central, if not the central, subject of the reconfiguration agreement.

Reconfiguration agreements would be very difficult to reach in the fewer than ten remaining days until December 26, even if, as cannot be assured, acceptable protection (against the risks that a rebanding cost estimate proves to be incomplete and that the licensee would be prejudiced thereby) could be obtained. Certain licensees are seeking such protection from Sprint Nextel and, to date, have not been successful.

Forcing 800 MHz public safety licensees which are in the position described above into the mediation process serves no proper purpose. Mediation is designed to resolve disputes. What is to be mediated in relation to licensees which sought planning funding and have not had their planning funding requests processed by Sprint Nextel? The rigid adherence to the RPP in this respect seems only to enable the TA to create the appearance that the RPP is being complied with by the TA and to waste resources by placing before the TA matters that have not reached the dispute stage because of the inaction of Sprint Nextel. Instead of recognizing that the RPP is broken and acting to fix it, the TA moves forward apparently indifferent to the realities of the 800 MHz Rebanding when viewed from the standpoint of 800 MHz public safety licensees:

- To impress those 800 MHz licensees into the mediation process is perverse as it serves no good purpose;

- Requiring those licensees to enter mediation at this time only serves to add to the illusion that the RPP is on course; and

- Forcing those licensees to focus resources upon mediation now (prematurely) places the licensees at risk in relation to recovery of transaction costs (cost of mediation participation) by causing them to waste time in a pointless process which does not address the critical issue: Sprint Nextel simply did not timely process planning funding requests.

4. Issues Not Addressed by the TA

RCC respectfully suggests that certain critical issues have not been or do not appear to have been addressed by the TA or have not been addressed adequately and that those issues have the potential to disrupt the 800 MHz Rebanding and cause disruption to public safety radio systems and/or vastly increase the cost and complexity of completing the physical rebanding process. Some of the evidence in support of that conclusion is set forth in the following six sections:

- Vehicular Repeater Systems (§II.A.4.a);
- Required Motorola Rebanding Firmware (§II.A.4.b);
- Conventional Channels (§II.A.4.c) ;
- Resource Contraints (§II.A.4.d);
- TV Channel 69 (§II.A.4.e).

The issues addressed in this Section II.A.4 are among the issues that should be addressed during the period of any delay to the RPP authorized by the Commission. RCC respectfully submits that, if any such delay is granted, but is not used to solve these and other critical problems in relation to the 800 MHz Rebanding, additional delays without authorization therefor are inevitable.

a. Vehicular Repeater Systems

On December 21, 2004, the TA invited interested industry participants to provide comments on various issues related to the 800 MHz Rebanding and the schedule therefor which the TA was then developing. RCC responded to the TA's request on January 11, 2005, and raised a number of issues with the TA for its consideration. Among the issues raised by RCC were certain problems respecting ancillary, but critical, uses by public safety licensees of 800 MHz spectrum and, in particular, the use of in-band 800 MHz vehicular repeater systems (VRS).

The response of RCC to the TA with respect to VRS was as follows:

"The problem of critical ancillary uses in planning for rebanding derives from the fact that certain 800 MHz spectrum is deployed in critical ancillary operations that are not directly part of the basic fixed radio system infrastructure. Those operations, and certain in-band VRS usage seems to be the most obvious example, have certain requirements that would not continue to be met absent specific consideration of those requirements. The matter of VRS usage and the problem of rebanding are addressed in the text and illustration below:

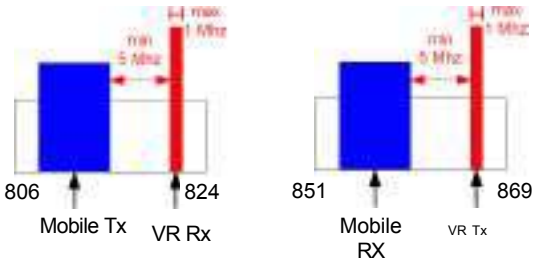


Figure 1: Main System in 806 Band

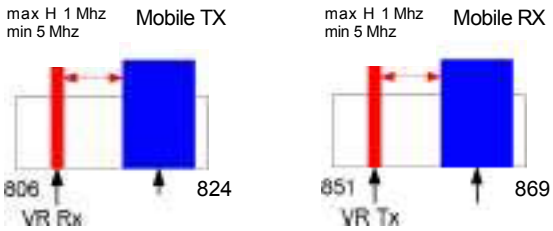

max H 1 Mhz
min 5 Mhz
Mobile TX
806
824
VR Rx
max H 1 Mhz
min 5 Mhz
Mobile RX
851
869
VR Tx

Figure 2: Main System in 821 Band

"In-band VRS have been increasingly deployed within the public safety industry in order cost-effectively to deliver in-building radio network coverage. These devices also resolve many of the deficiencies associated with having to move off radio networks and onto "talk-around" or walkie-talkie operations for fire-ground communications on-scene.

"VRS have been around for many years although in the past, the units were operated as cross-band repeaters and alternative bands such as VHF/UHF were utilized for the portable-to-repeater link. In the case of in-band repeaters, the application takes advantage of the current band separation between 851-861 MHz and the NPSPAC band located between 866-869 MHz. This band separation meets one of the VRS application's two special frequency assignment requirements.

"There must be 5 MHz separation between the main radio system and the VRS conventional interface channels.

"As an example, a licensee may have a host trunking system operating in the 854-861 MHz sub-band. In that case, they will have licensed 866-869 MHz channels for the conventional link between the portable and the VRS interface. In most cases, the licensee is operating multiple channel pairs for the VRS to allow multiple, independent conversations on the scene.

"Under the proposed rebanding plan, the NPSPAC operations will be relocated to the 851-853 MHz sub-band. When this takes place, the required separation will no longer exist unless the host system was deployed in the higher end of the 851-866 MHz sub-band.

"The second requirement is related to the span of frequencies permitted in applications where multiple VRS conventional channels are utilized. In this example, the VRS channels have the necessary separation since the rebanding plan simply relocates the NPSPAC band to 851-853 with all channels in the same relative position in the band.

"The bandpass filter in the VRS-portable interface limits the frequency spread to 1 MHz for optimum performance.

"RCC would encourage the 800TA to disclose its plans in relation to maintaining the operability of VRS which are increasingly critical to public safety radio operations. …"

So far as RCC is aware, the TA has never addressed the problems of VRS in any statement of policy or procedure. If the problem of VRS is not resolved, then 800 MHz public safety licensees no longer able to use VRS will have to prepare rebanding plans that address the unavailability of VRS by means of other comparable facilities. Such other comparable facilities include major expansions of trunked radio systems to provide in-building coverage presently supported by VRS rather

than by the trunked radio system. Such expansion of trunked radio systems would be very costly, time-consuming, and burdensome.

There is today no simple truly comparable replacement for the commonly used Futurecom II VRS when used as a radio system coverage extension device for either:

- Portable in-building coverage in urban and suburban areas; or
- Portable coverage in rural areas for which only mobile coverage has been designed.

Solutions that envision the modification of the current Futurecom design are fraught with difficulties that affect the ease of use and the reliable operation of that equipment. Substitute comparable facilities are, as noted, very costly, time-consuming, and burdensome to plan, procure, install and test.

In addition, there is today no simple truly comparable replacement for the commonly used Futurecom II VRS when used as a gateway between national and local mutual aid conventional channels. Substitute comparable facilities for this application are also very costly, time consuming, and burdensome to plan, procure, install, and test.

In the absence of a solution to the VRS issue, once Stage 2 of each Wave arrives, the process of negotiations between Sprint Nextel and 800 MHz public safety licensees which rely on VRS will likely grind to a full stop as Sprint Nextel resists paying for expensive solutions like trunked system extensions and 800 MHz public safety licensees reliant upon VRS insist upon comparable facilities.

This matter cannot be reasonably left to negotiations without serious policy guidance if any schedule for the 800 MHz Rebanding is to be maintained. No such policy guidance has been supplied by the TA despite the issue's having been raised at least 11 months ago (by RCC and, perhaps, earlier by others concerned in the process).

Finding solutions for the VRS problem is, RCC respectfully submits, vastly more important than solving the problems addressed by the TA in certain of its policy pronouncements. The VRS problem could literally halt the 800 MHz Rebanding as 800 MHz public safety licensees dependent upon VRS properly refuse to proceed with reconfiguration in the absence of agreement with Sprint Nextel to pay what could be the considerable cost of facilities which provide a comparable substitute. This issue must be addressed in policies that consider not only solutions involving other equipment, but also solutions enabled by creative spectrum allocations. This issue should not be deferred to dispute resolution because mediation and arbitration neither bring nor are intended to bring creativity to solving technical problems as opposed to resolving commercial disputes.

The TA does not appear to be addressing the VRS problem, and Stage 2 of Wave 1 commences in fewer than 60 days. The TA's Report does refer to 'Vendor-Related

Issues,' but the issues being addressed and actions being taken by the TA under that caption (preparation of "additional vendor guidance regarding program safeguards afforded vendors …" and finalization of a "Standard Bid Package … designed to assist municipal licensees …") do not include the VRS problem.

The failure by the TA to issue any policy in relation to the VRS problem or even publicly to acknowledge the VRS problem and provide assurance that the issue is under study and that a solution or policy will shortly be forthcoming is a failure of critically required leadership on the part of the TA. The 800 MHz Rebanding is a daunting undertaking for which leadership on critical issues is essential. No concentration by the TA upon cost verification and justification, fraud prevention or detection, web site or educational expense reimbursement policies will solve the VRS problem. Moreover, while none of the problems addressed by the TA's referred-to processes and procedures have the potential to cripple the 800 MHz Rebanding, the absence of a solution for or policy to address the VRS problem has precisely that potential. (Other examples of failure of required leadership on the part of the TA are discussed in §§II.A.5.a-b of this memorandum, below.)

b. Required Motorola Rebanding Firmware

The TA's Report makes reference to "Motorola Software Development: as follows:

> "During this quarter, Motorola completed two additional major milestones in its development of rebanding radio software, which will allow hundreds of thousands of radios to be reprogrammed rather than replaced. The TA participated in the review of Milestone #4 regarding Certification Test Scripts and Summary Requirements for the soft ware. Motorola indicated to the TA that, at this time, it does not foresee any difficulties in meeting the April 2006 deadline to deliver the software for implementation."

The fair inference from the quoted section of the TA's Report is that all is well in relation to the Motorola software (actually firmware) expected to be delivered in April 2006. That section recalls the teaching of Dr. Pangloss of Voltaire's *Candide* (1759) that all is for the best in the best of all possible worlds. While it is doubtless true that progress is being made by Motorola in relation to the rebanding firmware, there are serious concerns respecting that firmware, the timing of its availability, the functionality thereof, and the conditions precedent to its implementation, and none of those problems receive attention in the TA's Report. Those problems are addressed in the following four sections:

- Stage 1 of Wave 1 (§II.A.4.a(i));
- Functionality questions (§II.A.4.a(ii));
- Implementation questions (§II.A.4.a(iii)) ; and
- Rebanding firmware and procedural gaps in the RPP (§II.A.4.a(iv)).

(i) Stage 1 of Wave 1

As the TA is aware, the Motorola rebanding firmware cannot be relied upon by the licensees in Stage 1 of Wave 1. The firmware will not be available within the timeframe established by the RPP, and its timely delivery and proper functionality is unpredictable. Proceeding with the physical rebanding process in the absence of such firmware would, without extraordinary and extremely expensive measures, degrade the control channel redundancy and failsoft capabilities of those 800 MHz public safety systems affected by Stage 1 and, by so doing, materially adversely affect public safety radio system operations and interoperability, all as have been explained to the TA by concerned 800 MHz public safety licensees and, particularly, such licensees which operate within a very dense web of interoperability/mutual aid arrangements.

For the purposes of this §II.A.4.a(i), it is sufficient to note the serious problem facing 800 MHz Wave 1 public safety licensees as a result of their inability to rely upon the Motorola rebanding firmware, which problem is nowhere mentioned in the TA's Report, despite the TA's having participated in several meetings and two presentations made by or on behalf of a group of concerned 800 MHz public safety licensees. In §II.A.5.a of this memorandum below, information is provided respecting the failure of the TA to provide required leadership in relation to this problem in at least one critical area of the country by taking decisive action in response to a suggestion by concerned 800 MHz public safety licensees that Stages 1 and 2 of Wave 1 be consolidated as it affects such licensees to enable them to defer the reconfiguration of their Lower 120 Channels until the Motorola rebanding firmware becomes available.

(ii) Functionality questions

Certain 800 MHz public safety licensees which have been in discussions with Motorola respecting Motorola's rebanding firmware have become aware of Motorola's apparent unwillingness to certify to users of its equipment that such users will be protected from the possible unintended consequences of implementing the Motorola rebanding firmware such that subscriber radios will retain the features, functionality, capability, talkgroup capacity, and speed of response which they presently have after the application of the Motorola rebanding firmware.

For the purposes of this §II.A.4.a(ii), it is sufficient to note the serious concerns of 800 MHz public safety licensees with applying the Motorola rebanding firmware in the absence of such a certification, which concerns are nowhere mentioned in the TA's Report.

(iii) Implementation questions

As a matter of established practice and procedure, many 800 MHz public safety licensees do not implement on a fleet-wide basis new subscriber unit firmware without first applying appropriate testing procedures to a limited number of subscriber units. The implication of the TA's Report that 800 MHz public safety licensees will widely implement the Motorola rebanding firmware forthwith upon its availability is simply inconsistent with the properly cautious approach of 800 MHz public safety licensees

which have experienced or have knowledge of the problems that can result from premature wide implementation of a new firmware load.

(iv) Rebanding firmware and procedural gaps in the RPP

In Section II.A.2 of this memorandum, above, the attention of the Commission was respectfully drawn to the problems of procedural gaps in the RPP. One of those gaps involved the failure of the RPP to make provision for 800 MHz public safety licensees without infrastructure subject to the 800 MHz Rebanding to file rebanding plans and rebanding estimates and be included in the process of recovering reconfiguration costs for the implementation into their infrastructure of the Motorola rebanding firmware without which implementation those licensees would not be able to maintain comparable facilities.

Where an 800 MHz licensee employs Motorola infrastructure that operates on no channels subject to retuning, mandatory or optional, the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure because:

- The current version of firmware in Motorola infrastructure is capable of broadcasting the NPSPAC Channels in their present spectral location, *i.e.*, before the reconfiguration of the 800 MHz band pursuant to the 800 MHz Rebanding.

- This capability of broadcasting the NPSPAC Channels is present in Motorola infrastructure even if NPSPAC Channels are not currently in use therein, and, therefore, if a licensee adds NPSPAC Channels to its infrastructure today (pre-rebanding), the controllers can be programmed to operate on or broadcast the newly-added NPSPAC channels to the fleet of subscriber units.

- Once the NPSPAC channels are moved pursuant to the 800 MHz Rebanding, the Motorola controllers will no longer be able to broadcast the relocated NPSPAC channels to the subscriber fleet if added to a system which has not had a firmware upgrade.

- Therefore, the facilities (infrastructure) of that licensee after the 800 MHz Rebanding is completed will not be comparable to the present facilities (infrastructure) of that licensee absent the firmware upgrade.

- Absent a firmware upgrade, in addition to the problem of maintaining comparability in the short term, there is a danger that the old infrastructure firmware will at some point no longer be supported.

- That licensees will, therefore, be stranded with an unsupported version of infrastructure firmware while the more generally implemented new infrastructure firmware becomes the supported version, and the effect of the unavailability of support would represent an additional aspect of failing to maintain comparability.

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with no subscriber units that operate on channels other than those utilized by the licensee's Motorola Infrastructure, the licensee will nonetheless be affected by the 800 MHz Rebanding in relation to its subscriber units because:

- The current firmware in Motorola subscriber units is capable of accessing the NPSPAC Channels in their present spectral location.

- This capability is present in Motorola subscriber units even if those units are not presently utilizing the NPSPAC Channels, and, therefore, if a licensee were to add NPSPAC channels to its infrastructure today (pre-rebanding) or if an interoperability partner of that licensee were to do so, the subscriber units of the licensee in the position of Case 1 could access the newly-added NPSPAC channels.

- Once the NPSPAC channels are moved pursuant to the 800 MHz Rebanding, the Motorola subscriber units, as presently configured, will no longer be able to access NPSPAC channels if added to a system unless the subscriber units have had a firmware upgrade.

- Therefore, the facilities (subscriber units) of that licensee after the 800 MHz Rebanding is completed will not be comparable to the present facilities (subscriber units) of that licensee.

- Absent a firmware upgrade, in addition to the problem of maintaining comparability in the short term, there is a danger that the old subscriber unit firmware will at some point no longer be supported.

- That licensee will, therefore, be stranded with an unsupported version of subscriber unit firmware while the more generally implemented new subscriber unit firmware becomes the supported version, and the effect of the unavailability of support would represent an additional aspect of failing to maintain comparability.

(There are Motorola subscriber units which are not presently capable of operating on the NPSPAC Channels in a manner compliant with FCC regulations respecting hardware. The argument made above with respect to maintaining comparable facilities would not apply to Motorola subscriber units which are not presently capable of compliant operation on the NPSPAC Channels in their current location.)

A licensee in the positions described above is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding. Accordingly, a licensee in such position is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain

comparability in relation to infrastructure (or infrastructure and subscriber units as the case may be). A licensee in such a position clearly falls in one of the procedural gaps of the RPP described in Section II.A.2, above, because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding for the purpose of seeking to maintain the comparability of its facilities.

For the purposes of this §II.A.4.a(iv), it is sufficient to note that:

- There are procedural gaps in the RPP which disenable certain 800 MHz public safety licensees from maintaining comparable facilities through the 800 MHz Rebanding as implemented in the RPP by applying the Motorola rebanding firmware; and

- Those procedural gaps are nowhere mentioned in the TA's Report.

***

For the reasons stated in §§II.A.4.a(i)-(iv), above, all is not clearly for the best in the world of the 800 MHz Rebanding as respects the Motorola rebanding firmware, and the picture of that world presented in the TA's Report is over-optimistic and improperly unqualified.

c. Conventional Channels

The TA has not addressed two problems that concern the effect of the 800 MHz Rebanding upon certain 800 MHz conventional channels:

- In some subscriber radio configurations there is at present no recognized safe means, and in all subscriber configurations there are no effective means by which conventional or 'talkaround' channels in subscriber radios can be rebanded in a manner such that those facilities remain available to the public safety officers who rely thereon and whose lives and the lives of the public depend thereon during the physical rebanding process; and

- In some subscriber radio configurations there is at present no recognized safe means, and in all subscriber configurations there are no effective means by which 800 MHz NPSPAC mutual aid channels designed for nationwide compatibility so as to enable the use thereof by any 800 MHz public safety subscriber unit in connection with a major incident or disaster (and, most recently, used extensively in response to the devastation of hurricane Katrina) can be rebanded in a manner such that (i) those facilities remain compatible as they now are and (ii) confusion, risk, inability to communicate and real danger are not created during the physical rebanding process by the introduction of incompatibilities.

In either case, certain subscriber radio configurations may not have the ability to add the new channel plan and simultaneously retain the current plan. Fixed infrastructure cannot in all cases be deployed to address this situation particularly given the capabilities and performance of talkaround operations.

The TA's Report does, as previously noted, reflect that the TA "will establish a working group to focus on mutual aid and interoperability issues." Surely, this critical issue should have been accorded a higher priority by the TA than certain of the other endeavors of the TA discussed in this memorandum. The maintenance of the effectiveness of conventional channels for public safety use goes to the heart of the Commission's purpose in ordering the 800 MHz Rebanding (improving public safety communications). Given the focus of The 9/11 Commission Report - Final Report of the National Commission on Terrorist Attacks Upon the United States on failures of public safety communications interoperability that was issued prior to the *July 2004 Report and Order*, preservation and improvement of interoperability for public safety communications should have been thoroughly addressed in the 800 MHz Rebanding process. Preservation of interoperability amongst public safety agencies should have been among the very highest priorities of the TA. Yet, that issue remained in the TA's Report as one to be addressed not by offering solutions "[i]n the upcoming quarter, [but, rather, by] the TA['s] … establish[ing] a working group to focus on mutual aid and interoperability issues … [and] establish[ing] recommendations and guideline for maintaining critical communications during reconfiguration" at some unspecified future time by which the physical rebanding process may have commenced without the benefit of such recommendations and guidelines. The question must be asked, how do public safety licensees in the early portion of the RPP address interoperations if they are to be rebanded, or at least have come to agreement, prior to having the benefit of the planned working group?

d. Resource Constraints

With the placement by the TA of so many critical public safety systems in Wave 1 and the failure of the RPP to provide for a slow ramp-up of the process to gain experience and to provide time for training of necessary personnel, both recognized and criticized in the Comments, there is a very real potential that insufficient trained technical resources will be available to handle, in a manner compliant with the RPP as presently in effect, the concurrent reconfiguration of large 800 MHz public safety radio systems and their extensive fleets of subscriber units. This potential for inadequate resources is particularly evident in large metropolitan areas where several large systems are present which share intersystem programming of subscriber radios to enable compatible and interoperable communications for first responders.
In one area of the country
For example, the Baltimore-Washington-Northern Virginia area of 800 MHz public safety licensees operate 23 800 MHz trunked radio communication systems. These jurisdictions serve a large population area and provide first-due response of the closest fire and/or EMS unit based upon the location of the emergency regardless of the jurisdictional boundaries. This is possible as, over the last 10 years, the region has taken

the initiative to purchase compatible radio equipment and to program that equipment to interoperate on the 800 MHz public safety radio infrastructure of various localities and entities.

Collectively, there are approximately over 200 radio base station sites, 31,000 mobile radios, 42,000 portable radios and an additional 6,000 fixed or other radios such as in-band vehicular repeaters operating within the region. There are over 80 bi-directional amplifier sub-systems providing service in the public transportation system tunnels and in public buildings. The radio and system technician time alone, not counting the logistics, support, quality assurance, and without counting any parallel activities such as the licensee agency liaisons or end user time lost, will require approximately 87,000 person-hours to tune the infrastructure and the subscriber fleets. A second fleet reprogramming cycle is presently considered to be required in order to remove the pre-rebanding channels from the subscriber radios.

The TA's Report does not appear to refer to any on-going study by the TA of this issue or the reassessment of the views which the TA formed in connection with the preparation of the RPP.

e. Television Channel 69

Relocation of NPSPAC licensees to the 851-854 MHz band will increase the potential for interference from Television Channel 69 transmitters to 800 MHz public safety radio systems in cities where that television channel remains in use. Noise measurements performed by RCC in one such city indicate that the potential for desensitization of public safety radio system receivers by channel 69 noise is very real and substantial. In such cases public safety licensees may be trading one form of interference (commercial ESMR) for another (desensitization from noise from a television transmitter). This interference is a function of the distance from the television transmitter and its effective radiated power relative to the location of the public safety communications system.

Interference from TV Channel 69 will raise difficult problems in relation to the maintenance of comparable facilities, and the solutions available to maintain comparability are likely to be complex, expensive and time-consuming to procure, install, and test. Until the reconfiguration of the television band is completed and Channel 69 is abandoned, this form of interference will be a threat to the maintenance of comparable facilities by certain public safety licensees.

The TA's Report appears to make no reference to this concern, and the TA does not seem to have any on-going initiatives which address this concern, the solution for which a high priority should have been established by the TA. Here again, absent solutions or policy guidance from the TA, the resistance of Sprint Nextel to funding solutions for this problem will clash with the insistence of 800 MHz public safety licensees upon comparable facilities and will send these clashes to the mediation process which is not

designed to offer creative technical or regulatory solutions and could be effectively overwhelmed thereby.

5. Failure of Required Leadership

RCC respectfully suggests that the TA has not provided required leadership in relation to the 800 MHz Rebanding at critical times and has, rather, avoided decisive action when needed on serious issues and hard questions. Some of the evidence in support of that conclusion is provided in the following two sections:

- Consolidation of Stages 1 and 2 of Wave 1 for Certain Regions (§II.A.5.a); and
- Prioritization Risk Issues Created by the RPP (§II.A.5.b).

a. Consolidation of Stages 1 and 2 of Wave 1 for Certain Regions

As mentioned in §II.A.4.b, above, the TA is aware that the Motorola rebanding firmware cannot be relied upon by the licensees in Stage 1 of Wave 1 as there is no certainty that it will be available in a timely basis or work reliably in the timeframe established by the RPP. Proceeding with the physical rebanding process in the absence of such firmware would, without extraordinary and extremely expensive measures, degrade the control channel redundancy and failsoft capabilities of those Stage 1, Wave 1 systems and, by so doing, will materially adversely affect public safety radio system operations and interoperability, all as have been explained to the TA by concerned 800 MHz public safety licensees and, particularly, such licensees which operate within a very dense web of interoperability/mutual aid arrangements.

800 MHz public safety licensees in the National Capital region made several presentations to the TA concerning this problem, which very clearly affects that region in a very great degree. Affected 800 MHz public safety licensees studied the problem and the possible solutions thereto and concluded that the least risky and least expensive solution to the timely availability of the Motorola rebanding firmware for Stage 1, Wave 1, 800 MHz public safety licensees is, in effect, to consolidate Stages 1 and 2 of Wave 1 as it affects such licensees to enable them to defer the reconfiguration of their Lower 120 Channels until the Motorola rebanding firmware becomes available.

That conclusion was shared with the TA at meetings on September 1 and October 21, 2005, after which representatives of the TA indicated to the concerned licensees that if they provided supporting information the TA would take such other action to secure the approval by the Commission of the deferral of the reconfiguration of the Lower 120 Channels as was necessary to implement the licensees' solution to the problems caused by the unavailability of the Motorola rebanding firmware.

Concerned licensees were pleased and relieved that the TA had recognized their concerns, adopted their proposed solution, agreed to advocate that solution before the Commission, and had generally taken command of the situation as was required.

With the passage of time, however, a very different picture emerged and an about-face became apparent. On November 23, 2005, the TA sought to 'clarify' its position by;

- Altering the clear expectations of the concerned 800 MHz public safety licensees by the assertion that it is the responsibility of the licensees to present their own case for relief to the Commission;

- Distancing the TA from the problem and the solution by the announcement of the position that the TA would provide support and assistance and

- Impliedly denying that the TA had the power to seek the requested relief from the Commission by the assertion that all waivers of timely implementation of the RPP are to be filed by the licensee.

The failure of required leadership in the about-face of the TA is patent. The impropriety of shifting the responsibility for seeking relief from the TA to the concerned licensees is transparent, particularly with the scheduled closing of the mandatory negotiation period for Stage 1 of Wave 1 in about 20 days after the reversal of position by the TA. The distancing of the TA from the relief it had so clearly indicated was necessary and proper is inexplicable. The implication that the TA lacked authority to proceed is contradicted by the letter of Squire, Sanders & Dempsey L.L.P., counsel to the TA, to Mr. Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 2, 2005, which, citing appropriate authority, stated that "the Commission gave the TA flexibility and discretion to change the reconfiguration schedule to meet unanticipated 'demands.'"

The about-face of the TA in relation to the concerns of 800 MHz public safety licensees in the National Capital region is, RCC respectfully submits, an incomprehensible and improper exercise of the flexibility and discretion which the TA has properly claimed was delegated to it by the Commission. The failure to use delegated power in so clear a case to improve, indeed only maintain, public safety communications is a failure to provide leadership of the kind so clearly needed by a proceeding with the complexity and high purpose of the 800 MHz Rebanding.

The pinched vision of its power expressed in the about-face of the TA in a matter so close to the central purpose of the 800 MHz Rebanding is in stark contrast to the expansive view of its authority taken by the TA in relation to the Guidance on Review Rights, which will never, even if enforced with vigor, make any contribution to improving public safety communications. This contrast does not, RCC respectfully submits, reflect well upon the leadership offered by, or the priorities of, the TA in relation to the 800 MHz Rebanding.

b. Prioritization Risk Issues Created by the RPP

In one instance well known to RCC (and there are likely to be others), the RPP created problems by separating a state-wide 800 MHz public safety radio system by geography into more than one of the Waves of the RPP. That separation causes problems for such system both in relation to matters of interference at the border of the regions separated by the Waves and in relation to the maintenance of uninterrupted operations arising as a result of doubling the number of reconfiguration rounds of the same system.

In this instance, the assistance of the TA was sought and the assistance provided was very disappointing. In one instance, the TA told the licensee that, despite the problem's having been created by the TA in the formulation of the RPP, the TA could do nothing about the problem, the licensee should speak to Nextel (as it then was). The TA suggested that the licensee contact Nextel and advised that the recovery of any cost incurred by the licensee in its effort to address this issue was "at risk.". A meeting was held with Nextel the representative of which stated that Nextel would be happy to assist in modifying any geographic areas they could, but they suggested the licensee contact and coordinate with licensees in the later Wave, and informed the licensee that the recovery of the costs incurred in that effort on the part of that licensee were at risk if performed before agreement with respect thereto was reached with Nextel.

This instance not only established the problems created by the RPP for licensees with systems that span multiple NPSPAC regions, but also demonstrates the practical effect of the "at risk" rule which is to discourage 800 MHz public safety licensees from taking protective measures required in the interest of public safety.

The failure of the TA to act decisively and take responsibility for creating and solving these problems affecting public safety radio systems constituted additional failure of the TA to provide critically-required leadership.

This leadership failure is especially noteworthy because the problems as to which the TA failed to provide needed assistance were called to the attention of the TA by RCC on January 11, 2005, in response to the invitation of the TA to concerned parties to offer comments on the schedule for the 800 MHz Rebanding then in preparation by the TA (ultimately the RPP). The relevant section of RCC's comments is, in pertinent part, as follows:

> "While the geographic definitions of regions are clearly defined in the rules, the allocation of NPSPAC channels is not so strictly limited. Regions cooperate along their borders to provide seamless operations to those agencies that have an interest that transcend the border of the region. Examples include those licensees that have operational areas that include two or more regions. These licensees are accommodated through the allotment of like channels in all areas. This situation is particularly applicable to states that are divided between two or more regions and have a statewide NPSPAC operation. Other not so obvious examples are licensees that have coverage requirements that reach the regional border and require transmitters in adjacent regions to provide coverage. This situation may exist even in regions that are bound by state borders. Cities that are located at a regional boundary, as well as a state system, may rely on

transmitters located just over the boundary to provide coverage back into the primary area of coverage. These out-of-region transmitters must, in the view of RCC, move with the primary system and not be detached from the system during any rebanding."

It is surely poor leadership practice for a leader to be advised of a problem, have responsibility for addressing the problem, have the opportunity to address the problem, fail to address the problem, and then advise parties affected by the problem that they should look elsewhere than to the leader for assistance therewith. When that pattern is practiced by a leader charged with the responsibility for administering a major undertaking for the purpose of improving public safety communications and where that leader fails to address directly a problem in that undertaking that has a material adverse effect upon public safety communications, takes no responsibility therefor and declines to provide active assistance, there is a problem in leadership which, RCC respectfully submits, cannot be ignored.

6. Resultant Cynicism

RCC respectfully suggests that the actions of the TA have engendered substantial cynicism among some 800 MHz public safety licensees and other participants in the 800 MHz rebanding which view with considerable cynicism the contribution of the TA in the 800 MHz Rebanding. That cynicism has its origins in the following concerns:

- Concern that the TA is insensitive to the achievement of improvement in public safety communications;

- Concern that the TA does not understand the commitment and dedication of public safety officers and their dependence for survival upon the proper operation of public safety radio systems;

- Concern that the TA expends entirely too much time and resources on accounting matters and entirely too little time on solving the critical issues confronting the 800 MHz Rebanding and serving the central purpose thereof;

- Concern that the TA has devoted substantial effort and funds to issue numerous public pronouncements relating to cost justification by 800 MHz licensees, which as of September 30, 2005 had actually received less than $500 thousand for rebanding costs, but not a single public pronouncement relating to cost justification by Sprint Nextel which, according to the TA's report, has charged approximately $360 million to its minimum commitment pursuant to the 800 MHz Rebanding;

- Concern that the TA has not been even handed as between Sprint Nextel and 800 MHz licensees as, for example, in promulgating the "at risk" rule and in requiring levels of cost detail unwarranted by any possible saving such detail might create;

- Concern that the TA's inflexible accounting perspective will create costs for licensees, fees for the TA, and delays in the completion of the 800 MHz Rebanding all out of proportion to any benefits in savings that could possibly be achieved achieved;

- Concern that the TA seems intent upon expanding its role by undertaking responsibilities (extending audit review rights and reviewing written requests for permission to reproduce TA written materials, for example) that surely increase the role of the TA without clearly enhancing in any manner the improvement of public safety communications;

- Concern that the TA has failed to provide the kind of leadership that the 800 MHz Rebanding so clearly requires; and

- Concern that the TA is the only risk-protected participant of the 800 MHz Rebanding and will benefit disproportionately therefrom. Transparency is needed for both the Sprint-Nextel costs and TA costs per system, backed by the same level of documentation to be imposed on the licensees affected by the 800 MHz Rebanding.

- Concern that the TA established no deadline for approval by Sprint-Nextel of Requests for Planning Funding, and the delay in the receipt of such funds has placed licensees in the position of limited or no time for detailed planning of system reconfiguration within the timeframe of the RPP.

7. Consequences of Cynicism

RCC respectfully suggests that the growth of cynicism has had, is having, and, unless checked and reversed, will continue to have a corrosive effect upon the commitment of certain 800 MHz public safety licensees to the 800 MHz Rebanding. Certain licensees have begun to question the value of the 800 MHz Rebanding for which they had great hopes because they fear that, although they were intended as the primary beneficiaries of the reconfiguration process, they may suffer a disaster in relation to their public safety responsibilities during the physical rebanding process if they are unable to plan and implement a proper rebanding plan effectively and are compelled to proceed in the absence thereof or decline to proceed and engage in extended litigation to defend their performance of their responsibilities. This development cannot have a positive effect upon the swift completion of the 800 MHz Rebanding.

8. Situation Serious, but Not Hopeless

Notwithstanding the above-detailed dreary partial catalog of 800 MHz Rebanding realities, the situation is far from hopeless, and the Commission can make an early course correction that will steer the 800 MHz Rebanding toward its objective of improving public safety communications. RCC will offer specific suggestions in this respect in Part III of this memorandum after addressing in Part II.B the contributions of Sprint Nextel to

the box of distressing 800 MHz Realities and in Part II.C other and further sources of grim realities.

B. Factual Realities and the Comments

800 MHz public safety licensees have certain serious reasons for concern with and disappointment in the role of Sprint Nextel in the implementation of the requirements of the 800 MHz Rebanding., but those licensees likely share certain of the criticisms of the TA leveled by Sprint Nextel. In this Part II.B, RCC provides details with respect to the bases for concern and disappointment, the bases of agreement, and of the consequences thereof in the seven sections that follow:

- Front-end Loading in the RPP (§II.B.1);
- Requests for Planning Funding (§II.B.2);
- Prejudice from Delays and Failures in relation to Planning Funding (§II.B.3);
- Sprint Nextel's Disingenuousness concerning Its Funding Obligations (§II.B.4);
- The Case for Greater Supervision by the Commission (§II.B.5); and
- Reforming the Schedule for the 800 MHz Rebanding (§II.B.6).

1. Front-end Loading in the RPP

Sprint Nextel is correct when it asserts in the Comments that the RPP should not have front-end loaded the schedule for the 800 MHz Rebanding, but should, rather, have provided for "a 'ramp-up period' to allow a manageable number of 'pilot' retunees, their equipment vendors and advisors to gain substantial experience in the retuning planning and negotiation process and to have the opportunity to share that experience with other incumbents."

RCC need not support the conclusion of Sprint Nextel with further argument, but does note that the problems created by the RPP are hardly limited to the stress upon the schedule produced by the unreasonable front-end loading by the TA. Problems of at least equal magnitude, if not greater, have already be explained by RCC in relation to the gaps in the RPP and the failure of the TA to provide in the RPP or elsewhere for a workable process to maintain interoperability during the physical rebanding process.

2. Requests for Planning Funding

Sprint Nextel is not correct when it asserts in the Comments that it "is doing everything within its control to make the 800 MHz band reconfiguration progress as quickly as possible." The experience of RCC is to the contrary particularly in relation to requests for planning funding. In the Comments, Sprint Nextel asserts that of the 35 requests for planning funding timely filed, "all parties including Sprint Nextel, the incumbent and its vendors have reached agreement on 14 requests and these are being finalized. Two of those RPFs have been memorialized in signed Agreements and approved by the TA …

Significantly, in almost every one of these cases, the parties agreed to consolidate their RPFs within an overall FRA – thereby eliminating the need for the parties to execute a separate planning funding contract."

RCC is aware that at least three licensees included in the situation described as "in almost every one of these cases, the parties agreed to consolidate their RPFs within an overall FRA," no such agreement existed at all and the determination to consolidate the rebanding funding requests of those three with an overall frequency reconfiguration agreement was made unilaterally by Sprint Nextel without the consent of the licensees concern. After that unilateral determination, Sprint Nextel put the planning funding requests on the back burner," and they have not to this day been processed. More recently, Sprint Nextel has reversed its position and advised the licensees that Sprint Nextel does not wish to proceed with a discussion of the FRA but, rather, wants to return to the planning funding request which Sprint Nextel had unilaterally abandoned.

RCC has experience in another case where a public safety licensee submitted a Request for Planning Funding on September 27, 2005 to Sprint Nextel. Sprint Nextel contacted the licensee on December 5, 2005 and requested a meeting that was held on December 13, 2005. The result of that meeting was that Sprint Nextel indicated they were committed to "expediting" the 60 plus day old request. That commitment, however, was coupled with a request from Sprint Nextel that, contrary to the stated requirements of the TA, the licensee resubmit the request for planning funding on new forms promulgated by the TA. This request severely circumscribes the commitment of Sprint Nextel to the expeditious provision of planning funding to the concerned licensee.

3. Prejudice from Delays and Failures in relation to Planning Funding

A statistical review of the status of requests for planning funding of the sort provided by Sprint Nextel would, even if accurate, provide no insight into the prejudice to 800 MHz licensees and public safety licensees in particular caused by the unreasonable delays in the provision of planning funding. Those delays create risk in relation to development of a safe and effective plan and to the recovery of rebanding costs, abbreviate the time available for necessary reconfiguration planning, draw licensees unnecessarily and purposelessly into or closer to the mediation process, and create difficulties for the negotiation of agreements with Sprint Nextel that provide adequate protection against the risks caused by those delays.

4. Sprint Nextel's Disingenuousness concerning Its Funding Obligations

Sprint Nextel has consistently sought to create and elevate protection for Sprint Nextel against its having to spend more than its minimum financial commitment to equal dignity with improving public safety communications as a purpose of the 800 MHz Rebanding. Sprint Nextel has sought to explain that it must support the requirements of the TA for adequate detail and support of proposed costs in connection with the 800 MHz Rebanding because "Sprint Nextel's funding of the 800 MHz band reconfiguration is subject to a potential 'anti-windfall' payment at the end of band reconfiguration;

accordingly, Sprint Nextel is placed in a position where it is the steward of public funds." That statement is seriously misleading because it fails entirely to recognize that Sprint Nextel is advantaged if an anti-windfall payment is required because such payment will be required if and only if Sprint Nextel does not expend funds in relation to the 800 MHz Rebanding beyond the minimum commitment required of Sprint Nextel by the Commission in connection therewith.

The Commission denied Sprint Nextel a cap upon its obligation to fund the 800 MHz Rebanding. The effort of Sprint Nextel to assure that it makes an anti-windfall payment cannot be viewed solely, if at all, as a reflection of the sense of responsibility on the part of Sprint Nextel because Sprint Nextel is obviously and directly financially advantaged if such payment is made. The effort of Sprint Nextel to assure that it makes an anti-windfall payment may be more accurately viewed as an effort to secure for Sprint Nextel in practice the cap upon expenditures that was denied to Sprint Nextel in principle by the Commission.

The total funding necessary for the 800 MHz Rebanding is uncertain, and it is that uncertainty which led the Commission to deny Sprint Nextel its desired cap on expenditures. The Commission clearly understood that a cap could shift the risk of cost-bearing in relation to the 800 MHz Rebanding from Sprint Nextel to the 800 MHz licensees, which risk-shifting was unacceptable to the Commission.

Representatives of Sprint Nextel have advised representatives of public safety licensees that Sprint Nextel must make a payment to the United States Government. Such statements are not only false and misleading, but also code for Sprint Nextel's not spending too much to cover the rebanding costs of 800 MHz licensees. For those charged with the preservation of life and property this argument is both hollow and insulting, as it implies that protection of human life is placed as a lower priority than making a well publicized payment to the United States Government.

In a meeting attended by RCC in September of this year representatives of the TA stated that the TA works for the Commission and that their responsibility is to protect the public interest which is defined as managing the costs of the 800 MHz Rebanding such that funds are sent to the United States Government. This comment raises the question "What became of the goal of "Improving Public Safety Communications in the 800 MHz Band"? One may further ask why the TA joins in Sprint Nextel's effort to impose the cap on Sprint Nextel's funding obligations which the Commission expressly refused to apply?

Nowhere in the Comments is Sprint Nextel completely truthful or candid in relation to its effort to create and elevate protection for Sprint Nextel against its having to spend more than its minimum financial commitment to equal dignity with improving public safety communications as a purpose of the 800 MHz Rebanding.

The effort of Sprint Nextel to minimize its funding obligations must operate to the prejudice of 800 MHz licensees because such efforts will naturally and probably lead to

efforts on the part of Sprint Nextel to intrude improperly into and minimize the efforts of public safety licensees to plan for and implement a rebanding plan that is necessary for the fulfillment of the public safety obligations of those licensees. RCC is aware of aggressive efforts of Sprint Nextel to substitute its judgment for that of 800 MHz public safety licensees in relation to reconfiguration methods which are the sole responsibility of public safety agencies which maintain and operate their radio systems in support of efforts to save lives and property.

5. The Case for Greater Supervision by the Commission

Sprint Nextel suggested in the Comments that implied and unarticulated reservations about the performance of the TA require "the Commission to be more actively involved in overseeing the fairness and efficiency of the 800 MHz reconfiguration process." RCC agrees with Sprint Nextel that the active involvement of the Commission would be positive, but has sought in Section II.A of this memorandum to explain to the Commission the specific shortcomings of the TA which make greater supervision by the Commission essential and in Section III to offer specific suggestions for the manner of effecting such involvement on the part of the Commission.

6. Reforming the Schedule for the 800 MHz Rebanding

Sprint Nextel suggested in the Comments that "[t]he appropriate start date for 800 MHz band reconfiguration should be adjusted to begin sixty days after publication of the [Commission's Memorandum Opinion and Order of October 5, 2005] in the Federal Register."

While RCC agrees with Sprint Nextel that the schedule for the 800 MHz Rebanding must be adjusted, RCC does not believe that a simple deferral is the proper approach to establishing a proper schedule for the proceeding. The demonstrated defects in the RPP and the unresolved critical issues make clear that the required rescheduling should involve substantially more than an approximately sixty day extension, which extension will not cure the defects in the RPP or effect a resolution of the critical open issues.

RCC does not accept the position of Sprint Nextel that the Commission by its issuance of the Memorandum Opinion and Order of October 5, 2005, created any material additional problems for the 800 MHz Rebanding, which was in serious trouble long before that ruling.

While RCC differs with Sprint Nextel concerning the manner of reforming the schedule for the 800 MHz Rebanding, RCC is not in any manner arguing that the schedule should be altered in a manner that would prejudice the ability of Sprint Nextel to meet the requirements of the schedule and receive the expected 1.9GHz spectrum as a result thereof.

C. Further Factual Realities

In this Part II.C, RCC identifies sources of certain of the realities of the 800 MHz Rebanding other than the TA and Sprint Nextel. The identification of the nature and reason for such other sources of those realities is made in the following three sections:

- Motorola: Uncertainty Respecting Effect of Rebanding Firmware (§II.C.1);
- Motorola: Disruption of Customer Relationships (§II.C.2); and
- The Relative Silence of 800 MHz Public Safety Licensees (§II.C.3).

1. Motorola: Uncertainty Respecting Effect of Rebanding Firmware

Motorola has not been forthcoming of certain critical issues which could have a very material effect upon the ability of 800 MHz public safety licensees to proceed with the physical rebanding process. Motorola is apparently unwilling or at least to date unable to certify to its public safety customers that there will be no adverse consequences to the capabilities of infrastructure equipment or subscriber units by the implementation of the Rebanding Firmware. Without such certification public safety licensees must be concerned that their fleets of subscriber units may not function comparably to their present capabilities after the implementation of the Rebanding Firmware and that features, functions, capabilities, talkgroup capacity, response times, and other aspects of performance will in some material degree be degraded. Such degradation could prove fatal to a user of such a subscriber unit in an emergency. This uncertainty serves to undermine the commitment of public safety licensees operating Motorola trunked systems to the 800 MHz Rebanding.

2. Motorola: Disruption of Customer Relationships

The relationship between Motorola and its public safety customers has been complicated by the relationship between Motorola and Nextel (and Sprint Nextel). Sprint Nextel is Motorola's largest customer as previously noted, and Motorola was a major shareholder of Nextel and may remain a major shareholder of Sprint Nextel. The importance to Sprint Nextel of the 800 MHz Rebanding is clearly well known and appreciated by Motorola which has made extraordinary efforts to accommodate the interest of Nextel (and Sprint Nextel) in minimizing the costs of the 800 MHz Rebanding.

The accommodation of Motorola to Nextel and the obvious influence of Sprint Nextel with Motorola have not gone unnoticed by 800 MHz public safety licensees. A number of those public safety licensees have been seriously discomforted by the apparent conflict of interest faced by Motorola as it seeks to serve both Sprint Nextel which is committed to minimizing the costs of funding the 800 MHz Rebanding and public safety licensee customers which would ordinarily look to and rely upon Motorola for advice in relation to the effect of the 800 MHz Rebanding upon their radio systems and how to manage the risks inherent in the physical rebanding process.

The inability of 800 MHz public safety licensees to look without reservations to Motorola for advice may be a source of what Sprint Nextel improperly interprets as some 800 MHz licensees' not feeling "the same pressure as Sprint Nextel to get the band reconfiguration completed quickly." In truth, certain 800 MHz public safety licensees feel effectively deprived of a traditional and much-relied-upon source of advice in Motorola, and that sense of deprivation may well contribute to uncertainty and hesitation on the part of those licensees which Sprint Nextel wrongly views as a lack of commitment to the process.

3. The Relative Silence of 800 MHz Public Safety Licensees

800 MHz Licensees do not appear to have been willing to share their concerns and reservations about the state of the 800 MHz Rebanding with the Commission or to openly criticize the TA. There may be many reasons for such relative silence, including, but hardly limited to, a respect for authority, the need for escalation of comments to regulators through a bureaucratic chain of command, possibly an institutional reluctance to challenge duly constituted centers of power, and a general disposition to cooperate in a global regulatory undertaking even in circumstances where sacrifice of local interests may be involved. Whatever the reason for such silence, that silence has delayed the process of making the realities of the 800 MHz Rebanding clearly visible to the Commission, and that silence is itself one of those realities.

III. Recommendations to the Commission

RCC believes that the 800 MHz Rebanding can, should, and must be reset upon its original course and rededicated to achieving the Commission's stated primary objective: **Improving Public Safety Communications.** To that end, RCC respectfully suggests that the Commission take actions of two different kinds:

- Actions to redirect the approach of the TA (and in certain respects Sprint Nextel) toward the primary purpose of the Commission in ordering the 800 MHz Rebanding (Part III.A); and

- Actions to strengthen the TA, the expertise available to the TA, and provide the required leadership for the 800 MHz Rebanding, which has not been provided by the TA, in order to assure that the actions of the TA contribute more effectively to improving public safety communications (Part III.B).

A. Actions to Redirect the Approach of the TA toward the Primary Purpose of the Commission in ordering the 800 MHz Rebanding

RCC respectfully submits that certain actions are necessary in order to redirect the approach of the TA toward the primary purpose of the Commission in ordering the 800 MHz Rebanding. RCC does not make these suggestions casually, but, rather after serious consideration. RCC believes that changes, however difficult, are urgently needed if the 800 MHz Rebanding is to be the success which was intended by the Commission and is to make the contribution to interference reduction that is so sorely needed by 800 MHz public safety licensees. RCC's recommendations in this respect are made in the following seven sections:

- General Instructions to the TA and Sprint Nextel (§III.A.1);
- Periodic Reports (§III.A.2);
- Unsolved Issues (§III.B.3);
- Reconsideration of the RPP (§III.A.4);
- Sprint Nextel Review of Revised RPP (§III.A.5);
- Provision for Effective Planning Funding (§III.A.6);
- Oversight (§III.A.7)

1. General Instructions to the TA and Sprint Nextel

RCC respectfully recommends to the Commission that the Commission issue general instructions to the TA and Sprint Nextel for the purpose of emphasizing that the primary purpose of the Commission in ordering the 800 MHz Rebanding was to improve public safety communications and that the Commission has subordinated all other matters concerning the 800 MHz Rebanding to that primary purpose.

RCC respectfully submits that the general instructions suggested below are a proper and measured response to the manner of the administration of the 800 MHz Rebanding by the TA and the response thereto by Sprint Nextel, all as detailed in Part II of this memorandum, above.

RCC offers the following text for consideration by the Commission for issuance as general instructions to the TA and Sprint Nextel:

"In both issuing policies or procedures in relation to the 800 MHz Rebanding and in reviewing a submission of an 800 MHz public safety licensee in connection with the 800 MHz Rebanding, it is important for the TA to understand, appreciate, and give full force and effect to (i) the primary purpose of the Commission in ordering the 800 MHz Rebanding (improving public safety communications in the 800 MHz band) and (ii) the subordination by the Commission of all other matters concerning the 800 MHz Rebanding to that primary purpose.

"Approaches to the rebanding of public safety radio systems that would put those systems at risk (in terms of availability, capacity, or functionality) during the physical rebanding process are clearly inconsistent with the central regulatory purpose of the Commission.

"Any policy, procedure, rule, or decision by the TA which disables, discourages, or makes unreasonably difficult the development by or on behalf of 800 MHz public safety licensees of approaches to the rebanding of their radio systems that would avoid placing those systems at risk (in terms of availability, capacity, or functionality) during the physical rebanding process are clearly inconsistent with the central regulatory purpose of the Commission.

"The TA shall review all of its issued policies, procedures, rules, and decisions and revise or eliminate any and all of them (including, but not limited to the Alternative Dispute Resolution Plan of the TA, the "at risk rule," and the process established with respect to rebanding funding) that are inconsistent in purpose or effect, directly or indirectly, with the primary purpose of the Commission in ordering the 800 MHz Rebanding.

"The TA must accept that the knowledge of public safety licensees with respect to the hazards that first responders are called upon to meet and the operation and maintenance of the reliability and robustness of the radio systems used to support those first responders is greater than that of the TA or Sprint Nextel or any other participant in the 800 MHz Rebanding. The combination of that knowledge and the critical mission of public safety communications systems requires the TA to revise its thinking in relation to the burden of proof, the burden of persuasion, and other legal devices employed in relation to the 800 MHz Rebanding by the TA and that the TA accept that:

- The good faith judgment of a public safety licensee with respect to the manner in which to assure the availability, capacity, and functionality during the rebanding process should be conclusively presumed to be proper;

- As a matter of public policy, neither the TA, nor Sprint Nextel, nor any other party should be permitted to discourage public safety agencies from carrying out their critical responsibilities in relation to maintaining the availability and robustness of their communications systems by challenging (in litigation, through withholding funding, or otherwise) the good faith judgments of public safety agencies in relation to how to proceed with rebanding;

- In no event, should the TA, Sprint Nextel, or any other participant in the 800 MHz Rebanding be permitted to substitute its judgment for that of a public safety licensee with respect to the proper manner in which to proceed with the rebanding of a public safety radio system while that system is in use supporting first responders to emergencies, including those involving the risk of death and injury; and

- In the determination of any dispute between a public safety licensee and Sprint Nextel with respect to the costs of rebanding, the importance attached by the Commission to maintaining robust and reliable public safety radio systems has a significant bearing upon the burden of proof, *i.e.*, places the burden upon Sprint Nextel to establish by clear and convincing evidence that the cost proposed by the public safety licensee to be incurred to implement measures designed to avoid risks to the continued availability, capacity, or functionality of its radio system is not the minimum cost for the implementation of those measures.

"Neither any concerns Sprint Nextel may have with respect to controlling the burden of funding the rebanding of 800 MHz licensees nor the interest of the United States Government in receiving some cash compensation for the 1.9 GHz spectrum to be received by Sprint Nextel nor the administration of the 800 MHz Rebanding by the TA can be allowed in any manner (i) to override the necessity for the protection of public safety radio systems during the physical rebanding process and for assuring that those radio systems maintain their availability, capacity, and functionality throughout the 800 MHz Rebanding or (ii) to limit the obligation of Sprint Nextel to fund all expenditures required to assure that that necessity is satisfied.

"The improvement of public safety communications, as the primary regulatory purpose of the Commission in relation to the 800 MHz Rebanding should be considered by the TA and Sprint Nextel and should inform every aspect of the administration of the 800 MHz Rebanding by the TA and every action taken by Sprint Nextel in connection therewith."

For a legal analysis of the issues of presumptions and burdens of proof in relation to the review of rebanding plans and rebanding estimates of 800 MHz public safety licensees, the Commission is respectfully referred to Appendix 4 to this memorandum. The analysis of Appendix 2 also, as previously noted, establishes that certain provisions of the *Alternative Dispute Resolution Plan for the 800 MHz Transition Administrator, LLC*, Version 1.0, dated August 23, 2005, respecting the burden of provision and related matters are improper and inconsistent with the purposes of the Commission in relation to the 800 MHz Rebanding.

2. Periodic Reports

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA that its periodic reports shall focus primarily upon the manner in which the administration of the 800 MHz Rebanding has worked to improve public safety communications and the extent to which the financial resources of Sprint Nextel and the compensated efforts of the TA have been applied to that purpose.

RCC believes that this specific instruction is a proper response to the inadequacies of the TA's Report, as demonstrated in Part II of this memorandum, above, and the departure by the TA from the central purpose of the 800 MHz Rebanding in its administration thereof as also demonstrated in that Part II.

3. Unsolved Issues

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA that it should address directly, effectively, transparently, and cooperatively:

- each of the issues identified in this memorandum as requiring attention; and
- each other issue affecting the achievement of the central purpose of the Commission in ordering the 800 MHz Rebanding which have arisen or hereafter arise

and provide reports upon and opportunities for comment on the progress of the TA in providing solutions to those issues.

RCC believes that this specific instruction is a proper response to the failures of the TA to address certain critical issues materially affecting the 800 MHz Rebanding and to the focus of the TA upon matters essential without positive effect upon the 800 MHz [Rebanding?], as demonstrated in Part II of this memorandum, above.

4. Reconsideration of the RPP

RCC respectfully recommends to the Commission that the Commission issue general instructions to the TA that it must reconsider the RPP in light of the problems created thereby and the issues that remain unsolved in relation thereto and present for public comment and review by the Commission of a revised schedule within a specified period of time.

RCC believes that an extension of the schedule for the 800 MHz Rebanding is sadly and sorely needed, but RCC further believes that the time added to the schedule must be used to address problems that are unresolved in relation to the RPP itself and problems that even more generally affect the 800 MHz Rebanding that have not been addressed by the TA , all as shown in detail in Part II of this memorandum.

RCC also respectfully recommends to the Commission that the Commission issue specific instructions to the TA to revise the RPP by:

- Preparing a description of all of the situations in which the rights of affected 800 MHz public safety licensees as provided for in the RPP are unclear or in which the RPP excludes 800 MHz public safety licensees from participation in the 800 MHz Rebanding despite their being affected thereby;

- Amending the RPP and all other relevant pronouncements by the TA to address properly the procedural gaps created by the RPP as presently in effect and giving notice to all 800 MHz public safety licensees of such amendments;

- Requiring 800 MHz public safety licensees to identify all other such licensees with which they have Bilateral Interoperability Agreements or Multilateral Interoperability Agreements, i.e., all such licensees with Others' Subscriber Units Based Elsewhere that are interoperable with the radio systems of the 800 MHz Licensees and amending the TA's Interoperability Maintenance Requirements to the foregoing identification obligation in all instances relating to Others' Subscriber Units Based Elsewhere;

- Clarifying that, except as provided for above, the TA's Interoperability Maintenance Requirements apply only to Home-based Subscriber Units;

- Notifying all 800 MHz public safety licensees of these amendments and clarifications of the TA's Interoperability Maintenance Requirements; and

- Requiring the filing of contact forms by all licensees affected by the 800 MHz Rebanding whether in relation to their infrastructure or their subscriber units or both and establishing for all such affected licensees a position in the RPP to enable them to participate fully in the 800 MHz Rebanding, including setting a date or period for the submission of planning funding requests by such affected licensees in relation to the applicable stage and wave and setting a date or period for the filing of rebanding plans and rebanding estimates by such affected licensees in relation to the applicable stage and wave.

5. Sprint Nextel Review of Revised RPP

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA that it must afford Sprint Nextel an opportunity to review the proposed revised schedule and address its ability to comply therewith.

Sprint Nextel is a central and critical participant, and Sprint Nextel's funds are the fuel for the 800 MHz Rebanding. While Sprint Nextel should not guard those funds in a manner inconsistent with the purpose of the 800 MHz Rebanding and should not seek to withhold those funds as if there were a cap upon its financial obligations, Sprint Nextel

should have a reasonable expectation that its acting properly will result in its gaining the expected block of 1.9 GHz spectrum. Accordingly, its input into the RPP as it should be revised is critical.

6. Provision for Effective Planning Funding

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA and Sprint Nextel that they must forthwith provide a fully effective, prompt, and sufficient means of supplying at least planning funds to all affected 800 MHz licensees requiring or desiring such funding pursuant to which all licensees, wherever located, could commence planning for the 800 MHz Rebanding as promptly as possible and place themselves in a position to adapt to a new schedule that would seek to make up for the time lost as a result of missteps to date.

RCC further respectfully submits that the Commission should specifically direct the TA to defer disputes with respect to planning funds by requiring the requested planning funds, even if disputed by Sprint Nextel, to be released and the determination of the propriety thereof made in connection with the later negotiation of a frequency reconfiguration agreement or in dispute resolution procedures thereafter by which time the reasonableness of the planning expenditures will become clear or at least much clearer than before the planning work is done.

RCC also respectfully recommends to the Commission that the Commission issue specific instructions to the TA and Sprint Nextel that the required means of providing planning funds shall not include any reference to an 'at risk rule' or any other means, device, or instrumentality to discourage or disenable any 800 MHz public safety licensee from undertaking the planning for the 800 MHz Rebanding which in the judgment of that licensee is necessary or proper for the performance of its public safety obligations.

7. Oversight

RCC respectfully recommends to the Commission that the Commission establish by appropriate means the oversight by the Commission of the 800 MHz Rebanding on an active basis designed to assure that the primary purpose of the Commission to improve public safety communications guides all actions of all concerned with the implementation of the 800 MHz Rebanding. Such oversight might be implemented, in part, by the appointment of a Chief Executive Officer for the 800 MHz Rebanding as discussed in, §III.B.3, below.

B. Actions to Strengthen the TA and Increase the Expertise Available thereto in order to Enable the TA More Effectively to Contribute to the Improvement of Public Safety Communications

RCC respectfully submits that certain actions are necessary in order to strengthen the TA and increase the expertise available thereto in order to enable the TA more effectively to contribute to the improvement of public safety communications. RCC does not make these recommendations lightly, but believes that changes, however uncomfortable, are urgently needed if the 800 MHz Rebanding is to be the success which was intended by the Commission and is so sorely needed by 800 MHz public safety licensees. RCC's recommendations in this respect are made in the following three sections:

- Expert Support in relation to Unsolved Issues (§III.B.1);
- Expert Review of Revised RPP (§III.B.2); and
- Appointment of an Individual as the CEO for the 800 MHz Rebanding (§III.B.3).

1. Expert Support in relation to Unsolved Issues

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA that it must secure a periodic external expert review of its efforts to address:

- each of the issues identified in this memorandum as requiring attention; and

- each other issue affecting the achievement of the central purpose of the Commission in ordering the 800 MHz Rebanding which have arisen or hereafter arise

and accept the recommendations of the expert with respect thereto or show good cause to the Commission why those recommendations should not be accepted.

This suggestion seems an appropriate and measured response to the unaddressed problems affecting the 800 MHz Rebanding described in Part II of this memorandum, below.

2. Expert Review of Revised RPP

RCC respectfully recommends to the Commission that the Commission issue specific instructions to the TA that it must secure a periodic external expert review of the proposed revised schedule and accept the recommendations of the expert with respect thereto or show good cause to the Commission why those recommendations should not be accepted.

This suggestion seems an appropriate and measured response to the problems created by the RPP and related issues affecting the RPP described in Part II of this memorandum, below.

3. Appointment of an Individual as the CEO for the 800 MHz Rebanding

RCC respectfully recommends to the Commission that an individual be appointed to act in the role of Chief Executive Officer for the 800 MHz Rebanding in order to provide the leadership, judgment, vision, understanding, purpose, and drive which, RCC respectfully submits, Part II of this memorandum has shown have been absent in the process to date and are sorely needed.

RCC does not fail to understand the seemingly radical nature of this suggestion, but, rather, believes that serious measures must now be taken to enable the 800 MHz Rebanding to proceed toward its intended goal. The gravamen of this memorandum is that there is substantial reason to be concerned that the 800 MHz Rebanding is failing or may fail. All concerned with the proceeding, including the Commission, understood the magnitude and unprecedented nature of the required undertakings. That adjustments, even major adjustments, to the management of the 800 MHz Rebanding are now required should not be surprising, however disappointing the causes for the need for such adjustments may be.

Clearly, Sprint Nextel has been chastened by the "[r]eal world experience [with the 800 MHz Rebanding] over the last six months," and submitted the Comments to suggest certain limited adjustments to the process, adjustments intended primarily to relieve Sprint Nextel of jeopardy in relation to earning its expected 1.9 GHz spectrum. The problems threatening the 800 MHz Rebanding are not so limited and are not curable by such limited adjustments.

RCC does not suggest that the Commission should have anticipated the need for a Chief Executive Officer for the 800 MHz Rebanding, but, rather, suggests that that real world experience requires an effective response to save the 800 MHz Rebanding and the critical promise thereof. The appointment of a Chief Executive Officer in the present circumstances of the 800 MHz Rebanding is not a radical measure. Such appointment is simply a necessary and proper measure to protect a critical proceeding in order to assure that its goals are achieved.

RCC does not by any means suggest that the TA be replaced, but rather made responsive to an individual with or with easy access to the required experience (management, technical, legal, and regulatory), capabilities (leadership, vision, and understanding), and commitment to the objective of the Commission in relation to the 800 MHz Rebanding.

The Chief Executive Officer for the 800 MHz Rebanding should report directly to the Commission in such manner as the Commission determines in connection with its decisions in relation to the oversight of the 800 MHz Rebanding.

Appendix 1: List of Studies of the 800 MHz Rebanding by the RCC Rebanding Support Group

- *The 800 MHz Rebanding: Ten Principles for a First Response: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 0* (February 12, 2005)

- *The 800 MHz Rebanding: A Framework for Risk Analysis: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 1 (4ith Revised Edition)* (May 15, 2005)

- *The 800 MHz Rebanding: A Framework for the Development of Strategies to Address Both the Technical Rebanding Challenge and the Legal Rebanding Contest: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 2* (March 10, 2005)

- *Draft Memorandum of Law in Support of an 800 MHz Rebanding Submission by an 800 MHz Public Safety Licensee to Nextel and the Transition Administrator: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 3 (2nd Revised Edition) (June 3*, 2005)

- *Draft Form of the Lead Affidavit in Support of the Rebanding Plan, the Rebanding Estimate, and the Certification to be Submitted to Nextel and the Transition Administrator: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 4 (3rd Revised Edition)* (June 11, 2005)

- *Hazard Assessment Methodology for Use in Connection with the Development of an 800 MHz Rebanding Plan: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 5* (May 4, 2005)

- *Preparing the Hazard Assessment Report for Use in Connection with the Development of an 800 MHz Rebanding Plan: A Form of Supporting Affidavit*: *Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc.* -- Paper No. 6 (November 13, 2005)

- *Rebanding Estimate Development Methodology: Occasional Papers of the RCC Consultants, Inc., Rebanding Support Group, Paper No. 7* (May 30, 2005)

- *Draft Form of the Rebanding Estimate to be Submitted to Nextel and the Transition Administrator in Connection with the 800 MHz Rebanding: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 8* (May 18, 2005)

- *Rebanding Plan Development Methodology: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 9* (June 1, 2005)

- *Draft Form of the Rebanding Plan to be Submitted to Nextel and the Transition Administrator in Connection with the 800 MHz Rebanding: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 10* (June 1, 2005)

- *Draft of Certification Required of a Licensee in Connection with the 800 MHz Rebanding: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 11* (June 1, 2005)

- *Vendor Support in connection with the 800 MHz Rebanding: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 12 (June 7, 2005)*

- *Rebanding Plan Development Methodology: Special Considerations for Unrebandable Systems: A Supplement to Paper 9 in this Series: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 13* (June 22, 2005)

- *Emerging Problems in relation to the 800 MHz Rebanding: Early Engagement with Nextel, Vendor Conflicts, Planning Funding, Contingent Fees, Professional Responsibility, and State Law Issues: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 14 (3rd Edition)* (July 7, 2005)

- *Rebanding Plan Development Methodology: Special Considerations in relation to the Convergence of Apparently Disparate Objectives and the Matter of Incidental Rebanding Benefits: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 15* (July 27, 2005)

- *Procedural Gaps in the Regional Prioritization Plan for the 800 MHz Rebanding: Problems with the Transition Administrator's Remedies: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 16 (4th Edition)* (September 25, 2005)

- *Audit Rights and Proper Costs in the View of the Transition Administrator: Questions of Mutuality, Authority, and Practical Application: Occasional Papers of the Rebanding Support Group of RCC Consultants, Inc. -- Paper No. 17* (November 10, 2005)

Appendix 2: Procedural Gaps in the Regional Prioritization Plan and the Problems Created Thereby

A. The Nature and Sources of the Procedural Gaps in the RPP

Most of the problems addressed in this Appendix 2 arise from the structure of the RPP with its geographic division of the country into four waves, each comprised of two stages:

- Stage 1 for the reconfiguration of Lower 120 Channels; and

- Stage 2 for the reconfiguration of (i) NPSPAC Channels and (ii) channels in the Expansion Band as to which the licensee has not exercised and will not exercise its option to remain in the Expansion Band (Expansion Band Channels).

This Appendix 2 will show that:

- 800 MHz Public Safety Licensees which employ radio system *infrastructures* that operate *only* on channels which are not subject to retuning pursuant to the 800 MHz Rebanding but which are nonetheless materially affected thereby and that those licensees hitherto considered 'safe' must take action to protect the maintenance of the comparability of their public safety radio systems before and after the completion of the 800 MHz Rebanding;

- 800 MHz Public Safety Licensees which employ system *infrastructures* that operate on one, but not both, of (a) the Lower 120 Channels and (b) either or both of (i) the NPSPAC Channels or (ii) the Expansion Band Channels are or may be materially affected by the 800 MHz Rebanding in both Stage 1 and Stage 2 of their respective Waves and not only, as may have hitherto been thought, by the stage into which they are seemingly uniquely placed by the RPP as a result of the channel dependencies of their *infrastructures*; and

- 800 MHz Public Safety Licensees are or may materially be affected by the 800 MHz Rebanding's effect upon their subscriber units if those licensees (1) are subject to interoperability agreements and (2) employ radio system infrastructures that operate (a) only on channels which are not subject to retuning pursuant to the 800 MHz Rebanding or (b) on one, but not both, of (i) the Lower 120 Channels and (i) either or both of (A) the NPSPAC Channels or (B) the Expansion Band Channels.

The 800 MHz Rebanding is a complex proceeding that has, from a substantive and scheduling standpoint, been viewed as driven from and by:

- the channels upon which the fixed infrastructure upon which 800 MHz radio systems operate; and

- the place in the RPP of the NPSPAC Region (or Regions) in which the radio system is located.

That is to say, a licensee is said to be affected by the 800 MHz Rebanding primarily by reference to whether the channels upon which that licensee's fixed radio infrastructure operates are subject to mandatory or optional retuning and where the radio system is located by the structure of the RPP. An 800 MHz licensee which has no channels that must or may be retuned is today generally spoken of as 'safe' or free from the burdens of the 800 MHz Rebanding. An 800 MHz licensee is said to be 'in' Stage 1 or Stage 2 of its own Wave (or both) depending upon its infrastructure channels and is said not to be 'in' any stage which does not affect its infrastructure channels.

These understandings of the effect of the RPP are grounded in the RPP itself and the language thereof which does not reflect or reflect adequately the effects of the 800 MHz Rebanding upon licensees, particularly public safety licensees, in stages which the licensees do not or may not think of themselves as being 'in.'

The RPP is not only driven by a combination of (i) the channels upon which the licensee's radio *infrastructure* operates and (ii) geography, but also assumes or appears to assume that the 800 MHz Rebanding has effects (i) only upon licensees with affected channels in use *in the radio system infrastructure* and (ii) then only at the times provided for in the schedule of the Transition Administrator. The RPP makes no provision or inadequate provision to address either (i) the effect of the 800 MHz Rebanding upon radio system infrastructure that does not require retuning or (ii) the effect of the 800 MHz Rebanding upon the subscriber units of an 800 MHz licensee when that effect is not associated with a substantially contemporaneous retuning of the licensee's infrastructure either because (a) the licensee has no infrastructure subject to retuning or (b) certain of the effects of the 800 MHz Rebanding upon subscriber units under the RPP are separated in time from some of the effects of the 800 MHz Rebanding upon the licensee's infrastructure (and certain other effects upon the licensee's subscriber units).

B. Six Cases Exemplary of the Procedural Gaps in the RPP

In this section B, six cases are considered which serve to exemplify the procedural gaps in the RPP. All six cases are framed in relation to Motorola SmartNet or SmartZone infrastructures (Motorola Infrastructure) and related Motorola subscribers units because such systems are the most common in public safety radio implementations and the procedural gaps affect such systems to a greater degree than certain EDACS systems from M/A-COM, although all EDACS systems are not unaffected by these issues.

The six cases used as examples are as follows:

- Case 1: 800 MHz licensee with Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with no mobile or portable radios that operate on channels other than those utilized by the licensee's Motorola Infrastructure;

- Case 2: 800 MHz licensee with Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on Lower 120 Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels);

- Case 3: 800 MHz licensee with Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on NPSPAC or Expansion Band Channels pursuant to interoperability arrangements [on another licensee's system] in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels);

- Case 4: 800 MHz licensee with Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobile or portable radios that operate on Lower 120 Channels and NPSPAC or Expansion Band Channels licensed to others pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure;

- Case 5: 800 MHz licensee with Motorola Infrastructure that operates on Lower 120 Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on NPSPAC or Expansion Band Channels licensed to others in addition to the channels utilized by the licensee's Motorola Infrastructure; and

- Case 6: 800 MHz licensee with Motorola Infrastructure that operates on NPSPAC or Expansion Band Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on Lower 120 Channels licensed to others in addition to the channels utilized by the licensee's Motorola Infrastructure.

Each of these cases illustrates an aspect of the procedural gaps in the RPP and share the effects of those procedural gaps in that 800 MHz Public Safety Licensees which are situated in the position described in one of those six cases are unable under the terms of the RPP to participate effectively in the 800 MHz Rebanding. That conclusion follows from the fact that the RPP, as presently in effect, does not enable those licensees:

- to be identified pursuant to the procedure of the RPP;

- to be given an opportunity to seek planning funding under the schedule provided in the RPP; or

- to be afforded a place in the schedule set forth in the RPP to file a rebanding plan and a rebanding estimate.

Each of the six cases is analyzed in relation to the RPP in section I.D, immediately below.

C. Analysis of the Six Cases in the Gap

This section C will explain why 800 MHz Public Safety Licensees which fall within one of the six cases described above will be subject to the problems created by the procedural gap in the RPP.

(i) Case 1

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with no mobile or portable radios that operate on channels other than those utilized by the licensee's Motorola Infrastructure, the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units.

A licensee in the position of Case 1 would be affected by the 800 MHz Rebanding in relation to its infrastructure because:

- The current version of firmware in Motorola Infrastructure is capable of broadcasting the NPSPAC Channels in their present spectral location, *i.e.*, before the reconfiguration of the 800 MHz band pursuant to the 800 MHz Rebanding.

- This capability of broadcasting the NPSPAC Channels is present in Motorola Infrastructure even if NPSPAC Channels are not currently in use therein, and, therefore, if a licensee adds NPSPAC Channels to its infrastructure today (pre-rebanding), the controllers can be programmed to operate on or broadcast the newly-added NPSPAC channels to the fleet of subscriber units.

- Once the NPSPAC channels are moved pursuant to the 800 MHz Rebanding, the Motorola controllers will no longer be able to broadcast the relocated NPSPAC channels to the subscriber fleet if added to a system which has not had a firmware upgrade.

- Therefore, the facilities (infrastructure) of that licensee after the 800 MHz Rebanding is completed will not be comparable to the present facilities (infrastructure) of that licensee absent the firmware upgrade.

- Absent a firmware upgrade, in addition to the problem of maintaining comparability in the short term, there is a danger that the old infrastructure firmware will at some point no longer be supported.

- That licensee will, therefore, be stranded with an unsupported version of infrastructure firmware while the more generally implemented new infrastructure firmware becomes the supported version, and the effect of the unavailability of support would represent an additional aspect of failing to maintain comparability.

A licensee in the position of Case 1 would be affected by the 800 MHz Rebanding in relation to its subscriber units because:

- The current firmware in Motorola subscriber units is capable of accessing the NPSPAC Channels in their present spectral location.

- This capability is present in Motorola subscriber units even if those units are not presently utilizing the NPSPAC Channels, and, therefore, if a licensee were to add NPSPAC channels to its infrastructure today (pre-rebanding) or if an interoperability partner of that licensee were to do so, the subscriber units of the licensee in the position of Case 1 could access the newly-added NPSPAC channels.

- Once the NPSPAC channels are moved pursuant to the 800 MHz Rebanding, the Motorola subscriber units, as presently configured, will no longer be able to access NPSPAC channels if added to a system unless the subscriber units have had a firmware upgrade.

- Therefore, the facilities (subscriber units) of that licensee after the 800 MHz Rebanding is completed will not be comparable to the present facilities (subscriber units) of that licensee.

- Absent a firmware upgrade, in addition to the problem of maintaining comparability in the short term, there is a danger that the old subscriber unit firmware will at some point no longer be supported.

- That licensee will, therefore, be stranded with an unsupported version of subscriber unit firmware while the more generally implemented new subscriber unit firmware becomes the supported version, and the effect of the unavailability of support would represent an additional aspect of failing to maintain comparability.

(There are Motorola subscriber units which are not presently capable of operating on the NPSPAC Channels in a manner compliant with FCC regulations respecting hardware. The argument made above with respect to maintaining comparable facilities would not apply to Motorola subscriber units which are not presently capable of compliant operation on the NPSPAC Channels in their current location.)

A licensee in the position of Case 1 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding. Accordingly, a licensee in the position of Case 1 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to both infrastructure and subscriber units. A licensee in the position of Case 1 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding for the purpose of seeking to maintain the comparability of its facilities.

(ii) Case 2

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on Lower 120 Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding because:

- First, a licensee in the position of Case 2 has the same need to replace the firmware for its Motorola Infrastructure as does a licensee in the position of Case 1 for the reasons stated in the analysis of Case 1;

- Second, a licensee in the position of Case 2 has the same need to replace the firmware for its Motorola subscriber units as does a licensee in the position of Case 1 for the reasons stated in the analysis of Case 1; and

- Third, a licensee in the position of Case 2 may lose interoperability with systems that operate on Lower 120 Channels, and with it comparable facilities, when the infrastructure of those systems is retuned because:

    - if the control channels of the systems of the interoperability partners are among the Lower 120 Channels and are on that account, retuned, the subscriber units of the licensee in the position of Case 2 will not (unless retuned) continue to function properly when in the coverage area of those interoperability partners; and

    - if the retuning of the Lower 120 Channels of the interoperability partners involves changes to failsoft programming and if failsoft programming is coordinated by interoperability partners, the subscriber units of the licensee in the position of Case 2 will not (unless reprogrammed) continue to maintain failsoft functionality when in the coverage area of those interoperability partners; and

- therefore, the licensee will not have facilities after the 800 MHz Rebanding is completed which are comparable to those it currently has.

(The observations made in relation to Case 1 [that (i) there are Motorola subscriber units which are not presently capable of operating on the NPSPAC Channels in a manner compliant with FCC regulations respecting hardware and (ii) the argument made with respect to maintaining comparable facilities would not apply to Motorola subscriber units which are not presently capable of compliant operation on the NPSPAC Channels in their current location] also apply to Case 2.)

A licensee in the position of Case 2 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding.

Accordingly, a licensee in the position of Case 2, like a licensee in the position of Case 1, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and its subscriber units. In this respect, a licensee in the position of Case 2, like a licensee in the position of Case 1, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from the standpoint of firmware.

Accordingly furthermore, a licensee in the position of Case 2 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations. In this respect as well, a licensee in the position of Case 2 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

(iii) Case 3

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on NPSPAC or Expansion Band Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding because:

- First, a licensee in the position of Case 3 has the same need to replace the firmware for its Motorola Infrastructure as does a licensee in the position of Case 1 or Case 2 for the reasons stated in the analysis of Case 1;

- Second, a licensee in the position of Case 3 has the same need to replace the firmware for its Motorola subscriber units as does a licensee in the position of Case 1 or Case 2 for the reasons stated in the analysis of Case 1;

- Third, a licensee in the position of Case 3 may lose interoperability with systems that operate on NPSPAC or Expansion Band Channels, and with it comparable facilities, when the infrastructure of those systems is retuned because:

    - if the control channels of the systems of the interoperability partners are among the NPSPAC or Expansion Band Channels and are on that account, retuned, the subscriber units of the licensee in the position of Case 3 will not (unless retuned) continue to function properly when in the coverage area of those interoperability partners; and

    - if the retuning of the NPSPAC or Expansion Band Channels of the interoperability partners involves changes to failsoft programming and if failsoft programming is coordinated by interoperability partners, the subscriber units of the licensee in the position of Case 3 will not (unless reprogrammed) continue to maintain failsoft functionality when in the coverage area of those interoperability partners; and

    - therefore, the licensee will not have facilities after the 800 MHz Rebanding is completed which are comparable to those it currently has.

A licensee in the position of Case 3 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding.

Accordingly, a licensee in the position of Case 3, like a licensee in the position of Case 1 or Case 2, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units. In this respect, a licensee in the position of Case 3, like a licensee in the position of Case 1 or Case 2, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Such licensee has no place in any stage of any wave of the RPP and, therefore, no window through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from the standpoint of firmware.

Accordingly furthermore, a licensee in the position of Case 3 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations. In this respect as well, a licensee in the position of Case 3 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee

has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

(iv) Case 4

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on Lower 120 Channels and NPSPAC or Expansion Band Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding because:

- First, a licensee in the position of Case 4 has the same need to replace the firmware for its Motorola Infrastructure as does a licensee in the position of Case 1, Case 2, or Case 3 for the reasons stated in the analysis of Case 1;

- Second, a licensee in the position of Case 4 has the same need to replace the firmware for its Motorola subscriber units as does a licensee in the position of Case 1, Case 2, or Case 3 for the reasons stated in the analysis of Case 1;

- Third, a licensee in the position of Case 4, like a licensee in the position of Case 2, may lose interoperability with systems that operate on Lower 120 Channels, and with it comparable facilities, when the infrastructure of those systems is retuned for the reasons stated in the analysis of Case 2; and

- Fourth, a licensee in the position of Case 4, like a licensee in the position of Case 3, may lose interoperability with systems that operate on NPSPAC or Expansion Band Channels, and with it comparable facilities, when the infrastructure of those systems is retuned for the reasons stated in the analysis of Case 3.

A licensee in the position of Case 4 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding.

Accordingly, a licensee in the position of Case 4, like a licensee in the position of Case 1, Case 2, or Case 3, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units. In this respect, a licensee in the position of Case 4, like a licensee in the position of Case 1, Case 2, or case 3 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and its subscriber units from the standpoint of firmware.

Accordingly furthermore, a licensee in the position of Case 4 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations. In this respect as well, a licensee in the position of Case 4 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning. Because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

(v) Case 5

Where an 800 MHz licensee employs Motorola Infrastructure that operates on Lower 120 Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on NPSPAC or Expansion Band Channels in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels subject to the 800 MHz Re banding), the licensee will nonetheless be affected by the 800 MHz Rebanding because:

- First, a licensee in the position of Case 5 has the same need to replace the firmware for its Motorola Infrastructure as does a licensee in the position of Case 1, Case 2, Case 3, or Case 4 for the reasons stated in the analysis of Case 1;

- Second, a licensee in the position of Case 5 has the same need to replace the firmware for its Motorola subscriber units as does a licensee in the position of Case 1, Case 2, Case 3, or Case 4 for the reasons stated in the analysis of Case 1;

- Third, a licensee in the position of Case 5, like a licensee in the position of Case 3 or case 4, may lose interoperability with systems that operate on NPSPAC or Expansion Band Channels, and with it comparable facilities, when the infrastructure of those systems is retuned for the reasons stated in the analysis of Case 3.

(The first observation above may not be a problem once the Motorola infrastructure firmware is available, which it is not at present, if the new infrastructure firmware is installed in connection with the retuning of the Lower 120 Channels in the infrastructure for which that firmware may not be necessary. The securing of reimbursement for such firmware, if unnecessary for the retuning of the Lower 120 Channels in the infrastructure, may be problematic. For licensees in the position of Case 5, the first observation will remain a problem if Stage 1 retuning is to proceed absent the Motorola infrastructure firmware.)

(The second observation above may not be a problem once the Motorola subscriber unit firmware is available, which it is not at present, if the new subscriber unit firmware is installed in connection with the retuning of the Lower 120 Channels in the subscriber

radios for which that firmware may not be necessary. The securing of reimbursement for such firmware, if unnecessary for the retuning of the Lower 120 Channels in the subscriber units, may be problematic. For licensees in the position of Case 5, the first observation will remain a problem if Stage 1 retuning is to proceed absent the Motorola subscriber unit firmware.)

(The third observation above is unaffected by the availability of the Motorola subscriber unit firmware, i.e., the problem will still exist even if the Motorola subscriber unit firmware is available and installed.)

A licensee in the position of Case 5 is not assigned a position in Stage 2 of any wave of the RPP because that licensee has no NPSPAC or Expansion Channels in its infrastructure subject to the 800 MHz Rebanding in Stage 2 of one of the four waves of the RPP.

Accordingly, a licensee in the position of Case 5, like a licensee in the position of Case 1, Case 2, Case 3, or Case 4, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units. In this respect, a licensee in the position of Case 5, like a licensee in the position of Case 1, Case 2, or Case 3, or Case 4, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 2 of one of the four waves of the RPP. Because such licensee has no place in Stage 2 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from a firmware standpoint.

Accordingly furthermore, a licensee in the position of Case 5 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations with licensees utilizing NPSPAC or Expansion Band Channels. In this respect as well, a licensee in the position of Case 5 clearly falls into one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 2 of any wave of the RPP. Because such licensee has no place in Stage 2 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability with licensees utilizing NPSPAC or Expansion Band Channels.

(vi) Case 6

Where an 800 MHz licensee employs Motorola Infrastructure that operates on NPSPAC or Expansion Band Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on Lower 120 Channels in addition to the channels utilized by the licensee's

Motorola Infrastructure (but no other channels subject to the 800 MHz Rebanding), the licensee will nonetheless be affected by the 800 MHz Rebanding in a manner for which no procedural opportunity to participate therein is afforded by the RPP because the subscriber units of a licensee in the position of Case 6, like a licensee in the position of Case 2 or Case 4, may lose interoperability with systems that operate on Lower 120 Channels, and with it comparable facilities, when the infrastructure of those systems is retuned for the reasons stated in the analysis of Case 2.

A licensee in the position of Case 6 is not assigned a position in Stage 1 of any of the four waves of the RPP because that licensee has no Lower 120 Channels in its infrastructure subject to the 800 MHz Rebanding in Stage 1 of any of the four waves of the RPP.

Accordingly, a licensee in the position of Case 6 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations with licensees utilizing Lower 120 Channels. In this respect, a licensee in the position of Case 6 clearly falls into one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 1 of any wave of the RPP. Because such licensee has no place in Stage 1 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability with licensees utilizing Lower 120 Channels.

D. The Transition Administrator and the Problem of the Gap

As noted above, the TA clearly understands at least some of the procedural gap problems created by the RPP and has sought to address those problems by imposing obligations upon the interoperability partners of those 800 MHz Public Safety Licensees which are representative of Cases 2-6. It does not appear that the TA has provided any response to the problems created in the RPP for 800 MHz Public Safety Licensees in the position of Case 1, but to be fair to the TA the Case 1 problem is not an obvious one, although it does need to be addressed.

This section D will discuss the measures taken by the TA to address the procedural gap problem as its affects 800 MHz Public Safety Licensees in the position of Cases 2-6. In section I. F, immediately below, this paper will analyze the sufficiency and practicality of the measure taken by the TA in this respect and will further show that those measures do not address the problems for an 800 MHz Public Safety Licensee in the position of Case 1.

The TA has indicated in at least four publications how the TA intends to assure that all aspects of interoperability are addressed in the 800 MHz Rebanding:

- IWCE Presentation

- Reconfiguration Handbook
- Albany APCO Presentation; and
- Fact Sheet: Mutual Aid and Interoperability

The relevant sections of these four publications are reproduced below:

1. IWCE Presentation

In its presentation to IWCE on April7, 2005, the TA wrote at page 8 as follows in relation to planning considerations for public safety licensees:

- Thoroughly define the community operating on your system so that no one is missed
- All agencies with subscriber devices on the system
- All other licensed systems on which licensees' subscribers operate
- NPSPAC Mutual Aid channels in use
- For larger systems involving multiple agencies, develop a formal interoperability plan that can be validated as part of the testing process

2. The Reconfiguration Handbook

The *Reconfiguration Handbook* (Version 1.1, June 3, 2005) issued by the TA provides as follows at pages 34-5 of the need to define the interoperability environment:

It is common for 800 MHz public safety systems to be shared by multiple agencies spanning extended geographic areas. In some cases, an agency will purchase subscriber equipment to operate on channels licensed to another entity. If you are a licensee in such an environment, it is essential that you notify related agencies and ensure that al subscriber devices are included in the reconfiguration process.

This activity will not apply to most commercial or B/ILT licensees. It will be the responsibility of the licensee to identify unlicensed agencies operating under user agreements on their systems.

What is the expected outcome?

This step will ensure that no organizations or groups of users are missed during reconfiguration and will impact the Implementation Planning Phase. It will generate interoperability requirements for reconfiguration.

How do I complete this activity? …

1. Determine agencies operating on your licensed system

- Identify all agencies and user groups that have subscriber devices operating on your system
- Determine contact information for administrative and technical purposes.
- Notify the agencies and include them in the subscriber equipment inventory and Cost Estimate preparation (and SOW preparation for complex systems).

2. Determine other systems programmed into your subscriber equipment

- Evaluate your subscriber's equipment to determine if there are other 800 MHz systems programmed into their devices.
- Identify these systems to Nextel. This is especially important if the subscribers have not been already been contacted by the licensee that operates the other system.

3. Determine NPSPAC mutual aid channels

- Evaluate your subscriber equipment for any NPSPAC mutual aid channels used in your radios and networks. Identify licensee information and agency relationships.

4. ***Define communications approach for affected user communities***

Recommended steps, especially for large networks in a multi-agency environment include:

- Document all interoperability requirements for your systems, devices and NPSPAC mutual aid channels.
- Establish well-defined reconfiguration communication plan for affected user communities to keep them informed and coordinated during planning and implementation

3. Albany APCO Presentation

In the presentation of the TA to the APCO 800 MHz Rebanding Symposium (Albany, NY, June 9, 2005) referred to the need to define the interoperability environment at page 14 and there wrote:

- Thoroughly define the community operating on your system so that no one is missed
- Determine agencies operating on your licensed system
- Determine other systems programmed into your subscriber equipment
- Determine NPSPAC mutual aid channels used in your radios and network

- Define reconfiguration communications approach for affected user communities

4. Fact Sheet: Mutual Aid and Interoperability

In the fact sheet entitled *800 MHz Reconfiguration Program: Addressing Mutual Aid and Interoperability* (Version 1.0, August 16, 2005), the TA wrote at pages 1-2:

The FCC's 800 MHz Reconfiguration Program affects many 800 MHz systems, including public safety, critical infrastructure, private businesses and commercial systems. Many of the public safety systems are shared or have interdependencies with other systems. Some examples of interoperability include:

- Mutual aid or interoperability channels specifically set aside to allow different public safety entities to communicate with one another
- An agency that uses subscriber equipment to operate on channels licensed to another entity
- 800 MHz public safety systems shared by multiple agencies spanning extended geographic areas

Interoperability issues may not affect all licensees, especially those operating commercial systems or private businesses.

If you are a licensee with mutual aid/interoperability issues, it is essential that you identify all such interdependencies and notify Nextel early in the reconfiguration process.

To successfully define your proper system environment and prepare for reconfiguration, the TA recommends completing the following steps. This will help ensure that no organizations or groups of users are missed during reconfiguration, and help to generate specific interoperability requirements.

1. Determine all agencies operating on your licensed system

- Identify all agencies and user groups that have subscriber devices operating on your system.
- Determine all associated NPSPAC mutual aid channels, and/or other systems, devices and processes that may be affected by your relocation.
- Identify unlicensed agencies operating under user agreements on your systems.
- Determine contact information for affected entities for administrative and technical purposes.
- Use the contact information to keep all affected entities informed and coordinated

during reconfiguration planning and implementation.

- Be prepared to provide this information when negotiating your reconfiguration agreement with Nextel.

2. Determine other systems programmed into your subscriber equipment

- Evaluate your subscribers' equipment to determine if there are other 800 MHz systems programmed into their devices and inform Nextel accordingly. This is especially important if the licensee that operates the other systems has not already contacted subscribers.

3. Determine National Public Safety Planning Advisory Committee (NPSPAC) mutual aid channels

Evaluate your subscribers' equipment for any NPSPAC mutual aid channels used in your radios and networks.

Identify licensee information and agency relationships.

Notify the agencies and include them in the subscriber equipment inventory and Statement of Work preparation (if one is to be prepared) to provide Nextel.

4. Define communications approach for affected user communities

Document all interoperability requirements for your systems, devices and NPSPAC mutual aid channels.

Establish well-defined reconfiguration communication plan for affected system users and communicate with them throughout the reconfiguration process.

5. Define your requirements for minimum disruption and document the optimal solution.

- Sample Solution 1: For the five nationwide mutual aid channels, maintain back-to-back repeaters on the old and new mutual aid channels for each channel and site, region-by-region, for the duration of the reconfiguration process. If appropriate, this plan should also include any region-specific mutual aid channels used in a similar fashion to the NPSPAC channels.

- Sample Solution 2: Keep both sets of mutual aid channels programmed into the subscriber equipment for the duration of the reconfiguration process.

- Sample Solution 3: You may also form an informal committee of agency groups that typically operate under a mutual aid plan, and document those mutual aid plans and operational requirements. Then, determine options for reconfiguration factors, such as timing, additional hardware and programming masks that will minimize disruption to the mutual aid plans, including a process to inform users any interim changes to the mutual aid operations.

6. Communicate and agree upon the solution with Nextel.

***

The foregoing represent all or substantially all of the pronouncements of the TA available on its web site that bear upon the effort of the TA to make sure that interoperability arrangements are comprehensively addressed or, in other words, to plug the procedural gaps of the RPP.

The four pronouncements are consistent in that each of them expressly or implicitly requires 800 MHz Public Safety Licensees:

- To define the interoperability environment in which they operate;

- To include subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's inventory of subscriber units;

- To include the effort necessary to retune (or replace) subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's rebanding plan;

- To include the cost of retuning (or replacing) subscriber units operating on the radio system of an 800 MHz Public Safety Licensee, but not belonging to that licensee, in that licensee's rebanding estimate; and

- To be generally responsible for the coordination of the maintenance of interoperability arrangements by keeping interoperability partners and the TA informed of all relevant considerations.

These requirements (collectively, the TA's Interoperability Maintenance Requirements) are not in themselves fundamentally objectionable in the view of RCC.

RCC's concerns with respect to the TA's Interoperability Maintenance Requirements relate to the sufficiency and practicality of the indicated requirements, and these concerns are discussed in section 1.F, immediately below.

It is worth noting that, while, as discussed above, the RPP is focused upon infrastructure, the four pronouncements of the TA addressing the matter of the preservation of the effectiveness of interoperability agreements are focused upon subscriber units. That change in focus is quite proper.

However, as will be shown below, that change to a subscriber-unit focus is alone inadequate to address the procedural gaps in the RPP because:

- That subscriber-unit focus is not sufficient to address Cases 1-5, in which infrastructure reconfiguration is an issue and which infrastructure issue is not addressed in the RPP; and

- That subscriber-unit focus involves clear problems of practicality in Cases 2-6 once the distinctions made below between "Others' Home-based Subscriber Units" and "Others' Subscriber Units based Elsewhere" and between "Bilateral Interoperability Agreements" and "Multi-lateral Interoperability Agreements" and the importance of those distinctions are recognized.

E. The Sufficiency and Practicality of the Measures Taken by the Transition Administrator

This section E will explain why, in the view of RCC, the requirements imposed by the TA in pronouncements other than the RPP upon 800 MHz Licensees which are directly affected by the RPP are not practical or are insufficient to remedy the procedural gaps in the RPP which were identified in Cases 1-6.

This section addresses each of Cases 1-6 separately. The following distinctions and definitions are utilized in the analyses of Cases 2-6, but not in Case 1:

- First, the distinction between:
  - Subscriber units which:
    - operate on the radio system of a particular 800 MHz Public Safety,
    - do not belong to that licensee, and
    - are programmed to treat the radio system of that licensee as their home system (Others' Home-based Subscriber Units); and
  - Subscriber units which:
    - operate on the radio system of a particular 800 MHz Public Safety,
    - do not belong to that licensee, and
    - are programmed to treat a radio system other than that of that licensee as their home system (Other's Subscriber Units Based Elsewhere).
- Second, the distinction between:

- Bilateral Interoperability Arrangements: those involving interoperability only between two 800 MHz public safety radio systems; and

- Multi-lateral Interoperability Arrangements: those involving interoperability among three or more 800 MHz public safety radio systems.

This section I.D will explain why 800 MHz Public Safety Licensees which fall within one of the six cases described above will be subject to the problems created by the procedural gap in the RPP.

(i) Case 1

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with no mobiles that operate on channels other than those utilized by the licensee's Motorola Infrastructure, the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units for the reasons stated in the analysis of Case 1 and the discussion there of the importance of new firmware to maintain the comparability of both infrastructure and subscriber units.

As previously demonstrated:

- a licensee in the position of Case 1 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding;

- accordingly, a licensee in the position of Case 1 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to both infrastructure and subscriber units;

- a licensee in the position of Case 1 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning; and

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding for the purpose of seeking to maintain the comparability of its facilities.

The procedural gap described above is not remedied by the TA's Interoperability Maintenance Requirements because:

- Those requirements address no issue related to infrastructure; and

- Those requirements have no application to Case 1 in which the hypothetical licensee has no interoperability agreements requiring the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, no interoperability partner of that licensee is subject to any of those requirements.

The TA's Interoperability Maintenance Requirements are clearly insufficient to address the procedural gap in the RPP which has been shown to exist in relation to Case 1.

(ii) Case 2

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on Lower 120 Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units for the reasons stated in the analysis of Case 2 and the discussion there of the importance of new firmware to maintain the comparability of both infrastructure and subscriber units and of the retuning required to maintain interoperability.

As previously demonstrated:

- a licensee in the position of Case 2 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding;

- accordingly, a licensee in the position of Case 2, like a licensee in the position of Case 1, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and its subscriber units;

- in this respect, a licensee in the position of Case 2, like a licensee in the position of Case 1, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning;

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from the standpoint of firmware.

- accordingly furthermore, a licensee in the position of Case 2 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations;

- in this respect as well, a licensee in the position of Case 2 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning; and

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

The procedural gap in the RPP described above is not remedied for infrastructure or for subscriber units for licensees in the position of Case 2 by the TA's Interoperability Maintenance Requirements because:

- Those requirements address no issue related to infrastructure.

- Those requirements have no practical application to Case 2 even though the hypothetical licensee in that case has interoperability agreements to enable the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, the interoperability partners of that licensee are subject to those requirements because:

    - While it might be proper and practical for 800 MHz Public Safety Licensees to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of that licensee, it is neither proper nor practical for that licensee to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere which do not, in any sense, owe their primary ability to operate to that licensee.

    - An 800 MHz Public Safety Licensee with which a licensee in the position of Case 2 has an interoperability agreement cannot properly or practically command even with the sanction of the TA that the licensee in the position of Case 2 to place its subscriber units at the disposal of that 800 MHz Public Safety Licensee and to delegate to that 800 MHz Public Safety Licensee the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the licensee in the position of Case 2 or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of the licensee in the position of Case 2.

    - The subscriber units of the licensee in the position of Case 2 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain under the control of that licensee or there will be a serious risk of

disruption to the public safety operations of that licensee, and, therefore, the placing of any responsibility upon 800 MHz Public Safety Licensees which have interoperability agreements with the licensee in the position of Case 2 even with the sanction of the TA could not possibly be proper or practical.

- Even if, contrary to fact, it would be proper or practical for an 800 MHz Public Safety Licensee with which a licensee in the position of Case 2 had its only interoperability agreement (a licensee in the position of Case 2 with only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 2, it would be entirely impractical for all 800 MHz Public Safety Licensees with which a licensee in the position of Case 2 had Multi-lateral Interoperability Agreements to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 2.

- If all 800 MHz Public Safety Licensees with which a licensee in the position of Case 2 had Multi-lateral Interoperability Agreements took responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 2, then all such 800 MHz Public Safety Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

The TA's Interoperability Maintenance Requirements are clearly insufficient and impractical to address the procedural gap in the RPP which has been shown to exist in relation to Case 2.

(iii) Case 3

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on NPSPAC or Expansion Band Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units for the reasons stated in the analysis of Case 3 and the discussion there of the importance of new firmware to maintain the comparability of both infrastructure and subscriber units.

As previously demonstrated:

- a licensee in the position of Case 3 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding;

- accordingly, a licensee in the position of Case 3, like a licensee in the position of Case 1 or Case 2, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units;

- in this respect, a licensee in the position of Case 3, like a licensee in the position of Case 1 or Case 2, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning;

- such licensee has no place in any stage of any wave of the RPP and, therefore, no window through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from the standpoint of firmware;

- accordingly furthermore, a licensee in the position of Case 3 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations;

- in this respect as well, a licensee in the position of Case 3 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning; and

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

The procedural gap in the RPP described above is not remedied for infrastructure or for subscriber units for licensees in the position of Case 3 by the TA's Interoperability Maintenance Requirements. The reasons for that conclusion are essentially the same as those for the similar conclusion as to licensees in the position of Case 2 and are as follows:

- Those requirements address no issue related to infrastructure.

- Those requirements have no practical application to Case 3 even though the hypothetical licensee in that case has interoperability agreements to enable the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, the

interoperability partners of that licensee are subject to those requirements because:

- While it might be proper and practical for 800 MHz Public Safety Licensees to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of that licensee, it is neither proper nor practical for that licensee to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere which do not, in any sense, owe their primary ability to operate to that licensee.

- An 800 MHz Public Safety Licensee with which a licensee in the position of Case 3 has an interoperability agreement cannot properly or practically command even with the sanction of the TA that the licensee in the position of Case 3 to place its subscriber units at the disposal of that 800 MHz Public Safety Licensee and to delegate to that 800 MHz Public Safety Licensee the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the licensee in the position of Case 3 or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of the licensee in the position of Case 3.

- The subscriber units of the licensee in the position of Case 3 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain under the control of that licensee or there will be a serious risk of disruption to the public safety operations of that licensee, and, therefore, the placing of any responsibility upon 800 MHz Public Safety Licensees which have interoperability agreements with the licensee in the position of Case 3 even with the sanction of the TA could not possibly be proper or practical.

- Even if, contrary to fact, it would be proper or practical for an 800 MHz Public Safety Licensee with which a licensee in the position of Case 3 had its only interoperability agreement (a licensee in the position of Case 3 with only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 3, it would be entirely impractical for all 800 MHz Public Safety Licensees with which a licensee in the position of Case 3 had Multi-lateral Interoperability Agreements to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 3.

- If all 800 MHz Public Safety Licensees with which a licensee in the position of Case 3 had Multi-lateral Interoperability Agreements took

> responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 3, then all such 800 MHz Public Safety Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

The TA's Interoperability Maintenance Requirements are clearly insufficient and impractical to address the procedural gap in the RPP which has been shown to exist in relation to Case 3.

(iv) Case 4

Where an 800 MHz licensee employs Motorola Infrastructure that operates on no channels subject to retuning, mandatory or optional, and with mobiles that operate on Lower 120 Channels and NPSPAC or Expansion Band Channels pursuant to interoperability arrangements in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels), the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units for the reasons stated in the analysis of Case 4 and the discussion there of the importance of new firmware to maintain the comparability of both infrastructure and subscriber units.

As previously demonstrated:

- a licensee in the position of Case 4 is not assigned a position in any stage of any wave of the RPP because that licensee has no infrastructure channels subject to the 800 MHz Rebanding;

- accordingly, a licensee in the position of Case 4, like a licensee in the position of Case 1, Case 2, or Case 3, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units;

- in this respect, a licensee in the position of Case 4, like a licensee in the position of Case 1, Case 2, or Case 3 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning;

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and its subscriber units from the standpoint of firmware;

- accordingly furthermore, a licensee in the position of Case 4 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a

rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations;

- in this respect as well, a licensee in the position of Case 4 clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning; and

- because such licensee has no place in any stage of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability.

The procedural gap in the RPP described above is not remedied for infrastructure or for subscriber units for licensees in the position of Case 4 by the TA's Interoperability Maintenance Requirements. The reasons for that conclusion are essentially the same as those for the similar conclusions as to licensees in the position of Case 2 or Case 3 and are as follows:

- Those requirements address no issue related to infrastructure.

- Those requirements have no practical application to Case 4 even though the hypothetical licensee in that case has interoperability agreements to enable the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, the interoperability partners of that licensee are subject to those requirements because:

    - While it might be proper and practical for 800 MHz Public Safety Licensees to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of that licensee, it is neither proper nor practical for that licensee to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere which do not, in any sense, owe their primary ability to operate to that licensee.

    - An 800 MHz Public Safety Licensee with which a licensee in the position of Case 4 has an interoperability agreement cannot properly or practically command even with the sanction of the TA that the licensee in the position of Case 4 to place its subscriber units at the disposal of that 800 MHz Public Safety Licensee and to delegate to that 800 MHz Public Safety Licensee the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the licensee in the position of Case 4 or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of the licensee in the position of Case 4.

- The subscriber units of the licensee in the position of Case 4 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain under the control of that licensee or there will be a serious risk of disruption to the public safety operations of that licensee, and, therefore, the placing of any responsibility upon 800 MHz Public Safety Licensees which have interoperability agreements with the licensee in the position of Case 4 even with the sanction of the TA could not possibly be proper or practical.

- Even if, contrary to fact, it would be proper or practical for an 800 MHz Public Safety Licensee with which a licensee in the position of Case 4 had its only interoperability agreement (a licensee in the position of Case 4 with only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 4, it would be entirely impractical for all 800 MHz Public Safety Licensees with which a licensee in the position of Case 4 had Multi-lateral Interoperability Agreements to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 4.

- If all 800 MHz Public Safety Licensees with which a licensee in the position of Case 4 had Multi-lateral Interoperability Agreements took responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 4, then all such 800 MHz Public Safety Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

The TA's Interoperability Maintenance Requirements are clearly insufficient and impractical to address the procedural gap in the RPP which has been shown to exist in relation to Case 4.

(v) Case 5

Where an 800 MHz licensee employs Motorola Infrastructure that operates on Lower 120 Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on NPSPAC or Expansion Band Channels in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels subject to the 800 MHz Rebanding), the licensee will nonetheless be affected by the 800 MHz Rebanding both in relation to infrastructure and subscriber units for the reasons stated in the analysis of Case 5 and the discussion there of the importance of new firmware to maintain the comparability of both infrastructure and subscriber units.

As previously demonstrated:

- a licensee in the position of Case 5 is not assigned a position in Stage 2 of any wave of the RPP because that licensee has no NPSPAC or Expansion Channels in its infrastructure subject to the 800 MHz Rebanding in Stage 2 of one of the four waves of the RPP;

- accordingly, a licensee in the position of Case 5, like a licensee in the position of Case 1, Case 2, Case 3, or Case 4, is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the replacement of firmware necessary to maintain comparability in relation to its infrastructure and subscriber units;

- in this respect, a licensee in the position of Case 5, like a licensee in the position of Case 1, Case 2, or Case 3, or Case 4, clearly falls in one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 2 of one of the four waves of the RPP;

- because such licensee has no place in Stage 2 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its infrastructure and subscriber units from a firmware standpoint;

- accordingly furthermore, a licensee in the position of Case 5 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations with licensees utilizing NPSPAC or Expansion Band Channels;

- in this respect as well, a licensee in the position of Case 5 clearly falls into one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 2 of any wave of the RPP; and

- because such licensee has no place in Stage 2 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability with licensees utilizing NPSPAC or Expansion Band Channels.

The procedural gap in the RPP described above is not remedied for infrastructure or for subscriber units for licensees in the position of Case 5 by the TA's Interoperability Maintenance Requirements. The reasons for that conclusion are essentially the same as those for the similar conclusions as to licensees in the position of Case 2, Case 3, or Case 4 and are as follows:

- Those requirements address no issue related to infrastructure.

- Those requirements have no practical application to Case 5 even though the hypothetical licensee in that case has interoperability agreements to enable the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, the interoperability partners of that licensee are subject to those requirements because:

    - While it might be proper and practical for 800 MHz Public Safety Licensees to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of that licensee, it is neither proper nor practical for that licensee to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere which do not, in any sense, owe their primary ability to operate to that licensee.

    - An 800 MHz Public Safety Licensee with which a licensee in the position of Case 5 has an interoperability agreement cannot properly or practically command even with the sanction of the TA that the licensee in the position of Case 5 to place its subscriber units at the disposal of that 800 MHz Public Safety Licensee and to delegate to that 800 MHz Public Safety Licensee the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the licensee in the position of Case 5 or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of the licensee in the position of Case 5.

    - The subscriber units of the licensee in the position of Case 5 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain under the control of that licensee or there will be a serious risk of disruption to the public safety operations of that licensee, and, therefore, the placing of any responsibility upon 800 MHz Public Safety Licensees which have interoperability agreements with the licensee in the position of Case 5 even with the sanction of the TA could not possibly be proper or practical.

    - Even if, contrary to fact, it would be proper or practical for an 800 MHz Public Safety Licensee with which a licensee in the position of Case 5 had its only interoperability agreement (a licensee in the position of Case 5 with only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 5, it would be entirely impractical for all 800 MHz Public Safety Licensees with which a licensee in the position of

Case 5 had Multi-lateral Interoperability Agreements to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 5.

- If all 800 MHz Public Safety Licensees with which a licensee in the position of Case 5 had Multi-lateral Interoperability Agreements took responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 5, then all such 800 MHz Public Safety Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

The TA's Interoperability Maintenance Requirements are clearly insufficient and impractical to address the procedural gap in the RPP which has been shown to exist in relation to Case 5.

(vi) Case 6

Where an 800 MHz licensee employs Motorola Infrastructure that operates on NPSPAC or Expansion Band Channels and no other channels subject to retuning, mandatory or optional, and with Motorola subscriber units that, through interoperability arrangements, operate on Lower 120 Channels in addition to the channels utilized by the licensee's Motorola Infrastructure (but no other channels subject to the 800 MHz Rebanding), the licensee will nonetheless be affected by the 800 MHz Rebanding in a manner for which no procedural opportunity to participate therein is afforded by the RPP because the subscriber units of a licensee in the position of Case 6, like a licensee in the position of Case 2 or Case 4, may lose interoperability with systems that operate on Lower 120 Channels, and with it comparable facilities, when the infrastructure of those systems is retuned for the reasons stated in the analysis of Case 2.

As previously demonstrated:

- a licensee in the position of Case 6 is not assigned a position in Stage 1 of any of the four waves of the RPP because that licensee has no Lower 120 Channels in its infrastructure subject to the 800 MHz Rebanding in Stage 1 of any of the four waves of the RPP;

- accordingly, a licensee in the position of Case 6 is not afforded any opportunity under the RPP to seek planning funding or file a rebanding plan and a rebanding estimate in connection with the retuning of its subscriber units to maintain comparability in relation to interoperations with licensees utilizing Lower 120 Channels;

- in this respect, a licensee in the position of Case 6 clearly falls into one of the procedural gaps of the RPP because such licensee has no channels in its infrastructure subject to retuning in Stage 1 of any wave of the RPP; and

- because such licensee has no place in Stage 1 of any wave of the RPP, such licensee has no window under the RPP through which to enter the 800 MHz Rebanding in order to maintain the comparability of its subscriber units in order to assure interoperability with licensees utilizing Lower 120 Channels.

The procedural gap in the RPP described above is not remedied for infrastructure or for subscriber units for licensees in the position of Case 5 by the TA's Interoperability Maintenance Requirements. The reasons for that conclusion include certain of the reasons for the similar conclusions as to licensees in the position of Case 2, Case 3, Case 4, or Case 5 and are as follows:

- Those requirements have no practical application to Case 6 even though the hypothetical licensee in that case has interoperability agreements to enable the subscriber units of that licensee to operate on channels subject to the 800 MHz Rebanding which are utilized by interoperability partners, and, therefore, the interoperability partners of that licensee are subject to those requirements because:

    - While it might be proper and practical for 800 MHz Public Safety Licensees to take responsibility for the maintenance of interoperability for Home-based Subscriber Units which, in a sense, owe their primary ability to operate to the consent of that licensee, it is neither proper nor practical for that licensee to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere which do not, in any sense, owe their primary ability to operate to that licensee.

    - An 800 MHz Public Safety Licensee with which a licensee in the position of Case 6 has an interoperability agreement cannot properly or practically command even with the sanction of the TA that the licensee in the position of Case 6 to place its subscriber units at the disposal of that 800 MHz Public Safety Licensee and to delegate to that 800 MHz Public Safety Licensee the power to decide on the manner and timing of the implementation of new firmware in and the retuning of the subscriber units of the licensee in the position of Case 6 or the power to process the recovery of the costs for the new firmware or the retuning or replacement of the subscriber units of the licensee in the position of Case 6.

    - The subscriber units of the licensee in the position of Case 6 are used by public safety personnel in the course of their duties, and, therefore, all matters affecting the availability of those subscriber units must remain

under the control of that licensee or there will be a serious risk of disruption to the public safety operations of that licensee, and, therefore, the placing of any responsibility upon 800 MHz Public Safety Licensees which have interoperability agreements with the licensee in the position of Case 6 even with the sanction of the TA could not possibly be proper or practical.

- Even if, contrary to fact, it would be proper or practical for an 800 MHz Public Safety Licensee with which a licensee in the position of Case 6 had its only interoperability agreement (a licensee in the position of Case 6 with only one Bilateral Interoperability Agreement and no Multi-lateral Interoperability Agreements) to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 6, it would be entirely impractical for all 800 MHz Public Safety Licensees with which a licensee in the position of Case 6 had Multi-lateral Interoperability Agreements to take responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 6.

- If all 800 MHz Public Safety Licensees with which a licensee in the position of Case 6 had Multi-lateral Interoperability Agreements took responsibility for the maintenance of interoperability of Others' Subscriber Units Based Elsewhere of the licensee in the position of Case 6, then all such 800 MHz Public Safety Licensees would have responsibility for taking an inventory of and for retuning those subscriber units and for the recovery of the cost thereof, with a resultant array of conflicting plans and multiple overlapping claims for cost recovery.

The TA's Interoperability Maintenance Requirements are clearly insufficient and impractical to address the procedural gap in the RPP which has been shown to exist in relation to Case 6.

F. The Effect of New Motorola Firmware: Cases 4 and 5

The new Motorola firmware for infrastructure and for subscriber units, when available, may alter in some degree the analysis of Cases 1-6, but is not likely to resolve all or nearly all of the problems shown to exist in relation to procedural gaps in the RPP.

G. The Applicability of this Paper to EDACS Systems from M/A-Com

The observations of Cases 1-5 with respect to firmware for radio system infrastructure do not apply to EDACS systems from M/A-COM.

The observations of Cases 1-5 with respect to firmware for subscribers units apply to certain EDACS subscriber units, but not others. The EDACS subscriber units to which the observations of Cases 1-5 apply will require either replacement or updated programming firmware in order to support access to the NPSPAC Channels after those channels are moved pursuant to the 800 MHz Rebanding.

The observations of Cases 1-6 with respect to retuning of subscriber units applies in a broader degree to all EDACS subscriber units because all system channels must be programmed into each subscriber unit since in an EDACS system all channels are able to operate as control channels.

Appendix 3: Analysis of Distinction between 800 MHz Public Safety Licensees and Other 800 MHz Licensees in Relation to the Application of the "Hard Look" and the Means to Give Effect to that Distinction

The distinction between 800 MHz Public Safety Licensees and other 800 MHz Licensees subject to the 800 MHz Rebanding made by the FCC in relation to the application of scrutiny to transaction costs could be given effect in various ways, including, but not limited to, the following:

- Not applying the hard look to transaction costs in cases involving 800 MHz Public Safety Licensees;

- Modifying (softening) the hard look as applied to transaction costs in cases involving 800 MHz Public Safety Licensees; and

- Reframing the hard look as applied to transaction costs in cases involving 800 MHz Public Safety Licensees to give effect to the importance attached by the FCC to the avoidance of more than minimal disruption to the operations of public safety radio systems and to the provision of comparable facilities to 800 MHz Public Safety Licensees.

Each of these three possible approaches will be considered.

- *Not applying the hard look*: Simply not applying the hard look in any form to transaction costs in cases involving 800 MHz Public Safety Licensees seems unsupported by the language of the FCC which determined not to adopt a cap on transaction costs, but did not say that transaction costs in excess of two per cent of hard costs should not be examined in cases involving 800 MHz Public Safety Licensees. Some sort of review of transaction costs when they exceed two per cent of hard costs seems proper.

- *Softening the hard look*: Modifying (softening) the hard look as applied to transaction costs in cases involving 800 MHz Public Safety Licensees seems facially attractive as it preserves both the review of transaction costs in excess of two per cent and the distinction between 800 MHz Public Safety Licensees and other 800 MHz licensees subject to the 800 MHz Rebanding. The problem with a general softening of the hard look is that it has no clear underlying standard and, therefore, provides no guidance to 800 MHz Licensees and no basis for reviewing decisions of the TA.

- *Reframing the hard look*: Reframing the hard look as applied to transaction costs in cases involving 800 MHz Public Safety Licensees to give effect to the importance attached by the FCC to the avoidance of more than minimal disruption to the operations of public safety radio systems and to the provision of comparable facilities to 800 MHz Public Safety Licensees

seems to be an approach that not only preserves both the review of transaction costs in excess of two per cent and the distinction between 800 MHz Public Safety Licensees and other 800 MHz licensees subject to the 800 MHz Rebanding, but also may provide a basis for establishing standards that would both provide guidance to 800 MHz Licensees and a basis for reviewing decisions of the TA.

If the approach of reframing the hard look is determined to be proper, as RCC believes it should be, then the reframed hard look could be stated as follows:

- The TA recognizes that the FCC has made a distinction between 800 MHz Public Safety Licensees and other 800 MHz licensees subject to the 800 MHz Rebanding in relation to the two percent transaction cost threshold. Specifically, the TA seeks to give effect to the concern of the FCC that, "with respect to public safety entities, outside expertise may be required in the negotiation of agreements and in analysis of 'comparable facilities' proposals. We can foresee that such outside costs could raise the transactional cost above two percent of the 'hard costs.'"

- To preserve the distinction between 800 MHz Public Safety Licensees and other 800 MHz licensees subject to the 800 MHz Rebanding in relation to the two percent transaction cost threshold and to give effect to the concerns expressed by the RCC in relation thereto and to reflect the importance attached by the FCC to the avoidance of more than minimal disruption of radio system operations during the physical rebanding process and the provision of facilities after the completion of the physical rebanding process which are in all material respects comparable to the facilities in use before the commencement of the physical rebanding process, the TA has determined that the following approach shall be taken to reviewing transaction costs that exceed the two per cent threshold when incurred or to be incurred by 800 MHz Public Safety Licensees:

    - Transaction costs arising in connection with efforts to avoid more than minimal disruption of radio system operations during the physical rebanding process or to provide for facilities after the completion of the physical rebanding process which are in all material respects comparable to the facilities in use before the commencement of the physical rebanding process shall be presumed to be or to have been properly incurred and fully reimbursable even if those transaction costs exceed the two per cent threshold. The TA will not disallow the reimbursement of such transaction costs in the absence of clear and convincing evidence of the impropriety of such costs when incurred or to be incurred by 800 MHz Public Safety Licensees.

- Transaction costs arising other than in connection with efforts to avoid more than minimal disruption of radio system operations during the physical rebanding process or to provide for facilities after the completion of the physical rebanding process which are in all material respects comparable to the facilities in use before the commencement of the physical rebanding process shall be subject to the 'hard look' generally applicable to transaction costs.

RCC believes that the approach outlined above, or an approach substantially similar thereto, is required in order to preserve the distinction made by the FCC between 800 MHz Public Safety Licensees and other 800 MHz licensees subject to the 800 MHz Rebanding in relation to the two percent transaction cost threshold and to give effect to the concerns expressed by the FCC in relation thereto and to reflect the importance attached by the FCC to the avoidance of more than minimal disruption of radio system operations during the physical rebanding process and the provision of facilities after the completion of the physical rebanding process which are in all material respects comparable to the facilities in use before the commencement of the physical rebanding process.

Appendix 4: Legal Basis for the Suggested Issuance by the Commission of the Instructions to the TA and Sprint Nextel in Relation to the 800 MHz Rebanding

A. The Rights of Licensees in the 800 MHz Rebanding

The *July 2004 Report and Order* establishes a number of critical rights of 800 MHz Public Safety Licensees in connection with the Physical Rebanding Process. In understanding those rights of 800 MHz Public Safety Licensees, it is critical to bear in mind the central purpose of the FCC in ordering the 800 MHz Rebanding -- to maintain the reliability and robustness of 800 MHz Public Safety Radio Systems. The rights of 800 MHz Public Safety Licensees in connection with the Physical Rebanding Process flow from that central purpose, the rights should be interpreted as expansively as necessary to achieve that central purpose, and any effort to limit those rights in a manner that would jeopardize that central purpose must be rejected.

1. The Rebanding Plan should be examined, from a regulatory standpoint, primarily with reference to the central purpose of the 800 MHz Rebanding – maintaining the reliability and robustness of public safety radio systems.

The FCC has established rights of 800 MHz Public Safety Licensees to assure that the central purpose of the 800 MHz Rebanding is achieved. To assure the maintenance of the reliability and robustness of 800 MHz Public Safety Radio Systems, the FCC has established that:

- During the Physical Rebanding Process, there shall be no more than a minimal disruption of the operation of public safety licensees; and

- At the end of the Physical Rebanding Process, public safety licensees shall have a radio system that is at least comparable to the radio system of the licensee before the Physical Rebanding Process.

The rights to uninterrupted operations and to comparable facilities are the critical rights of 800 MHz Public Safety Licensees in the Physical Rebanding Process.

a. The avoidance of disruption during the Physical Rebanding Process

The right to uninterrupted or at most minimally disrupted operations during the Physical Rebanding Process is established in the *July 2004 Report and Order* in which the FCC made repeated references thereto.

In order to effectuate the new 800 MHz band plan, the FCC established "a transition mechanism by which … there is minimal disruption to the operations of all affected 800 MHz incumbents during the transition period …" *July 2004 Report and Order*, ¶ 4, pp. 5-6 (Emphasis supplied.)

The FCC wrote that "[t]hroughout this proceeding, we have sought a solution to the interference problem that achieves the following paramount goals," including "a solution that … imposes minimum disruption to the activities of all 800 MHz band users, including public safety, non-cellular SMR, and Business, Industrial and Land Transportation (B/ILT) systems." *July 2004 Report and Order*, ¶ 2, pp. 4-5 (Emphasis supplied.)

The FCC recognized that the 800 MHz Rebanding "raises significant transition issues, particularly with respect to the relocation of public safety and other non-cellular licensees from old to new frequency assignments" and was "sensitive to the concerns raised about service and operational disruption" and "committed to ensuring that the band reconfiguration process does not result in degradation of existing service or an adverse effect on public safety communications and operations." *July 2004 Report and Order*, ¶ 26, p. 18 (Emphasis supplied.)

The FCC, in establishing the final "Commission Band Plan," took into account "five principal components," one of which was "[t]the extent to which incumbents would be treated most fairly, including the degree of disruption associated with channel changes, the ability to provide relocated incumbents with truly comparable spectrum and minimum interruption of critical public safety and CII communications." *July 2004 Report and Order*, ¶ 149, p. 80 (Emphasis supplied.)

The FCC referred to the development of a "Commission Band Plan" that was "consistent with our goals in this proceeding," including "minimizing disruption to existing services." *July 2004 Report and Order*, ¶ 151, p. 82 (Emphasis supplied.)

Finally and quite importantly, the FCC wrote that "[i]f the reconfiguration of a licensee will entail a significant interruption of service during the relocation process, Nextel will fund the installation of a redundant system." *July 2004 Report and Order*, ¶ 201, p. 109 (Emphasis supplied.)

b. The assurance of comparable facilities in the long run

The right to at least comparable facilities after the Physical Rebanding Process is completed is established in the *July 2004 Report and Order* in which the FCC made repeated references thereto.

The FCC "assign[ed] financial responsibility to Nextel for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities, i.e., systems with comparable technological and operational capability." *July 2004 Report and Order*, ¶ 11, p. 9 (Emphasis supplied.)

The FCC further decreed that "Nextel is obligated to ensure that relocated licensees receive at least comparable facilities when they change channels." *July 2004 Report and Order*, ¶ 178, p. 96

The FCC adopted rules with a view to ensuring "that relocating licensees receive 'comparable facilities' on their new frequency assignments, whether this requires retuning existing equipment or providing replacement equipment." July 2004 Report and Order, ¶ 26, p. 18

The FCC, in establishing the final "Commission Band Plan," took into account "five principal components," including "[t]the extent to which incumbents would be treated most fairly, including … the ability to provide relocated incumbents with truly comparable spectrum." *July 2004 Report and Order*, ¶ 149, p. 80 (Emphasis supplied.)

Finally and most importantly, the FCC wrote that "[a]ll relocating licensees shall be relocated to comparable facilities. Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs." *July 2004 Report and Order*, ¶ 201, p. 109 (Emphasis supplied.)

> *2. The Rebanding Plan should take the matter of cost into account only as a secondary matter, i.e., only after the Rebanding Plan has adequately addressed the requirements for maintaining the reliability and robustness of public safety radio systems and for comparable facilities.*

The FCC has established rights of public safety licensees to assure that the central purpose of the 800 MHz Rebanding is achieved – maintaining the reliability and robustness of 800 MHz Public Safety Radio Systems. At no point, does the *July 2004 Report and Order* qualify the rights of 800 MHz Public Safety Licensees by reference to the matter of the costs of the 800 MHz Rebanding which are to be borne by Nextel.

The importance attached by the FCC to its central purpose in ordering the 800 MHz Rebanding requires that the avoidance of any more than minimal disruption of 800 MHz Public Safety Radio Systems and the provision of comparable facilities makes clear that the FCC gave precedence to these rights over any interest of Nextel in minimizing its funding obligation or any interest of the United States Government in the receipt of funds from the cost/value true-up of the 800 MHz Rebanding.

The Rebanding Plan should be framed with a view to managing all risks that threaten the uninterrupted operations and assuring that comparable facilities are provided to public safety licensees. Only after these rights are secured, should the matter of costs even be considered. The responsibility of 800 MHz Public Safety Licensees to maintain the reliability and robustness of their 800 MHz Public Safety Radio Systems overrides any interest of Nextel or the United States Government in containing those costs. (The

Rebanding Plan Development Methodology expressly follows the indicated approach. See: Paper 9.)

This clearly proper conclusion is relevant not only to the manner in which a Rebanding Plan is developed, but also to certain critical related matters. Those matters include (a) the weight to be given to the judgment of 800 MHz Public Safety Licensees in framing their Rebanding Plans, (b) a prohibition against Nextel's or the Transition Administrator's seeking to substitute the judgment of either of them for that of an 800 MHz Public Safety Licensee in relation to the management of risk to the uninterrupted operation of its 800 MHz Public Radio System or to the achievement of comparable facilities therefor, and (c) the manner of the determination of the scope of the obligation of Nextel to fund the 800 MHz Rebanding.

> *3. The general rule is that all costs incurred or to be incurred by or on behalf of the licensee in connection with the 800 MHz Rebanding should be borne by Nextel.*

It is a central right of public safety licensees to have all costs of participation in the 800 MHz Rebanding paid for by Nextel, and that critical right should be interpreted as expansively as necessary to provide full funding of that cost by Nextel. Any effort to limit that cost in a manner that would (a) sacrifice the ability of the licensee to protect its rights in the Physical Rebanding Process, (b) undermine the achievement of the central purpose of the FCC in the 800 MHz Rebanding, or (c) deprive the licensee of fully funded nature of the rebanding mandate must be rejected.

The FCC has established a general rule that all costs of a licensee's participation in the 800 MHz Rebanding are to be paid by Nextel. The FCC referred to and repeated that rule time and again in the *July 2004 Report and Order*. The FCC further sought to protect public safety licensees from any funding shortfall either by reason of Nextel's possible cost underestimation or limitations that may arise as a result of Nextel's ability to fund the 800 MHz Rebanding.

In order to effectuate the new 800 MHz band plan, the FCC established that "the associated reconfiguration costs are funded." *July 2004 Report and Order*, ¶ 4, pp. 5-6 (Emphasis supplied.)

The FCC declared that it "assign[ed] financial responsibility to Nextel for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities…" *July 2004 Report and Order*, ¶ 11, p. 9 (Emphasis supplied.)

The FCC similarly stated: "Under the band reconfiguration plan, the principle cost component will be borne by Nextel, which will pay for all channel changes necessary to implement the reconfiguration." *July 2004 Report and Order*, ¶ 178, p. 96

The FCC clearly and purposively imposed the full cost of the 800 MHz Rebanding upon Nextel without any limitation upon the obligation of Nextel and rejected Nextel's effort to have a cap on its obligation. "Nextel has committed to pay up to $850 million for retuning and replacement expenses associated with its own relocation and the related relocations discussed in this *Report and Order*, an amount it claims is sufficient to cover all such costs. We do not believe, however, that Nextel should be able to cap its obligation to pay relocation costs, because doing so could leave public safety and other relocating entities without the means to complete the relocation process in the event that Nextel's estimates prove low and relocations costs exceeded any such cap. Therefore, we decline to 'cap' Nextel's obligations at $850 million or any other amount but instead require Nextel to pay all costs of band reconfiguration, as defined in this *Report and Order*." *July 2004 Report and Order*, ¶ 29, p. 19 (Emphasis supplied.)

The general rule was established by the FCC with full knowledge that underwriting the costs of the 800 MHz Rebanding could be very high as a result of the fact that "band reconfiguration may require extensive replacement of existing 800 MHz band public safety equipment" or otherwise. *July 2004 Report and Order*, ¶ 24, p. 17

The FCC expressly noted that "[b]and reconfiguration will be costly." *July 2004 Report and Order*, ¶ 177, p. 96

Finally and most importantly, the FCC's Supplemental Order and Order on Reconsideration (WT Docket 02-55) (December 22, 2004) (the "*December 2004 Supplemental Order*") reiterated the general rule that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel." ¶15, p.10 (Emphasis supplied.)

4. Subject to the general rule, certain limited protections are afforded to Nextel in relation to its bearing the costs of the 800 MHz Rebanding.

The *July 2004 Report and Order* is inexplicit in relation to protections afforded to Nextel in relation to its bearing the costs of the 800 MHz Rebanding. Nextel has "the opportunity to review the details of the [Rebanding Estimate] and, if appropriate, dispute the [Rebanding Estimate" *July 2004 Report and Order*, ¶ 198, p. 106, but the FCC provides no criteria for what might be an appropriate basis for disputing the Rebanding Estimate. It is, however, clear that Nextel cannot properly dispute the Rebanding Estimate without a genuine basis for so doing. The *July 2004 Report and Order* (¶ 198, p. 106) also provides that Nextel's concurrence in the Rebanding Estimate "shall not unreasonably be withheld."

The only inferentially proper basis in the *July 2004 Report and Order* for disputing a Rebanding Estimate is that derivable from ¶ 198, p. 106, which requires a licensee to submit with the Rebanding Estimate a certification to the effect that the funds requested in the Rebanding Estimate are the minimum necessary to provide facilities comparable to

those presently in use. That inferential guidance and the protection afforded to Nextel thereby are rather limited as neither covers (a) the costs of developing and implementing a Rebanding Plan to avoid adverse consequences to the availability, capacity, or functionality of the licensee's radio system during the Physical Rebanding Process or (b) the costs of the participation by the licensee in the Legal Rebanding Contest.

The *December 2004 Supplemental Order*, after reiterating the general rule that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs … lies with Nextel" (¶15, p. 10) and after rejecting certain limitations on cost recovery proposed by Nextel (¶70, pp. 31-32) indicates that the Transition Administrator serves "as a watchdog over excess transactional costs and 'goldplating'" (¶70, p.32) and that the dispute settlement and appeals processes "should provide a sufficient safeguard against excessive claims for transaction costs associated with band reconfiguration." ¶70, p. 32

Neither the *July 2004 Report and Order* nor the *December 2004 Supplemental Order* establishes any substantive rules to protect Nextel in relation to the matter of the costs of funding the 800 MHz Rebanding. All protection offered to Nextel in this respect is procedural as Nextel is remitted to relying upon the non-binding decisions of the Transition Administrator in its watchdog role or upon the dispute settlement and appeals process.

> *5. The limited protections afforded to Nextel in relation to its bearing the costs of the 800 MHz Rebanding do not extend to second-guessing by Nextel or the TA of the Rebanding Plan*.

The limited protections afforded to Nextel in relation to the matter of the costs of funding the 800 MHz Rebanding provide no basis whatsoever for Nextel's or the Transition Administrator's seeking to contain costs by substituting the judgment of either of them for that of the public safety licensee in relation to managing all risks that threaten the uninterrupted operations and assuring that comparable facilities are provided to public safety licensees.

Indeed, it is plain that the FCC would not countenance any such judgment substitution effort. The FCC has declared that (a) the central purpose of the FCC in ordering the 800 MHz Rebanding is to maintain the reliability and robustness of public safety radio systems; and (b) Nextel is to bear all the costs of the 800 MHz Rebanding. It is simply inconceivable that the FCC even consider any effort to lessen (a) the protections against disruption of public safety operations or (b) the assurance of achieving comparable facilities, both as deemed necessary by public safety licensees, at the suggestion of Nextel or the Transition Administrator.

The FCC clearly intended a prohibition against Nextel's or the Transition Administrator's seeking to substitute the judgment of either of them for that of the public safety licensee in relation to the management of risk to the uninterrupted operation of its radio system or the requirements for the achievement of comparable facilities.

6. The interest of the United States Government as a residual beneficiary in the 800 MHz Rebanding is strictly subordinate to the public policy interest in the maintenance of the availability and robustness of public safety radio systems and is not a basis for limited cost recovery by public safety licensees.

The responsibility of 800 MHz Public Safety Licensees to maintain the reliability and robustness of their radio systems to support their statutory duty to protect life and property overrides any interest of the United States Government in containing those costs. Indeed, it is plain that the FCC would not countenance that interest to lessen the achievement of the central purpose of the FCC in ordering the 800 MHz Rebanding -- to maintain the reliability and robustness of public safety radio systems. It is simply inconceivable that the FCC would ever consider any effort to lessen (a) the protections against disruption of public safety operations or (b) the assurance of achieving comparable facilities in order to assure a greater recovery by the United States Government.

B. The Good Faith Judgment of a Public Safety Licensee with Respect to the Manner of Proceeding with the Physical Rebanding Process Must Be Accepted.

The good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner of proceeding with the Physical Rebanding Process must be accepted because:

- The good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

- As a matter of public policy, neither Nextel, nor the TA, nor any other party should be permitted to discourage public safety agencies from carrying out their critical responsibilities in relation (a) to maintain the availability and robustness of their communications systems or (b) to assure the comparability of facilities after the completion of the Physical Rebanding Process by challenging in litigation, through withholding funding, or otherwise the good faith judgments of public safety agencies in relation to how to proceed with the Physical Rebanding Process.

- In no event, should Nextel or any other participant in the rebanding process be permitted to substitute its judgment for that of an 800 MHz Public Safety Licensee with respect to the proper manner in which to proceed with the Physical Rebanding Process with respect to a public safety radio system while that system is in use supporting first responders to emergencies, including those involving the risk of death and injury.

1. The good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

A number of factors compel the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

Those factors include the responsibility and responsibilities of 800 MHz Public Safety Licensees, the significance of the public safety licensee's assessment of what is required for the safe and effective rebanding of its radio system, the good faith of the licensee's assessment as reflected in prior consistent practice, the certification of the public safety licensee, and the central purpose of the FCC in ordering the 800 MHz Rebanding.

Cumulatively at least, those factors make clear that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be beyond challenge by any party.

a. The responsibility and responsibilities of an 800 MHz Public Safety Licensee

The FCC recognizes quite clearly the obligations of first responders and their dependence upon robust and reliable radio systems. For example, the FCC wrote: "The Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." *July 2004 Report and Order*, ¶ 1, p. 3

Similarly, the FCC wrote that it "must take the actions necessary to ensure that first responders – both public safety and CII personnel – have communications channels free of unacceptable interference and thereby suitable for mission-critical operations including rapid response to major incidents that threaten Homeland Security." *July 2004 Report and Order*, ¶ 13, p. 11

The FCC repeated that purpose and affirmed that "to ensure that the Nation's public safety agencies can effectively carry out their Homeland Security obligations, we must remedy the problem of interference in the 800 MHz band and ensure that public safety agencies have access to sufficient spectrum." *July 2004 Report and Order*, ¶ 68, pp. 44-45

The FCC clearly recognizes that public safety agencies and public safety agencies alone have the responsibilities for responding to emergencies and depend upon public safety communications systems to fulfill those responsibilities. It is equally clear that, if a response to an emergency is inadequate for reasons related to the unavailability, lessened capacity, or lessened functionality of the public safety radio system as a result of a problem occurring during the Physical Rebanding Process, it is the public safety agency and the public safety agency alone that will be the subject of claims or lawsuits by persons injured as a result.

This factor supports the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

b. The significance of an 800 MHz Public Safety Licensee's assessment of what is required for the safe and effective rebanding of its radio system as a function of the experience of public safety agencies

The legal significance of the assessment of an 800 MHz Public Safety Licensee with respect to what is required for the safe and effective rebanding of its system is not limited to the responsibility and responsibilities of licensees. The experience of public safety licensees should also be recognized as having legal significance. No party has greater experience than 800 MHz Public Safety Licensees and the users of their radio systems in the utilization and utility, maintenance, and operation of 800 MHz Public Safety Radio Systems, and no party other than the Licensee and the users of the Licensee's Radio System have greater knowledge of that system.

That experience requires that the greatest weight be given to the judgment of 800 MHz Public Safety Licensees (including input from the users of their networks) with respect to the management of risks to the reliability or robustness of those systems.

This factor supports the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

c. The good faith of the Licensee's assessment as reflected in prior consistent practice

The good faith of the Licensee in its judgment respecting the management of risks to the reliability or robustness of those systems is made plain where that judgment is consistent with the prior practices of the Licensee with respect to the management of those risks. That consistency is plain in this case as has been demonstrated above.

This factor supports the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

d. The central purpose of the FCC in ordering the 800 MHz Rebanding

As has been established in this memorandum, the central purpose of WT Docket 02-55, in which the *July 2004 Report and Order* was issued, was "**Improving Public Safety Communications in the 800 MHz Band**." See: *July 2004 Report and Order*, ¶ 1, p. 3; ¶ 7, p. 7; and ¶ 68, pp. 44-45.

For that central purpose to be recognized and given proper effect, that purpose must be understood to increase the weight to given to the judgment of the most knowledgeable parties -- the 800 MHz Public Safety Licensees and the users of their radio systems -- with respect to how that purpose can be achieved and thereby assure that the reliability and robustness of the licensee's radio system is maintained during the Physical Rebanding Process and the availability of comparable facilities after the completion of the Physical Rebanding Process is assured.

This factor supports the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

> *2. As a matter of public policy, neither Nextel, nor the Transition Administrator, nor any other party should be permitted to discourage public safety agencies from carrying out their critical responsibilities in relation to maintaining the availability and robustness of their communications systems by challenging in litigation, through withholding funding, or otherwise the good faith judgments of public safety agencies in relation to how to proceed with the Physical Rebanding Process.*

A number of factors make the opinions of Nextel or the Transition Administrator irrelevant to and of no weight in answering the question whether the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities before and after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

Those factors include the responsibility and responsibilities of Nextel and the Transition Administrator, the lack of experience underlying the assessment by Nextel or the Transition Administrator of what is required for the safe and effective rebanding of its radio system, and the central purpose of the FCC in ordering the 800 MHz Rebanding.

Cumulatively at least, those factors make clear that the opinions of Nextel or the Transition Administrator are irrelevant to and of no weight in relation to the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities before and after the completion of the Physical Rebanding Process should be beyond challenge by any party.

a. The responsibility and responsibilities of Nextel and the Transition Administrator

Neither Nextel nor the Transition Administrator has any public safety responsibility. If the Physical Rebanding Process with respect to an 800 MHz Public Safety Radio System goes awry with adverse consequences to life or property by reason of an inability of public safety agencies to respond properly because that radio system is compromised, absent indemnification, it is an 800 MHz Public Safety Licensee, rather than Nextel or the Transition Administrator, that will face claims of legal responsibility. (See: Paper 1 and Paper 5.)

This factor supports the conclusion that the opinions of Nextel or the Transition Administrator are irrelevant to and of no weight in answering the question whether the conclusion that the good faith judgment of a public safety licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities before and after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

b. The lack of experience underlying Nextel's or the Transition Administrator's assessment of what is required for the safe and effective rebanding of the Licensee's Radio System

Neither Nextel nor the Transition Administrator have any experience in carrying out the responsibilities of public safety agencies.

This factor supports the conclusion that the opinions of Nextel or the Transition Administrator are irrelevant to and of no weight in answering the question whether the conclusion that the good faith judgment of a public safety licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities before and after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

c. The central purpose of the FCC in ordering the 800 MHz Rebanding

As has been established in this memorandum, the central purpose of WT Docket 02-55, in which the *July 2004 Report and Order* was issued, was "**Improving Public Safety**

Communications in the 800 MHz Band." See: *July 2004 Report and Order*, ¶ 1, p. 3; ¶ 7, p. 7; and ¶ 68, pp. 44-45.

For that central purpose to be recognized and given proper effect, that purpose must be understood to require that no weight be given to the judgment of any but the most knowledgeable parties -- the public safety licensees and the users of their radio systems -- with respect to how that purpose can be achieved and thereby assure that the reliability and robustness of the licensee's radio system is maintained during the Physical Rebanding Process and the availability of comparable facilities after the completion of the Physical Rebanding Process is assured.

This factor supports the conclusion that the opinions of Nextel or the Transition Administrator are irrelevant to and of no weight in answering the question whether the conclusion that the good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

> *3. In no event, should Nextel or any other participant in the 800 MHz Rebanding be permitted to substitute its judgment for that of an 800 MHz Public Safety Licensee with respect to the proper manner in which to proceed with the Physical Rebanding Process with respect to an 800 MHz Public Safety Radio System while that system is in use supporting first responders to emergencies, including those involving the risk of death and injury.*

Neither Nextel nor any other participant in the 800 MHz Rebanding should be permitted to substitute its judgment for that of a public safety licensee with respect to the proper manner in which to proceed with the Physical Rebanding Process with respect to an 800 MHz Public Safety Radio System while that system is in use supporting first responders to emergencies, including those involving the risk of death and injury.

This conclusion is demonstrated first by reference to two analogous situations for which the law has created relevant presumptions and second by comparison of the interest at stake if such a substitution of judgment was to be permitted.

a. Business judgment rule analogy

It is well settled that the actions of corporate officers and directors cannot be challenged in the absence of either (a) lack of due diligence or (b) fraud or bad faith. That rule of law is referred to as the "business judgment rule." See: Gevurtz, Franklin A., *Corporation Law* (2000), §4.1.2, pp. 274 et seq. "The 'business judgment' rule sustains corporate transactions and immunizes management from liability where the transaction is within the powers of the corporation (intra vires) and the authority of management, and

involves the exercise of due care and compliance with applicable fiduciary duties." Henn, Harry C., and Alexander, John R., Laws of Corporations (1983), §242, p. 661.

The rule is intended to make impermissible the substitution of the judgment of a shareholder for that of a duly elected corporate officer or director who has acted prudently and in good faith. The rule is intended to place corporate decisions in the hands of corporate officers and directors and to prevent shareholder intervention absent either (a) a required degree of prudence or (b) fraud or bad faith on the part of the officers or directors even though the shareholder in a derivative suit challenging corporate action can have no interest adverse to that of the corporation. There is no escape from the effect of the business judgment rule in the absence of bad faith or imprudence.

A similar, but even stronger, rule should apply to a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies. That judgment is entitled to a far stronger presumption than the routine rebuttable presumption in relation to official action. It is for public safety officials to manage the radio systems upon which they rely, and that responsibility is not by law shared with Nextel or the Transition Administrator in the rebanding process or otherwise. The judgment of a public safety officer in relation to a matter solely within the responsibility of the public safety agency is entitled to prevail if made in good faith and absent fraud as against any private party seeking to argue that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system. That rule should surely be inescapable as against a private party whose interest is solely to avoid a financial burden or create a financial benefit.

Thus, without a showing of bad faith or fraud, Nextel should not be permitted to challenge a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies on the ground that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system because Nextel's sole interest in the matter is to save itself money.

Similarly, without a showing of bad faith or fraud, the TA should not be permitted to challenge a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies on the ground that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system because the TA's sole interest in the matter is to protect the residual financial interest of the United States Government.

It would be indeed perverse to allow Nextel or the Transition Administrator to challenge public safety officials on the ground that those officials have been excessively prudent or unreasonably careful in protecting the public safety. It is simply unimaginable that the FCC would support any such challenge.

b. Analogy to the presumption of regularity in relation to official actions by public officers

The law recognizes a rebuttable presumption that official actions by public officers are regularly and legally performed. That presumption relates to compliance with proper process in relation to official proceedings and to fulfillment of required duties. "The presumption is that public officers do as the law and their duty requires them." Lawson, John D., *The Law of Presumptive Evidence* (1886, 1982), Rule 14, p. 53. That presumption can be rebutted on proof that the required formalities were not followed. The presumption reflects the probability that the process was properly followed and recognition of the difficulty of proving that the officer complied with all requirements of regularity and legal process. See: Strong, John W., et al., *McCormick on Evidence* (5th Ed. 1999), § 343, p. 520. The rebuttable nature of the presumption reflects the public policy that challenges to official's compliance with proper formalities are to be permitted because of the public interest in assuring such compliance.

The presumption in favor of a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies is entitled to a far stronger presumption than the routine rebuttable presumption in relation to official action. That judgment is entitled to an irrebuttable presumption in its favor as against any private party seeking to argue that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system. That presumption should surely be irrebuttable as against a private party whose interest is solely to avoid a financial burden or create a financial benefit.

Thus, Nextel should not be permitted to challenge a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies on the ground that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system because Nextel's sole interest in the matter is to save itself money.

Similarly, the Transition Administrator should not be permitted to challenge a public safety official's judgment with respect to the management of risk to the availability, capacity, and functionality of a radio system relied upon by first responders to emergencies on the ground that the public safety officer has been too rigorous or unreasonably cautious in protecting that radio system because the Transition Administrator's interest in the matter is to protect the residual financial interest of the United States Government.

c. Interest in the public safety vs. a strictly financial interest

The judgment of public safety officials with respect to how to maintain the reliability and robustness of the licensee's radio system during the Physical Rebanding Process and how to assure the availability of comparable facilities after the completion of the Physical Rebanding Process is in a fundamental sense disinterested. Those officials have no personal financial stake in the development of the Rebanding Plan or the contents thereof.

Those officials' judgment is designed only to assure the recognition of the public interest in the effectiveness and availability of public safety communications.

The judgment of those officials is, moreover, not gratuitously offered. That judgment is made in furtherance of their fulfilling the obligations imposed upon them by law. [Under Virginia law, for example, a local police force "is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and enforcement of state and local laws, regulations, and ordinances." Code of Virginia § 15.2-1704.A. Under Virginia law, every member of a fire company is obligated "upon any alarm of fire or call of a medical emergency, [to] attend … and endeavor to extinguish such fire or assist in the medical emergency." Code of Virginia § 27-11. The Licensee's Radio System is plainly critical to the carrying out of those duties, and judgment respecting how to assure the continuing availability, capacity, and functionality of that system must be viewed as judgments made in fulfillment or in aid of the fulfillment of obligations imposed by law.]

By contrast, Nextel has a direct financial interest in minimizing the cost of implementing the Rebanding Plan because Nextel cannot want to be made to fund expenses greater than the net value of the spectrum Nextel will have as a result of the 800 MHz Rebanding. Nextel has no legal cap upon its funding obligation, but has nonetheless a clear interest in capping its obligations by whatever means are available.

Clearly, the interest of the public must be given a strict precedence over the private financial interest of Nextel. That clarity derives directly from the recognition that, as has been established in this memorandum, the central purpose of WT Docket 02-55, in which the *July 2004 Report and Order* was issued, was "**Improving Public Safety Communications in the 800 MHz Band**." See: *July 2004 Report and Order*, ¶ 1, p. 3; ¶ 7, p. 7; and ¶ 68, pp. 44-45.

For that central purpose to be recognized and given proper effect, that purpose must be understood to require that no opportunity be afforded to Nextel to seek to substitute its financially interested judgment for the disinterested public interest-motivated judgment of the public safety licensees and the users of their radio systems with respect to how that purpose can be achieved and thereby assure that the reliability and robustness of the licensee's radio system is maintained during the Physical Rebanding Process and provision for the availability of comparable facilities after the completion of the Physical Rebanding Process is made.

That central purpose would be denied recognition and effect if any opportunity was to be afforded to Nextel to seek to substitute its financially interested judgment for the disinterested public interest-motivated judgment of the public safety licensees and the users of their radio systems with respect to how that purpose can be achieved and thereby enable Nextel to seek to limit its financial exposure at the expense of the reliability and robustness of the licensee's radio system during the Physical Rebanding Process and of the availability of comparable facilities after the completion of the Physical Rebanding Process.

This distinction between the disinterested public safety-motivated judgment of an 800 MHz Public Safety Licensee and the financial self-interested judgment of Nextel supports the conclusion that no opportunity be afforded to Nextel to seek to substitute its judgment for that of public safety licensees and the users of their radio systems with respect to how to assure that the reliability and robustness of the licensee's radio system is maintained during the Physical Rebanding Process and provision for the availability of comparable facilities after the completion of the Physical Rebanding Process is made.

C. The Rebanding Estimate Submitted by the Licensee Should Be Accepted as the Financial Road Map for the Payment of All the Reasonable Costs Associated with the Rebanding of the 800 MHz Radio System of the Licensee.

The Rebanding Estimate should be accepted as the financial road map for the payment of all the reasonable costs associated with the rebanding of the Licensee's Radio System because:

- The Rebanding Estimate represents the good faith judgment of the licensee in relation to the costs of the 800 MHz Rebanding as it affects the licensee;

- The Rebanding Estimate is entitled to presumptions of correctness and of regularity and compliance with applicable law;

- The presumptions in favor of the Rebanding Estimate cannot be overcome except by clear and convincing evidence; and

- Neither Nextel nor any other party to the Legal Rebanding Proceeding can overcome the presumptions of correctness and of the regularity and legality of the Rebanding Estimate by arguing that some lesser level of assurance that the Licensee's Radio System will not be adversely affected in the Physical Rebanding Process than that provided in the Rebanding Plan would be adequate for the Licensee and that only the cost of providing that lesser level of assurance should be borne by Nextel.

The Rebanding Estimate is entitled to presumptions of correctness and of regularity and compliance with applicable law. The presumption of correctness derives from the July *2004 Report and Order*. The presumption of regularity and compliance with applicable law derives from the law of evidence.

The policy considerations underlying the presumptions in favor of the Rebanding Estimate do not permit those presumptions to be easily overcome. The clear and convincing evidence standard is clearly more appropriate than the preponderance of the evidence standard to the matter of overcoming the presumptions created in favor of the Rebanding Estimate because:

- The FCC has placed a very high value upon the maintenance of the availability and robustness of public safety radio systems;

- The FCC has indicated that it places no value upon protecting Nextel in relation to its bearing the costs of the 800 MHZ Rebanding except as necessary to secure Nextel's consent to the arrangement; and

- Those relative values must be reflected in both the allocation of the burden of proof and in the appropriate burden of persuasion.

In consequence:

- All costs incurred in connection with the implementation of the Rebanding Plan to assure that the Licensee's Radio System maintains its availability, capacity, and functionality during the Physical Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear and convincing evidence that a more cost-effective method to obtain that assurance is reasonably available; and

- All other costs incurred by the Licensee in connection with the 800 MHz Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear and convincing evidence that those costs are unreasonable.

1. The July 2004 Report and Order establishes a presumption in favor of the correctness of the Rebanding Estimate.

The *July 2004 Report and Order* must be read as establishing a presumption in favor of the correctness of a Rebanding Estimate submitted by a licensee in good faith.

a. The Licensee's obligation of good faith

The FCC has ordered that: "All parties, including Nextel, are held to a high standard of utmost good faith in their transactions with Nextel, or its designee, the Transition Administrator, other licensees, and the Commission. In particular, and without limiting the generality of the foregoing obligation, representations made to the Transition Administrator will be held to the same standard of truth and candor as representations made to the Commission." *July 2004 Report and Order*, ¶ 201, p. 107

b. The obligations of Nextel in responding to the Rebanding Estimate

The *July 2004 Report and Order*, ¶ 198, p. 106, provides that Nextel's concurrence in the Rebanding Estimate "shall not unreasonably be withheld."

The FCC has provided that: "All parties, including Nextel, are held to a high standard of utmost good faith in their transactions with Nextel, or its designee, the Transition

Administrator, other licensees, and the Commission. In particular, and without limiting the generality of the foregoing obligation, representations made to the transition Administrator will be held to the same standard of truth and candor as representations made to the Commission." *July 2004 Report and Order*, ¶ 201, p. 107

c. The relationship between the general reimbursement rule and the rules affording protection to Nextel in relation to the 800 MHz Rebanding

The FCC clearly and purposively imposed the full cost of the 800 MHz Rebanding upon Nextel without any limitation upon the obligation of Nextel and rejected Nextel's effort to have a cap on its obligation. "Nextel has committed to pay up to $850 million for retuning and replacement expenses associated with its own relocation and the related relocations discussed in this *Report and Order*, an amount it claims is sufficient to cover all such costs. We do not believe, however, that Nextel should be able to cap its obligation to pay relocation costs, because doing so could leave public safety and other relocating entities without the means to complete the relocation process in the event that Nextel's estimates prove low and relocations costs exceeded any such cap. Therefore, we decline to 'cap' Nextel's obligations at $850 million or any other amount but instead require Nextel to pay all costs of band reconfiguration, as defined in this *Report and Order*." *July 2004 Report and Order*, ¶ 29, p. 19

The *July 2004 Report and Order* is inexplicit in relation to protections afforded to Nextel in relation to its bearing the costs of the 800 MHz Rebanding. Nextel has "the opportunity to review the details of the [Rebanding Estimate] and, if appropriate, dispute the [Rebanding Estimate" *July 2004 Report and Order*, ¶ 198, p. 106, but the FCC provides no criteria for what might be an appropriate basis for disputing the Rebanding Estimate. It is, however, clear that Nextel cannot properly dispute the Rebanding Estimate without a genuine basis for so doing. The *July 2004 Report and Order* (¶ 198, p. 106) also provides that Nextel's concurrence in the Rebanding Estimate "shall not unreasonably be withheld."

The only inferentially proper basis in the *July 2004 Report and Order* for disputing a Rebanding Estimate is that derivable from ¶ 198, p. 106, which requires a licensee to submit with the Rebanding Estimate a certification to the effect that the funds requested in the Rebanding Estimate are the minimum necessary to provide facilities comparable to those presently in use. That inferential guidance and the protection afforded to Nextel thereby are rather limited as neither covers (a) the costs of developing and implementing a Rebanding Plan to avoid adverse consequences to the availability, capacity, or functionality of the licensee's radio system during the Physical Rebanding Process or (b) the costs of the participation by the licensee in the Legal Rebanding Contest.

The *December 2004 Supplemental Order*, after reiterating the general rule that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs … lies with Nextel" (¶15, p. 10) and after rejecting certain limitations on cost recovery proposed by Nextel (¶70, pp. 31-

32) indicates that the Transition Administrator serves "as a watchdog over excess transactional costs and 'goldplating'" (¶70, p.32) and that the dispute settlement and appeals processes "should provide a sufficient safeguard against excessive claims for transaction costs associated with band reconfiguration." ¶70, p. 32

Neither the *July 2004 Report and Order* nor the *December 2004 Supplemental Order* establishes any substantive rules to protect Nextel in relation to the matter of the costs of funding the 800 MHz Rebanding. All protection offered to Nextel in this respect is procedural as Nextel is remitted to relying upon the non-binding decisions of the Transition Administrator in its watchdog role or upon the dispute settlement and appeals process.

d. The creation of the presumption of the correctness of the Rebanding Estimate where the licensee's good faith is established

Read together, the FCC's declarations and orders respecting the obligations of good faith, the burden upon Nextel when objecting to a Rebanding Estimate, and the far greater emphasis placed by the FCC upon the general rule that Nextel pay all the costs of the 800 MHz Rebanding than upon affording protections to Nextel in relation to the matter of its funding obligations combine to create a presumption in favor of the correctness of a Rebanding Plan prepared in good faith.

2. The presumption of regularity and compliance with the requirements of law of official actions applies to the preparation of the Rebanding Estimate.

As has already been demonstrated, the law recognizes a rebuttable presumption that official actions by public officers are regularly and legally performed. That presumption operates in favor of the Rebanding Estimate.

a. The Rebanding Estimate was prepared by a public official pursuant to the official's regular duties and responsibilities.

See section II.B.3.b, above.

b. The preparation of the Rebanding Estimate constitutes official action within the meaning of the presumption that official actions are regularly and legally performed.

See section II.B.3.c above.

3. Neither Nextel nor any other party to the Legal Rebanding Proceeding can overcome the presumptions of correctness and of the regularity and legality of the Rebanding Estimate by arguing that some lesser level of assurance that the licensee's radio system will not be adversely affected in the Physical Rebanding Process than that provided in the Rebanding Plan would be adequate for the

licensee and that only the cost of providing that lesser level of assurance should be borne by Nextel.

As has already been demonstrated, the good faith judgment of a public safety licensee with respect to the manner of proceeding with the Physical Rebanding Process must be accepted because:

- The good faith judgment of an 800 MHz Public Safety Licensee with respect to the manner in which to assure (a) the availability, capacity, and functionality during the Physical Rebanding Process and (b) the comparability of facilities before and after the completion of the Physical Rebanding Process should be conclusively presumed to be proper.

- As a matter of public policy, neither Nextel, nor the Transition Administrator, nor any other party should be permitted to discourage public safety agencies from carrying out their critical responsibilities in relation (a) to maintain the availability and robustness of their communications systems or (b) to assure the comparability of facilities before and after the completion of the Physical Rebanding Process by challenging in litigation, through withholding funding, or otherwise the good faith judgments of public safety agencies in relation to how to proceed with the Physical Rebanding Process.

- In no event, should Nextel or any other participant in the rebanding process be permitted to substitute its judgment for that of an 800 MHz Public Safety Licensee with respect to the proper manner in which to proceed with the Physical Rebanding Process with respect to an 800 MHz Public Safety Radio System while that system is in use supporting first responders to emergencies, including those involving the risk of death and injury.

It follows as a corollary from that demonstration that neither Nextel nor any other party to the Legal Rebanding Proceeding can overcome the presumptions of correctness and of the regularity and legality of the Rebanding Estimate by arguing that some lesser level of assurance that the Licensee's Radio System will not be adversely affected in the Physical Rebanding Process than that provided in the Rebanding Plan would be adequate for the licensee and that only the cost of providing that lesser level of assurance should be borne by Nextel.

In matters relating to the achievement of the central purpose of the FCC in ordering the 800 MHz rebanding, Nextel and the Transition Administrator are not only barred from challenging directly the approach adopted by an 800 MHz Public Safety Licensee to manage the risks associated with the Physical Rebanding Process by seeking to substitute Nextel's judgment for that of an 800 MHz Public Safety Licensee, but they are also barred from challenging that judgment of an 800 MHz Public Safety Licensee indirectly by arguing that Nextel should bear less than all of the costs required to carry out the risk management approach adopted by the public safety licensee.

4. The FCC has placed a very high value upon the maintenance of the availability and robustness of public safety radio systems.

Repeatedly in the course of the *July 2004 Report and Order* (and subsequent pronouncements of the FCC), the FCC made clear beyond peradventure or doubt that it was acting in order to assure that public safety agencies had wireless communications systems that were reliable and robust in order to support responses to public safety emergencies. For example, the FCC wrote: "The Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." *July 2004 Report and Order*, ¶ 1, p. 3.

For the avoidance of any doubt with respect to its purposes in the 800 MHz Rebanding, the FCC stated that "[t]he totality of the actions we take today are based on unique and compelling public interest considerations in the record before regarding the serious and continuing public safety interference problems in the 800 MHz band. These considerations require that we take the most effective actions, in the short-term and long-term, to promote robust and reliable public safety communications in the 800 MHz band to ensure the safety of life and property." *July 2004 Report and Order*, ¶ 7, p. 7

5. The FCC has indicated that it places no value upon protecting Nextel in relation to its bearing the costs of the 800 MHZ Rebanding except as necessary to secure Nextel's consent to the arrangement.

The FCC has established a general rule that all costs of a licensee's participation in the 800 MHz Rebanding are to be paid by Nextel. The FCC declared that it "assign[ed] financial responsibility to Nextel for the full cost of relocation of all 800 MHz band public safety systems and other 800 MHz band incumbents to their new spectrum assignments with comparable facilities…" *July 2004 Report and Order*, ¶ 11, p. 9 (Emphasis supplied.)

The FCC clearly and purposively imposed the full cost of the 800 MHz Rebanding upon Nextel without any limitation upon the obligation of Nextel and rejected Nextel's effort to have a cap on its obligation. "Nextel has committed to pay up to $850 million for retuning and replacement expenses associated with its own relocation and the related relocations discussed in this *Report and Order*, an amount it claims is sufficient to cover all such costs. We do not believe, however, that Nextel should be able to cap its obligation to pay relocation costs, because doing so could leave public safety and other relocating entities without the means to complete the relocation process in the event that Nextel's estimates prove low and relocations costs exceeded any such cap. Therefore, we decline to 'cap' Nextel's obligations at $850 million or any other amount but instead require Nextel to pay all costs of band reconfiguration, as defined in this *Report and Order*." *July 2004 Report and Order*, ¶ 29, p. 19 (Emphasis supplied.)

The general rule was established by the FCC with full knowledge that underwriting the costs of the 800 MHz Rebanding could be very high as a result of the fact that "band reconfiguration may require extensive replacement of existing 800 MHz band public safety equipment" or otherwise. *July 2004 Report and Order*, ¶ 24, p. 17

Most importantly, the FCC's Supplemental Order and Order on Reconsideration (WT Docket 02-55) (December 22, 2004) (the "*December 2004 Supplemental Order*") reiterated the general rule that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the cost of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel." ¶15, p.10 (Emphasis supplied.)

As has already been shown, neither the *July 2004 Report and Order* nor the *December 2004 Supplemental Order* establishes any substantive rules to protect Nextel in relation to the matter of the costs of funding the 800 MHz Rebanding. All protection offered to Nextel in this respect is procedural as Nextel is remitted to relying upon the non-binding decisions of the TA in its watchdog role or upon the dispute settlement and appeals process.

> *6. Those relative values must be reflected in both the allocation of the burden of proof and in the appropriate burden of persuasion.*

The relative values that the FCC has placed upon the maintenance of the availability and robustness of public safety radio systems (very high), on the one hand, and upon protecting Nextel in relation to its bearing the costs of the 800 MHZ Rebanding (none, except as necessary to secure Nextel's consent to the 800 MHz Rebanding), on the other hand) must be reflected in both the allocation of the burden of proof and in the appropriate burden of persuasion.

Those relative values have been shown to be reflected in the presumptions in favor of the Rebanding Plan and the Rebanding Estimate and must also be reflected in the appropriate burden of persuasion. The clear and convincing evidence standard is clearly more appropriate than the preponderance of the evidence standard to the matter of overcoming the presumptions created in favor of the Rebanding Estimate because of that gross disparity in value attributed by the FCC between the maintenance of the availability and robustness of public safety radio systems and protecting Nextel in relation to its bearing the costs of the 800 MHZ Rebanding.

> *7. All costs incurred in connection with the implementation of the Rebanding Plan to assure that the Licensee's Radio System maintains its availability, capacity, and functionality during the Physical Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear and convincing evidence that a more cost-effective method to obtain that assurance is reasonably available.*

It follows from the argument set forth above that all costs incurred in connection with the implementation of the Rebanding Plan to assure that the Licensee's Radio System maintains its availability, capacity, and functionality during the Physical Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear

and convincing evidence that a more cost-effective method to obtain that assurance is reasonably available.

> *8. All other costs incurred by the Licensee in connection with the 800 MHz Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear and convincing evidence that those costs are unreasonable.*

It also follows from the argument set forth above that all other costs incurred by the Licensee in connection with the 800 MHz Rebanding Process should be borne by Nextel, subject only to a demonstration by Nextel by clear and convincing evidence that those costs are unreasonable.