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

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| In the Matter of | ) | |
| Improving Public Safety Communications in the 800 MHz Band | ) | WT Docket 02-55 |
| Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels | ) | |
| Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems | ) | ET Docket No. 00-258 |
| Petition for Rulemaking of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service | ) | RM-9498 |
| Petition for Rulemaking of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service | ) | RM-10024 |
| Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service | ) | ET Docket No. 95-18 |

# ORDER

**Adopted: January 13, 2005** **Released: January 14, 2005**

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. In this *Order*, we deny the Motion for Partial Stay of Decision Pending Appellate Review, filed jointly by Mobile Relay Associates (MRA) and Skitronics, LLC (collectively, Movants).[1] Movants seek a partial stay of the Commission's July 8, 2004 *Report and Order* addressing interference to public safety communications in the 800 MHz Band (*800 MHz R&O*).[2] In pertinent part, the *800 MHz R&O* established rules to spectrally separate the mix of incompatible technologies that is the underlying root cause of interference to public safety communications.[3] For the reasons discussed below, we conclude

[1] Mobile Relay Associates and Skitronics, LLC., Motion for Partial Stay of Decision Pending Appellate Review (filed Nov. 19, 2004) (Motion).

[2] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) as amended by Erratum, DA 04-3208, 19 FCC Rcd 19651 (2004), and Erratum, DA 04-3459, 19 FCC Rcd 21818 (2004) (*800 MHz R&O*).

[3] *See 800 MHz R&O*, 19 FCC Rcd at 15045-15079 ¶¶ 142-209.

that Movants have not met the legal standard for a stay.

## II. BACKGROUND

2. On July 8, 2004, the Commission adopted technical and procedural measures designed to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.[4] Under the terms of the *800 MHz R&O*, the Commission undertook steps to expeditiously reconfigure the 800 MHz band to separate public safety, critical infrastructure industry (CII), and other non-cellular systems from Enhanced Specialized Mobile Radio (ESMR)[5] systems characterized by the use of high-density cellular architecture.[6] To this end, the *800 MHz R&O* requires public safety, CII, and other non-cellular licensees to operate in the lower portion of the 800 MHz band, and for ESMR carriers that utilize high-density cellular architecture to operate in the upper portion of the 800 MHz band.[7] To the extent necessary to effectuate band reconfiguration, non-cellular carriers in the lower portion of the band, which will be used by relocated public safety licensees, will be relocated to comparable facilities[8] elsewhere in the non-cellular portion of the band immediately above the new public safety segment. All relocation expenses will be paid for by Nextel Communications, Inc. (Nextel).[9] Thus, the Commission has established a transition mechanism to minimize disruption to the operations of all affected 800 MHz incumbents during band reconfiguration, and required all associated reconfiguration costs to be paid for by Nextel with payment secured by a $2.5 billion letter of credit.[10] Subsequent to release of the *800 MHz R&O*, Movants filed a Motion for Partial Stay of Decision Pending Appellate Review of the Commission's *800 MHz R&O*.[11] Several public safety organizations, as well as Nextel, opposed the Motion.[12]

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[4] *Id.* at 15021-15045 ¶¶ 88-141.

[5] For a definition of ESMR, *see id.* at 15060-15061 ¶¶ 172-173.

[6] For an explanation of a high-density cellular architecture system *see id.* at 15060-15061 ¶¶ 172-174.

[7] Public safety, CII, and other non-cellular licensees will operate below 817/862 MHz and ESMR systems will operate on spectrum above 817/862 MHz.

[8] To further minimize disruption to relocating incumbents, the *800 MHz R&O* provides that all relocating licensees shall be relocated to comparable facilities. *See 800 MHz R&O*, 19 FCC Rcd at 14977, 14986, 15048, 15077 ¶¶ 11, 26, 148, 201. 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. *Id.* at 15077 ¶ 201.

[9] In exchange for Nextel's spectral and financial contributions to 800 MHz band reconfiguration the Commission will modify Nextel's license to reflect ten megahertz of spectrum in the 1.9 GHz band. *Id.* at 14974-5 ¶ 5.

[10] *See id.* at 14987 ¶ 30. The Commission subsequently clarified that Nextel may secure its $2.5 billion commitment to fund band reconfiguration by the use of a single letter of credit or multiple letters of credit. *See* note 13 *infra citing 800 MHz Supplemental Order* at para. 20.

[11] Specifically, Movants did not seek a stay of the effectiveness of rule changes pertaining to interference protection; nor the rule allowing 900 MHz Private Land Mobile Radio Service licensees to convert their licenses to Specialized Mobile Radio/Commercial Mobile Radio Service (*i.e.*, Part 22; revised Section 90.621(f); new Sections 90.672 through 90.675). However, Movants request that all Commission rules that require licensees, such as Movants, to move from their current frequencies, and the rules that restrict high-density cellular operations below 816 MHz be stayed pending appellate review. Motion at n.1.

[12] *See* The Association of Public-Safety Communications-Officials, International, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, Inc., Major Cities Chiefs Association, Major County Sheriff's Association, and National Sheriff's Association, Opposition to the Motion for Partial Stay, Nov. 24, 2004 (APCO Opposition); Nextel, Opposition to Motion for Partial Stay, Nov. 26, 2004 (Nextel Opposition). We also observe that Movants filed a Reply to Oppositions on Dec. 7, 2004. *See* Reply to Oppositions to Motion for Partial Stay of Decision Pending Appellate Review, filed by MRA and Skitronics (Dec. 7, 2004). Section 1.45(d) of the Commission's Rules, however, provides that "[r]eplies to oppositions [to a request for stay of any order] should not

(continued....)

3. On December 22, 2004 the Commission released a *Supplemental Order and Order on Reconsideration* (*800 MHz Supplemental Order*) clarifying and modifying certain aspects of the *800 MHz R&O*.[13] Of particular relevance to Movants' Motion, the Commission reversed its earlier determination that incumbent licensees operating at 809-809.75 MHz / 854-854.75 MHz (former channels 121-150) had to be relocated.[14] We note that all of Skitronics' site-based and Economic Area (EA) facilities are located in this portion of the 800 MHz band and thus need not be relocated. Moreover, the *800 MHz Supplemental Order* affords non-ESMR EA licensees, such as Skitronics, the option to relocate their EA licenses to the ESMR band contingent on their using cellular technology.[15] We also note that some, but not all, of MRA's facilities operate on former channels 121-150 and thus do not have to be relocated. In the *800 MHz Supplemental Order*, the Commission reaffirmed that interference to public safety and CII licensees compelled restructuring the 800 MHz band to spectrally segregate incompatible technologies.[16] We therefore address Movants' stay request to the extent that, notwithstanding the *800 MHz Supplemental Order*, Movants continue to seek relief from the Commission's actions in this proceeding.

## III. MOVANT'S CLAIMS

4. Currently Movants operate non-cellular systems in the portion of the 800 MHz band that the *800 MHz R&O* designated for non-cellular operations. As noted above, Skitronics does not have to relocate its facilities.[17] MRA, however, must relocate some of its facilities because these facilities are in the lower portion of the non-cellular band that has been designated for relocated public safety[18] systems.[19] Thus, MRA must relocate certain of its non-cellular facilities to other spectrum in the non-cellular portion of the 800 MHz band immediately above the public safety segment. Movants argue that requiring them to relocate to other channels in the "non-cellular" portion of the band[20] would "confiscate Movants' existing spectrum and replace it with far less valuable spectrum...."[21] According to Movants, the *800 MHz R&O* would foreclose the ability of Movants to expand and change their technology to digital technology (which we interpret to mean cellular technology, because the *800 MHz R&O* does not preclude the use of

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be filed and will not be considered." 47 C.F.R. § 1.45(d). Movants have failed to show why the Commission should waive its rules to allow the filing of their reply. Accordingly, we dismiss the reply and, pursuant to Section 1.45(d) of the Rules, we will not consider the arguments raised therein.

[13] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Supplemental Order and Order on Reconsideration*, FCC 04-294 (Dec. 22, 2004) (*800 MHz Supplemental Order*).

[14] *See id.* at ¶ 61 (providing that non-public safety and CII incumbents may remain on new channels 231-260, formerly channels 121-150).

[15] *See id.* at ¶¶ 79-81.

[16] *See, e.g., id.* at ¶ 81.

[17] Skitronics is licensed to operate on former channels 121-150. These channels are not designated for NPSPAC licensees, hence Skitronics facilities need not be relocated. *See 800 MHz Supplemental Order* at ¶ 61.

[18] These licensees currently occupy spectrum at 821-824 MHz / 866-869 MHz, the so-called "NPSPAC Channels." *See* In the Matter of Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services, GEN. Docket No. 87-112, *Report and Order*, 3 FCC Rcd 905 (1987).

[19] MRA and others currently occupy channels in the 806-809 MHz / 851-854 MHz portion of the 800 MHz spectrum where the NPSPAC licensees will be relocated.

[20] Relocating licensees would be relocated to "non-cellular" channels in the 809-816 MHz / 854-861 MHz portion of the 800 MHz spectrum.

[21] Motion at 4.

digital technology) at some future time of their choosing.[22] Movants allege that this reduced flexibility decreases the value of Movants' spectrum, notably in the secondary market.[23] Movants also aver that under the rules in effect prior to the *800 MHz Report and Order*, their incumbent site-based licenses in certain metropolitan and close-in suburban markets had potential value to other licensees, namely to geographic area (Economic Area) licensees that purchased the overlay "white space" spectrum[24] in those markets at auction. Because their channels might, at some undefined time, be sold to the geographic licensee, Movants claim they have a vested right to remain on their current channels.[25] Movants further claim that if they had known that the Commission would deprive them of this "vested right" by "confiscating" their spectrum,[26] they would have acted differently in previous auctions. Thus, Movants claim, the Commission has engaged in retroactive rulemaking that will cause them economic harm.[27]

5. Movants also contend that the *800 MHz R&O* confers a spectrum windfall on Nextel and SouthernLINC[28] because they will obtain unencumbered ESMR spectrum when 800 MHz band reconfiguration is completed.[29] The "windfall" argument hinges on Movants' claim that the Commission underestimated the value of the ESMR spectrum.

6. Furthermore, the *800 MHz R&O* would require Movants to retune or, in some instances, replace the mobile and portable units used by their subscribers. Movants claim that this would disrupt their operations to such an extent that they would lose customers.[30] They also assert that during the retuning process, Nextel would launch an aggressive marketing campaign to acquire Movants' customers. Movants believe that Nextel would not incur a similar disruption of service to its customers when Nextel retunes its facilities to the ESMR portion of the band.[31] They aver that the *800 MHz R&O* fails to compensate them for this alleged loss of customers, that band reconfiguration would give Nextel near monopoly power in the dispatch services market, and that Movants therefore would suffer irreparable

[22] *Id.* at 2, 4-12, n.3. Movants contend that they will have to forever forgo implementing digital technology if reconfiguration is implemented. *Id.* at n.3.

[23] *Id.* at 4-5.

[24] "White space" spectrum refers to spectrum not occupied by incumbent licensees in a given market.

[25] *Id* at 10-11. By way of background, MRA holds site-based SMR licenses in certain markets and Skitronics holds site-based SMR and EA licenses in certain markets, not necessarily the same market. The Commission in Auction Nos. 34 and 36 auctioned geographic overlay (*e.g.*, EA) licenses in these markets. There are 176 U.S. Economic Areas. As a result, the auction winner, obtained "white space" spectrum, while incumbents, such as MRA, in the lower 230 SMR channels were grandfathered, thus precluding the geographic area (EA) licensee from relocating these incumbents. *Id.* at 6-12.

[26] *Id.* at 11.

[27] *Id.*

[28] SouthernLINC is a Nextel competitor operating in the Southeast United States.

[29] Motion at 6-10.

[30] *Id.* at 12-14. Without a stay Movants predict that they will lose approximately seventy-five percent of their customers and ultimately their business because they purportedly will have to relocate their operations twice: first under the terms of the *800 MHz R&O* and again "when the Commission's Order is ultimately overturned." *Id.* Movants base their allegation of drastic customer turnover to MRA's previous relocation from the 800 MHz band to the 470-512 MHz band in the competitive California dispatch market. *Id.* In this regard, we note MRA's previous relocation was a voluntary retuning and not occasioned by Commission action. In this regard we note that the Commission has previously mandated the relocation of 800 MHz incumbents, subject to certain procedural steps, without untoward effect to relocating incumbents. *See Public Safety Order*, 19 FCC Rcd 15048 ¶ 148. 47 C.F.R. § 90.699; ¶ 14, *infra*.

[31] *See* Motion at 12-14.

economic harm.[32]

## IV. DISCUSSION

7. The Commission evaluates petitions for stay under well-settled precedent. To warrant a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.[33] We find that the Movants have not satisfied any of these criteria.

### A. Movants Have Not Shown They Would Prevail on the Merits.

8. Movants have failed to show that they would likely prevail on judicial review of the *800 MHz Report and Order*. The actions the Commission has taken to abate interference to public safety and CII licensees—for the reasons stated in the *800 MHz R&O* and the *800 MHz Supplemental Order*—are fully within the Commission's authority and are amply supported by a comprehensive record.[34] Movants participated in the rule making proceeding that led to the *800 MHz R&O* and the *800 MHz Supplemental Order* and their arguments, many of which are repeated in their Motion, were fully considered but rejected as inconsistent with the Commission's interference abatement goals.[35]

9. Further, Movants substantially overstate the effect that band reconfiguration would have on their operations. As an initial matter, the *800 MHz R&O* was crafted to allow licensees, such as Movants, maximum flexibility consistent with ensuring the integrity of public safety and CII communications. Thus, Movants may convert to low density cellular technology, which from an interference perspective is much more compatible with public safety systems.[36] As to Skitronics, the *800 MHz Supplemental Order* affords EA licensees the option to remain on their current spectrum and operate a low-density cellular system on a non-interference basis or relocate their EA licenses to the ESMR portion of the band, thus allowing them to provide what Movants characterize as "digital," *i.e.*, cellular architecture service.[37] In affording this latter option to non-ESMR EA licensees, the Commission preserved licensees' expectancies to the extent possible consistent with abatement of interference to public safety and CII licensees. Finally, although MRA—a site-based licensee—argues that the *800 MHz R&O* precludes it from offering cellular-architecture services, it has not claimed, much less demonstrated, that it has sufficient spectrum holdings at the present time to initiate a cellular architecture system or has any plan to do so.[38]

10. Precedent makes clear that the *800 MHz R&O* does not retroactively confiscate Movants'

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[32] *Id.* at 12.

[33] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); *see also Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)

[34] *See 800 MHz R&O*, 19 FCC Rcd at 15010-15021 ¶¶ 62-87.

[35] *See, e.g.*, Comments of MRA/Skitronics (Dec. 2, 2004); Comments of MRA/Skitronics (Oct. 22, 2002); Comments of MRA/Skitronics (Feb. 10, 2003); Comments of MRA/Skitronics (Sept 23, 2002); Comments of MRA/Skitronics (Aug. 7, 2002).

[36] *See 800 MHz R&O*, 19 FCC Rcd at 15060-61¶¶ 172-173.

[37] *See 800 MHz Supplemental Order* at ¶¶ 79-81. Licensees relocating to the ESMR portion of the band would have to use cellular technology; otherwise, allowing non-cellular operations in the ESMR band would subject non-cellular operators to severe levels of interference and would be inconsistent with the Commission's determination that spectral separation of cellular and non-cellular technology is essential to its interference abatement goals. *See id.* at ¶ 81.

[38] *See* Nextel Opposition at 10, n.26.

spectrum, and that they have no "vested right" to remain on what they regard as more lucrative spectrum. A retroactive rule forbidden by the Administrative Procedure Act (APA) is one that alters the past legal consequences of past actions.[39] Although Movants claim that they would have bid differently in prior auctions of geographic area licenses had they "known the Commission was prevaricating and would be forcing them to migrate off the spectrum in favor of the auction licensee,"[40] a new rule "is not retroactive 'merely because it...upsets expectations based on prior law.'"[41] Many agency rulemakings affect expectations based on prior law, but such an effect does not, by itself, render a rule invalid.[42] Commission licensees, in particular, have no vested right to an unchanged regulatory framework throughout their license term.[43]

11. Movants' argument that band reconfiguration confers an undeserved windfall on Nextel is also unavailing. The *800 MHz R&O* contains a detailed set of calculations, to be applied at the conclusion of band reconfiguration, to assure eq uipoise between the expenses incurred by Nextel during band reconfiguration, the value of 800 MHz spectrum surrendered by Nextel, and the value of the 800 MHz and 1.9 GHz spectrum rights that Nextel will receive.[44] In any event, Nextel is uniquely qualified to assist the Commission in curing the interference problem.[45] Notwithstanding Nextel's considerable contributions, financial and otherwise, to resolving interference, the *800 MHz R&O* ensures that Nextel, other licensees and the public are treated equitably.[46] Finally, Movants have merely alleged that the Commission's spectrum valuation was defective, but have not pointed to either error in our methodology or defects in the data employed.

12. In expanding on the "prevailing on the merits" prong of the *Virginia Petroleum* test, courts have focused on the requisite "strong showing" burden imposed on a party seeking a stay. Thus, even

[39] *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 219-220 (1988) (J. Scalia concurring) (rules are retroactive if they "alter the past legal consequences of past actions" or "change what the law was in the past," not simply because they "affect" past transactions (emphasis in original).

[40] Motion at 11.

[41] *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499 (1994)). "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; ...." *Id. quoting Landgraf*, 511 U.S. at 270 n.24.

[42] *See, e.g., Chemical Manufacturers Ass'n v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.").

[43] *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding prospective regulations limiting multi-media ownership under the FCC's general rulemaking powers, including requirement for divestiture as a condition for license renewal); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking); *WBEN, Inc. v. United States*, 396 F.2d 601, *cert. denied*, 393 U.S. 914 (1968) (upholding license modifications that limited predawn AM broadcasting rights of "daytimer" licensees that previously had some of the more ample privileges granted to "fulltimer" licensees).

[44] We note that, given the risks attendant on implementing band reconfiguration, Nextel may incur a net loss if the cost of band reconfiguration and clearance of the 1.9 GHz spectrum exceeds the value of the 1.9 GHz spectrum. *See 800 MHz R&O*, 19 FCC Rcd at 15082 ¶ 214.

[45] *See id.* at 15081 ¶ 211. In addition Nextel is the only nationwide ESMR licensee with 800 MHz spectrum holdings sufficient, when surrendered, to provide public safety with additional 800 MHz spectrum for its expanded operations – another important goal of the instant proceeding. *See id.* 14972, 14975 at ¶¶ 2, 5.

[46] *See id.* at 14575 ¶ 5.

when a court may believe that a party would eventually prevail on the merits, it requires more, *i.e.*,"that the record before us is of such order of probability as to mandate the stay."[47] Movants' unsupported arguments on the merits fail to meet this standard.

### B. Movants Will Not Suffer Irreparable Injury

13. Movants have also failed to show that they will suffer irreparable injury if a stay is not granted. The standards for demonstrating irreparable injury are clear: "A party moving for a stay is required to demonstrate that the injury claimed is 'both certain and great.'"[48] As is the case with injunctive relief, a stay "will not be granted against something merely feared as liable to occur at some indefinite time"; rather, the party seeking a stay must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm."[49] Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur."[50]

14. The basis of Movants' irreparable injury claim is that band reconfiguration will cause their spectrum to have less value, and that they would lose customers to Nextel during the band reconfiguration process, especially if Nextel were to initiate a vigorous marketing program encouraging customers to change services. This argument fails with respect to Skitronics, which need not be relocated to implement band reconfiguration.[51] These speculative contentions, moreover, are wholly insufficient to support a claim of certain and irreparable harm, and they ignore the steps taken by the Commission to prevent incumbents from being harmed by band reconfiguration.[52] The *800 MHz R&O* and *800 MHz Supplemental Order* preserve the ability of Movants to convert to newer technologies—although not ESMR operation—in the lower portion of the 800 MHz band. The *800 MHz Supplemental Order* permits Skitronics to remain on its current spectrum and continue serving its customers without any disruption whatsoever, or, should it so elect, to move its EA licenses to the ESMR portion of the band. Further, MRA's relocation will be conducted pursuant to long-established procedures[53] combined with an additional layer of safeguards to minimize any disruption, perceived or actual, to MRA and its customers during the transition. Finally, although Movants aver that band reconfiguration will render their spectrum less valuable, to the extent it will not support ESMR operations once the band is reconfigured, we note that Movants are not ESMR providers and have submitted no evidence that they intended to convert to ESMR operation or sell their rights to another user in the foreseeable future. We therefore hold that Movants conjectural arguments regarding future lost spectrum value are inadequate to sustain an irreparable injury claim.

15. We also find Movants' prediction of a mass exodus from their systems to Nextel's when band reconfiguration is underway to be speculative and unpersuasive. Movants have provided no support for their conjecture that Nextel might conduct a marketing program that would succeed in attracting Movants' customers who otherwise would not switch carriers. As Nextel points out, Movants offer

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[47] *North Atlantic Westbound Freight Ass'n v. Federal Maritime Commission*, 397 F.2d 683, 685 (D.C. Cir. 1968).

[48] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (A party attempting to show irreparable harm must show that the alleged harm is "both certain and great; ... actual and not theoretical....Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur."). *Id.*

[49] *Id., citing Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) and *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd* 548 F.2d 977 (D.C. Cir. 1976.)

[50] *Id.*

[51] *See* para. 3, n.17, *infra.*

[52] *See 800 MHz R&O* 19 FCC Rcd at 14972-3 ¶ 2, 15048 ¶ 148.

[53] *See* 47 C.F.R. § 90.699.

localized, low-cost, traditional SMR dispatch services to small, regional businesses, whereas Nextel's high-density cellular network offers a broad range of nationwide and international wireless communications services to the general public.[54] Moreover, Movants have not shown that they would lose a substantial portion of their customer base when they relocate to new facilities. Thus, Movants have also failed the second prong of the *Virginia Petroleum* test because of their wholly speculative claims of irreparable injury.

### C. A Stay Would Injure Other Parties and is Contrary to the Public Interest

16. In the instant matter, the final two prongs of the *Virginia Petroleum* test are so interrelated as to merit treating them together. We find that grant of a stay would both harm other parties and be contrary to the public interest because it would prevent the Commission from achieving its core goal of abating interference to public safety and CII communications. The record in this proceeding overwhelmingly demonstrates that the interference problem is real, growing, and a threat, not only to the safety of first responders, but also to the citizens whose lives and property they are charged to protect. We note, but reject, Movants' claim that unacceptable interference may satisfactorily be abated during the pendency of an appeal by application of "Best Practices." Our *800 MHz R&O* made clear that experience with Best Practices showed them to be less than effective in many cases and that they had such high transactional costs as to render them unaffordable for public safety agencies, absent prompt reconfiguration of the 800 MHz band.[55] Further, the Best Practices on which Movants rely are a reactive solution that addresses interference *after* it occurs.[56] The Commission recognized that "it would be scant consolation for a public safety officer subjected to a life-threatening communications failure to know that he or she could report a problem so that technical fixes could be applied after the fact."[57] Therefore, were a stay granted, there would be palpable – even life-threatening – harm to both public safety agencies and to the public as a whole resulting from continued and unabated interference to public safety and CII systems.

17. Movants also assert that high implementation costs associated with band reconfiguration and the supposed likelihood that the *800 MHz R&O* will be overturned by the courts on appeal militate in favor of a stay.[58] Their theory is that if a court halted band reconfiguration in mid-course, the nation would be left with incompatible band plans in different areas of the country, thus exacerbating the interference problem.[59] This theory, of course, hinges on Movants' claim that they likely would prevail on the merits in a judicial appeal, which we have rejected above. Moreover, Movants' argument is entirely speculative as to the remedy a court might fashion on appeal.

## V. CONCLUSION

18. For the reasons explained above, we find that Movants have provided no sustainable reason for reversing the Commission's public interest findings. We believe granting a stay would only operate to delay the public interest benefits the Commission articulated in the *800 MHz R&O*, contravene the Commission's goals in this proceeding and undermine the Commission's accomplishment of its

[54] *See* Nextel Opposition at 8-10.

[55] *800 MHz R&O*, 19 FCC Rcd at 14980-82 ¶¶ 17-18.

[56] *Id.* at 15027 ¶ 101.

[57] *Id.* at 15036 ¶ 119.

[58] Motion at 15-16.

[59] We recognized in the *800 MHz R&O* that piecemeal band reconfiguration was undesirable and therefore required Nextel to obtain a letter of credit to ensure that band reconfiguration would be accomplished, nationwide, regardless of any changes in Nextel's financial condition. *See 800 MHz R&O*, 19 FCC Rcd at 15067 ¶¶ 181-182.

mandate to promote safety of life, health and property through radio communications under the Communications Act, as amended.[60] Accordingly, as precedent dictates, we conclude that Movants have wholly failed the *Virginia Petroleum* test for grant of a stay and deny their *Motion for Stay Pending Appellate Review.*

## VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 1.41 and 1.43 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43 that the Motion for Partial Stay of Decision Pending Appellate Review submitted by Mobile Relay Associates and Skitronics, LLC, in the above-captioned proceeding on November 19, 2004, IS DENIED.

20. IT IS FURTHER ORDERED, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 1.41, 1.43 and 1.45 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43, 1.45 that the Reply to Opposition to Motion for Partial Stay of Decision Pending Appellate Review submitted by Mobile Relay Associates and Skitronics, LLC, in the above-captioned proceeding on December 7, 2004, IS DISMISSED.

21. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief,
Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau

[60] *See* 47 U.S.C. § 151.