SHULMAN
ROGERS
GANDAL
PORDY &
ECKER, P.A.

June 30, 2006

VIA ELECTRONIC MAIL

Michael J. Wilhelm, Chief
Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 02-55

Dear Mr. Wilhelm:

As you are aware, this office is counsel to over one hundred different 800 MHz licensees that are required to negotiate rebanding agreements with Sprint Nextel Corporation ("Nextel").

On June 30, 2006, the Wireless Telecommunications Bureau issued a Public Notice, reminding Wave 3 Channel 1-120 licensees of their obligations under the Commission's Rules and Regulations with regard to rebanding negotiation and mediation. That Public Notice included the following statement:

> .... However, licensees who fail to reach a mediated agreement must bear their own costs in further administrative or judicial appeals of band reconfiguration issues, including *de novo* review by PSCID and appeal of any such review before an ALJ.

The Bureau properly added a footnote indicating that this statement is the subject of a Petition for Reconsideration (which includes filings by this office). However, the fact of the matter is that these petitions and filings have been pending since early January of 2006. In more than six months, the Bureau has failed to address the very significant issues raised in those filings. As a result, this office has now been through two mediation cycles on behalf of licensees with this significant issues looming over the licensees' heads. Next week, the Wave Three mediation period will begin, again without Commission response. Failure by the Commission to act anytime soon

will ultimately mean that any Commission decision will be too late to be of assistance to any licensee.

Nextel has never argued before a mediator, or made any statement to this office, that Shulman Rogers has negotiated on behalf of its clients in bad faith. Yet, on at least two occasions, Shulman Rogers has been involved in rebanding mediation proceedings where the licensee was forced to "cave" on a relevant issue, or face an appeal process which would not be a recoverable expense, even if the licensee prevailed on the issue. In both cases, this office (not exactly a stranger to the Commission's rebanding rules, having been intimately involved in the creation of the Consensus Plan) believed that the issues represented legitimate issues of dispute, and were by no means frivolous.

The "success" of the mediation process has been trumpeted by others as an example of how well the process works. However, that "success" has at least been partially fueled by the Bureau's violation of the Commission's central tenet of this proceeding, that all licensees will have their legitimate and prudent costs reimbursed by Nextel.

Shulman Rogers believes that it is a travesty that the Bureau has been unable to act on this critical issue in more than six months, and Shulman Rogers urges the Bureau to immediately take action which represents a full and complete analysis of the issue and due consideration of the harm which the Commission is visiting upon licensees. However, FCC delays which are harming the rebanding process are not limited to this one issue.

On January 27, 2006, Shulman Rogers, on behalf of its Puerto Rico-based SMR clients, requested a clarification of the rights and obligations of Puerto Rico licensees with regard to the ESMR band, as in this area of the country there are numerous non-Nextel incumbent licensees that were never moved, and Nextel is not the holder of the Block "A" or "C" licenses. Because the FCC has yet to respond, two SMR licensees in Puerto Rico, both of which hold licenses above 862 MHz, have been forced to enter into negotiations to move their 1-120 channels to the middle band. Essentially, this required the licensees to make decisions which may not be in their best interests, requiring at a minimum multiple radio "touches" for one of the licensees. The licensees' decisions with regard to their 1-120 authorizations could be deeply impacted by the outcome of the Clarification Request.

In addition, on June 3, 2004, Shulman Rogers, on behalf of its 800 MHz EA client, Western Communications, filed a waiver of the Commission's unjust enrichment rules to permit Western to swap its EA licenses with Nextel without Western being required to pay an unjust enrichment fee.

Western and Nextel sought to engage in the "early" swap at that time in order to avoid costs of Western in constructing its system on one set of channels, only to have to change the frequencies shortly thereafter. Subsequently, the Commission's Rebanding Order specified that unjust enrichment payments would not be required from swapping EA licenses.[1] Yet, despite the subsequent rule change, the Commission has yet to act on the Waiver Request, which has now been pending over two years. Numerous pleas by this office for action by the Commission has yielded no results. It is beyond explanation as to why the Commission cannot act on an item which is now consistent with the Commission's Rules.

Finally, Shulman Rogers is in full agreement with the Enterprise Wireless Association's ("EWA") request of June 8, 2006, wherein EWA requested a blanket waiver from negotiation obligations by Wave 4 licensees which cannot be issued frequency assignments by the Transition Administrator until such time as the Commission has reached treaty agreements with Canada and Mexico. It is impossible for licensees to determine their costs for rebanding without knowing what frequencies they are moving to, as many licensees have equipment that is only retunable within a certain range. Similarly, it is impossible to know whether combiners must be replaced, or to have intermodulation studies conducted, without knowledge of the new frequencies.

Shulman Rogers believes that it makes little sense for licensees to individually request delays, as the Commission has suggested. There is little reason to impose an additional burden, and additional costs,[2] on licensees for no reason. They cannot negotiate.

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[1] Improving Public Safety Communications in the 800 MHz Band, *Supplemental Report & Order*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) at para. 84.

[2] It should be noted that the costs of each licensee requesting a delay in negotiations is a recoverable expense. More expenses paid by Nextel means less money for the U.S. Treasury. As a result, the Commission's failure to grant a blanket waiver will needlessly impose additional costs on taxpayers.

On several occasions, Bureau personnel have asked this office what the Bureau can do to facilitate the rebanding process. The Shulman Rogers response is to urge the Bureau to take immediate action on the items detailed herein, as well as other rebanding issues which the Firm has placed before the Commission for consideration. It is the intention of Shulman Rogers to assist in the timely rebanding of impacted 800 MHz radio systems, while ensuring no loss of service by licensees, and full recovery of costs. In fact, Shulman Rogers has already reached dozens of agreements with Nextel for relocation of incumbent licensees in the current process. However, the continued success of negotiations is dependent upon the Commission's timely response to legitimate requests. The Commission has imposed a deadline on licensees, but those deadlines can only be met if the Commission acts as quickly as it expects licensees to act.

Sincerely,

Alan S. Tilles, Esquire