

# EFJohnson®

Our Mission—Your Safety

July 27, 2006

Chairman Kevin J. Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: WT Docket No. 02-55

Dear Chairman Martin:

This letter is in response to Motorola's July 6, 2006 submission in this docket, wherein Motorola requests the Wireless Telecommunications Bureau to initiate the premature release of 800 MHz reconfiguration funds for the replacement or upgrading by Motorola of mobile and portable radios prior to the entry of any system reconfiguration agreement between Sprint Nextel and a licensee utilizing those radios.<sup>1</sup> EF Johnson opposes the Motorola request as an ill-conceived and anticompetitive maneuver outside the authority of the Transition Administrator and the Commission's rules in WT Docket No. 02-55.

EF Johnson is a leading provider of two-way radios and communications systems for law enforcement, fire fighters, EMS and the military, and is working closely with the 800 MHz Transition Administrator, Sprint Nextel, and the public safety community to make the ongoing 800 MHz transition as smooth as possible. EF Johnson provides solutions for reconfiguring licensees to facilitate the transition to comparable facilities without significant disruption in service. In doing so, EF Johnson offers an array of innovative equipment, including radios that can serve as direct substitutes for many of the Motorola radios that are incapable of being reprogrammed and must be replaced.

While EF Johnson agrees that the process of reconfiguration should be completed in a reasonable and timely manner, the changes suggested by Motorola are not needed to resolve delays and instead would function primarily as anticompetitive by reducing opportunities for public safety entities to replace Motorola radios with those of other qualified manufacturers. In essence, Motorola, a company with an extensive inventory and manufacturing capability, is asking the Bureau for a ruling that would unfairly assist Motorola in using the 800 MHz reconfiguration process as an opportunity to capture market share while simultaneously reducing options available for reconfiguring licensees.

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<sup>1</sup> See letter to Ms. Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, dated July 6, 2006.

The current rules *require* a negotiation process between Sprint Nextel and reconfiguring licensees—not just negotiations between Sprint Nextel, the Transition Administrator and Motorola—as well as the entry of a written agreement between Sprint Nextel and a licensee, prior to the release of reconfiguration funds.<sup>2</sup> The change proffered by Motorola would circumvent these requirements. The Commission's rules and policies are competitively neutral and do not authorize any actions by the Transition Administrator that would skew the process to favor one equipment manufacturer over another, as requested by Motorola. Accordingly, Motorola's request must be rejected.

### **Motorola's Proposal Seeks an Unfair Anticompetitive Advantage**

Motorola asserts in its letter that the early release of funds for replacing or upgrading radios prior to the entry of reconfiguration agreements is needed in order for the reconfiguration of 800 MHz licensees to be completed in a timely manner. There is no evidence however that the process of handing out replacement radios or upgrading radio software is a source of significant delay in carrying out reconfiguration. Although delays may be occurring as the result of unexpected difficulties in reaching negotiated reconfiguration agreements, the process of physically reconfiguring systems appears to be going smoothly once reconfiguration agreements are reached. Thus, the unprecedented changes suggested by Motorola, which are aimed more at streamlining the physical work of retuning rather than expediting negotiations, will do little to resolve the unanticipated delays in the reconfiguration process.

Agreements between the Transition Administrator, Sprint Nextel and particular manufacturers in which certain specific products may be pre-approved as acceptable replacement equipment, may indeed assist in simplifying the negotiation process. As revealed by Motorola in its letter, such an agreement already has been entered with regard to the radios Motorola mentions in its letter as needing to be replaced. Raising the specter of delay, Motorola now attempts to turn the TA's pre-approval into a basis for circumventing the negotiation process established under the 800 MHz reconfiguration rules. It would be inappropriate from both a legal and policy standpoint, to turn such an agreement for pre-approval into a replacement mandate. Under the scenario Motorola proposes, some licensees would likely be entering the negotiation process with their radios already having been replaced or upgraded with Motorola equipment, possibly during routine maintenance performed by Motorola on old equipment, effectively eliminating the right of these licensees to choose or to negotiate for replacement radios made by other manufacturers, during the negotiation process.

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<sup>2</sup> See *In the Matter of Improving Public Safety Communications in the 800 MHz band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (Released August 6, 2004) ("*800 MHz R&O*"), Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (Released December 22, 2004) ("*800 MHz Reconfiguration Reconsideration Order*").

EF Johnson makes an array of radios that are suitable and competitive replacements for many of the Motorola radios that are incapable of being reconfigured. Under the current rules, licensees undergo planning of their reconfiguration, and then conduct negotiations with Sprint Nextel, before any funds are released pursuant to an executed agreement between Sprint Nextel and the licensee for purchasing replacement radios. This process ensures that licensees and Sprint Nextel have an opportunity to consider all the available alternatives before reaching agreement on a specific reconfiguration plan and moving on to an equipment purchase.

If the Commission short circuits the negotiation process in the manner suggested by Motorola, some licensees will likely have their radios replaced by Motorola prior to the planning and negotiation phases of their system reconfiguration without the opportunity for input from their technical consultants, other manufacturers, Sprint Nextel or the Transition Administrator on the critical issue of the most suitable and valuable replacement radio alternative. It is inappropriate for the Commission to adopt a reconfiguration process that favors the use of one manufacturer's equipment over that of another, particularly when either manufacturer's equipment might be suitable or preferable depending on a variety of technical and/or cost reasons.<sup>3</sup> It is not the Commission's place to provide such special treatment to one manufacturer, and doing so would be contrary to existing Commission policies and would be unfairly anticompetitive.<sup>4</sup>

The current rules allow for the consideration by licensees of all equipment alternatives during the planning and negotiation phases of reconfiguration prior to the entry of an agreement and the subsequent purchase of equipment. There is no justification for altering those rules. Motorola has raised the specter of delay in an effort to turn the reconfiguration process into a means for locking up market share, and the Commission should reject that effort.

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<sup>3</sup> For example, comparable equipment by other manufacturers may be less costly.

<sup>4</sup> The Motorola proposal runs contrary to the Commission's long-standing policy of declining to get involved in market place decisions concerning choice of technology or equipment. See e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Notice of Proposed Rulemaking, ¶ 47 (released June 27, 2006); *In the Matter of Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*; 17 FCC Rcd 9980, ¶ 52 (2002); *In the Matter of the Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, 17 FCC Rcd 14999, Appendix B ¶ 13 (2002).

**The Reconfiguration Rules Require Sprint Nextel and Licensees to Negotiate and Enter Written Agreements Prior to the Release of Funds**

The Commission's reconfiguration rules make clear that reconfigurations are to be negotiated and carried out pursuant to agreements between Sprint Nextel and the licensees being reconfigured. Numerous obligations are imposed on both sides in the process, including the obligation to participate in mandatory good faith negotiations. While there is a Transition Administrator established to assist in carrying out the reconfiguration process, at its core the Commission's 800 MHz reconfiguration rules rely on the concept of a negotiated agreement being entered between Sprint Nextel and any licensee being reconfigured, and contemplate that reconfigurations are to be carried out pursuant to such agreements. Thus, the Commission made clear, "We also caution parties to memorialize agreements in writing to be signed by authorized parties of both the relocating incumbent and Nextel."<sup>5</sup>

The Transition Administrator has no authority to impose any specific obligation concerning what equipment must be used and/or paid for in the context of any licensee's reconfiguration, absent agreement between Sprint Nextel and the licensee. As the Commission stated in adopting the current reconfiguration rules, "the Transition Administrator cannot unilaterally bind Nextel or the incumbent to any obligation associated with band reconfiguration."<sup>6</sup> The Commission further emphasized, "the Transition Administrator cannot unilaterally require Nextel to pay a sum not authorized in an agreement between Nextel and an incumbent."<sup>7</sup>

Under the current record in docket no. 02-55, the Commission itself does not have the authority to impose any obligation for the use of or payment for a specific type or make of equipment in the context of any specific system reconfiguration, except pursuant to a full adjudicatory proceeding, and then only after a full record is developed with regard to the specific system and its reconfiguration needs.<sup>8</sup> Under Motorola's proposal, the Commission would in essence be establishing a process that would lead to licensees being required to accept and Sprint Nextel being required to pay for specific makes and models of replacement radio, absent any negotiated agreements or adjudicatory orders. Such a sweeping change in the 800 MHz reconfiguration process would clearly violate

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<sup>5</sup> 800 MHz Reconfiguration Reconsideration Order at ¶ 73.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See 800 MHz R&O at ¶ 201; 800 MHz Reconsideration Order at n. 183 (explaining that nothing "precludes the Commission from directing Nextel to pay, or an incumbent to accept, any payment arising from Commission adjudication of a dispute between Nextel and an incumbent.")

the existing reconfiguration rules, and at best could be implemented only pursuant to notice and comment rulemaking procedures.<sup>9</sup>

Remarkably, although the Commission's 800 MHz reconfiguration rules are intended primarily for the protection of public safety entities, Motorola's proposal essentially would remove from public safety licensees the full right to participate in the planning and negotiation of their own reconfigurations. Instead, Motorola seeks to have certain portions carried out pursuant to an agreement between Motorola, the Transition Administrator and Sprint Nextel, in which individual licensees have had no participation. The Commission rejected the notion of such a "one size fits all" approach in adopting rules requiring Sprint Nextel and reconfiguring licensees to participate in negotiations and to enter individual reconfiguration agreements. There is no reason to reverse that decision or otherwise to take away the rights of reconfiguring licensees to plan and negotiate their own relocations.

Even assuming the Commission could overcome the legal hurdles to imposing such a sweeping and ill-conceived change, there are significant practical and policy considerations that would arise and would still need to be addressed. Difficulties will undoubtedly come to light when reconfiguring licensees are expected to enter final agreements providing for the acceptance of specific radios *after* those radios have already been delivered without full input from the reconfiguring licensee. For example, a reconfiguring licensee that has already received equipment from Motorola without the opportunity to complete planning and negotiation of its own system reconfiguration might subsequently decide after full review of its options that it would prefer to have another manufacturer's radios instead, and hence refuse to enter an agreement that failed to provide such other radios. Additionally, the Transition Administrator's audit and true up mechanisms that are generally imposed as part of a signed frequency reconfiguration agreement might prove unworkable with regard to funds that are disbursed without an agreement in place. Accordingly, awkward and undesirable consequences and delays would arise as these and other issues are required to be worked out.

#### **Motorola's Proposal Violates Commission Rules and Policies Requiring Competitive Neutrality**

As noted above, a change in the rules of the sort proposed by Motorola would violate the Commission's long-standing policy against interfering in marketplace decisions.<sup>10</sup> Therefore such a change could be implemented only pursuant to notice and comment rulemaking allowing full consideration of all of the issues involved. Even a policy allowing the release of funds pursuant to written agreements entered by licensees authorizing Motorola to begin the early replacement of their radios prior to completion of

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<sup>9</sup> See *Southwestern Bell v. FCC*, 28 F.3d 165, 169 (D.C. Cir. 1994) ("Accordingly, the Commission was bound to follow [its] statements until such time as it altered them through another rulemaking.")

<sup>10</sup> See n. 4, *supra*.

system reconfiguration planning, would not be allowed under the current rules. In the context of individual relocations, such a policy would inevitably favor the use of one manufacturer's equipment—i.e., the manufacturer of the licensee's existing equipment—over that of any other, thus hampering competition in the market for selling 800 MHz reconfiguration radios. Given the imperatives of public safety communications systems, it would not make sense to allow the 800 MHz reconfiguration process to degenerate into a program that stifles competition or stagnates the development of equipment alternatives.<sup>11</sup>

While the Transition Administrator may have broad authority to administer the 800 MHz reconfiguration program, that administration must be done in accordance with the Commission's rules and policies, including appropriate procedural safeguards.<sup>12</sup> The Commission has made clear that, "The overriding obligation of the Transition Administrator is to facilitate timely band reconfiguration in a manner that is equitable to all concerned."<sup>13</sup> The Transition Administrator cannot approve a process that is inequitable to any particular radio manufacturer, and must ensure that its procedures treat all vendors fairly.

This is far different from the Transition Administrator's release of planning funding pursuant to agreements for the purpose of allowing 800 MHz licensees to plan their individual reconfigurations. The Transition Administrator's planning funding program does not favor any specific vendor over another in either concept or operation. The Motorola proposal on the other hand is based on a specific agreement between Motorola, the Transition Administrator and Sprint Nextel regarding which Motorola Radios could be used as replacements for other Motorola radios, and Motorola now seeks to turn that vendor-based agreement with its specific make and model requirements into a generic rule of general application. To do so would be anticompetitive and inequitable to EF Johnson and other competitors. This is particularly true in light of the fact that EF Johnson was never afforded an opportunity to comment on the radio-specific agreement entered among Motorola, the Transition Administrator and Sprint Nextel.

Motorola's suggested changes to the 800 MHz reconfiguration rules are ill-advised, unnecessary and prohibited by the existing rules that require reconfigurations to be carried out pursuant to negotiated agreements between Sprint Nextel and reconfiguring licensees, and would if adopted provide Motorola an unfair anticompetitive

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<sup>11</sup> As the Commission has stated, "The Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." *800 MHz Reconfiguration R&O* at ¶ 1.

<sup>12</sup> The Transition Administrator cannot circumvent the Administrative Procedures Act and existing Commission policies. See *In the Matter of Improving Public Safety Communications in the 800 MHz band*, Order granting Transition Administrator waiver requests (released May 8, 2006).

<sup>13</sup> *800 MHz Reconfiguration Reconsideration Order* at ¶ 72.

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advantage in the sale of radios needed to complete 800 MHz reconfigurations.  
Accordingly, the Commission should reject Motorola's suggestion.

Respectfully submitted,



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