

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1413

MOBILE RELAY ASSOCIATES ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

CII	Critical Infrastructure Industries. Railroads, utilities, pipelines and other facilities that are privately owned but provide important public services. Many CII entities use 800 MHz spectrum to manage their operations.
CMRS	Commercial Mobile Radio Service. Wireless mobile telephony interconnected with the wireline telephone network. <i>See</i> 47 U.S.C. § 333(d)(1).
EA	Economic area. A geographic area defined by the Department of Commerce that serves as the licensing area for auctioned 800 MHz licenses.
ESMR	Enhanced Specialized Mobile Radio. A cellular-architecture application used to provide wireless mobile telephone service.
MHz	Megahertz. One million cycles per second, a measure of frequency that can refer both to a particular place on the electromagnetic spectrum and an amount of spectrum, much like inches on a ruler.
NPSPAC	National Public Safety Planning Advisory Committee. A term used to refer to a block of spectrum in the 800 MHz band that has been set aside for use by public safety systems.
OOBE	Out of band emission. A type of interference that occurs when a transmitter emits signals that spill over from the user's licensed frequencies into adjacent frequencies.
SMR	Specialized Mobile Radio. A generic term applied to private sector use of the 800 MHz band for communications purposes. Initial SMR applications involved services such as dispatch; newer applications involve the provision of wireless mobile telephone service.

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QUESTIONS PRESENTED

In the orders on review, the FCC reorganized the 800 MHz spectrum band, principally to alleviate significant problems of harmful interference to public safety communications systems, such as those used by fire and police departments. The interference had been caused in large part by the mixture in the band of two incompatible technologies known as high density “enhanced specialized mobile radio” (ESMR) service and “high-site” radio service. Under the reorganization, the different technologies will be segregated into separate segments of the band, and existing licensees will be moved into band segments that are appropriate for their technology. Segmentation of the band means that licensees who do not occupy the part of the

band set aside for ESMR service may not use their licenses to operate high density cellular technology, which may be operated only in the part of the band set aside for ESMR use. The questions presented are:

1. Whether the Commission reasonably restricted the type of service that may be provided by occupants of the “non-ESMR” portion of the 800 MHz band, in particular:
 - a. Whether the agency unlawfully discriminated between similarly situated parties;
 - b. Whether the agency’s action was unlawfully retroactive; and
 - c. Whether the restriction constitutes an unconstitutional taking.
2. Whether the FCC was required to reimburse licensees who will be relocated to new spectrum for any loss of customers caused by the move.
3. Whether the FCC improperly valued the spectrum that Nextel, the largest 800 MHz licensee, will occupy after the band reorganization.

JURISDICTION

The Court has jurisdiction over FCC rulemaking orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

All pertinent materials are attached to petitioners’ brief.

COUNTERSTATEMENT

The Communications Act gives the Commission “comprehensive powers” to regulate radio communications. *National Broadcasting Co. v. FCC*, 319 U.S. 190, 216 (1943). The Commission has authority, *inter alia*, to “[a]ssign bands of frequencies to the various classes of stations,” 47 U.S.C. § 303(c), to adopt rules the agency deems necessary “to prevent interference between stations and to carry out the provisions of [the Communications] Act,” 47 U.S.C.

§ 303(f), and to assign and modify station licenses, 47 U.S.C. §§ 308-309, 316. Section 1 of the Act expressly directs the Commission to exercise these powers, *inter alia*, “for the purpose of promoting safety of life and property through the use of wire and radio communication.” 47 U.S.C. § 151. Section 332(a) of the Act likewise directs the Commission, “[i]n taking actions to manage the spectrum,” to “promote the safety of life and property.” 47 U.S.C. § 332(a).

This case concerns the Commission’s reorganization of a portion of the electromagnetic spectrum to alleviate serious and growing problems of interference to public safety radio systems. On the basis of an extensive record, the Commission determined that the interference was caused principally by the incompatibility of the technology used by most public safety systems (and some private licensees) and that used by other private licensees. The Commission accordingly reorganized the band to separate the two technologies into different segments of the band. Spectral segregation, the Commission concluded, will protect significantly against interference and thereby promote the reliability of public safety communications. The rulemaking on review began with the issuance of *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 4873 (2002) (*Public Safety NPRM*) (JA 1). We will refer to the two orders on review as the *Public Safety Order* (JA 64) and *Public Safety Reconsideration* (JA 335). The Commission declined to stay the *Public Safety Order* in Order No. DA 05-82 (released Jan. 14, 2005) (*Stay Order*) (JA 506). On October 5, 2005, the Commission released a Memorandum Opinion and Order that clarified and reconsidered various aspects of the two earlier orders. FCC Order No. 05-174 (rel. Oct. 5, 2005) (JA 414) (*Public Safety MO&O*) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-174A1.pdf).

1. Interference In The 800 MHz Band.

Since the 1970s, the FCC has licensed spectrum in the 800 MHz band for use by public safety officials, such as police and fire departments, medical rescuers and other emergency personnel.¹ At the same time, the Commission has also licensed the 800 MHz band for a variety of private purposes, such as internal company communications, management of railroads, utilities, pipelines and other facilities (referred to as “critical infrastructure industries” (CII)), and a commercial application called “specialized mobile radio” (SMR). The technology of the 1970s did not accommodate the use of contiguous spectrum by a single system, so the Commission did not make separate blocks of spectrum available to each type of user. Instead, a large part of the 800 MHz band was “interleaved,” with spectrum allocations for public safety users and various private users mixed together side-by-side. *See Public Safety NPRM* ¶7 (JA 5). In the late 1980s, the Commission dedicated a 6 MHz block of spectrum at 821-824/866-869 MHz to exclusive public safety use as recommended by the National Public Safety Planning Advisory Committee (NPSPAC); that spectrum was known as the NPSPAC block. *Id.* ¶8 (JA 6).

By the early 1990s, two distinct types of technology had been deployed in the 800 MHz band. The traditional architecture of an 800 MHz system, employed by most public safety systems as well as many private ones, consists of a single antenna, ordinarily situated at a high elevation, that provides a signal to a relatively large, roughly circular, area with the transmitting antenna in the center. *Public Safety NPRM* ¶10 (JA 7). Because of the typical antenna siting, the systems are called “high site” systems. In that system design, one user is assigned to one channel, and no other user can be on the same channel throughout the entire area covered by the

¹ “800 MHz band” refers to the spectrum located between 806 and 824 MHz and between 851 and 869 MHz. The frequencies are assigned and referred to in pairs; the lower set of frequencies is used for mobile handset transmissions and the higher set for base station transmissions.

central antenna's signal. The number of discrete users that can be served at one time is accordingly limited by the number of available channels. Due to the physics of radio signal propagation, the signal is weaker the farther a mobile unit is located from the central antenna. The typical type of commercial service provided on traditional SMR systems is dispatch service for taxis and the like. Both petitioners operate such high site private systems to provide localized SMR dispatch services to small regional businesses.

Other 800 MHz licensees have more recently developed systems called "enhanced specialized mobile radio" (ESMR, pronounced "easemer") systems, which function like cellular telephone systems. The Commission used the terms ESMR and cellular to refer generally to the same type of system.² In a cellular system, the service area is divided into small multi-channel cells, each of which operates at lower power than a traditional high-site system, often (but not always) using a lower antenna elevation. *Public Safety Order n.6* (JA 67). The use of smaller cells allows "frequency reuse," which is "the ability to use the same frequencies repeatedly within a single system." Newton's Telecom Dictionary at 363 (16th ed. 2000). Unlike the traditional high-site system in which a single channel is used in the entire service area, in a cellular system, the same channel may be used in non-adjacent cells by different users at the same time. For example, in a Washington, D.C. cellular system, a user at Judiciary Square can be on a channel while another user in Dupont Circle can be on the same channel at the same time

² The Commission defined an ESMR system as one "that use[s] multiple, interconnected, multi-channel transmit/receive cells and employ[s] frequency reuse to serve a larger number of subscribers than is possible using non-cellular technology" – *i.e.*, a typical cellular architecture. *Public Safety Order n.6* (JA 67). The Commission later codified that definition in the *Public Safety MO&O* at 7, 68 (JA 419, 481) (modifying Rule 90.7), and clarified that ESMR systems must employ automatic handoff between cells. The Commission distinguished ordinary cellular systems from "high density" cellular systems, *Public Safety Order n.9* (JA 68), which may not operate outside their dedicated portion of the band.

(and another one can be using that channel in upper Northwest, and so on). As the mobile unit moves from one cell to another, the communications link is automatically “handed off” to the next cell, and usually the channel is switched, with no noticeable affect on the user.³ See Ray Horak, *Communications Systems & Networks* at 464-466 (2d ed. 2000).

Cellular system architecture allows efficient use of the spectrum that can support many more customers than a high-site SMR system and makes it feasible to provide commercial mobile radio service (CMRS) that is connected to the wireline telephone network. *Public Safety NPRM* at ¶¶11-13 (JA 7-9); 47 U.S.C. § 333(d)(1) (defining “commercial mobile service”). Intervenor Nextel is the largest 800 MHz licensee and the biggest ESMR provider in the country and competes nationwide with wireless telephone carriers such as Verizon Wireless.

As use of 800 MHz spectrum by both public safety and private users increased, so did problems of interference to the operation of high-site systems, particularly public safety systems, caused by ESMR systems, particularly “high density” systems of the type deployed in many markets by Nextel, which use low antenna sites and small cells, and thus make very intensive use of spectrum.⁴ By 2002, the FCC had received reports of interference with public safety communications caused by ESMR operators in at least 25 cities throughout the country. *Public Safety NPRM* ¶14 (JA 9).⁵ A newspaper article submitted in the record recounted the story of

³ Traditional cellular telephone systems are quite similar to ESMR systems, but they operate in contiguous spectrum, which ESMR systems do not, and use somewhat different technology. *Public Safety Order* n.7 (JA 67).

⁴ Interference has also been caused by traditional cellular telephone operators, which occupy spectrum adjacent to the 800 MHz band. *Public Safety Order* ¶2 (JA 67).

⁵ Many state and local governments reported interference problems. *E.g.*, comments of the City of Baltimore, Maryland; the District of Columbia; Fairfax County, Virginia; the State of Florida; King County, Washington; the County of Maui, Hawaii; the City of Newport News, Virginia; the New York City Transit Authority; the City of Portland; the Public Safety Improvement Coalition

police in Portland in hot pursuit of a carjacker, whose efforts to cordon off his hiding place were thwarted by interference. The same article told of police officers confronting a house fire with a garden hose because they were unable to summon the fire department due to radio interference. “Wireless Growth Hinders Rescuers,” Washington Post Aug. 18, 2003, attached to Nextel *ex parte* of Sept. 15, 2003 (JA 1174-1176). The record of this proceeding also contains evidence of ESMR interference to high-site private SMR systems. Comments of Skitronics, LLC at 3 n.3 (filed May 6, 2002) (JA 592). Interference to public safety systems has become particularly problematic in the wake of increased and increasingly complex public safety and homeland security needs since the September 11 attacks. *Public Safety NPRM* ¶17 (JA 10).

The Commission identified two types of interference to which high-site private and public safety communications systems, particularly those using interleaved spectrum, are susceptible. The first type, “out of band emission” (OOBE) interference, involves the spillover of signals outside of a transmitter’s licensed frequency into adjacent spectrum. *Public Safety Order* ¶90 (2004) (JA 118). The second, “intermodulation interference,” results when two undesired signals mix inside the receiving apparatus and together form a third frequency, known as an intermodulation product, that matches the target frequency and effectively nullifies the desired signal. *Id.* ¶91 (JA 118-119).

When cellularized systems were first introduced into the 800 MHz band, interference problems were relatively minor and could be resolved on a case-by-case basis. Recent technological changes, however, have led to more pervasive interference that is often harder and more expensive to reconcile. In the late 1990s, most CMRS providers, including those in the

(including statements from the Cities of Cincinnati, Philadelphia, Phoenix, Scottsdale, Tucson, San Diego, and D.C.; as well as the Counties of Anne Arundel, Maryland; Fauquier, Virginia; Hamilton, Ohio; Osceola, Florida; and San Diego), all filed May 6, 2002.

800 MHz band, began to convert from analog to digital technology. Digital transmission allows for even more intensive use of the spectrum (thus letting more customers use the same amount of spectrum), but it causes a greater degree of OOB emissions. *Public Safety NPRM* ¶13 & n.22 (JA 8-9). At this point, usage of high-site and cellular systems, especially high density systems of the sort operated by Nextel, on adjacent spectrum has become “fundamentally incompatible,” *Public Safety Order* ¶2 (JA 67), which has led to a “serious interference problem ... that deserves resolution,” *Public Safety NPRM* ¶20 (JA 12). The Commission predicted that interference to public safety systems and other high site users in the 800 MHz band will worsen as ESMR operators make increasingly intensive use of their spectrum. *Public Safety Order* ¶¶13-14 (JA 73-74).

2. The Rulemaking On Review.

In the 2002 *Public Safety NPRM*, the FCC initiated the rulemaking on review and solicited proposals on how to remedy the interference problems. Ultimately, the Commission conducted multiple rounds of notice-and-comment, through which it compiled a record of more than 2200 comments containing multiple engineering, economic, legal and policy analyses. *Public Safety Order* ¶61 (JA 98). One of the most significant filings was made by a coalition comprising Nextel, the major public safety organizations, and a number of private wireless groups (the “Consensus Parties”), which proposed a reconfiguration of the 800 MHz band. *See Public Safety Order* ¶¶4, 15 (JA 68-69, 75). In brief, the Consensus Parties proposed segregating traditional high-site systems and cellular ESMR systems into two separate blocks of spectrum. To facilitate the change, Nextel offered to cede part of its 800 MHz spectrum holdings, plus other spectrum located at 700 MHz, to public safety use. Nextel also agreed to fund the costs of rebanding up to \$500 million. In exchange for the spectrum and the promise of funding, Nextel

asked that it be granted new spectrum in the 1900 MHz band. *See* Reply Comments of Aeronautical Radio *et al.* (filed Aug. 7, 2002) (JA 725). The Consensus Proposal ultimately became a general template for the Commission’s restructuring plan.

a. The New 800 MHz Band Plan

The ensuing *Public Safety Order* established rules and policies for the abatement of interference in the 800 MHz band. On the basis of the extensive rulemaking record, the FCC adopted a two-fold solution to the problem of unacceptable interference to public safety operations in the 800 MHz band. The Commission first adopted technical standards, practices, and procedures collectively known as “Enhanced Best Practices” to provide for the immediate abatement of individual instances of interference. *See Public Safety Order* ¶¶88-141 (JA 117-140). The Commission recognized, however, that “[a]lthough case-by-case treatment of potential and actual interference under an Enhanced Best Practices regime provides clear benefits over the current voluntary regime ... [s]ome interference situations respond poorly, if at all, to the use of the techniques contained in the Enhanced Best Practices.” *Id.* ¶17 (JA 75-76). The FCC also noted that case-by-case remedies are “fundamentally reactive because interference must first be encountered before abatement efforts commence.” *Id.* ¶119 (JA 131). The Commission found that a “serious drawback” of this reactive approach is that the only “remedy” for a “life-threatening communications failure” is for public safety officials to “report the problem so that technical fixes could eventually be applied to fix it – or not.” *Ibid.* The Commission predicted that case-by-case remediation would become less effective as cellular systems expanded and interference grew. *Id.* ¶17 (JA 75-76).

As a result, the Commission also decided to implement a longer term, structural solution: band reconfiguration that separated high-site non-ESMR technology from low-site, high density

technology. Recognizing that the “root cause” of the interference was the mixture in the band of “generally incompatible” high-site and cellular technologies, *Public Safety Order* ¶3 (JA 68), the Commission ordered the 800 MHz band reconfigured to segregate in different band segments ESMR cellular operations and high-site public safety and private SMR operations. The Commission was “guided by the principle that we can minimize unacceptable interference in the 800 MHz band by placing similar system architectures in like spectrum and isolating dissimilar architectures from one another.” *Public Safety Order* ¶22 (JA 78). The Commission found that both OOB and intermodulation interference will be reduced substantially as a result of separating NPSPAC systems from ESMR systems. *Id.* ¶146 (JA 142). The Commission noted that not just public safety systems, but all high-site 800 MHz systems will be “beneficiaries of the actions we take today” because “the interference protections we afford today inure to the benefit of all 800 MHz non-cellular licensees.” *Id.* n.12 (JA 69).

Specifically, the Commission divided the 800 MHz band into several segments, each of which is dedicated to a specific type of principal use (*see* band plan diagram at ¶22 of the *Public Safety Order* (JA 78)). Under the Order, the license of any licensees operating in a part of the band that will be dedicated to an incompatible use (for example, a private SMR operating in a part of the band that will be dedicated to NPSPAC systems) will be modified pursuant to 47 U.S.C. § 316(a)(1) so that the license will specify new channel assignments in a different part of the band. We describe the five segments of the newly rebanded 800 MHz block below.

i. The NPSPAC Block.

At the lower end of the 800 MHz band, the Commission reserved 6 MHz of spectrum for the exclusive use of public safety radio communication systems. All public safety licensees in the former NPSPAC band will be moved into the new NPSPAC public safety block at 806-

809/851-854 MHz. *Public Safety Order* ¶151 (JA 145-147). All private users currently located in the new NPSPAC portion of the band must move to new spectrum.

ii. The Interleaved Block.

Directly above the NPSPAC block, the Commission retained an “interleaved” band segment (809-815/854-860 MHz) for use by both public safety and private systems. Public safety licensees in higher frequency portions of the interleaved band have the option (but are not required) to move to new spectrum lower in the interleaved band in order to achieve maximum separation from cellular operations. *Public Safety Order* ¶154 (JA 148). More public safety channels will be available in the new interleaved band plan because Nextel has agreed to relinquish part of its existing spectrum for use by public safety systems. *Id.* ¶23 (JA 79-80); *Public Safety Reconsideration* ¶31 (JA 349-350).

Most of the non-public safety SMR licensees that will remain in the interleaved portion operate high-site systems. Licensees in the interleaved portion of the band may implement cellular architecture without prior approval, *Public Safety Order* ¶172 (JA 155), but no licensee may operate a “high density” cellular system, as defined in 47 C.F.R. § 90.7 (2005) (set forth in Appendix C of the *Public Safety Order* (JA 252-253), as amended by the *Public Safety MO&O* at 68), in the interleaved band in the absence of a waiver, *id.* ¶173 (JA 155-156). High density systems were the principal cause of interference to public safety and commercial SMR systems; there is a greater degree of compatibility between high site systems and cellular systems that are not high density.

iii. The Expansion And Guard Bands.

Directly above the interleaved block, the Commission provided for an “expansion band” (815-816/860-861 MHz) and a “guard band” (816-817/861-862 MHz) to provide additional

spectral separation between ESMR users, particularly high density systems, and public safety users. *Public Safety Order* ¶¶154-158 (JA 148-150). ESMR systems (other than high density systems) may operate in the expansion and guard bands, but they are subject to strict interference guidelines and must coordinate any changes in their system with other nearby spectrum users. *Id.* ¶162 (JA 151-152).

iv. The ESMR Band.

At the upper end of the 800 MHz band – at the opposite end of the band from the new NPSPAC band – the Commission created an ESMR band (817-824/862-869 MHz) reserved for licensees operating ESMR systems. All high-density ESMR systems must migrate to the ESMR band, and no high density system may be operated outside of the ESMR band. Nextel, for example, will move its systems to 6 MHz of ESMR band spectrum. Other ESMR cellular systems have the option – but are not required – to relocate to the ESMR band. *Public Safety Order* ¶¶172-173 (JA 155-156). The Commission recognized, however, that “ESMR systems operating in the [ESMR band] are less likely to cause interference than ESMR systems operating” in other portions of the band. *Id.* ¶161 (JA 151). No non-cellular system may be operated in the ESMR band. *Public Safety Reconsideration* ¶81 (JA 371).

The Commission gave ESMR operators whose current spectrum is not in the ESMR portion of the band three options: relocate to the ESMR band; relocate to the guard band or the expansion band; or remain on their current spectrum (as long as the current spectrum is not in the new NPSPAC band). Because the Commission recognized that maximal spectral separation between cellular and non-cellular operations would create the best interference environment, it provided various incentives to induce ESMR operators to relocate to the ESMR band. First, the ESMR band allows the greatest degree of system expansion because it allows high density

systems. Second, in some instances, licensees' spectrum holdings could be effectively increased in geographic scope. *Public Safety Reconsideration* ¶77 (JA 369); see pp. 15-16, *infra*. Third, ESMR licensees remaining on their spectrum or moving into the guard and expansion bands are subject to stricter interference controls and must coordinate any changes in their systems with other licensees. *Public Safety Order* ¶162 (JA 151-152).

The Commission recognized that in some places, the planned ESMR band would not be large enough to accommodate the systems of all users who planned to move there. In particular, in several southern states, Southern LINC, a relatively large CMRS provider operating an ESMR system, competes with Nextel; both companies intend to move into the ESMR band. In order to ensure adequate spectrum for both, the Commission expanded the size of the ESMR band in the particular counties in which Southern LINC provides service. See *Public Safety Order* ¶¶164-166 & Appendix G (JA 152-153, 313-314). The Commission did not establish the precise spectrum sharing arrangements between Nextel and Southern LINC, but allowed them to reach a private agreement. *Id.* ¶167-168 (JA 153-154); *Public Safety Reconsideration* ¶82 (JA 371-372).

b. Relocation Of Existing Licensees.

The Commission recognized that reconfiguration of the 800 MHz band would entail the relocation of many existing users to different spectrum. For example, most public safety users were located in either the interleaved block or the prior NPSPAC band, and many ESMR and high-site users were located in what had been called the "General Category" band but most of which was slated to become the new NPSPAC band. Compare *Public Safety Order* ¶¶21 (chart) (JA 78) and 22 (chart) (JA 79). Any now-non-conforming users will be moved to new spectrum. To minimize the disruption of relocation, the Commission specified that all relocating licensees would be moved to comparable facilities 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.* ¶201 (JA 172). The Commission further pledged that the band reconfiguration process would not result in the degradation of existing service or adversely affect public safety communications and operations. *Id.* ¶26 (JA 81). The details of the relocation process, such as specific new spectrum assignments and the determination of compensation for moving expenses, will be handled by a Transition Administrator appointed by and reporting to the Commission. *Id.* ¶¶190-200 (JA 165-170).

The relocation of 800 MHz systems in the band reorganization will affect different non-public safety licensees somewhat differently, depending on the current use and type of the licenses. A non-public safety licensee located in the portion of the band that will become the NPSPAC spectrum and that does not use (or will not convert to) cellular architecture will be moved to new spectrum in the interleaved portion of the band and will receive a spectrum allotment equivalent to its old one. As explained below, Nextel must pay all expenses associated with the move. About half of MRA's licenses fall into that category. Br. 8.

Licensees that are currently located in the new interleaved spectrum do not have to move at all (unless they operate a high-density cellular system). The other half of MRA's licenses are in that category, Br. 8, as are all of Skitronics' licenses, *see Stay Order* ¶14 (JA 512) (Skitronics may "remain on its current spectrum and continue serving its customers without any disruption whatsoever"). Licensees in the interleaved and general category portions of the band that do not currently employ an ESMR system, such as Skitronics, may relocate (at their own expense) to the ESMR band, on the condition that they convert their operations to cellular architecture. *Public Safety Reconsideration* ¶¶79, 81 (JA 370, 371); *Stay Order* ¶14 (JA 512). Licensees that currently operate an ESMR system and that are required to move may relocate to the ESMR

band at Nextel's expense; ESMR operators that are not required to move may do so at their own expense.

Different types of 800 MHz licenses will be treated differently in some circumstances. The Commission has issued two types of 800 MHz licenses: "site-based" and "economic area" (EA) licenses. Site-based licenses, issued free of charge, were the first licenses to be awarded in the 800 MHz band; they authorize the user to construct and operate a transmitter at a specific site. In the mid-1990s, the Commission switched to EA licenses, awarded by auction, that authorize the user to serve a large geographic area at any site(s) of the licensee's choosing. *See Amendment of Part 90 of the Commission's Rules*, 12 FCC Rcd 19079, 19083 (1997) (*Geographic License Order*).

The territory covered by an EA license typically included one or more existing site-based operation and were thus "encumbered" by the existing licensee. EA licensees in the upper part of the 800 MHz band were given the right to relocate any incumbent site-based users to another part of the band. *Geographic License Order*, 12 FCC Rcd at 19085. EA licensees in the lower part of the band took their licenses subject to the rights of the incumbent site-based licensees, who could not be involuntarily moved. *Ibid.* The area of an EA license that is not encumbered by an incumbent site-based licensee is referred to as "white space."

In some cases, an ESMR EA licensee that held spectrum encumbered by a site-based licensee will be moved to new spectrum that is not encumbered. Encumbrances would be removed if the site-based encumbering licensee does not move to the ESMR band. *Public Safety Reconsideration* ¶77 (JA 369). The Commission viewed such an outcome as "an incentive for such [EA] licensees to transition from the interleaved spectrum," thus removing a source of potential interference to public safety systems. *Ibid.* EA licensees who are either remaining on

their spectrum (such as Skitronics) or will be moved to new spectrum outside the ESMR band will not receive unencumbered licenses.

In addition, a licensee that moves to the ESMR band is allowed to move both its EA licenses and its site-based licenses if the site-based cell was “an integral part of the EA’s licensee’s ESMR system as of the date the [*Public Safety Order*] was published in the Federal Register.” *Public Safety Reconsideration*, ¶78 (JA 370); *Public Safety MO&O* ¶25 (JA 426-427). The Commission specified a technical description to determine whether a site-based license was integrated into the ESMR system, including the capability of the site-based cell to “hand off” calls to the EA-based cells. *Public Safety Reconsideration* ¶78 (JA 369-370). Site-based licenses that are not part of an integrated system may not move into the ESMR band.

c. Funding For Relocation.

The relocation process will be expensive, as the equipment of licensees that are moving (and, for commercial operators, their customers) will have to be retuned, or even replaced, in order to operate on new spectrum. To fund the moves, the FCC accepted a modified version of the offer in the Consensus Plan that Nextel bear the costs. Instead of capping Nextel’s liability as proposed in the Consensus Plan, however, the Commission required Nextel (subject to Nextel’s acceptance of the responsibility, which occurred on February 7, 2005) to fund “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.” *Public Safety Order* ¶11 (JA 72); *see id.* ¶29 (rejecting cap on payment) (JA 82). Nextel, the largest 800 MHz licensee and the principal ESMR provider in the country, was required to secure payment with a \$2.5 billion letter of credit. *Id.* ¶182 (JA 162) (Nextel has fulfilled that obligation).

In recognition of Nextel's assumption of all relocation costs and relinquishment of spectrum, the Commission stated that it would modify some of Nextel's licenses to provide it with rights to use spectrum in the 1900 MHz band. The Commission decided to use what it termed a "value-for-value" approach under which the Commission determined the value of the spectrum Nextel is forfeiting, plus the costs of relocation, plus other related costs, and offset that amount against the estimated value of the replacement spectrum at 1900 MHz. *Public Safety Order* ¶¶5, 12 (JA 70, 72-73).

To ensure against a windfall for Nextel, the Commission decided that if Nextel's 800 MHz relocation costs and the value of its relinquished spectrum (taking into account encumbrances on that spectrum) amount to less than the value of the replacement 1900 MHz spectrum, Nextel must pay the difference to the Treasury. *Public Safety Order* ¶¶11-12, 321 (JA 72-73, 214-215). The Commission gave no assurance, however, that at the end of the day Nextel's gains would equal its costs; to the contrary, the Commission noted that "Nextel is taking the very substantial risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives." *Id.* ¶214 (JA 177).

The Commission "require[d] [the] band reconfiguration to be completed through a phased transition process within thirty-six months of release of a Public Notice announcing the start date of reconfiguration." *Public Safety Order* ¶11 (JA 72). That Public Notice was released on June 27, 2005. 20 FCC Rcd 9961 (2005). Nextel accepted the terms of the payment plan in February 2005. Letter of Feb. 7, 2005 from Tim Donohue, President/CEO, Nextel, to Michael Powell, Chairman, FCC. Rebanding will now occur region-by-region across the country, according to a schedule established by the Transition Administrator and approved by the Commission's Wireless Telecommunications Bureau. *Public Safety Order* ¶201 (JA 170-172).

SUMMARY OF ARGUMENT

The restructuring of the 800 MHz spectrum band results from the Commission's exercise of its authority to "promot[e] safety of life and property through the use of ... radio communication." 47 U.S.C. § 151. The Commission found that interference caused by cellular-architecture telephone systems was compromising the communications networks on which police, fire, and other emergency officials must be able to rely to protect citizens in the midst of a public crisis. The Commission forecast that the problem would grow increasingly urgent over time.

The Commission concluded, on the basis of an extensive record, that the best solution to the problem of interference was to reorganize the 800 MHz band to eliminate the intermingling of incompatible system architectures and separate traditional high site 800 MHz systems from cellular systems. Combined with an enhanced regime of resolving individual instances of interference, band restructuring and segregation will provide a long-term structural solution that will enable both public safety and private licensees to operate their systems in a significantly interference-reduced environment. In short, the Commission found that restructuring the 800 MHz band is necessary to fulfill the public interest.

1. Petitioners do not deny the problem of interference and they do not dispute the Commission's engineering judgment that band reorganization will substantially reduce interference and thus serve the public interest. Instead, they argue that the Commission discriminated against them unlawfully when it allowed cellular operators, but not high site operators such as petitioners, to move to the portion of the band reserved for "enhanced specialized mobile radio" (ESMR) providers and when it allowed licensees moving to the ESMR band to receive licenses with fewer encumbrances in some cases.

But separating cellular systems from incompatible non-cellular ones was the basic precept of the 800 MHz proceeding, and it was reasonable for the Commission to treat the two types of licensees differently. Petitioners are not situated similarly to cellular operators because their systems are not cellular systems. They lack the essential attributes of cellular systems such as division of territory into cells, automatic handoff between cells, and frequency reuse.

Petitioners are wrong that keeping *private* high site licensees out of the ESMR band is not necessary to protect public safety systems. The Commission has tried to achieve the largest feasible degree of spectral segregation between public safety systems and cellular systems. If private high site systems were allowed into the ESMR band, the size of the band would have to be expanded to accommodate them, which would necessarily shrink the separation between cellular systems and public safety systems and thereby undermine the effectiveness of the Commission's solution. Moreover, in addition to relieving interference to public safety systems, the Commission also reasonably sought to eliminate interference between cellular systems and *private* high site systems. Petitioner Skitronics itself had told the Commission that it has experienced such interference, and the Commission was accordingly justified in establishing segregation of all high site and cellular licensees.

2. The Commission's reorganization plan is not unlawfully retroactive. The band plan alters only future uses of the spectrum, not past ones. The new band plan may have upset petitioners' expectations, but the uses of the radio spectrum are not set in stone, and the law is clear that altering such uses prospectively does not render an agency's actions unlawful. Nor was the segregation of different types of licensees secondarily retroactive. Rather, it was a reasonable response to a pressing and worsening public problem. Moreover, the effects of the band plan on the petitioners will be fairly small. Both petitioners' businesses can continue as

they always have, and both will have the opportunity to expand their systems for future growth. A possible reduction in the resale value of petitioners' licenses does not render the band plan unreasonable.

3. The possibility that the secondary market value of petitioners' spectrum will fall because of band segregation also does not result in a taking of petitioners' property. Petitioners do not have a property interest, enforceable against the Commission, in the secondary market value of their licenses. Congress has allowed "the use of" the electromagnetic spectrum by licensees, but it has expressly forbidden "the ownership thereof." 47 U.S.C. § 301. Licensees thus hold a limited and highly regulated permission to use a public resource to serve the public interest. Petitioners' interests exist subject to, not apart from, reasonable government regulation, and changes in such regulations cannot give rise to claims within the ambit of the Fifth Amendment.

In any event, petitioners have not stated a valid takings claim under the traditional test to assess such claims. They provide no evidence to support their allegations of economic impact, and the circumstances suggest that there will be relatively little such impact. Indeed, their existing business can continue largely unaffected. That outcome shows that there will be little interference with their legitimate investment-backed expectations, which are lower in the highly regulated environment of spectrum-based radio communications than they might otherwise be. Finally, the Commission's actions are reasonable for the reasons discussed above.

4. The Commission reasonably declined to compensate MRA for "customer churn," the loss of customers that MRA alleges will occur in the rebanding process. The law does not require an agency to reimburse regulated entities for costs imposed on them by regulations necessary to fulfill the public interest. Even if there were such a requirement, MRA's predicted

customer loss is speculative, resting on a single example from a different context. An agency need not make predictive judgments about compensation in the absence of more conclusive data.

5. Petitioners lack standing to challenge the value assigned to Nextel's spectrum assignment in the ESMR band. If petitioners prevailed in their claim, the only consequence would be that Nextel would have to pay more money to the Treasury; there would be no benefit to petitioners and no remediation of any injury suffered by petitioners.

Even if petitioners had standing to raise the claim, they are barred from doing so because they did not preserve the issue before the agency. The transaction between Verizon Wireless and NextWave, another wireless company, did not take place until after the *Public Safety Order* had been issued and could not have been considered at the time the agency established a value for Nextel's spectrum. Moreover, petitioners failed to raise the matter in a petition for reconsideration, and their mention of the Verizon/NextWave transaction in a footnote to a stay motion did not give the Commission an adequate chance to address the relevance of the transaction to the valuation at hand.

There is in any event no basis for overturning the Commission's valuation analysis, which was not undermined by the Verizon/Next Wave transaction. The task before the Commission was to establish the value of a nationwide license that covered a range of markets with widely varying spectrum values. The Verizon/NextWave licenses, however, were concentrated in very large markets, including New York, Boston, and Philadelphia. The transaction does not provide a basis for altering the agency's careful analysis of several valuation studies that had been placed in the record.

In the end, petitioners have provided no good reason to overturn the Commission's carefully considered plan to restructure the 800 MHz band to separate incompatible services and

thereby eliminate interference to critical public safety systems. The impact on petitioners' private interests does not nearly outweigh the public's interest – or the Commission's authority – in promoting the efficient and effective use of the radio spectrum to protect health, safety, life and property.

ARGUMENT

I. STANDARD OF REVIEW.

Under the Administrative Procedure Act, a court may reverse an agency's determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is highly deferential; the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

In addition, where the Commission is "fostering innovative methods of exploiting the spectrum," it "functions as a policymaker and, inevitably, a seer – roles in which it will be accorded the greatest deference by a reviewing court." *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001), quoting *Telocator Network of America v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982). The Court consistently has deferred to the FCC's expert judgment in matters regarding spectrum management. See, e.g., *Teledesic*, 275 F.3d at 84; *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 443-45 (D.C. Cir. 1991); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1209-14 (D.C. Cir. 1984). See also *Hispanic Information & Telecommunications Network v.*

FCC, 865 F.2d 1289, 1297-1298 (D.C. Cir. 1989) (the Court will uphold FCC technical judgments that are supported “with even a modicum of reasoned analysis”).

II. THE COMMISSION REASONABLY DECIDED TO SEGREGATE CELLULAR LICENSEES FROM HIGH SITE LICENSEES.

The public interest will be served by the FCC’s exercise of its spectrum management authority to ensure that public safety officials, including police officers, firefighters, and other first responders retain the ability to communicate effectively and without interference from other radio services. Public safety officers must have adequate and reliable communications when responding to emergencies, rescuing citizens from burning buildings, apprehending criminals, and engaging in other dangerous tasks critical to the public security, health and welfare. The *Public Safety Order* advances the fundamental statutory objective of “promoting safety of life and property through the use of ... radio communication.” 47 U.S.C. §§ 151, 332(a)(1).

MRA and Skitronics (hereafter, collectively, “MRA,” except where it is necessary to refer to the petitioners individually) do not dispute that interference in the 800 MHz band presents a serious and growing threat to the reliability of public safety communications systems. Nor does MRA question the basic scientific soundness of the Commission’s approach to alleviate that interference – segregating different technologies in different parts of the band. Finally, MRA does not dispute the Commission’s authority to modify “any station license ... if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act ... will be more fully complied with.” 47 U.S.C. § 316(a)(1).

A. Segregation Of Licensees Does Not Unlawfully Discriminate Against MRA.

The gist of MRA’s argument is that the band plan reorganization arbitrarily and unfairly places it in a spectrum block – the interleaved spectrum – that has less flexibility, and therefore allegedly less value, than its original spectrum assignments. Under the former band plan, MRA argues, it was free to implement any type of system architecture it wished; under the new plan, MRA may not use high density cellular architecture.

MRA claims that the band reorganization unlawfully discriminates against it in two principal ways. First, it claims that it was unfair to allow some licensees, particularly Nextel and Southern LINC, to move into the allegedly more desirable ESMR band, while MRA may not. Br. 25-26. Second, MRA claims that licensees moving into the ESMR band unfairly will receive better licenses after the move. Br. 25. MRA alleges that it is situated similarly to Nextel and Southern LINC, Br. 26-27, and thus that the unequal treatment violates the principle established in *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), that similarly situated parties must be treated similarly. Br. 27-28. None of those claims is correct.

(1) The Commission Reasonably Distinguished Between Cellular And Non-Cellular Systems

The Commission reasonably allowed cellular operators, such as Nextel and Southern LINC, to move into the ESMR band without affording non-cellular, high site operators like MRA and Skitronics a similar right. The fundamental precept of the 800 MHz proceeding was to separate cellular licensees from high site licensees. The Commission explained at length that cellular and high site system architectures are “generally incompatible,” *Public Safety Order* ¶3 (JA 68), and that segregating them is necessary to protect against unacceptable interference to both public safety systems and private high-site systems, *id.* ¶22 (JA 78-79). “Eliminating

interleaving ... will reduce the number of ‘band edges’ between spectrum utilized by the two different network architectures thus significantly reducing the risk of interference.” *Id.* ¶18 (JA 76); *see also id.* ¶146 (JA 142) (segregation will reduce both OOB and intermodulation interference). Moreover, without segregation “the interference problem will only intensify as cellular-architecture licensees make more intensive use of their spectrum,” and as that happens, case-by-case remediation “will not stem the growth of unacceptable interference.” *Id.* ¶14 (JA 74). Thus, allowing the two system architectures to remain interleaved would “undercut one of the basic tenets of this proceeding: that incompatible ‘high-site’ non-ESMR technology must be segregated from ‘low-site’ ESMR technology if unacceptable interference is to be avoided.” *Public Safety Reconsideration* ¶81 (JA 371).

MRA does not challenge that reasoning. Instead, it argues that even if segregating public safety systems and cellular systems is necessary, it is not reasonable to segregate *privately* operated high site systems from cellular systems and that the Commission lacked a rational basis for doing so. Br. 27, 32, 34-36. Rather, MRA claims, all private licensees should be allowed into the ESMR band. Br. 28, 39. That claim fails for two reasons. First, MRA’s approach would undercut the protection of public safety systems. The Commission’s overriding goal was to protect public safety systems by spectrally separating them from cellularized systems to the largest degree feasible. The Commission included an “expansion band” and a “guard band” precisely to provide maximal separation between the NPSPAC block and the ESMR band. *Public Safety Order* ¶¶154, 157 (JA 148, 149). Allowing all private high site licensees into the ESMR band would have required the Commission to have expanded that band considerably to accommodate them (indeed, in certain markets the ESMR band had to be expanded to accommodate just Nextel and Southern LINC). But enlarging the ESMR band would shrink the

separation between cellular operators and public safety systems, which would render less effective the solution to public safety interference. The Commission accordingly found that allowing high-site licensees into the ESMR band would “undercut one of the basic tenets of this proceeding.” *Public Safety Reconsideration* ¶81 (JA 371).

Second, MRA’s approach would undermine the Commission’s other important goal of reducing the overall level of interference in the 800 MHz band, including interference to private high-site systems. The Commission found specifically that rebanding will “inure to the benefit of all 800 MHz non-cellular licensees,” including private SMR operators. *Public Safety Order* n.12 (JA 69). The record contained evidence – provided by Skitronics itself – of interference caused by ESMR operators to the operations of high-site systems. Comments of Skitronics at 3 n.3 (JA 592) (“we have had to resolve issues where Nextel sites were causing interference on our systems”). The Commission also reached the predictive judgment that, absent band reconfiguration, interference would worsen as ESMR licensees use their spectrum more intensively. *Public Safety Order* ¶14 (JA 74). Petitioners provide no reason to question that judgment. *See Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998) (when the FCC makes a predictive judgment, it need only “identify the considerations it found persuasive”). Thus, segregation of *all* licensees using incompatible technologies, not just public safety licensees, was necessary to improve “the overall interference environment at 800 MHz” because spectral separation will result in “less potential for interference to public safety *and other non-cellular 800 MHz band licensees.*” *Public Safety Order* ¶161 (JA 151) (emphasis added); *see id.* ¶18 (JA 76) (“Band reconfiguration addresses interference comprehensively and proactively by ... separating cellularized multi-cell and non-cellularized high-site systems within the band.”). Reduction of interference to private SMR systems is a reasonable public interest goal that will be

advanced by the Commission's actions and is entitled to "the deference traditionally accorded decisions regarding spectrum management." *Teledesic*, 275 F.3d at 84.

Petitioners' challenges to the FCC's action cannot overcome the public interest in ensuring adequate communication for both public safety systems and private operators that motivated this proceeding. Indeed, the interests they assert are particularly weak: neither petitioner has ever indicated that it intends (or even has sufficient spectrum resources) to implement cellular architecture to make more efficient use of spectrum or serve the public better. *Stay Order* ¶9 (JA 510). Rather MRA's true interests here appear to be maximizing the value of its licenses for sale in the secondary market. *See, e.g.*, Br. 37-38; Skitronics' September 30, 2004, Ex Parte Presentation at 1-2 (JA 1250-1251). The worry is that when CMRS companies like Nextel move to unencumbered ESMR spectrum, they will no longer need to acquire spectrum from encumbering licensees, and the resale value of the site-based spectrum (which MRA received free of charge) will fall. That concern cannot outweigh the Commission's findings on the necessity of eliminating interference to promote public safety.

**(2) Petitioners Do Not Operate Cellular Systems
And Are Not Situated Similarly To Nextel Or
Southern LINC.**

MRA claims that it is situated similarly to cellular operators, Br. 26-27, but the record is clear that neither petitioner employs cellular architecture that would entitle it to relocate to the ESMR band. The Commission defined cellular systems for the purpose of determining which licensees would be eligible for the ESMR band as systems "that use multiple, interconnected, multi-channel transmit/receive cells and employ frequency reuse to serve a larger number of subscribers than is possible using non-cellular technology." *Public Safety Order* nn.6 & 9 (JA 67, 68); *Public Safety MO&O* ¶8 & p.68 (JA 420, 481) (definition of cellular includes automatic

handoff between cells). The Commission identified a specific technology – the Motorola iDEN system – that is frequently used to support such service. *Public Safety Order* n.6 (JA 67). The Commission found (and MRA does not challenge) that both Nextel and Southern LINC operate cellular systems using that technology. *See id.* n.6 & ¶¶2, 159 (JA 67, 150).⁶

Petitioners do not meet that definition. They operate traditional high-site systems without cellular architecture. MRA’s system consists of four distinct transmitting antennas with a small overlap used to provide dispatch service to a small number of customers – the classic description and business plan of a traditional high-site system. Br. 9. Before the Commission, MRA described its system as using “the same type of system architecture ... as do most other traditional SMR ... licensees in the 800 MHz band.” Reply Comments of Mobile Relay Associates at 2 (filed Aug. 7, 2002) (JA 763); *see also* Comments of Skitronics at 2 (“Skitronics presently only offers traditional SMR mobile dispatch services”) (JA 591).

Nor does MRA’s system function like a cellular system. When an MRA customer moves from one coverage zone to another, he must contact a dispatcher and they must mutually agree to switch to another channel. Br. 8-9. That arrangement is quite unlike the automatic hand-off and channel switching that is a hallmark of cellular systems. Skitronics describes its system in similar terms. Br. 11. Tellingly, neither petitioner claims to employ frequency reuse, the engineering concept that makes intensive spectrum use possible – but can also lead to the type of

⁶ MRA is wrong that Southern LINC and Nextel are not eligible to move into the ESMR band because they do not meet the definition of “800 MHz Cellular System” set forth in 47 C.F.R. § 90.7 (JA 252-253). Br. 26. Section 90.7 does not regulate what licensees are allowed into the ESMR band, but defines the high-density systems that are excluded from the non-ESMR bands. *Public Safety Order* ¶174 (the definition “serves only as a demarcation between systems that can operate in the non-cellular portion of the 800 MHz band without a waiver and those that require a waiver”) (JA 156); *see also Public Safety MO&O* ¶8 (JA 420). MRA does not dispute that both Nextel and Southern LINC meet the definition of ESMR systems established in note 6 of the *Public Safety Order* (JA 67) and are accordingly entitled to relocate into the ESMR band.

interference problems that this proceeding was designed to eliminate. Moreover, neither petitioner provides CMRS service (unlike Nextel and Southern LINC), which inevitably requires cellular architecture to be commercially viable. *See Public Safety Order* ¶170 (JA 154). As such, petitioners' systems are not cellular systems and do not pose the same threat of interference with public safety systems as cellular systems. It was proper to exclude them from the ESMR band.

(3) Petitioners' Remaining Discrimination Claims Lack Merit.

MRA claims to be the victim of unlawful discrimination because Nextel and Southern LINC may receive unencumbered EA licenses after the move, whereas MRA will not receive such licenses. As discussed above, when an ESMR EA licensee that holds spectrum encumbered by a site-based licensee moves to new spectrum in the ESMR band, and the site-based licensee is not also moving, the encumbrance will be removed. *Public Safety Reconsideration* ¶77 (JA 369). EA licensees who are either remaining on their spectrum or will be moved to new spectrum outside the ESMR band will not receive a similar benefit.

That outcome does not discriminate unlawfully against MRA. The FCC reasonably reconfigured the 800 MHz band "to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference." *Public Safety Reconsideration* ¶1 (JA 337). The allocation of incumbent-free spectrum to ESMR operators serves both to untangle the mix of technologies and as "an incentive for such [EA] licensees to transition from the interleaved spectrum," into an ESMR-only band. *Id.* ¶77 (JA 369). Such considerations do not apply to non-cellular operators like MRA and Skitronics, which as discussed above are not similarly situated. Allowing replacement spectrum in the ESMR band to

remain encumbered by site-based, non-cellular licensees would perpetuate the interference to site-based systems.⁷ MRA makes no attempt to demonstrate otherwise.

MRA also claims that “for each channel held [by Nextel or Southern LINC] (whether currently held as an EA ‘white-space’ license or an incumbent license), Nextel and Southern LINC receive an EA-wide license in the new ESMR band,” whereas MRA does not receive such a benefit. Br. 25. That claim is factually incorrect. In the *Public Safety Order*, the Commission determined that *non-Nextel* licensees would receive an EA license when they transferred a site-based license to the ESMR band. *Id.* ¶163 (JA 152). Nextel was expressly excluded from receiving that benefit. In the *Public Safety Reconsideration*, the Commission reversed itself and determined that *no licensee* moving a site-based license to the ESMR band would receive an EA license. The Commission stated that “a non-Nextel, non-Southern LINC EA licensee, operating an ESMR system and relocating to the ESMR portion of the band, may also elect to relocate site-based cells” under the condition that “a site-based cell may be moved into the ESMR spectrum, but it is limited to the ... coverage contour it provided as of the date the [*Public Safety Order*] was published in the Federal Register.” *Public Safety Reconsideration* ¶ 78 (JA 369-370).

Although the exclusion of Nextel and Southern LINC from that formulation might be read to suggest that those companies would receive EA licenses for any site-based license transferred to the ESMR band, that is not the case. The Commission excluded those companies not to grant them the benefit denied to other companies, but to reflect the requirement imposed on them by

⁷ The same reasoning defeats MRA’s passing claim, Br. 26, that it was unlawfully discriminatory to allow cellular EA licensees to move site-based licenses that are integrated into the cellular system into the ESMR band, but not to allow non-cellular EA licensees to move site-based licenses into that band. In any event, the Commission later amended the policy to allow any licensee moving into the ESMR band to bring site-based operations that are integrated into the EA-based system. *Public Safety MO&O* ¶25 (JA 426-427).

the Commission to reach a spectrum sharing agreement. See *Public Safety Order* ¶¶164-168 (JA 152-154); *Public Safety Reconsideration* ¶82 (JA 371-372). Under that private agreement, a Southern LINC EA license that is encumbered by a Nextel site-based license (or vice versa) may end up unencumbered after both companies move to the ESMR band. That outcome would, however, be the result of private agreement, not FCC action.

Finally, MRA claims that the Commission assured Nextel of receiving “value-for-value” in its spectrum move, whereas MRA will end up with less valuable spectrum. That claim is based on an apples-to-oranges comparison. The value-for-value concept concerns the unique situation, applicable to no other licensee, of equilibrating the value of 800 MHz spectrum Nextel will give up plus the costs Nextel will bear to fund the 800 MHz rebanding process against the value of the replacement 1900 MHz spectrum. *Public Safety Order* ¶¶5, 12 (JA 70, 72-73). The agency used value-for-value as a way of *limiting* the compensation paid to Nextel, rejecting Nextel’s preferred MHz-for-MHz approach, which the Commission found would have been both overcompensatory and inconsistent with efficient spectrum use practices. *Id.* ¶278 (JA 200).

Unlike Nextel, MRA is not ceding any spectrum or paying any of the expenses of the rebanding process. After rebanding, petitioners will hold the precise amount of spectrum they currently hold, with the precise coverage patterns as the current spectrum. Indeed, Skitronics may remain on exactly the same spectrum it currently occupies, and its operations can continue without any adjustment at all. *Stay Order* ¶14 (JA 512). Half of MRA’s existing licenses will not be moved, and the other half will be modified to cover new spectrum of the exact same amount with the exact same coverage patterns, at no cost to MRA. *Ibid.* Even if MRA were correct that restrictions placed on the interleaved band will render the spectrum less valuable

than it had been, the value-for-value approach does not apply to that situation, and there has been no unlawful disparate treatment.

B. Segregation Of Licensees Is Not Unlawfully Retroactive.

Skitronics claims that the *Public Safety Order* is unlawfully retroactive. The argument is that Skitronics purchased EA licenses at auction with the understanding that it could use them for “any permissible form of SMR activity,” but the Commission has now prohibited Skitronics from using its EA licenses to provide high density cellular service (if it chooses to stay in the interleaved band). MRA holds no EA licenses and cannot be a party to that argument.

(1) Segregation Does Not Constitute “Primary Retroactivity.”

A rule is retroactive if it “alter[s] the past legal consequence of past actions.” see *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring); *Celtronix Telemetry v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002). For example, a rule that imposed liability on actions that were lawful at the time they were taken would be retroactive. The *Public Safety Order*, by contrast, regulates exclusively the *future* uses of 800 MHz spectrum. The agency’s decision thus “alters the future effect, not the past legal consequences” of how spectrum is utilized and is not retroactive. *Sinclair Broadcasting Group v. FCC*, 284 F.3d 148, 166 (D.C. Cir. 2002).

To be sure, the Commission has restricted what Skitronics can do with its licenses. But a regulation is not retroactive merely because it “upsets expectations based on prior law.” *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). Indeed, “[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectation frustrated when the law changes. This has never been thought to constitute

retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectation were deemed suspect.” *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989). Although under the prior band plan Skitronics could use its EA licenses more broadly than it may under the new plan – a right it chose not to exercise – it never had a right to be free of regulatory changes that serve the public interest. See *Celtronix*, 272 F.3d at 589 (“it is undisputed that the Commission always retained the power to alter the term[s] of existing licenses”). That is so even though EA licenses were awarded by auction rather than free of charge. Congress specified that “[n]othing ... in the use of competitive bidding shall ... diminish the authority of the Commission under the other provision of this Act to regulate ... spectrum licenses.” 47 U.S.C. § 309(j)(6)(C).

(2) Segregation Was Reasonable.

At most, the Commission’s action is secondarily retroactive. See *Bowen v. Georgetown University Hospital*, 488 U.S. at 219 (Scalia, J., concurring) (“secondary retroactivity” means “rule[s] with exclusively future effect [that] ... affect past transactions”). In that case, the action must be upheld as long as it is reasonable. “A rule that upsets expectations ... may be sustained if it is reasonable; *i.e.*, if it is not ‘arbitrary’ or ‘capricious.’ A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest if it gives a reasoned explanation for the revision.” *DirecTV*, 110 F.3d at 826 (citation and quotation marks omitted); see *Sinclair*, 284 F.3d at 331 (“the only question [in secondary retroactivity analysis] is whether the Commission’s action was reasonable”).

The Commission’s actions in restructuring the 800 MHz band – including the restriction placed on non-cellularized EA licenses – were plainly reasonable for the reasons stated above,

and Skitronics does not seriously challenge the Commission's compelling public interest rationale for restricting the future use of high site licenses. Instead, Skitronics focuses on the effect of the rebanding plan on its own private interests. None of its arguments prove that the Commission acted unreasonably.

First, Skitronics claims that the Commission "has made worthless the Petitioners' substantial investments made in reliance upon the prior rule." Br. 32. It fails to substantiate the claim, which is refuted by the undisputed facts. Skitronics' existing operations will not be affected at all by the restructuring process. Its licenses do not have to be moved, and its business can continue exactly as it has. *See Stay Order* ¶14 (JA 512). MRA is in a comparable position in that its business can continue with little interruption. *Ibid.* In that sense, the restructuring process will hardly affect either petitioner's business at all. To the degree petitioners complain about their ability to use cellular architecture to increase the capacity of their systems, they may use their existing licenses to create a cellularized system (other than a high density system). *Public Safety Order* ¶172 (JA 155). Skitronics may also, if it wishes, move into the ESMR band on the condition that it convert to a cellular system.

If petitioners' grievance is that a restriction on high density use renders their licenses less valuable on the secondary market, that does not render the agency's actions unreasonable. The public interest in this case lies with the abatement of unacceptable interference, not with maximizing the speculative possibility of future profits from resale of spectrum in the secondary market. *Cf. National Broadcasting Co. v. FCC*, 319 U.S. at 216 ("The 'public interest' to be served under the Communications Act is ... the interest of the listening public in 'the larger and more effective use of radio.'").

Skitronics next accuses the Commission of “bait and switch” tactics on the theory that Skitronics acquired licenses that could be used for any purpose, but are now more restricted. Br. 32-33. Skitronics made the same argument with respect to primary retroactivity, and it fares no better here. Skitronics could have implemented a high density cellular system from the time it acquired its licenses until the time of the *Public Safety Order*, but it chose not to. Skitronics never had a right to be free of regulatory changes necessary to protect the public interest.

Finally, MRA and Skitronics claim together that the FCC “deceived Petitioners into refraining from bidding” to acquire certain licenses. Br. 33-34. That petitioners decided not to pursue what could have turned out to be more lucrative opportunities had the regulatory landscape been different does not render unreasonable the Commission’s actions to remedy interference.

C. Segregation Does Not Constitute A Taking.

MRA contends, Br. 36-39, that the Commission has unlawfully taken MRA’s property in violation of the Fifth Amendment because segregation of system architectures reduces the value of non-ESMR spectrum in the secondary market. Br. 38 (“No arms’-length buyer is going to pay very much for a license that is barred from employing the most advanced forms of system upgrades.”).

MRA does not have a property interest, enforceable against the Commission, in the secondary market value of its licenses. Congress has provided for “the use of” the electromagnetic spectrum by Commission licensees, “but not the ownership thereof.” 47 U.S.C. § 301. The absence of an ownership interest manifests Congress’s intent to “maintain the control of the United States over all the channels of radio transmission.” *Ibid.* As a result, Congress specified that no license “shall be construed to create any right, beyond the terms, conditions,

and periods of the license.” *Ibid.* Licenses may be granted only insofar as the “public interest, convenience, and necessity” demands, 47 U.S.C. § 309(a), and even then have a limited term, with no guarantee of renewal, 47 U.S.C. § 307(c). The ownership of licenses may be transferred only “upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d). And, as mentioned above, Congress expressly empowered the Commission to modify the terms of “any station license” at any time “if in the judgment of the Commission such action will promote the public interest, convenience and necessity.” 47 U.S.C. § 316(a)(1). *See also* 47 U.S.C. § 304 (license applicant must “waiv[e] any claim to the use of ... the electromagnetic spectrum as against the regulatory power of the United States”). The FCC grants licenses so the licensee may provide service to the public, not simply to serve the licensee’s private pecuniary interests, and it retains significant regulatory authority over those licenses, notwithstanding petitioners’ “ownership” of them. In sum, “the electromagnetic spectrum ... is not the private property of any individual or group; rather, it is a public resource in which every citizen has an interest.” *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1191 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976) (Tamm, J., concurring). MRA does not have an unfettered property interest of the sort on which its argument rests.

Even if MRA had a property interest protected by the Fifth Amendment, it has failed to state a valid takings claim. The Takings Clause prohibits the government from taking “private property ... for public use, without just compensation.” U.S. Const. amend. V. In claims of taking by regulation, the inquiry is whether a regulation “reaches a certain magnitude” in depriving an owner of the use of property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *see also id.* at 415 (asking whether the regulation “goes too far”). To answer that

question, the Court assesses three primary factors: (1) the regulation's economic impact on the claimant; (2) its interference with the claimant's reasonable investment-backed expectations; and (3) the character of the government action. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

1. Economic Impact. MRA states that its licenses "are worth only a small fraction of what they were worth before," Br. 38, but it provides no evidence to support that claim. *See Sinclair*, 284 F.3d at 167 (rejecting takings claim where petition has "neither provided information about the economic impact on its business ... nor provided a basis on which to determine that there would be significant interference with its expectations"). As we have discussed above, petitioners' ongoing businesses will be largely unaffected by the restriction on future use of the licenses. Petitioners may also convert their systems to cellular architecture, and may even seek a waiver to implement high density architecture. *Public Safety Order* ¶¶172-173 (JA 155-156). Those circumstances leave little room to believe that the restriction on high density usage has an undue economic impact on petitioners.

2. Interference With Expectations. The foregoing analysis also shows that there will be little interference with MRA's investment expectations. Both MRA and Skitronics presumably acquired their licenses in order to provide traditional dispatch service; neither licensee has sought to convert its system to cellular architecture at any time or has expressed plans to do so (indeed, MRA itself sold a number of EA licenses to Nextel, hardly the action of a would-be cellular operator). Because the 800 MHz rebanding process will have no effect on either petitioner's ongoing operations, there will be no interference with their legitimate expectations. That is particularly so in the absence of any indication from either petitioner that it has any current plan to sell its existing licenses – a reasonable investment-backed expectation "must be more than a

‘unilateral expectation or an abstract need.’” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

Moreover, the investment expectations of parties that operate in a highly regulated environment like spectrum-based radio communications are necessarily lower than they would be otherwise. For example, where regulation destroyed the value of a private contract, the Supreme Court denied a takings claim because the pervasiveness of regulation in the area reduced the expectation of economic advantage. *Connolly v. PBGC*, 475 U.S. 211, 223-224 (1986) (regulation that “disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking”). “Those who do business in [a] regulated field cannot object if the [regulatory] scheme is buttressed by subsequent amendments to achieve the [regulatory] end.” *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

3. Character Of The Government Action. Where “interference with ... property rights ... arises from a public program that adjusts the benefits and burdens of economic life to promote the common good ... [it] does not constitute a taking.” *Connolly*, 475 U.S. at 225. It likewise does not constitute a taking where the government “has taken nothing for its own use and only has nullified a contractual provision ... by imposing an additional obligation that is otherwise within [the] power of [the government] to impose.” *Id.* at 225-226. Here, the Commission has legitimately exercised its broad power over spectrum management to protect the public interest. That the exercise places some burden on petitioners does not transform it into a taking.⁸

⁸ In a passing footnote, Br. 38 n.30, MRA also claims that differential treatment between it and Nextel amounts to an equal protection violation under the Fourteenth Amendment. Such cursory mention is not sufficient to preserve the issue for review, *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc) (“We need not consider cursory arguments made only in a footnote.”), and is wrong on the merits for the reasons discussed above with respect to petitioners’ claim of discriminatory treatment under the APA.

III. THE COMMISSION REASONABLY DECLINED TO COMPENSATE MRA FOR “CUSTOMER CHURN.”

MRA claims that the 800 MHz rebanding decisions were arbitrary and capricious because the Commission “refus[ed] to provide compensation to MRA for the inevitable customer churn it will suffer during the forced migration.” Br. 40. The claim is that when MRA’s licenses are modified to specify new frequencies (none of Skitronics’ licenses will be affected), a large number – MRA says 50% – of MRA’s customers will leave for other service providers, and the FCC was accordingly required to ensure compensation for that loss.

MRA has cited no source of law that support its twin propositions that an agency must arrange for reimbursement for costs that will allegedly be imposed by regulations that are necessary in the public interest and that an agency’s action is arbitrary simply because it imposes such costs. Courts routinely uphold regulatory decisions that impose considerable costs on individual companies, on entire industrial sectors, or on the public as a whole. For example, the Supreme Court upheld the Commission’s decision to prohibit common ownership of newspapers and television stations in the same market in order to protect the public interest in diversity of media viewpoints even though that rule limited the opportunity for media ownership and even required some existing license holders to divest their ownership of newspaper interests. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). This Court upheld an FCC requirement that television sets include a tuner that enables the set to receive over-the-air signals of digital television stations, which would raise the costs to both manufacturers and consumers. *Consumer Electronics Ass’n*, 347 F.3d 291. The Court also upheld rules that require all broadcasters to move to new spectrum and convert their operations from analog to digital, a potentially expensive undertaking for both manufactures and consumers. *Community Television, Inc. v. FCC*, 216 F.3d 1133 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001). Each of those

agency actions, like many regulatory decisions, imposed substantial costs on the regulated parties or the public generally. The FCC decided to require Nextel to compensate relocating licensees for the various costs of relocation, such as equipment costs, but it violated no duty by declining to require compensation for alleged customer churn.

Moreover, MRA's prediction that it will lose half its customers is speculative and improbable. The Commission has adopted safeguards in the reconfiguration process to ensure that the "transition to the new facilities [is] as transparent as possible to the end user." *Public Safety Order* ¶201 (JA 172). The Commission's past experience with similar band reconfigurations, including an earlier reconfiguration of the 800 MHz band in which site based licenses could be moved by EA licensees, has been that such safeguards protect relocating licensees against undue disruption. *See id.* ¶148 (JA 143).

Indeed, the thrust of MRA's brief is that it wants to be relocated into the ESMR band, despite the fact that such a move would also require retuning. Although MRA cites to a single instance in which it claims to have lost 50 percent of its customers when it voluntarily agreed to sell certain channels in the 800 MHz band to Nextel, Br. 10, 40, Nextel showed that MRA had migrated its customers to channels below 512 MHz, which required "replacing customer[s]' handsets with equipment generally perceived [to be] less advanced and desirable than 800 MHz customer equipment and a less-up-to-date network," and not a retuning of channels within the 800 MHz band. *Opposition of Nextel Communications, Inc. to Motion for Partial Stay* at 17 (filed Nov. 26, 2004) (JA 1302). Contrary to MRA's assertion (Br. 41), "the mechanics of migration" were not "exactly the same" in both cases.

Thus, the single example on which MRA relies to establish its "cost" of migration is not comparable to the situation at hand. The Commission acted reasonably when it declined to

require Nextel to reimburse licensees for any customer churn they encounter. The Court will not “require an agency to enter precise predictive judgments on all questions as to which ... interested commenters have been [un]able to supply certainty.” *American Public Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). Faced with incomplete data regarding a particular cost factor, the Commission may decline to order compensation. *Ibid.*

IV. THE FCC PROPERLY VALUED NEXTEL’S SPECTRUM.

MRA argues that the Commission improperly valued Nextel’s spectrum assignment in the ESMR band by assigning it a value of \$1.70 per megahertz per person in each market (“\$/MHz/pop”) rather than \$2.85/MHz/pop. Br. 41-43. The claim is that the higher figure, derived from the value reflected in a recent purchase of spectrum by Verizon Wireless from NextWave (another wireless company), reflects the greater value of the unencumbered spectrum Nextel will gain in the ESMR band compared with the smaller value of encumbered 800 MHz spectrum Nextel will vacate.

A. MRA Lacks Standing.

At the outset, MRA lacks standing to make these arguments. To establish standing, MRA must show a non-speculative injury, traceable to the agency’s action, that would be redressed by a reversal of the agency’s decision. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Even if MRA were correct on the merits and the Commission had improperly valued the spectrum, the only effect of that error would be an unwarranted benefit to Nextel; MRA has identified no injury to itself that is traceable to the error. Nor is there redressability: if MRA prevailed on its claim, Nextel would at most have to pay more money to the Treasury; there would be no benefit to MRA. As such, MRA fails the test for standing. The argument raised by MRA is akin to a challenge to the government’s extension of tax benefits to a

third party, a situation in which the challenger lacks standing. *Fulani v. Brady*, 935 F.2d 1324, 1327-1328 (D.C. Cir. 1991), *cert. denied* 502 U.S. 1048 (1992).

It does not matter that MRA may compete with Nextel in some minor way. Nextel operates on a nationwide basis, not just in the 2 or 3 markets where MRA and Skitronics have operations. An order that Nextel pay more money – the most relief MRA could achieve – would have a negligible impact on Nextel’s ability to compete in MRA’s markets. Even if the spectrum were improperly valued, there is no genuine harm to MRA that would be redressed. To be sure, it is theoretically possible that the valuation of the spectrum could change so dramatically that Nextel would back out of the band reorganization arrangement and the Commission would cancel the program, but such an outcome depends on a speculative “chain of events” of the sort the Court has found insufficient to accord standing. *E.g., New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). “[A] plaintiff’s standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties.” *National Wrestling Coaches Ass’n v. Dept. of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 2537 (2005); *accord Crete Carrier Corp. v. EPA*, 363 F.3d 490, 494 (D.C. Cir. 2004) (“Speculative and unsupported assumptions regarding the future actions of third-party market participants are insufficient to establish Article III standing.”). MRA fails the requirement that “it must be “likely,” as opposed to merely “speculative,” that an injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561 (quotation marks and citation omitted).

B. MRA’s Argument Is Barred By 47 U.S.C. § 405(a).

“The filing of a petition for reconsideration [by the FCC] shall ... be a condition precedent to judicial review ... where the party seeking such review ... relies on questions of fact

or law upon which the Commission ... has been afforded no opportunity to pass.” 47 U.S.C. § 405(a). The Court has “construed this section as codifying the exhaustion of administrative remedies doctrine, which ‘requires complainants, before coming to court, to give the FCC a fair opportunity to pass on a legal or factual argument.’” *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992), quoting *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987).

The Commission did not have a “fair opportunity to pass” on the pertinence of the Verizon/NextWave license transfer transaction to the valuation of the 800 MHz spectrum. The *Public Safety Order* was adopted by the Commission on July 8, 2004; Verizon and NextWave sought FCC approval for their license transfers on December 10, 2004. See Public Notice, 19 FCC Rcd 23797 (Dec. 10, 2004). The transfer application was granted in February 2005. See Public Notice Report No. 2086 (rel. March 2, 2005). As such, the Commission could not have considered the matter at the time it established the \$1.70/MHz/pop figure in the *Public Safety Order*. The *Public Safety Reconsideration* was adopted on December 22, 2004, just 12 days after Verizon’s transfer application – barely enough time to consider such a matter even if it had been raised properly. But it was not raised properly: MRA did not raise the matter in a petition for reconsideration; instead, it alluded to the Verizon/NextWave transaction in a footnote to a petition for an administrative stay of the *Public Safety Order*. Motion for Partial Stay of Decision at 10 n.11 (filed Nov. 19, 2004) (JA 1272).

Information contained in a footnote to a stay motion filed in the midst of a massive proceeding does not suffice to give the Commission “fair opportunity” to consider an issue during a reconsideration phase. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997). The Commission “need not sift pleadings and documents to identify” arguments that are not “stated with clarity” by a petitioner. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir.

1969), *cert. denied*, 409 U.S. 1027 (1972). MRA is accordingly barred from raising the argument before the Court.

C. MRA Is Wrong On The Merits.

MRA's claims are unavailing in any event. The Verizon/NextWave transaction does not demonstrate any error in the Commission's valuation of Nextel's replacement 800 MHz spectrum. The Commission derived the \$1.70/MHz/pop estimate after carefully examining three valuation studies to assess the value of the 1900 MHz spectrum. *Public Safety Order* ¶¶279-297 (JA 200-207). The Commission explained that the 1900 MHz spectrum was worth at least as much, if not more than, 800 MHz ESMR band spectrum, so that \$1.70/MHz/pop was an appropriate valuation for the 800 MHz spectrum as well. *Id.* ¶315 (JA 212). Skitronics itself seemed to agree with that valuation. See Skitronics' September 30, 2004, Ex Parte Presentation at 5 (Skitronics' site-based licenses "have had a resale value of \$1.70 per MHz-pop") (JA 1255). MRA challenges none of that analysis.

There is no basis to conclude that the Verizon/NextWave transaction would have changed the Commission's analysis. That transaction predominately involved licenses in some of the largest markets in the country, where spectrum is most valuable because usage is heaviest, such as New York City, Boston, Philadelphia, Washington, D.C., Los Angeles, Detroit, and Denver.⁹ In valuing the 800 and 1900 MHz spectrum, by contrast, the agency was attempting to determine "the value of a nationwide license" to reflect the nature of Nextel's use of the spectrum, as opposed to the value of a license in a specific market. *Public Safety Order* ¶294 (JA 206). It thus assessed recent license sales in "a representative range of small to large markets." *Id.* ¶294

⁹ A full listing of the markets is contained in Exhibit 2 to Verizon's application for authority to transfer the licenses, which we have attached hereto.

(JA 206). Because the Verizon/NextWave transaction was heavily skewed toward the largest markets, the price for those licenses would have overstated the value of licenses that covered large numbers of far smaller markets.

Furthermore, MRA has failed to substantiate its bare allegation that “unencumbered 800 MHz spectrum is more valuable than [1900 MHz] spectrum.” Br. 42. In reasoning that MRA does not challenge, the Commission found that “the market value of six megahertz of spectrum [Nextel’s ESMR band 800 MHz spectrum] would not be proportional on a per-megahertz basis to the market value of ten megahertz of spectrum,” which Nextel would receive at 1900 MHz. *Public Safety Order* ¶315 (JA 212). The Commission rejected Nextel’s claim that the 800 MHz spectrum was worth more than the 1900 MHz spectrum. *Ibid.*

Finally, the Commission accounted for encumbrances on Nextel’s former 800 MHz spectrum by reducing the credit accorded to Nextel for giving up that spectrum. *Public Safety Order* ¶¶321, 322 (JA 214-215). As a result, even if MRA were correct that the Commission must increase the valuation of the new spectrum Nextel will receive to reflect the Verizon/NextWave transaction, *see Public Safety Reconsideration* ¶31 (chart) (JA 350), the Commission also would be required to increase the valuation of the spectrum Nextel is surrendering. Because the newly assigned spectrum is offset against the surrendered spectrum, increasing the value assigned to all the spectrum could result in Nextel’s receiving a larger credit for giving up spectrum rights, not the smaller one that MRA posits.

CONCLUSION

For the foregoing reasons, the petition for review of the Public Safety Order and the Public Safety Reconsideration order should be denied.

Respectfully submitted,

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October 6, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOBILE RELAY Associates et al.,)
)
 PETITIONERS,)
)
 V.)
)
 FEDERAL COMMUNICATIONS COMMISSION AND UNITED)
 STATES OF AMERICA,)
)
 RESPONDENTS.)
)
)
)

No. 04-1413

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Respondents” in the captioned case contains 13998 words.

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