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September 23, 2004

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

RE: In the Matter of Improving Public Safety Communications in the 800 MHz Band
WT Docket No. 02-55
Request for Clarification
***Ex Parte* Presentation**

Dear Chairman Powell:

AIRPEAK Communications, LLC ("AIRPEAK") and Airtel Wireless Services, LLC ("Airtel") (collectively "Companies"), by undersigned counsel, respectfully request clarification of the recent Report and Order in the above-entitled proceeding.[1] Specifically, and as detailed below, the Companies ask the Commission to clarify that as licensees of the non-Nextel ESMR systems addressed in paragraphs 159-164 of the Order, they may select on which channels they wish to operate within the newly designated ESMR segment of the 800 MHz band (817-824 MHz/862-869 MHz), provided the election: (i) does not increase the cost of retuning their systems; (ii) does not delay the retuning process; and (iii) does not adversely impact the ongoing operations of either Nextel Communications, Inc. ("Nextel") or public safety entities.

Throughout the course of this proceeding, the Companies have urged the Commission to recognize that there are licensees other than Nextel and Southern LINC that operate cellular-like systems on interleaved 800 MHz channels.[2] They have explained that each of the Companies

[1] Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order*, FCC 04-168 (rel. Aug. 6, 2004) ("Order").
[2] Airtel Wireless LLC, Nevada Wireless LLC, Ex Parte Presentation, WT Docket No. 02-55 (Nov. 7, 2003); Airtel Wireless LLC, Nevada Wireless LLC, Ex Parte Presentation, WT Docket No. 02-55 (Dec. 22, 2003); AirPeak Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (Feb. 12,

purchased and began deployment of Motorola's Harmony technology, an iDEN-derivative, before Nextel filed its initial "White Paper" that resulted in the instant proceeding.[3] AIRPEAK now operates in markets as diverse as Reno, NV; Anchorage, AK; Spokane, WA; and Coeur d'Alene, ID. Airtel is the only ESMR providing service in the State of Montana and already covers the major population centers and several of the connecting highways. As the FCC is aware, both Companies selected their infrastructure before there was any indication that the FCC might restrict the operation of cellular-like systems in certain portions of the 800 MHz band.

The markets in which the Companies operate are relatively small and in many instances primarily rural. To date, there has been limited public safety use of 800 MHz spectrum in these areas. The result is minimal overlap between the Companies' systems and those operated by public safety entities. That undoubtedly will change as the Companies expand their networks and public safety simultaneously increases its reliance on the 800 MHz band. Indeed, as described in previous filings, AIRPEAK already has encountered interference problems with governmental entities using 800 MHz spectrum in the Reno, NV market.[4] Those problems were resolved by AIRPEAK voluntarily restricting the use of its authorized channels; but, as the FCC well knows, that solution is impermanent and sometimes ineffective.[5] Over time, the Companies' networks will not be able to co-exist compatibly with public safety and other traditional incumbents.

The Commission's Order explicitly acknowledges systems such as those operated by the Companies, even identifying them by name,[6] and defines three specific relocation options from which they may select:

1) Relocate all of their systems in a market into the ESMR portion of the band where they will share spectrum with Nextel; or
2) Relocate their systems as close as possible to the ESMR portion of the band but remain in the non-cellular portion of the band, i.e., in order of preference (a) the 816-817 MHz/861-862 MHz Guard Band; (b) the 815-816/860-861

2004); AIRPEAK Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (Mar. 31, 2004); AIRPEAK Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (Apr. 5, 2004); AIRPEAK Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (Apr. 9, 2004); AIRPEAK Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (June 17, 2004); and AIRPEAK Communications, LLC and Airtel Wireless Services, LLC, Ex Parte Presentation, WT Docket No. 02-55 (June 23, 2004).

[3] See Promoting Public Safety Communications, Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio - Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs, Nextel Communications, Inc, submitted by Robert S. Foosaner, Nextel Communications, Inc., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (cover letter dated Nov. 12, 2001) ("White Paper").

[4] *See* n. 2 *supra*.

[5] Order at ¶¶ 61, 68.

[6] Order at ¶ 159.

MHz Expansion Band; and (c) channels below 815 MHz/860 MHz if necessary. These licensees will operate on a strict non-interference basis, subject to pre-coordination of any new or modified operations; or

3) Remain on their current channels in the non-cellular portion of the band on a strict non-interference basis, subject to pre-coordination of any new or modified operations.[7]

The Companies intend to select the first relocation option. In light of the public safety interference problem already experienced in Reno and the likelihood that such problems will increase as the Companies' networks are deployed more fully, the Commission's primary objective in this proceeding would be ill-served by any other choice on their part. Moreover, since relocation to the Guard Band or Expansion Band or continued operation on existing channels, options two and three, both would be on a strictly non-interference basis, these Companies actually have only a single viable option for preserving their investment and maintaining service to their subscribers.

Although it is beyond question that the Order permits the Companies to elect relocation to the ESMR band (817-824 MHz/862-869 MHz), it is silent as to which channels within the band may be used and who makes the selection. The Companies have considered this matter carefully and urge the Commission to clarify that relocation to the 821-824 MHz/866-869 MHz band segment, the spectrum currently allocated to NPSPAC, should be permitted if that election: (i) does not increase the cost of retuning their systems; (ii) does not delay the retuning process;

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[7] *Id.* At ¶ 162. Incredibly, Nextel has asked the FCC to "clarify" that the plain language of the Order cited above should be read to ignore the first option. Nextel has requested "clarification" that ESMR incumbents, other than Nextel and Southern LINC, that elect to be relocated out of the non-cellular 800 MHz channel block be retuned first to the 816-817/861-862 MHz block and to the very bottom of the 817/862 MHz band only if there is insufficient Guard Band capacity to accommodate them. *See* Nextel Communications, Inc., Ex Parte Presentation, WT Docket No. 02-55 (Sept 16, 2004) and Nextel Communications, Inc., Ex Parte Presentation, WT Docket No. 02-55 (Sept. 21, 2004). Ignoring for the moment the legal infirmities inherent in according the Companies different treatment even than Southern LINC, much less Nextel, Nextel has failed entirely to explain how the FCC can ignore the multiple, entirely unambiguous statements throughout the Order that confirm the availability of the first option. *See*, e.g., Order at ¶ 6 ("...in some areas Nextel may have to share spectrum in the 817-824 MHz/862-869 MHz band segment of the reconfigured band with other ESMR licensees. To the extent that such sharing may reduce the amount of 800 MHz spectrum available to Nextel, we believe we should provide the regulatory flexibility necessary for Nextel to make up the shortfall by using 900 MHz band channels.") Notably, the Order did not identify Southern LINC as the only ESMR licensee with which Nextel might have to share. Indeed, the language in footnote 59 makes clear that even more particularized arrangements would be necessary in markets in which both Nextel and Southern LINC operate. Paragraph 159 of the Order is even more explicit: "We recognize that there are CMRS licensees other than Nextel using iDEN or iDEN-like ESMR technology in the 800 MHz band.....Airtell (sic) Wireless, LLC, and Nevada Wireless, LLC [now AIRPEAK] operate an iDEN derivative, the Harmony system, on the interleaved channels....." The Order goes on to note the following in paragraph 161: "We find the Consensus Parties' proposal for relocation of Southern LINC's facilities too incomplete–to the extent it does not address other similarly situated licensees....." It simply is not credible that these numerous statements could be read out of the Commission's Order by issuing the "clarification" sought by Nextel.

and (iii) does not adversely impact the ongoing operations of either Nextel or public safety entities.

The Companies believe that relocation of their networks to contiguous channels in the uppermost part of the existing NPSPAC band segment would satisfy each of these criteria. Because of the more rural nature of the markets in which they operate, the NPSPAC allocation has been minimally licensed or deployed by public safety. The spectrum is largely, in some instances entirely, vacant. To the extent these channels are not being used, relocation of the Companies' networks could begin immediately once the rules are effective. This would ensure that the relocation costs would be contained since, in this instance, time is money: each day of delay in relocating the Companies' networks will mean greater relocation costs as more infrastructure and subscriber units will need to be modified. It those costs can be minimized, the savings would be passed on to the general public through Nextel's contribution to the Federal Treasury. Additionally, if AIRPEAK and Airtel were moved to the upper end of the NPSPAC band, there also should be some reduction in costs Nextel otherwise would incur in modifying its own network to accommodate the Companies' operations in the lower portion of the ESMR band, spectrum heavily used by Nextel. Finally, an accelerated relocation process will free up the Companies' channels in the non-ESMR band segment, first for use by Nextel on an interim basis as "green space" for retuning, and then by public safety entities, thereby facilitating the band reconfiguration process. Thus, moving to the upper, rather than lower, portion of the ESMR band would: (i) reduce relocation costs; (ii) accelerate the retuning process; and (iii) not impact the operations of either Nextel or public safety entities, since neither is using this spectrum at this time.

The public interest benefits of allowing the Companies to relocate to contiguous channels at the upper end of the NPSPAC spectrum are manifest. The Companies urge the Commission to clarify that ESMRs have the right to choose that spectrum when the criteria specified above are satisfied.

Very truly yours,

Elizabeth R. Sachs

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Airtel Wireless Services, LLC

cc: The Honorable Kathleen Q. Abernathy
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