



Transition
Administrator

The Official Reconfiguration Manager

VIA EMAIL AND FIRST-CLASS MAIL

July 25, 2005

Alan S. Tilles, Esq.
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Re: Guidance Regarding Transition Administrator's Review rights of Licensee Records as Provided for in Nextel/Licensee Reconfiguration Contracts

Dear Mr. Tilles:

On behalf of the 800 MHz Transition Administration, LLC ("TA"), this letter is in response to your request for guidance regarding the TA's request that Nextel/Licensee reconfiguration contracts include a provision regarding TA review and audit of licensee records after the closing of a transaction. In particular, that provision states:

Review Rights: In order to enable the Transition Administrator to comply with its audit obligations under the Order, Incumbent agrees to maintain records and other supporting evidence related to the costs that Incumbent has expended in connection with the Reconfiguration contemplated by this Agreement and that Nextel has paid or will pay to Incumbent pursuant to this Agreement. Incumbent agrees to maintain such records and make them reasonably available to the Transition Administrator for review or reproduction until eighteen (18) months after the date of Incumbent's executed Completion Certification required by this Agreement or for a longer period if Incumbent, for its own purposes, retains such records for a longer period of time. As used in this provision, "records" includes books, documents, accounting procedures and practices and other data regardless of type and regardless of whether such items are in written form, in the form of computer data or in any other form.

You had requested that the TA explain the authority, need and scope of this provision. Because the TA believes that this guidance will be of interest to all licensees affected by the 800 MHz rebanding effort, a copy of this letter will be filed in the Federal Communication Commission's ("FCC") public docket for reconfiguration, WT Docket No. 02-55 and will be posted on the TA's website (www.800ta.org).



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The TA's authority to require such a provision in the Nextel/Licensee contracts is found in the FCC's *Reconfiguration Orders*.¹ In the *Reconfiguration Orders*, the FCC identified several of the TA's specific duties, such as authorizing the payment of funds to licensees and vendors, establishing a relocation schedule for each NPSPAC region, and facilitating the resolution of disputes through mediation.² The FCC, however, made it clear that this description of the TA's duties was "illustrative, not exhaustive."³ The FCC has acknowledged that the "overriding obligation of the Transition Administrator is to facilitate timely band reconfiguration in a manner that is equitable to all concerned, including the United States government."⁴ Consequently, the FCC granted discretion to the TA to take such necessary and reasonable actions to ensure that this obligation is met.⁵ Accordingly, the TA's "portfolio includes taking 'the most effective actions, in the short-term and long-term, to promote robust and reliable public safety communications in the 800 MHz band to ensure the safety of life and property.'"⁶

After considering your comments, the TA has concluded that access to licensee records for some reasonable period of time following closing is necessary for the TA to fulfill its responsibilities and to facilitate timely band reconfiguration in a manner that is equitable to all

¹ See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 (2004) ("*Report and Order*"), as amended by *Erratum*, WT Docket No. 02-55 (rel. Sept. 10, 2004); *Second Erratum*, 19 FCC Rcd 19651 (2004); *Public Notice*, "Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding," 19 FCC Rcd 21492 (2004); *Third Erratum*, 19 FCC Rcd 21818 (2004); *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) ("*Supplemental Order*"); *Erratum*, WT Docket No. 02-55 (rel. Jan. 19, 2005) (collectively, "*Reconfiguration Orders*").

² See *Report and Order*, 19 FCC Rcd at 15072-77 ¶¶ 195-201.

³ *Supplemental Order*, 19 FCC Rcd at 25152 ¶ 71

⁴ *Id.* at 25152 ¶ 72.

⁵ *Id.*

⁶ *Id.* (quoting *Report & Order*, 19 FCC Rcd at 14975 ¶ 7).

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concerned. One of the TA's duties expressly identified by the FCC includes the audit of the amount expended after the conclusion of a system reconfiguration.⁷ In addition, the TA is required to provide annually to the FCC an audited statement of relocation funds expended to date.⁸ The TA has concluded that requiring review rights in the Nextel/Licensee contracts is necessary to carry out its duties.

These review rights clearly serve the public interest. To promote accountability over the reconfiguration process, the TA needs to be able to confirm the amounts and recipients of all funds expended by Nextel as proper and correct. This will deter potential fraud, waste and abuse. It will also promote fairness among all reconfiguring licensees and help to ensure that reconfiguration is conducted in the most cost efficient and timely manner possible. Without access to these records post-closing, it will be more difficult and time consuming for the TA to conduct its review of submitted reconfiguration contracts, audit the amounts expended for licensee reconfigurations or to address situations in which indications of fraud, waste or abuse are identified post-closing.

The external audit of 800 MHz expenditures will be performed on an annual calendar year basis. Therefore, the TA also requires post-closing access in order to provide a complete and accurate accounting of the reconfiguration expenditures to the 800 MHz external auditors and the FCC. Comparing and contrasting the same information from different sources is one of the most effective tools used by auditors. Although the TA and Nextel will have their own records for specific transactions, which will be provided to the external auditors, the auditors may also need the corresponding or additional licensee records to determine the complete and accurate "picture" of a transaction. For this reason, the TA expects that the external auditors may request these records in specific instances, and it is entirely appropriate that they should be given this access. The TA also expects the FCC may request to review these records.

The TA's decision to require that all Nextel/Licensee contracts provide a minimum 18-month post-closing review period is intended to provide a sufficient timeframe for the TA and the 800 MHz external auditors to conduct their review and audit rights of reconfiguration transactions. Although the TA does not contemplate that it or the external auditors will need to review these records for every transaction, this option must be preserved for those instances

⁷ *Report and Order*, 19 FCC Rcd at 15074 ¶ 198 (bullet #7).

⁸ *Id.* at 15073 ¶ 196 (bullet #3).



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where such a need is identified. The TA believes that this timeframe is a reasonable requirement that should not place an undue burden on any licensee. These records are of the type that would be maintained in the normal course of business. Requiring this provision in Nextel/Licensee contracts provides notice to all reconfiguring licensees that these records are to be maintained and made available to the TA. Please be advised that the TA reserves the right to request licensee records beyond 18 months post-closing in the event there are indications of potential fraud, waste or abuse regarding a transaction. The TA further advises that these contractual provisions do not replace, supersede or obviate in any manner any obligation of the licensees to maintain and provide access to its records imposed by any applicable law, regulation, rule or policy of governmental authorities of competent jurisdiction including, without limitation, the Federal Communications Commission.

Without exception, the TA will reject Nextel/licensee contracts that affirmatively state that the TA may not review these records as inconsistent with the TA's obligations as set forth in the FCC's *Reconfiguration Orders*. Contracts that are silent on the TA's review rights may, in the TA's discretion, be approved; however, such contracts may otherwise be subject to a greater level of TA scrutiny prior to closing or may be rejected for this reason. (Factors that the TA will consider in these instances would likely include the scope, size and complexity of the transaction in question.)

In sum, requiring that the Nextel/Licensee contracts include these review rights is consistent with the TA's authority as established in the FCC's *Reconfiguration Orders*. These rights will promote fairness, deter potential fraud, waste and abuse, and enable the TA to most effectively fulfill its responsibilities as the manager of the reconfiguration process.

Please let me know if you have any questions.

Sincerely,

Brett Haan

cc: Sandy Edwards, Nextel Communications, Inc.