

ORIGINAL
EX PARTE OR LATE FILED

DENNIS C. BROWN
ATTORNEY AT LAW
1730 K STREET, N.W., SUITE 304
WASHINGTON, D.C. 20006

02-55

PHONE 703/525-9630

FAX 703/526-0017
D.C.BROWN@ATT.NET

December 17, 2001

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*ex parte
w/ DocId 02-55*

RECEIVED
DEC 18 2001
FCC MAIL ROOM

Re: Stopping CMRS Interference to Adjacent Channel Licensees

Dear Mr. Sugrue:

I am writing you as Mayor of this here town of Wirelesville, hoping you can help me with this problem that I have with your city streets. See, I bought this great monster truck, but when I drive it on some of your streets, I sideswipe people in other lanes. This can't be my fault. The basic problem is that you made the streets too narrow for my monster truck.

Now I know that when I bought this truck from Motoroco, which also owns part of my little company, they told me that there were some streets that I might not be able to drive on. And I know that I'm what they call the "last man in". But that's not important right now. What's important is that everybody else has to get out of my way or Big Dawg (I call her Big Dawg because I AM the Big Dawg) is just going to run over even more people as time goes on.

That you made the streets too narrow for my new truck isn't the only problem. Another part of the problem is that the city's old fashioned fire trucks, some of which were also made by Motoroco, are so wide that they don't let me take up a part of their lane. Not my fault that the fire department chose such wide equipment before I bought Big Dawg.

I want you to know that I don't drive faster than the speed limit, so I say that I'm complying with the traffic laws. I guess that City Ordinances 90.173(b) and 90.403(e) don't apply to me, but if they do, I really do appreciate your not enforcing them against me thus far and I don't expect that you'll start now. While you think about my plan, I'm gonna keep on driving Big Dawg as I please.

So, Mayor, here's my plan in a nutshell. I'll pay part of the cost of paving some other streets for use by the police and fire departments. Maybe I'll help pay for some new police cars and fire equipment to drive on those streets. Of course, since none of this is my fault,

ORIGINAL
No. of Copies rec'd 1
A B C D E

I'm going to limit my giving to what I think is fair. By the way, for my courtesy, I'd also like the City to give me some of that underdeveloped land up there in the 2100 block of Broadway at no cost to me. If the TV stars who're squatting there give me any trouble, I may be back to ask for just a little more help.

Oh, yes, one more thing. I've been accused of sideswiping some private sector folks, too. As far as I'm concerned, those smallfoots can either leave town at their own expense or they can just get used to my sometimes trading paint with them because, with your kind help, there'll be nothing that they can do about it.

Well, Mayor, I do appreciate your reading this letter. You might also want to read my Brown Paper which I'm also sending you today. It's a little more formal-like.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dennis C. Brown". The signature is written in a cursive, flowing style with some loops and flourishes.

Dennis C. Brown

PROMOTING PUBLIC SAFETY COMMUNICATIONS

***STOPPING COMMERCIAL MOBILE RADIO SERVICE
INTERFERENCE TO ADJACENT CHANNEL LICENSEES***

Dennis C. Brown

**1730 K Street, Suite 304
Washington, DC 20006**

December 17, 2001

On November 21, 2001, Nextel Communications, Inc. (Nextel) submitted a White Paper in which it proposed a solution to interference caused by at least one Commercial Mobile Radio Service (CMRS) operator to Public Safety, Business, Industrial/Land Transportation and Specialized Mobile Radio System users of the 800 MHz band below 860 MHz. This Brown Paper provides a different view of the situation described by Nextel and suggests an alternative means for obtaining relief from the reported interference.

What's Wrong With Nextel's Plan

Nextel's White Paper is based on three major unreasonable assumptions:

- 1) The 1982 frequency allocation at 800 MHz is the cause of the problem.
- 2) Nextel is in compliance with the Commission's Rules.
- 3) Someone other than Nextel should contribute to the solution to the problem.

The Commission's frequency allocation Rules are not the cause of the problem. Nextel was fully aware of the structure of the frequency allocation below 860 MHz when it selected frequencies which were not contiguous for operation of its iDEN® digital system. Nextel, and its part owner, Motorola Communications, Inc., knew or should have known that Nextel's digital system was not suitable for use on frequencies where there was any adjacent channel authorized to a different person. The Commission's actions leading to frequency relocation in the Upper 200 SMR channels leave no room for doubt that Nextel did know, because Nextel so informed the Commission as early as 1994, see, the Commission's Third Report and Order concerning the 800 MHz band wherein the Commission stated that Nextel had argued that contiguous spectrum "enables systems to use spread spectrum and other broadband

technologies that are available to cellular and PCS but unavailable to systems operating on non-contiguous channels,” 9 FCC Rcd 7988, 8046 (1994).

In its Public Notice, Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service Frequencies in the Lower 80 Channels, the Commission warned Nextel that

the FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding, as they would with any new business venture,

15 FCC Rcd 12510 (WTB 2000). Because Nextel was aware that the Lower 80, non-contiguous channels were not suitable for use for its digital system and because Nextel was expressly informed of the applicable regulations before purchasing any spectrum in the Lower 80 channels, the Commission is under no obligation to do anything to help relieve Nextel of its sole burden to avoid causing harmful interference to adjacent channel licensees.

Knowing that it could not successfully use a broadband technology on non-contiguous spectrum, Nextel chose to operate its iDEN® system on non-contiguous frequencies below 860 MHz. Before anything else, the Commission should take effective action to enforce its Rules and stop Nextel from interfering with adjacent channel licensees.

Nextel should not be permitted to blame the victim by complaining about the bandwidth of adjacent channel receivers. Motorola is a major vendor of radio equipment to

Public Safety licensees. If anyone, as a part owner of Nextel and Nextel's principal equipment vendor, Motorola was in a position to advise Nextel of any known vulnerability of Public Safety radio receivers to adjacent channel interference and to advise Nextel concerning the potential for an iDEN® signal to interfere with those existing receivers.

It is black letter law that "a tortfeasor takes his victim as he finds him," and it is no defense to a complaint of personal injury that the victim was too fragile. The Commission should find that Nextel was fully aware of the potential for its digital system to interfere with adjacent channel licensees and should require Nextel to bear full responsibility for any interference which it may cause to adjacent channel licensees.

A law enforcement agency — and the Commission is a law enforcement agency — cannot negotiate while the knife remains at the throat of the hostage. Before anything else, the Commission should stop the harmful interference which Nextel admitted that it is causing.

Section 90.173(b) of the Commission's Rules provides that

all applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized frequencies. Licensees of stations suffering or causing interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned. Further use of any frequency at a given geographical location may be denied when, in the judgment of the Commission, its use at that location is not in the public interest; the use of any frequency may be restricted as to specified geographical areas, maximum power, or such other operating conditions, contained in this part or in the station authorization,

47 C.F.R. §90.173(b).

Section 90.403(e) of the Commission's Rules provides that

licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference,

47 C.F.R. §90.403(e).

Nextel cannot both be causing harmful interference and be in compliance with Rule Sections 90.173(b) and 90.403(e). The Commission has recently shown that it can enforce Rules 90.173 and 90.403, *see, e.g.,* Lund Partnership, Inc., WPMZ742 and Fisher Wireless Services, Inc, WPLZ806, reported in Public Notice DA 01-2818, released December 4, 2001. Before considering Nextel's proposal in any way, the Commission should accept Nextel's admission that it is causing harmful interference to adjacent channel licensees and take the enforcement steps necessary to stop all interference to adjacent channel licensees caused by Nextel. The Commission should use its full range of enforcement powers, from imposing limitations on Nextel operation to denying further Nextel operation to conditioning, cancelling or revoking offending Nextel licenses to stop the interference. Only when Nextel is no longer imposing on its spectrum neighbors can the Commission reasonably consider any proposal for changes to its current Rules.

For more than 50 years, the Commission's policy has been to require the newcomer to a frequency to bear the responsibility for remedying any interference which it may cause, *see, e.g.,* Midnight Sun Broadcasting Co., 11 FCC 1119 (1947). This policy is more commonly known as the "last man in" policy. Where the date of commencement of Nextel's operation of a digital system is or was subsequent to the date of authorization of adjacent channel station,

the policy should be applied to require Nextel, alone, to remedy the problem which Nextel has caused. A simple, related test is the “but for” test. But for Nextel’s operation, would the interference exist? If the answer is that but for Nextel’s operation, the interference would not exist, then the Commission should have no doubt as who is responsible for the interference.

In its White Paper, Nextel proposed to pay *some* of the cost of relocating Public Safety licensees to other spectrum, but placed a financial cap on its willingness. In Broadcast Corporation of Georgia (WVEU-TV), 96 FCC 2d 901 (1984), the Commission refused to allow the licensee of the interfering station to limit its financial liability to adjacent channel licensees. Nextel knew or should have known of the WVEU-TV precedent before it commenced digital operation on channels below the Upper 200. The Commission should follow the WVEU-TV precedent and not allow Nextel to limit in any way its liability to remedy all interference which it may cause.

Nextel not only proposed not to remedy any interference which it is causing to adjacent channel Business and Industrial/Land Transportation and SMR licensees, but Nextel would, instead, remedy Nextel’s problem by having these licensees either pay their own costs of moving elsewhere or be compelled to accept any interference which they receive. In short, Nextel would have the law enforcement agency shoot the victim to stop her from screaming. It is one thing to blame the Commission’s Rules for Nextel’s problem, another thing to blame victim Public Safety licensees as complicit in the problem by their purchase of allegedly inadequate equipment, but yet another level of audacity to propose to disadvantage entirely

innocent B/I/LT and directly competing SMR adjacent channel licensees to solve a problem solely of Nextel's making. This the Commission should totally reject. All incumbent licensees are entitled to receive full relief from the problem caused by Nextel.

While there may be other digital CMRS operators which have caused or are causing interference to adjacent channel licensees, Nextel has admitted that Nextel is causing interference and the Commission should act promptly to remove Nextel as a cause. Once Nextel is removed as a cause of interference to adjacent channel licensees, then the Commission will be in a position to move forward to evaluate easily the interference, if any, caused by other licensees and to deal with those situations accordingly.

A Better Plan

The Commission can solve the problem caused by Nextel much more expeditiously, with far less Commission involvement, and with no uncompensated disruption to incumbent licensees by adopting a simpler plan. That simpler plan follows.

The Commission should first enforce Rule Sections 90.173(b) and 90.403(e) to stop the interference caused by Nextel. Concurrently, to avoid allowing the problem to become worse and to avoid profiteering, the Commission should freeze all further licensing of site specific stations between 851 and 860 MHz and in the 900 MHz band, except for modifications which do not expand existing contours. No additions to authorized site specific facilities should be permitted.

The Commission should amend its rules to allow the conversion of all existing 800 MHz band and 900 MHz band licenses, including Public Safety licenses, without regard to the date of initial authorization, to CMRS use, at the option of the licensee. Because this would merely relieve regulatory burdens, no rule making proceeding should be required. This will allow Nextel to enter the marketplace and purchase, in freely negotiated transactions, the spectrum which it requires to solve the interference problem which Nextel has created.

An incumbent might choose to exchange spectrum for which it holds licenses for some quantity of spectrum for which Nextel holds licenses. Nextel might purchase an adjacent channel license outright and the incumbent could choose other means of communications. Nextel might offer to purchase the license of a television station which is limiting the use of the 700 MHz band and pay the cost of relocating an incumbent to the 700 MHz band. Nextel might offer to acquire an incumbent's license and to provide service to that person on Nextel's system for an agreed period of time. Nextel might offer to pay a certain sum of money to an incumbent in exchange for the incumbent's modifying its license to secondary status. Nextel should be able to devise a wide variety of other offers. The Commission need only assume that such transactions are in the public interest; it need not do anything more than allow Nextel to solve, in the marketplace, the problem which Nextel has created for its spectrum neighbors.

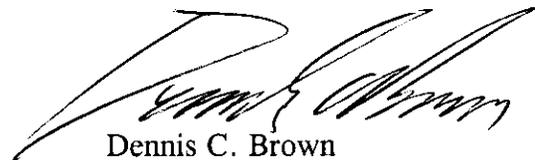
The Commission should reallocate all Public Safety, Business, and Industrial/Land Transportation spectrum from 854.7625 MHz to 859.9875 MHz and all spectrum at 900 MHz

to CMRS use.¹ As soon as possible, the Commission should grant CMRS geographic licenses for this spectrum by competitive bidding. The geographic area licenses should be subject to the customary provisions for the protection of incumbent licensees.

Nextel proposed that it be given spectrum in the 2.1 GHz band to assist in solving its interference problem. The Commission should find it more in the public interest to expedite the auction of that spectrum to allow Nextel to bid for it at auction promptly so that Nextel can use that spectrum as it may to aid it its solving the problem which Nextel has created.

Nextel alone made this problem. The Commission should first stop the interference. Then, it should step back to allow Nextel to use Nextel resources to avoid causing interference to incumbents in the future.

Respectfully submitted,



Dennis C. Brown
1730 K Street, NW, Suite 304
Washington, DC 20006
703/525-9630

Dated: December 17, 2001

¹ After two decades of availability, where the currently allocated 800 MHz and 900 MHz band Public Safety spectrum has not been fully assigned, it is reasonable for the Commission to conclude that the spectrum is not immediately needed and other spectrum, such as the 700 MHz band, can meet future needs. Accordingly, the Commission can reasonably conclude that Public Safety will not be impaired by reallocating the spectrum to CMRS use.