

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels)	WT Docket No. 02-55

**COMMENTS OF
UTSTARCOM, INC.**

UTStarcom, Inc. (“UTStarcom”), by its attorneys, hereby submits the following comments with respect to the Notice of Proposal Rulemaking (the “Notice”) in the above-referenced proceeding. UTStarcom’s comments are limited to the question of whether the Commission should assign a 10 MHz segment of the 1910-1930 MHz unlicensed PCS band to Nextel for, in essence, a trade-in by Nextel of certain area licensed frequencies in the 700, 800, and 900 MHz bands.

UTStarcom opposes including the 1910-1920 MHz band in the Nextel “swap.” As explained in UTStarcom’s Petition for Rulemaking (RM-10024)¹ and in its comments in the “3G” (ET Docket Nos. 00-258 & 95-18; IB Docket No. 99-81)² proceeding, the 1910-1920 MHz band is necessary for the operation of low-power community wireless networks in the band, which is the highest and best use of these frequencies. Furthermore, as demonstrated below, neither the Communications Act nor case precedent permits newly allocated frequencies to be assigned to Nextel without regard to Ashbacker requirements.

¹ Petition for Rulemaking of UTStarcom, RM-10024, (“UTS Petition”) Nov. 6, 2000.

² Comments of UTStarcom, Oct. 22, 2001.

I. THE 1910-1920 MHZ BAND SHOULD BE USED FOR LOW-POWER COMMUNITY WIRELESS NETWORKS.

The 1910-1920 MHz band is not well suited to applications other than the relatively low-power, limited-area, limited-mobility services for which it originally was allocated. As stated in the UTS Petition for Rulemaking, consistent with these characteristics of the band, the best use of the present UPCS frequencies is to serve the unmet needs for community wireless networks in rural areas and for underserved communities.

One of the most significant reasons that the need for such service remains unmet is the consolidation of the commercial mobile radio services wireless industry. This has left little spectrum available for small, local operators to provide fixed wireless local loop or limited mobility services. As a result, small towns across the country, unless they had the good fortune to be located on or near an interstate highway that is served by one of the major carriers, are left with no digital wireless service at all.

By making only modest changes in the rules and expanding the nature of the applications permitted in the UPCS band, the Commission can not only fulfill the promise of the originally contemplated uses of the UPCS band but also foster service offerings that will respond to unmet needs for community wireless services that can be provided rapidly and in a cost-effective manner in no other part of the spectrum. In doing so, the Commission will have selected the highest and best use of this band.

II. THE "TRADE" OF FREQUENCIES PROPOSED BY NEXTEL IS NOT PERMITTED UNDER THE COMMUNICATIONS ACT.

If the Commission determines to reallocate the 1910-1930 MHz band for licensed wireless PCS services, then under the Ashbacker doctrine³ and Section 309(j) of the Communications Act, the reallocated frequencies must be made available for competing applications.

³ Ashbacker v. U.S., 326 U.S. 327 (1945) ("Ashbacker").

While certain exceptions have been developed to the basic Ashbacker doctrine to allow licenses to “swap” frequency assignments,⁴ the basis for these channel swap decisions is that the relevant frequency rights are already held by individual licensees and, therefore, simply allowing such licensees voluntarily to exchange frequencies should not “open” up either frequency to general application.⁵ In essence, because only two licensees are involved, a public process for assigning frequencies among all interested parties is not required. As explained by the D.C. Circuit, the swap policy: “allows the Commission “to implement the will of private parties with minimal imposition of FCC requirements. Private parties, rather than the FCC, initiate the exchange.”⁶ By contrast, no such swap of already licensed frequencies is the 2GHz band involved here.

The cases cited by Nextel involving permissible license modifications do not support the notion that Nextel can be permitted to trade frequencies it has acquired from other bands, in some areas, and under separate licensing conditions for a new nationwide allocation of frequencies in another band.⁷ While, in each of the decisions cited, the Commission adopted rules to make it easier for FM radio licensees to upgrade their licenses on co-or adjacent channels, in neither decision did the Commission allow licensees to take new frequencies that could have been licensed to third parties without giving third parties a chance to apply for those frequencies. Rather, to the extent that the rules adopted might preclude certain other applications, this was solely a function of the fact that new certain facilities could not be licensed without interfering with the existing licensee’s operations. Even in these cases, moreover, the Commission did not preclude competing applications. To the contrary, the Commission stated.

⁴ See Amendments to the Television Table of Assignments, 59 Rad. Reg. 2d (P&F) 1455 (1986).

⁵ *Id.* ¶¶ 28-29 (the Commission analogized the situation to that of an application for assignment of license, where third party applications for the same facilities are not considered).

⁶ Rainbow Broadcasting Company, 949 F.2d 405, 408 (1991).

⁷ See Nextel’s White Paper, “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,” Nov. 21, 2001 (cited in Notice at p.13 n. 38), at 53 n. 82.

Pursuant to existing procedures, the Commission will consider any technically feasible counterproposal filed in response to a proposed allotment. Counterproposals are an inherent part of the rule making process, and the ... determinations regarding the best uses of the spectrum.⁸

The Commission's decision to relocate DEMS licensees from the 18 to the 24 GHz band is also inapposite. There, the Commission acted under the military affairs exception to the APA to relocate licensees whose operations would interfere with the operations of a military satellite.⁹ Even then, while modifying licensees to specify new frequencies, the Commission emphasized that "[n]one of these revisions is intended otherwise to alter, modify, or change in any material way the authorizations provided to incumbent DEMS licensees under the terms of their current licenses."¹⁰

The cited cases and other cases involving limited exceptions to the Ashbacker doctrine do not at all suggest that a licensee can put together a package of bits and pieces of unwanted or less useful licenses and, in essence, trade them in for a nationwide license in another band that it could then operate without the technical or licensing constraints to which it is currently subject.

In this regard, putting aside the public safety interference issues that Nextel points to in the 800 MHz band, its newly acquired 700 MHz licenses are subject to operational conditions and interference conditions that substantially reduce their utility. Indeed, Nextel has informed its shareholders that these conditions "will preclude their use for CMRS"¹¹ Why, given these constraints, Nextel elected to acquire licenses for

⁸ See Modification of FM Broadcast Licenses to Higher Class Co-channel or Adjacent, 60 Rad. Reg. 2d (P&F) 114, ¶ 19 (1986).

⁹ Amendment of the Commission's Rules to Relocate the Digital Electronic message Service from the 18 GHz Band to the 24 GHz Band, 13 FCC Rcd 15147, 15156-57 (1998).

¹⁰ Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service, 12 FCC Rcd 3471, 3477 (1997); See also Amendment of Section 73.606(b), Table of Allotments Television Broadcast Stations, 14 FCC Rcd 11856, 11861 (1999), "No technical changes are involved in this exchange of channel reservation. This modification merely changes the reservation for noncommercial educational use from one channel to another").

¹¹ See SEC form 10-K, Annual Report for the Fiscal Year Ended Dec. 31, 2001 ("Nextel 10-K") at 21.

these frequencies is unclear, but it is absolutely clear that such licenses were not auctioned for their trade-in value for other vacant spectrum.

III. CONCLUSION

As demonstrated by the foregoing, Nextel's premise in proposing a spectrum "trade" is false. There is no legal basis that would permit adoption of the proposal. Accordingly, the Commission should turn aside this proposal and, with respect to the 1910-1920 MHz band, move promptly to adopt rules that permit the rapid deployment of a variety of low-cost communications services to all communities currently lacking such services, as UTStarcom has proposed.

Respectfully submitted,

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