

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

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

To: The Commission

FURTHER COMMENTS OF SOUTHERN LINC

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EXECUTIVE SUMMARY

In these Further Comments, Southern LINC sets forth its many concerns with the so-called Consensus Plan and argues that the Federal Communications Commission must unequivocally reject it. While the Commission's intentions may be good, never has it given such serious attention to so draconian a proposal. In simple terms, Nextel Communications is trying to utilize a problem that it created to award itself billions of dollars of spectrum at essentially no cost, while simultaneously jeopardizing other users' systems and putting competitors out of business. Southern, on the other hand, is taking different approach to this matter. Southern recognizes the need to resolve public safety interference and has proposed a responsible plan to immediately address current problems and implement a real long-term solution to this problem. That proposal, a portion of which was also advanced by several other parties, is described in detail in Southern's Comments and should be the focus of the Commission's attention.

The Consensus Plan does not represent a consensus of the licensees that occupy the 800 MHz band, and, in fact, is extraordinarily unfair to many licensees who are operating systems in this band. Licensees in nearly every type of service in the 800 MHz band have either opposed the Consensus Plan or refused to endorse it. Furthermore, Nextel, through the "Consensus Plan," attempts to hold the Commission hostage by only agreeing to pay for relocation of public safety entities *if* the Commission agrees to all of its terms.

The Consensus Plan suffers from numerous flaws that make it tremendously disruptive, highly disadvantageous to many licensees, and, ultimately, largely ineffective in mitigating public safety interference. The only party clearly to benefit from the Consensus Plan is Nextel, which would receive nationwide, contiguous spectrum. From Southern's perspective, the Consensus Plan jeopardizes the existence of its system because, among other reasons, it would

ban cellularized systems from below 816/861 MHz, which is where Southern currently operates a cellularized system and where there is a strong likelihood it would be required to stay.

Southern's specific concerns with the Consensus Plan include:

- **The Consensus Plan would not substantially mitigate public safety interference.** The Consensus Plan apparently fails to account for fifth order intermodulation products, only "promises" to reduce third order intermodulation interference for *NPSPAC* licensees, and relies on "complementary measures" that will be very difficult for public safety licensees to implement.
- **The Consensus Plan would treat non-Nextel licensees in the General Category band inequitably.** Even though non-Nextel licensees in the General Category band are not causing interference public safety, they would be forced to relocate with no reimbursement. Auction winners in the General Category band would be forced off their frequencies and given less valuable spectrum in return.
- **The Consensus Plan lacks necessary funding mechanisms.** Nextel's proposed \$500 million contribution to help fund the relocation of public safety licensees comes with numerous contingencies which may not be met and, also, comes with various cancellation provisions that would allow Nextel to back out before the full amount is paid. Additionally, the Consensus Plan lacks provisions for reimbursing the relocation costs of B/ILT and SMR licensees.
- **The Consensus Plan would ban cellularized systems below 816/861 MHz.** The Consensus Plan contemplates a ban on cellularized systems below 816/861 MHz, which is where Southern currently operates a cellularized system and where there is a strong likelihood it would be required to stay. Moreover, Nextel's competitors that have not yet implemented cellularized systems would be prohibited from doing so to enhance their competitiveness, and public safety and B/ILT licensees would be blocked from realizing the benefits of advanced systems.
- **The spectrum being relinquished by Nextel would not be adequate to meet the requirements of the Consensus Plan.** The Consensus Plan depends on dislocated licensees relocating to spectrum below 816/861 MHz vacated by Nextel. However, much of Nextel's spectrum is encumbered by site-by-site licensees, and, at least in certain areas of the Southeast, Nextel does not have enough spectrum to adequately relocate Southern's channels.
- **The Consensus Plan does not provide for a predictable and orderly relocation for B/ILT and SMR licensees.** Pursuant to the Consensus Plan, Nextel, the Land Mobile Communications Council, and the Public Safety Regional Planning Committees would develop a bandplan for B/ILT and SMR licensees. However, all of these candidates have conflicts of interest and cannot be given the role of overseeing this process.

- **The Consensus Plan contemplates giving Nextel 10 MHz of nationwide, contiguous spectrum at 1.9 GHz.** Giving Nextel 10 MHz of 1.9 GHz spectrum is not necessary to resolve public safety interference and, additionally, would be contrary to the policies underlying the Ashbacker Doctrine and Section 309(j).

As Southern has made clear in its Comments and Reply Comments in this proceeding, the Commission should not adopt any 800 MHz band realignment plan. Rather, it should adopt the proposal outlined in Southern's Comments (which was supported by numerous commenters), which would alleviate interference in the short term through a market-based plan that utilizes technical solutions and limited license swaps, and eliminate interference in the long term through relocating all 800 MHz public safety licensees to the 700 MHz band.

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FURTHER COMMENTS OF SOUTHERN LINC

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission, Southern Communications Services, Inc., d/b/a Southern LINC ("Southern") respectfully submits these Further Comments in response to the *Public Notice* released September 6, 2002 in the above-captioned matter.¹

I. INTRODUCTION

In the *Public Notice*, the Commission seeks comment on the "Consensus Plan" filed in this rulemaking by Nextel Communications, the International Telecommunications Association ("ITA"), the Association of Public-Safety Communications Officials-International ("APCO"), and fourteen other parties.² The *Public Notice* was subsequently amended on September 17, 2002 by another *Public Notice* in which the Commission stated that it is additionally seeking

¹ Wireless Telecommunications Bureau Seeks Comment On "Consensus Plan" Filed In The 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, DA 02-2202 (Rel. Sept. 6, 2002). Unless otherwise indicated, all comments, reply comments, and other filings referenced herein were filed in WT Docket No. 02-55.

² The Consensus Plan as referenced herein is contained in the Reply Comments of the International Telecommunications Association.

comment on any other proposals "advanced or referenced" in the reply comments.³ However, despite the fact that it substantially expanded the scope of requested comments, the Commission did not extend the due date of September 23. Southern does not believe the Commission has provided adequate time to fully respond to all the proposals "advanced or referenced" in the reply comments, and thus does not attempt to do so here. Rather, it focuses these Further Comments on the Consensus Plan.⁴

Southern believes the so-called Consensus Plan is not the product of an open dialogue of all affected parties, but, rather, a deal cut by Nextel and several organizations to further their own agendas at the expense of the general good of licensees that occupy the 800 MHz band. It is clear that the Consensus Plan is highly favorable to Nextel, tremendously disruptive, disadvantageous for other licensees, and of questionable merit in addressing interference issues.

Southern's interest in having the Commission understand the truth about the Consensus Plan stems from the fact that it jeopardizes the existence of its system and many others.⁵ Despite the fact that Southern is the second largest individual licensee in the 800 MHz band and that it serves over 250,000 customers - including police departments, emergency services, municipal and state governments, school districts, and some of the country's largest utilities - its concerns have been given little more than lip service by the groups that formulated the plan. That is

³ Wireless Telecommunications Bureau Clarifies Scope Of Comments Sought In 800 MHz Public Safety Proceeding, WT Docket No. 02-55, *Public Notice*, DA 02-2306 (Rel. Sept. 17, 2002).

⁴ Southern recommends that the Commission issue a Further Notice of Proposed Rulemaking to give parties adequate opportunity to comment on all outstanding plans and related issues.

⁵ The Consensus Plan would ban cellularized systems from below 816/861 MHz, which is where Southern currently operates a cellularized system and where there is a strong likelihood that the Consensus Plan would require it to stay. The Consensus Plan would also force Southern to vacate its 800 MHz General Category channels - many of which it paid over \$50 million for at auction - at its own expense and with no real assurance of adequate relocation spectrum elsewhere in the band.

despite the fact that Southern communicated its concerns to the principal signatories of the Consensus Plan prior to their filing it with the Commission. It would be arbitrary for the Commission to simply "rubber-stamp" a proposal of this magnitude.

It is up to the Commission to objectively analyze the Consensus Plan and make a decision that is in the best interest of *all* licensees in the 800 MHz band. Many parties will be adversely affected by the "Consensus Plan." Even the intended beneficiaries of the Consensus Plan, public safety entities, may not realize any real improvements. Southern is confident that the end result of a truly fair, objective review will be rejection of the Consensus Plan.

II. THE CONSENSUS PLAN DOES NOT REPRESENT A TRUE CONSENSUS

A. Major Groups Of Interested Licensees, As Well As Many Individual Licensees, Do Not Support The Consensus Plan

The Consensus Plan is misnamed. The term "consensus" has been ascribed meanings such as "a general agreement" and "the judgment arrived at by most of those concerned."⁶ As applied to the licensees in the 800 MHz band, the Consensus Plan meets neither of those definitions, as various licensees and related entities in nearly every type of service have either opposed it or refused to endorse it.

Public Safety Community. APCO's support for the Consensus Plan is by no means representative of the entire public safety community. Some of the country's largest public safety entities have expressly reserved judgment on whether to support the Consensus Plan. This includes the City of New York, the District of Columbia, The City of Philadelphia, the City of

⁶ Merriam-Webster's Collegiate Dictionary, online version, located at <http://www.m-w.com/cgi-bin/dictionary>.

Phoenix, the City of San Diego, and the New Jersey Transit Authority.⁷ Among other reasons for reserving judgment, public safety entities, as well as critical infrastructure entities, wish to preserve the option of implementing cellularized or otherwise advanced systems so as to obtain better coverage, in-building penetration, and spectral efficiency.⁸ The Consensus Plan would generally not allow them to do that.

Critical Infrastructure Entities. Most utilities do not support the Consensus Plan or are opposed to certain of its fundamental components. This includes, among others, the United Telecom Council ("UTC") and some of the nation's largest utilities: Exelon Corporation, SCANA Corporation, Alliant Energy, Cinergy Corporation, Ameren Corporation, and TXU Energy.⁹

SMR Licensees. Although the American Mobile Telecommunications Association ("AMTA") is a signatory to the Consensus Plan, numerous SMR licensees oppose or do not

⁷ Letter from Agostino Cangemi of City of New York to FCC dated August 7, 2002; Reply Comments of District of Columbia at 7; Reply Comments of San Diego at 2-7(not accepting the Consensus Plan in its present form); Reply Comments of New Jersey Transit Authority at 2; Reply Comments of Public Safety Improvement Coalition at 5-6 (the PSIC is comprised of the Cities of Cincinnati, DC, Philadelphia, Phoenix, San Diego, Scottsdale, and Tucson; the Counties of Anne Arundel, Fauquier, Hamilton, Osceola, and San Diego; and the Greater (Denver) Metro Telecommunications Consortium).

Other public safety entities that expressly oppose or do not endorse the Consensus Plan include the County of Maui, County of Kauai Police Department, the Port of Seattle, and the City of Fort Lauderdale. Reply Comments to the Proposed "Consensus Plan" of County of Maui at 1 (supported by County of Kauai Police Department); Comments of Port of Seattle at 1; Reply Comments of City of Fort Lauderdale at 2.

⁸ See Reply Comments of Public Safety Improvement Coalition at 6; Reply Comments of City of San Diego at 3-4; Reply Comments of United Telecom Council at 15-16; Reply Comments of Cinergy at 65-66; Reply Comments of Delmarva Power & Light Company and Atlantic City Electric Company at 45-46.

⁹ Reply Comments of United Telecom Council at 11-12; Reply Comments of Exelon Corporation at 2; Reply Comments of SCANA Corporation at 18-28; Reply Comments of Alliant Energy at 2; Reply Comments of Cinergy Corporation at 6-9; Reply Comments of Ameren Corporation at 5; Reply Comments of Carolina Power and Light Company and TXU Business Services at 3-9.

endorse it, including Motient Communications, Mobile Relay Associates, Nevada Wireless, and Preferred Communications Systems.¹⁰ In fact, the Consensus Plan does not enjoy the support of any 800 MHz General Category auction winners except Nextel. Also, AMTA indicated in its Reply Comments that the Consensus Plan would need to be modified to preserve the rights of certain of its members.¹¹ UTC also indicated that sentiment, and it is vaguely hinted at in the Consensus Plan itself.¹²

Large Wireless Carriers. Large wireless carriers are opposed to the type of 800 MHz realignment and spectrum gift to Nextel that the Consensus Plan would entail. Opposition has been strongly voiced by, among others, CTIA, ALLTel Communications, AT&T Wireless, Cingular Wireless, Verizon Wireless, U.S. Cellular, First Cellular, and Southern.¹³

National Association of Manufacturers. The National Association of Manufacturers, representing 14,000 members and 350 member associations serving manufacturers and employees, has expressly stated that it does not endorse the Consensus Plan.¹⁴

Motorola. Motorola, the largest manufacturer of 800 MHz equipment, has filed its own compromise proposal for resolving public safety interference rather than support the Consensus Plan.¹⁵

¹⁰ Reply Comments of Motient Communications at 1; Reply Comments of Mobile Reply Associates at 3-9; Reply Comments of Nevada Wireless at 1; Reply Comments of Preferred Communications Systems at 4-8.

¹¹ Reply Comments of AMTA at 6-9.

¹² Reply Comments of UTC at 15-16; Consensus Plan at 11 n.42. UTC states that the Consensus Plan "appears to discriminate against Southern's existing CMRS system. . . . under the [Consensus Plan], it would not gain access to any designated 'cellularized' spectrum above 861 MHz" even though it operates a cellularized system.

¹³ Joint Reply Comments of ALLTel Communications, AT&T Wireless, Cingular Wireless, U.S. Cellular, First Cellular, and Southern LINC at 10-11; Comments of Verizon Wireless at 13-15. Southern is informed that CTIA will file comments opposing the Consensus Plan.

¹⁴ Reply Comment of NAM/MRFAC at 4-7.

III. THE CONSENSUS PLAN WOULD NOT SUBSTANTIALLY MITIGATE PUBLIC SAFETY INTERFERENCE

A. The Consensus Plan Fails To Take Into Account The Interference Potential Of Fifth Order Intermodulation Products

In extolling the intermodulation interference mitigation benefits of the Consensus Plan, limited as they are, its signatories rely on mitigation percentages generated by Nextel.¹⁶ However, those percentages appear to be based solely on intermodulation interference caused by third order intermodulation products.¹⁷ Nextel states that third order products are "almost always" the only products a licensee has to worry about.¹⁸ That assertion, however, is contradicted by the record in this proceeding. Motorola states in its Comments that fifth order intermodulation is "the more common form of IM interference received by public safety and industrial systems in the 800 MHz band."¹⁹

Fifth order intermodulation products extend further into the band (from the signals of the generating licensee or licensees) than third order products. With Nextel at 861-869 MHz, fifth order products would extend down the band to 845 MHz, which would encompass the relocated NPSPAC licensees at 851-854 MHz that Nextel claims would be highly protected. Thus, by apparently failing to take fifth order products into account, the signatories to the Consensus Plan overstate the degree to which it will reduce interference at 851-854 MHz.

¹⁵ Reply Comments of Motorola at 6.

¹⁶ Consensus Plan at 21.

¹⁷ Reply Comments of Nextel at 20-23.

¹⁸ Reply Comments of Nextel at Cascioli Technical Statement p. 6.

¹⁹ Comments of Motorola at 18.

B. Even If Fifth Order Intermodulation Is Excluded From Consideration, The Consensus Plan Would, At Best, Provide A Reduction In Interference Only For Some NPSPAC Licensees

The Consensus Plan would move public safety licensees in the current NPSPAC band to 806-809/851-854 MHz.²⁰ That move would arguably reduce the various forms of interference to some of those licensees (although not to the degree claimed by Nextel). However, there is no evidence that licensees above 809/854 MHz, including public safety entities, would experience a reduction in exposure to intermodulation interference from Nextel. That lack of evidence is highlighted by the fact that Nextel provides seemingly "precise" percentages of third order intermodulation interference reductions *only* for systems operating at 806-809/851-854 MHz.²¹ Tellingly, it provides no such predictions for the 809-816/854-861 MHz portion of the band.

Additionally, the Consensus Plan's relocation scheme places more importance on NPSPAC public safety licensees than on non-NPSPAC public safety licensees. To make room at 806-809/851-854 MHz for incoming NPSPAC licensees, the Consensus Plan would actually move non-NPSPAC public safety licensees *out* of 806-809/851-854 MHz, where they would be safer from intermodulation interference according to the Consensus Plan, and *into* the 809-814/854-859 MHz portion of the band, where there would be no assurance of protection from interference.²² Thus, the Consensus Plan sacrifices one type of public safety licensee to help another.

²⁰ Consensus Plan at 14.

²¹ Reply Comments of Nextel at 20-23.

²² Consensus Plan at 12.

C. The "Complementary Measures" Discussed In The Consensus Plan As Means Of Achieving Further Interference Reduction May Adversely Affect Public Safety Radio Systems

The Consensus Plan concedes that interference reduction beyond what band realignment can provide will be desirable, and to that end suggests that realignment would enable public safety licensees to utilize radios with narrower bandpass filters.²³ Such filters could mitigate interference by reducing the different frequencies to which public safety radios are exposed.²⁴

The first problem with a narrower bandpass filter is that it would result in additional attenuation for the radio, thus decreasing its coverage area. Few, if any, public safety licensees can afford to decrease their coverage area. An additional problem is that the cost of modifying public safety radios to operate with a narrower bandpass, or of purchasing new radios, could be prohibitive for most public safety entities. However, it appears that they would be expected to bear that cost on their own, as the Consensus Plan states that "equipment or system enhancements are at the expense of the public safety entity."²⁵ Without assurance that the "complementary measures" would be in place, the improvement in public safety interference mitigation may be modest, albeit purchased at a very high cost. The Commission cannot justify the disruption the Consensus Plan would entail when more reasonable alternatives for interference mitigation have been proposed by numerous parties.

²³ Consensus Plan at 22.

²⁴ Consensus Plan at 22.

²⁵ Consensus Plan at 21.

IV. THE CONSENSUS PLAN WOULD INEQUITABLY PUNISH LICENSEES LOCATED IN THE GENERAL CATEGORY BAND AND AT 814-816/859-861 MHZ

A. Incumbent Licensees In The General Category Band Which Are Not Causing Public Safety Interference Would Be Forced To Incur The Burden Of Relocation And Would Be Subjected To A Greater Likelihood Of Interference

To make way for incoming NPSPAC licensees, the Consensus Plan would clear all incumbent site-by-site and EA licensees from the General Category Band.²⁶ Nextel would be relocated to prime spectrum in the current NPSPAC band, which is clear of incumbents and would be authorized for use by cellularized systems.²⁷ Incumbent public safety licensees would be relocated to 809-814/854-859 MHz, where they would be subjected to a greater likelihood of interference.²⁸ Incumbent site-by-site Business and Industrial/Land Transportation ("B/ILT") and SMR licensees would be sent to 814-816/859-861 MHz, which is classified as a guard band in the Consensus Plan and is expected to be subject to the most interference.²⁹ Incumbent non-Nextel EA licensees would be sent to the Lower 80 band, where they would be subject to a greater likelihood of interference, incumbent licensees, and operating restrictions.³⁰

In the first instance, the Commission lacks authority to craft "special rules" for one licensee, namely Nextel. Under the Consensus Plan, Nextel is treated differently, and better, than similarly situated licensees such as other CMRS licensees holding EA or site-based licenses

²⁶ Consensus Plan at 12-14.

²⁷ Consensus Plan at 14.

²⁸ Consensus Plan at 12.

²⁹ Consensus Plan at 12-13.

³⁰ Consensus Plan at 13. The Consensus Plan also makes fleeting reference to licensees with cellularized systems being permitted to relocate above 816/861 MHz, which would presumably include non-Nextel licensees, such as Southern, with cellularized systems. Consensus Plan at 11. However, there is virtually no detail on how this would occur.

in the General Category band. Another problem with the Consensus Plan is that it has no provision for funding the relocation of non-Nextel B/ILT and SMR licensees.³¹ Such licensees would be forced to pay their own relocation costs, even though they will derive no benefit therefrom. That would be starkly contrary to Commission policy to reimburse licensees that are forced to relocate.³² As discussed in Southern's Reply Comments, the Commission has a firm and longstanding policy of reimbursing the relocation costs of displaced licensees.³³ It reaffirmed that policy in June 2000 in the *Report and Order* in *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, in which it required incoming satellite operators to reimburse the relocation costs incurred by displaced terrestrial operators.³⁴ In instituting that requirement, it noted that "[t]he Commission's policy has been to place the cost of an involuntary relocation to comparable facilities on the shoulders of the new entrant. We reaffirm this as our policy."³⁵ That reaffirmation was upheld by the D.C. Circuit Court of Appeals in *Teledesic LLC v. FCC*, in which the Court observed that "[t]he Commission's consistent policy has been to prevent new spectrum users from leaving displaced incumbents with a sum of money too small to allow them to resume their operations at a new location."³⁶

³¹ The statement in a footnote to the Consensus Plan that "Nextel and the private wireless community are currently discussing funding issues with respect to private wireless relocation" should come as cold comfort to B/ILT licensees. Consensus Plan at 19 n.56.

³² *See, e.g.*, *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, IB Docket No. 98-72, *Report and Order*, 15 FCC Rcd 13430, 13468-70 (2000).

³³ Reply Comments of Southern at 36-39.

³⁴ *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, IB Docket No. 98-72, *Report and Order*, 15 FCC Rcd 13430, 13468-70 (2000).

³⁵ *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, IB Docket No. 98-72, *Report and Order*, 15 FCC Rcd 13430, 13468 (2000).

³⁶ *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001).

B. The Consensus Plan Discriminates Between Nextel And Non-Nextel SMR Licensees And Is Contrary To Regulatory Parity

The General Category band currently contains both Nextel and non-Nextel SMR licensees holding both EA and site-based licenses. As noted above, to make way for incoming NPSPAC licensees, the Consensus Plan would clear all licensees, both Nextel and non-Nextel, from the General Category band.³⁷ Only Nextel would clearly be relocated to contiguous spectrum above 816/861 MHz.³⁸ Non-Nextel site-by-site SMR licensees would be relocated to non-contiguous spectrum at 814-816/859-861 MHz, and non-Nextel EA SMR licensees would be sent to non-contiguous spectrum in the Lower 80 band.³⁹

Under the foregoing scenario, Nextel would be relocated to highly valuable spectrum while non-Nextel SMR licensees would be relocated to much less valuable restricted spectrum. Additionally, given that the spectrum above 816/861 MHz is near the Cellular A Band, Nextel could assign or lease licenses in that band much more easily, and for a far greater price, than it could assign or lease licenses below 816/861 MHz. This differentiation would be discriminatory and contrary to well established principles of regulatory parity.⁴⁰ There is no apparent reason why non-Nextel SMR licensees could not also be relocated to spectrum above 816/861 MHz.

Perhaps in hopes of countering charges of discrimination, the Consensus Plan makes fleeting reference to licensees with cellularized systems being permitted to relocate above 816/861 MHz.⁴¹ However, the specifics of how that would occur are not treated in any type of

³⁷ Consensus Plan at 12-14.

³⁸ Consensus Plan at 14.

³⁹ Consensus Plan at 12-13.

⁴⁰ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993) (mandating that the Commission establish a uniform regulatory regime for all commercial mobile services).

⁴¹ Consensus Plan at 11.

detail, indicating that the likelihood of non-Nextel licensees actually being permitted to relocate above 816/861 MHz is tenuous at best.

Given the problems discussed above, the Commission should not adopt the Consensus Plan and, rather, should allow Southern and other licensees to remain in their current spectrum homes. There is no reason that Southern's channels should be relocated, but if they are, Southern would have to be given channels comparable to the ones it is being forced to vacate.⁴² Furthermore, the Commission should not change the rules of the band that Southern currently operates in, which would leave it and other competitors of Nextel at a severe competitive disadvantage. Southern's entire system must be grandfathered such that it can continue to utilize, develop, and grow its cellularized system.

C. The Consensus Plan Forces General Category EA Licensees To Trade Valuable General Category EA Licenses For Much Less Valuable Lower 80 Licenses Which Is Highly Damaging To The Integrity Of The Commission's Auction Process

The Consensus Plan contemplates moving non-Nextel General Category EA licensees to the Lower 80 band.⁴³ However, the prices commanded at spectrum auctions have established that General Category EA licenses are of far greater value than Lower 80 EA licenses. In Auction No. 34, the FCC auctioned 7.5 MHz of General Category spectrum for a total of \$319,112,060.⁴⁴ In Auction No. 36, the FCC auctioned 4 MHz of spectrum for a total of \$28,978,385.⁴⁵ Thus, in terms of MHz, the average cost of General Category spectrum was

⁴² To that end, the Upper 200 band would be preferable relocation spectrum.

⁴³ Consensus Plan at 13.

⁴⁴ 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, *Public Notice*, Attachment A p. 49, DA 00-2037 (Sept. 6, 2000).

⁴⁵ 800 MHz SMR Service Lower 80 Channels Auction Closes, *Public Notice*, Attachment A p. 49, DA 00-2752, p. 1 (Dec. 7, 2000).

\$42,663,785 *per MHz*, while the average cost of Lower 80 spectrum was \$7,244,596 *per MHz*. That difference in value is apparent even before restricting the usability of the spectrum, as the Consensus Plan would do.

The Commission's auction process has established that General Category EA licenses are worth nearly *six times* more than Lower 80 EA licenses. Forcing General Category EA licensees to accept an "equal amount" of Lower 80 channels would rob them of the value of their investment and undermine the integrity of the auction process.⁴⁶ For example, Southern spent over \$50 million dollars to acquire General Category EA licenses, and numerous other licensees expended millions or hundreds of thousands of dollars.⁴⁷ Relocating them to Lower 80 channels would leave them with spectrum worth only a fraction of their original investment. This kind of after-the-fact divestiture of an auction winner's licenses (at the behest of a competitor) is extremely damaging to what should be a secure expectation that an auction winner will be able to retain the value of its investment.

D. Incumbent Licensees At 814-816/859-861 MHz May Lose Recourse To Have Interference To Their Systems Corrected If The Spectrum On Which They Are Located Is Redesignated As "Guard Band" Spectrum

The Consensus Plan classifies 814-816/859-861 MHz as guard band spectrum and makes clear that licensees in those bands would have a high likelihood of being subjected to

⁴⁶ The Commission recently reaffirmed its commitment to protect the integrity of the spectrum auction program. Commission Seeks Comment On Disposition Of Down Payments And Pending Applications For Licenses Won During Auction No. 35, *Public Notice*, FCC 02-248, p. 3 (Sept. 12, 2002).

⁴⁷ 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, *Public Notice*, Attachment B, DA 00-2037 (Sept. 6, 2000).

interference.⁴⁸ Nonetheless, the Consensus Plan has no firm provisions for relocating incumbent B/ILT and SMR licensees that are currently in those bands, and, as explained above, actually contemplates moving additional B/ILT and SMR licensees into the bands. Southern is concerned that, since those bands would be designated as guard bands, licensees therein would be expected to tolerate a higher amount of interference than licensees elsewhere in the 800 MHz band. In other words, that licensees in the guard bands would have virtually no recourse to require interference-causers to mitigate the interference.

V. THE CONSENSUS PLAN LACKS NECESSARY FUNDING MECHANISMS

A. Nextel's Proposed \$500 Million Contribution Is Highly Conditional And Tenuous

Nextel has placed numerous conditions on its proposed \$500 million contribution to fund the relocation of public safety licensees, making it very likely that Nextel will never pay that amount. For example, one condition is that the Commission adopt every single aspect of the Consensus Plan (which contains the highly questionable and legally untenable demand that Nextel be given a spectrum gift of 10 MHz of contiguous, nationwide spectrum at 1.9 GHz).⁴⁹ By saying that it will refuse to pay unless the government adopts its proposal, Nextel is trying to put itself in the questionable position of having veto power over any action which the Commission may take in this matter. Another contingency is that all appeals and challenges to a Report and Order adopting the Consensus Plan must be resolved within two years of its release,

⁴⁸ Consensus Plan at 9-10.

⁴⁹ Reply Comments of Nextel at 31-32.

which is also unlikely given the complexity of this proceeding and the wide range of positions taken by affected parties.⁵⁰

B. Nextel's Fund Administration System Would Enable It To Walk Away After Contributing Just \$100 Million, Even If All Public Safety Licensees Are Not Yet Relocated

Pursuant to the fund administration system devised by Nextel, it would contribute an initial \$50 million to an independently administered fund and establish a "separate escrow account" of \$450 million.⁵¹ If all of Nextel's conditions are satisfied within two years, Nextel would transfer an additional \$50 million from the escrow account to the independent fund.⁵² As disbursements are made to public safety licensees from the independent fund, Nextel would transfer installments of \$50 million from escrow to the fund whenever the balance in the fund drops to \$50 million.⁵³ However, four years after its second \$50 million transfer, Nextel would not be required to make any further contributions to the fund, even if it has only paid \$100 million and additional funds are needed to relocate public safety.⁵⁴ Additionally, two years after Nextel's last \$50 million transfer, any money remaining in the fund would be refunded to Nextel, apparently regardless of whether all public safety licensees have been relocated.⁵⁵

⁵⁰ Reply Comments of Nextel at 31-32.

⁵¹ Reply Comments of Nextel at 31.

⁵² Reply Comments of Nextel at 31-32.

⁵³ Reply Comments of Nextel at 32.

⁵⁴ Reply Comments of Nextel at 32.

⁵⁵ Reply Comments of Nextel at 32.

C. The Consensus Plan Contains No Provision For Continuing To Fund The Relocation Of Public Safety Licensees If The Cost Exceeds Nextel's Proposed \$500 Million Contribution

The Consensus Plan notes that if Nextel's \$500 million contribution is exhausted before all public safety licensees are relocated, "Nextel has complete discretion as to whether to provide additional funding."⁵⁶ If not all licensees have been moved but the funding has run out, and Nextel refuses to contribute more funds, the Commission could find itself in a bind. Non-Nextel CMRS carriers, B/ILT licensees, and SMR licensees could not be tapped because the Commission does not have the authority to require them to pay for relocations that will not benefit them,⁵⁷ and government funding cannot be assured. Clearly, the Commission lacks the authority to "outsource" its responsibility to oversee this process by allowing a single party to dictate, through a financing mechanism, how any relocation would occur.

D. Distribution Of Nextel's Proposed \$500 Million Contribution Would Not Be Adequately Assured

As noted above, Nextel would contribute an initial \$50 million to an independently administered fund and establish a "separate escrow account" of \$450 million.⁵⁸ However, no detail is provided on the security and maintenance of the escrow fund. Depending on the manner in which it is designed, it may be reachable by creditors and acquiring companies who might drain it before all public safety licensees are relocated. It is not clear from the Consensus Plan that any such fund would be irrevocable by Nextel and unreachable by its creditors.

⁵⁶ Consensus Plan at 20.

⁵⁷ See *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1949); *National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336 (1973); *Skinner v. Mid-America Pipeline*, 490 U.S. 212, 224 (1989). A detailed discussion of this subject is set forth in Southern LINC's Reply Comments at 61-64.

⁵⁸ Reply Comments of Nextel at 31.

If the Commission thinks the threat of creditors seeking to reach independent or escrow funds established by Nextel is unlikely, it need look only at Nextel's SEC Form 10-K for 2001.⁵⁹ In a "Risk Factors" section, Nextel discusses how it has "never generated sufficient cash flow from operations to fund our business and its expansion."⁶⁰ It additionally notes that "[w]e had losses attributable to common stockholders of \$2.86 billion during 2001. Our accumulated deficit was \$9.18 billion at December 31, 2001."⁶¹ It goes on to explain that "[a]s of December 31, 2001, we had about \$14.87 billion of total domestic long-term debt outstanding . . . [as well as] \$2.11 billion in mandatorily redeemable preferred stock obligations."⁶² As a result of all that, Nextel "cannot be sure" that it will have adequate capital to, among other things, meet its debt service requirements.⁶³ Moreover, it is required to "maintain specified financial ratios and satisfy financial tests" under a bank credit facility, and if it fails to do so, it may be found in default and "required to repay all amounts then outstanding."⁶⁴

E. The Consensus Plan Contains No Provision For Funding The Relocation Of B/ILT And SMR Licensees

The Consensus Plan contains no provision for funding the relocation of B/ILT licensees.⁶⁵ Nor does it contain any provision for funding the relocation of SMR licensees, despite the fact that Nextel is the only SMR licensee known to cause significant amounts of

⁵⁹ Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002.

⁶⁰ Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002, p. 28.

⁶¹ Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002, p. 28.

⁶² Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002, pp. 28-29.

⁶³ Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002, p. 29.

⁶⁴ Nextel SEC Form 10-K for fiscal year ended Dec. 31, 2001, filed Mar. 29, 2002, pp. 30-31.

⁶⁵ Although there is a footnote to the Consensus Plan stating that "Nextel and the private wireless community are currently discussing funding issues with respect to private wireless relocation," that statement provides no real assurance to B/ILT licensees. Consensus Plan at 19 n.56.

interference to public safety licensees. As explained above in Section IV(A), requiring licensees to pay their own relocation costs, even though they would derive no benefit therefrom, would be starkly contrary to Commission policy to reimburse licensees that are forced to relocate.⁶⁶

F. The Consensus Plan Contains No Provision For Funding The Relocation Of Unlicensed PCS Users

Unlicensed PCS ("UPCS") licensees are currently located in the 1910-1930 MHz band. The Consensus Plan contemplates giving Nextel a nationwide, contiguous allocation at 1910-1915/1990-1995 MHz.⁶⁷ In its Reply Comments, NEC America contends that UPCS users and Nextel cannot coexist at 1910-1915 MHz.⁶⁸ If that is the case, UPCS users would have to be relocated and, hence, reimbursed for such relocation. NEC America estimates that relocation of the entire UPCS band, 1910-1930 MHz, could cost hundreds of millions of dollars.⁶⁹ Relocating UPCS users from 1910-1915 MHz may cost a significant portion of that amount. However, the Consensus Plan contains no provisions for reimbursing the relocation costs of UPCS users.

VI. THE CONSENSUS PLAN'S BAN ON CELLULARIZED SYSTEMS BELOW 816/861 MHZ IS ANTICOMPETITIVE AND WOULD UNDULY INHIBIT THE DEVELOPMENT OF HIGHLY SPECTRUM EFFICIENT SYSTEMS

A. Southern, Nextel's Largest Competitor In The Dispatch Market, Operates A Cellularized System Below 816/861 MHz And Would Thus Be Severely Impacted By A Ban On Such Systems

⁶⁶ See, e.g., In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, IB Docket No. 98-72, *Report and Order*, 15 FCC Rcd 13430, 13468-70 (2000).

⁶⁷ Consensus Plan at 18-19.

⁶⁸ Reply Comments of NEC America at 3.

⁶⁹ Reply Comments of NEC America at 5-6.

The Consensus Plan contemplates a ban on cellularized systems below 816/861 MHz.⁷⁰ Southern provides combined interconnected and dispatch service on a cellularized system located primarily on spectrum below 816/861 MHz. Thus, pursuant to the Consensus Plan, Southern would not be permitted to continue operating its system absent a waiver. Detrimentially impacting Southern's system through a rulemaking designed to eliminate public safety interference caused primarily by Nextel, its largest competitor, would be extraordinarily inequitable.

Banning cellularized systems below 816/861 MHz would also be arbitrary and contrary to well established principles of regulatory parity.⁷¹ If Nextel is allowed to operate a cellularized system on the 800 MHz band, then other CMRS licensees on the band should also be permitted to operate such systems. They should not be precluded from doing so simply because they are located in a different portion of the band. Moreover, Nextel operates the *one* SMR system known to cause interference across the 800 MHz band. In fact, the Consensus Plan acknowledges that Nextel would continue to cause interference.⁷² *There is no compelling evidence that moving Nextel's operations to a contiguous block above 816/861 MHz will significantly change the interference that its cellularized operations can cause in the entire 800 MHz band.* To take the step of restricting the operations of *all* of Nextel's competitors, while leaving Nextel free to operate as it wishes, would be arbitrary, capricious, and contrary to the principles of regulatory parity.

⁷⁰ Consensus Plan at 8-9.

⁷¹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993) (mandating that the Commission establish a uniform regulatory regime for all commercial mobile services).

⁷² Consensus Plan at 21-23.

Several commenters recognized the need for Southern to be treated fairly. AMTA states that "it may be necessary to consider a carve-out of [spectrum where cellularized operations are allowed], or to take other appropriate steps to ensure that Southern's and any other such operations are not compromised by the 800 MHz rebanding process"⁷³ UTC states that the Consensus Plan "appears to discriminate against Southern's existing CMRS system. . . . under the [Consensus Plan], it would not gain access to any designated 'cellularized' spectrum above 861 MHz" even though it operates a cellularized system.⁷⁴

A sentence in the Consensus Plan states, "Licensees currently operating in the non-cellularized block using a cellular, low-site architecture may move up to the cellularized block in exchange for their existing authorizations."⁷⁵ Appended to that sentence is a footnote stating, "Modification to the Consensus Plan may be appropriate within the specific geographic areas in which both Nextel and Southern Company have low-site CMRS systems."⁷⁶ No further detail is provided, however. If the Commission adopts the Consensus Plan (which it should not), it must also adopt the modifications necessary to adequately accommodate Southern's system in a competitively neutral way.

B. Nextel's Competitors In The Dispatch Market That Have Not Yet Implemented Cellularized Systems Would Be Prohibited From Doing So

Many companies with spectrum below 816/861 MHz provide commercial dispatch service over non-cellularized systems. Some of them may hope to eventually implement cellularized systems to provide better coverage and service and enhance their competitiveness,

⁷³ Reply Comments of AMTA at 8.

⁷⁴ Reply Comments of UTC at 16.

⁷⁵ Consensus Plan at 11.

⁷⁶ Consensus Plan at 11 n.42.

both with Nextel and with each other. However, under the Consensus Plan, they would be precluded from doing so solely because of the location of their spectrum. Such a result would, again, be inequitable and contrary to principles of regulatory parity.

C. The Consensus Plan Disregards Public Safety and B/ILT Licensees' Future Need For Advanced, Cellularized Systems

Pursuant to the Consensus Plan, public safety and B/ILT licensees will be located below 816/861 MHz, and thus will be prohibited from operating cellularized systems.⁷⁷ That, however, focuses too much on how those licensees use their systems today and disregards their future need for advanced, cellularized systems. For example, cellularized systems can provide better coverage, in-building penetration, spectral efficiency, and data transfer - all things that would greatly benefit public safety and B/ILT licensees, especially as highly advanced and reliable communications become increasingly important for law enforcement, fire and rescue, and homeland security generally. For those reasons, several public safety and B/ILT commenters stated that they wish to preserve the option of implementing cellularized or otherwise advanced systems.⁷⁸ They should not be prohibited from doing so.

Furthermore, the Consensus Plan proposes solutions which address the "status quo" and ignore that 800 MHz technology is rapidly evolving. Even now, Nextel has started deploying "quad base radios" which utilize four contiguous 25 kHz channels rather than two contiguous 25 kHz channels. Quad base radios have the potential to form intermodulation products that cover a wider range of spectrum. Likewise, other technologies such as CDMA are heading in the

⁷⁷ Consensus Plan at 8-11.

⁷⁸ See Reply Comments of United Telecom Council at 15-16; Reply Comments of Public Safety Improvement Coalition at 6; Reply Comments of City of San Diego at 3-4; Reply Comments of Cinergy at 65-66; Reply Comments of Delmarva Power & Light Company and Atlantic City Electric Company at 45-46.

direction of using wider bands of spectrum, which may create wider-ranging intermodulation products. Therefore, simply reshuffling the band - rather than moving 800 MHz public safety licensees to the 700 MHz band, as Southern and other parties propose - would not guarantee that public safety entities will be protected from interference generated by new technologies. Indeed, as explained above in Section III, the Consensus Plan would not even protect public safety licensees from interference generated by *today's* technologies.

D. The Consensus Plan's Provision For Allowing Entities To Obtain Waivers To Operate Cellularized Systems Below 816/861 MHz Is Illusory And Will Not Afford Flexibility To Install Advanced Systems

Pursuant to the Consensus Plan, a licensee desiring to operate a cellularized system below 816/861 MHz would have to obtain a waiver by "conclusively" showing that its system would not create interference and make "pre-application coordination with public safety frequency coordinators and licensees in the contemplated area of operation."⁷⁹ This type of requirement would be a major disadvantage for all users *except Nextel* in these bands, despite evidence that they are not causing a problem.

It would be unduly expensive, time-consuming, and burdensome for licensees wishing to operate cellularized systems below 816/861 MHz to go through the above-described drill. As an initial matter, requiring licensees to "conclusively" show that a series of sites would not cause interference is out of touch with reality. Although sites can be designed and operated such that they will almost never cause harmful interference (witness Southern's current system), conclusively proving that from an engineering standpoint could be virtually impossible. The requirement also ignores the fact that any interference that does occur can usually be quickly resolved on a case-by-case basis. Additionally, the cost of trying to prove that no interference

⁷⁹ Consensus Plan at 10 n.41.

would occur, and of engaging in "pre-application coordination with public safety frequency coordinators and licensees" could be exorbitant for a cellularized system of even modest size. The cost for Southern's system - with a coverage area of 127,000 square miles and over 500 sites - would be incalculable. Incredibly, Nextel, the company identified as the primary cause of interference in the 800 MHz band, would be able to continue to its deploy cellularized system in the 800 MHz band without going through a burdensome waiver process.

Additionally, it would be highly time-consuming and burdensome for the Commission to review and rule upon showings of "no interference" every time, for example, a licensee with a cellularized system wishes to construct a new site. Also, the Commission would be placed in the role of micromanaging licensees' systems, which is contrary to its current policy goals.

VII. THE CONSENSUS PLAN DOES NOT ADEQUATELY ADDRESS INTERNATIONAL BORDER ISSUES

A. The Consensus Plan Contains No Provisions For Addressing International Border Issues

Realigning the 800 MHz band along the Canadian and Mexican borders will be highly complex, as the spectrum in those areas has been apportioned pursuant to international treaties. As a result of those treaties, there is significantly less spectrum for U.S. licensees in those areas than there is in non-border regions. Thus, in the border regions, it will be difficult to relocate licensees from one portion of the 800 MHz band to another; there may simply not be enough spectrum to do so.

The Consensus Plan dodges the foregoing international border concerns. Rather than describe how they will be tackled, its signatories simply state that they "recognize the need for . . . a detailed spectrum re-alignment plan in the Mexican and Canadian border regions" and "will

provide the Commission with this information in a subsequent filing."⁸⁰ However, no submission has been provided. The Commission should take the lack of such a submission, nearly three months after the Consensus Plan signatories announced they were working on a plan, as a warning that adequately and fairly addressing border concerns under the Consensus Plan may be impossible.

VIII. THE SPECTRUM THAT WOULD BE RELINQUISHED BY NEXTEL WOULD NOT BE ADEQUATE TO MEET THE REQUIREMENTS OF THE CONSENSUS PLAN

A. The Usability Of Nextel's Spectrum Below 816/861 MHz Is Highly Questionable Because It Does Not Hold Both The Site-By-Site License And EA License For Certain Channels

To work, the Consensus Plan depends on Nextel moving out of spectrum at 809-816/854-861 MHz.⁸¹ That spectrum would then be used to relocate all licensees currently at 806-809/851-854 MHz and, to the extent necessary, public safety licensees currently at 814-816/859-861 MHz.⁸² However, Nextel's spectrum at 809-816/854-861 MHz may not be "clear" enough to accomplish relocation of all displaced licensees, because Nextel does not hold both the EA and site-by-site license for all of the channels in that portion of the band. This problem must be considered in light of the fact that aside from the NPSPAC channels, the 800 MHz band is almost completely encumbered.⁸³ Thus, realignment would be a zero-sum game; virtually no licensee would be able to move unless another licensee cleared space to accommodate it.

⁸⁰ Consensus Plan at 16.

⁸¹ Consensus Plan at 11-15.

⁸² Consensus Plan at 12-13.

⁸³ In a letter to the Commission dated Sept. 9, 2002, Southern discussed how the data that the Commission recently submitted to Congress does not accurately depict the nature and extent to which the 800 MHz band is used. Southern stated that "the data tends to under represent the

Even if it is possible to, for example, move a General Category EA licensee to Lower 80 spectrum encumbered by a non-Nextel site-by-site licensee, such relocation would be unfair if the EA licensee had gone to the burden and expense of clearing site-by-site licensees from its current spectrum. The EA licensee, currently enjoying the use of clear spectrum, would be sent back to a situation where it must contend with a site-by-site licensee. That would strip the EA licensee of the benefit of its investment and, thus, be highly inequitable.

B. Nextel May Not Hold Enough Spectrum Below 816/861 MHz To Meet The Requirements Of The Consensus Plan

Although Nextel may claim to have enough spectrum on a nationwide "running-average" level to support the Consensus Plan, the Commission should examine its holdings on a market-by-market basis. Nextel cannot truly support the Consensus Plan unless its spectrum holdings will enable dislocated licensees *all markets* to be relocated to comparable spectrum within the 800 MHz band.

The Consensus Plan contemplates moving General Category non-public safety site-by-site licensees to spectrum in the 814-816/859-861 MHz portion of the band that is vacated by public safety licensees and Nextel.⁸⁴ However, in the Southeast, Nextel, at least, may not have enough - if any - spectrum in the 814-816/859-861 MHz portion of the band in certain markets to accommodate dislocated licensees. For example, Southern's holdings of General Category site-by-site spectrum exceed Nextel's holdings of 814-816/859-861 MHz spectrum in numerous

actual extent to which the 800 MHz band is used by entities other than Nextel, and more specifically, by entities that operate commercial mobile radio services in competition with Nextel." For that reason, Southern asserted that the Commission should not rely upon the report to Congress in developing rules and policies in this proceeding. Southern reiterates that assertion herein. Letter dated Sept. 9, 2002 from Christine Gill of McDermott, Will & Emery to Marlene Dortch of the FCC, filed in WT Docket No. 02-55.

⁸⁴ Consensus Plan at 12-13.

markets. Thus, even if Nextel vacates all of its 814-816/859-861 MHz spectrum in those areas, there would still not be enough vacant spectrum to relocate Southern's General Category site-by-site licenses.⁸⁵

Likewise, the Consensus Plan also contemplates moving General Category non-Nextel EA licensees to Lower 80 EA channels vacated by Nextel and, if necessary, to channels 125-150 as vacated by Nextel.⁸⁶ However, in the Southeast, Nextel may not have enough Lower 80 EA spectrum, at least, to accommodate dislocated licensees. For example, Southern's holdings of General Category EA spectrum exceed Nextel's holdings of Lower 80 EA spectrum in nearly all of Southern's markets. Thus, even if Nextel vacates all of its Lower 80 EA spectrum in those areas, there would still not be enough vacant spectrum to relocate Southern's General Category EA licenses.

C. An Allocation Of Spectrum To Southern Under The Consensus Plan May Not Recognize Southern's Need For Non-Contiguous Spectrum

Southern is also concerned that the Consensus Plan could reduce the effective capacity of its system. Due to the fact that Southern's system was designed to take advantage of the channel separation of its existing non-contiguous holdings, a block of contiguous spectrum providing an identical number of channels will result in diminished system capacity, in turn limiting Southern's ability to serve additional customers and possibly impacting the quality of service to existing customers. However, the Consensus Plan does not appear to recognize this fact and,

⁸⁵ Of course, site-by-site licensees other than Southern may also need to be relocated in these markets.

⁸⁶ Consensus Plan at 13.

thus, provides no assurance that Southern's current level of capacity would be preserved if it were relocated.⁸⁷

D. Nextel's 700 MHz Commercial Guard Band Spectrum Cannot Be Used By Public Safety Entities Until Congress Passes Legislation Redesignating It For Public Safety Use

The Consensus Plan envisions Nextel returning its 700 MHz Guard Band spectrum and the Commission "re-designating" that spectrum for public safety use.⁸⁸ However, the 700 MHz Guard Band spectrum is currently allocated for commercial use pursuant to 47 U.S.C. § 337(a)(2). Section 337(a)(2) clearly states that the spectrum is to be used for commercial use. While such commercial use is significantly restricted (for example, cellularized systems are not permitted), the FCC cannot simply amend the statute on its own authority and reclassify the spectrum as public safety spectrum. Rather, Congress would have to amend the statute.

IX. THE CONSENSUS PLAN DOES NOT PROVIDE FOR PREDICTABLE AND ORDERLY RELOCATION OF B/ILT AND SMR LICENSEES

A. The Commission Must Be Responsible For Developing Any New Bandplan; It Cannot Be Left To Third Parties Who Have Conflicts Of Interest

Pursuant to the Consensus Plan, displaced public safety licensees would have the right to pre-approve their own relocation. Displaced B/ILT and SMR licensees, however, would have no such discretion. Rather, the signatories to the Consensus Plan would have Nextel, the Land

⁸⁷ Numerous of Southern's public safety and governmental customers have filed letters with the Commission expressing the importance of Southern's system to their communications needs, including the Alabama Emergency Management Agency, the Alabama Department of Transportation, the Morgan County Emergency Management Agency, the St. Florian Police Department, and the Killen Police Department.

⁸⁸ Consensus Plan p. 18.

Mobile Communications Council ("LMCC"), and the Public Safety Regional Planning Committees develop a bandplan for B/ILT and SMR licensees.⁸⁹ All of these entities have conflicts of interest with the licensees who would be subject to being relocated. The Commission cannot delegate its authority over any relocation process to these entities.

Nextel. Nextel should not be permitted to participate in the development of a bandplan or relocation process because it has an overwhelming conflict of interest with B/ILT and SMR licensees. With regard to B/ILT licensees, Nextel has demonstrated its interest in providing commercial service to such licensees, especially utilities.⁹⁰ As such, it has reason to impose a burdensome, costly, and time consuming rebanding plan upon them in the hope that they will give up on rebanding and simply subscribe to Nextel's service. With regard to SMR licensees, Nextel competes with them and thus has an incentive to use realignment to gain a competitive edge. The concept of placing a company's competitor in control of the company's most essential resource is absurd. Without question, Nextel serves its shareholders, not the public interest. Thus, it has no incentive to act in the best interests of either B/ILT or SMR licensees.

LMCC. LMCC also has a conflict of interest that disqualifies it from developing a bandplan. LMCC is an organization comprised of individual frequency coordinators and many other organizations with commercial interests, such as equipment vendors. These entities stand to derive significant financial revenue from the re-coordination of B/ILT and SMR licensees and potential new equipment sales. Another problem with LMCC is that it is a voluntary organization that lacks a permanent staff and a budget, and it delegates responsibilities to various members

⁸⁹ Consensus Plan at 17.

⁹⁰ *See, e.g.,* In re National Telecommunications Information Administration (NTIA) Report on Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Comments of Nextel Communications, Inc. (Mar. 6, 2002) (questioning the ability of critical infrastructure industries to build and operate modern digital networks).

based on their individual interest in a given matter. Thus, there is no assurance of neutrality within this organization.

Public Safety Regional Planning Committees. The Public Safety Regional Planning Committees are also not properly equipped to handle the responsibility of band redevelopment. The Regional Planning Committees are already preoccupied with NPSPAC licensees, and their workload will increase if the NPSPAC licensees must relocate under a rebanding plan. They also are not a realistic choice because their overall responsibility is to serve public safety entities.

B. If The Commission Adopts A Relocation Plan, The Plan Must Clearly Define The Rights And Responsibilities Of Affected Licensees

For purposes of developing a bandplan, the Commission must adopt a neutral process with self-executing measures. Such measures should be designed to establish rights and responsibilities of licensees similar to those adopted in the Emerging Technologies proceeding.⁹¹ Specifically, the Commission should provide that incumbent licensees would have, at a minimum, the right to: (1) relocate to comparable spectrum, defined as spectrum with the same bandwidth, reliability, and operating costs;⁹² (2) receive full reimbursement for relocation;⁹³ (3) negotiate the terms of relocation, including the right to a system-wide relocation;⁹⁴ (4) examine replacement facilities for a reasonable period of time in order to make adjustments, determine comparability, and ensure a seamless handoff;⁹⁵ and (5) use replacement spectrum for a trial period.⁹⁶

⁹¹ 47 C.F.R. §§ 101.69-101.75 (2001).

⁹² *Id.* § 101.75(b).

⁹³ *Id.* §§ 101.71-101.73.

⁹⁴ *Id.* §§ 101.69(a); 101.73(b).

⁹⁵ *Id.* § 101.75(c).

⁹⁶ *Id.* § 101.75(d).

In addition to protecting incumbents, the Commission should also adopt clearly defined responsibilities for the party that will relocate licensees. Only by balancing the rights and responsibilities of respective licensees can the Commission ensure a fair and neutral transition that offers safeguards against inequities, undue burdens, and service disruptions.

X. GIVING NEXTEL 10 MHZ OF CONTIGUOUS, NATIONWIDE SPECTRUM AT 1.9 GHZ WOULD BE UNNECESSARY AND CONTRARY TO ESTABLISHED SPECTRUM POLICY

A. Giving Nextel 10 MHz Of 1.9 GHz Spectrum Is Not Necessary For Resolving Public Safety Interference

The Consensus Plan includes a provision in which the Commission would give Nextel 10 MHz of contiguous, nationwide spectrum at 1910-1915/1990-1995 MHz.⁹⁷ According to the signatories to the Consensus Plan, such an allocation is necessary to "make Nextel whole" because it would be giving up scattered spectrum at 700, 800, and 900 MHz.⁹⁸ The Commission should not be fooled by this transparent attempt at bolstering Nextel's competitive standing.

Giving Nextel 1.9 GHz of spectrum would not directly result in any reduction of public safety interference, because it plans to continue operating in the 800 MHz band, where it will continue to cause intermodulation interference to public safety licensees across the entire band. Rather, the Consensus Plan's signatories' argument seems to be that Nextel will not give up its 700, 800, and 900 MHz spectrum, and thus the Consensus Plan will not be able to go forward, unless it is "made whole" with 10 MHz of 1.9 GHz spectrum. However, Nextel's 700 and 900 MHz spectrum is not integral to the Consensus Plan's realignment scheme; Nextel would simply prefer to trade it in for something vastly more valuable.

⁹⁷ Consensus Plan at 18-19.

⁹⁸ Consensus Plan at 18-19.

B. Giving Nextel 10 MHz Of 1.9 GHz Spectrum Would Be Contrary To The Policies Underlying The Ashbacker Doctrine And Section 309(j)

In Southern's Comments, it explained in detail why giving Nextel 10 MHz of 2.1 GHz spectrum would be contrary to the policies underlying the Ashbacker Doctrine and 47 U.S.C. § 309(j).⁹⁹ Those same arguments apply to giving Nextel 10 MHz of 1.9 GHz spectrum, and Southern incorporates them by reference herein.

C. 10 MHz Of Contiguous, Nationwide Spectrum At 1.9 GHz Is Far More Valuable Than The Scattered Spectrum That Nextel Would Be Relinquishing

Nextel would derive far more value from 10 MHz of contiguous, nationwide spectrum at 1.9 GHz than it does from its scattered allocations at 700 and 900 MHz. In fact, Nextel's 700 MHz spectrum is heavily restricted guard band spectrum; it cannot operate a cellularized system on it and, additionally, must lease half of it to other entities. 10 MHz of 1.9 GHz spectrum, on the other hand, would be highly coveted by virtually any large commercial licensee.

D. The Spectrum Sought By Nextel At 1.9 GHz Is Currently Being Used For Unlicensed PCS

As noted above in Section V(F), UPCS licensees are currently located in the 1910-1930 MHz band, which encompasses the allocation Nextel is seeking at 1910-1915/1990-1995 MHz. NEC America states that UPCS users and Nextel cannot coexist at 1910-1915 MHz.¹⁰⁰ If that is the case, to grant Nextel's request for 1.9 GHz spectrum, the Commission would have to determine that the public interest favors relocating UPCS licensees to accommodate Nextel. Given the fact that awarding Nextel 1.9 GHz spectrum is not necessary to resolve public safety

⁹⁹ Comments of Southern at 50-56.

¹⁰⁰ Reply Comments of NEC America at 3.

interference, the Commission cannot possibly find that the public interest is served by this proposal.

Additionally, if UPCS users needed to be relocated, the Commission would need to reimburse them for such relocation. NEC America estimates that relocation of the entire UPCS band, 1910-1930 MHz, could cost hundreds of millions of dollars.¹⁰¹ Relocating UPCS users from 1910-1915 MHz may cost a significant portion of that amount. However, the Consensus Plan contains no provision for reimbursing the relocation costs of UPCS users.

E. Allowing Nextel To Operate Its System At 1910-1915/1990-1995 MHz May Result In Interference To Broadband PCS Licensees Currently Operating At 1850-1910/1930-1990 MHz

NEC America contends that allowing Nextel to operate at 1910-1915/1990-1995 MHz "would cause significant interference to adjacent band PCS licensees."¹⁰² It explains that the 1910-1930 MHz UPCS band is adjacent to the PCS band and serves as an effective guard band because UPCS devices are very low power.¹⁰³ Introducing higher powered SMR operations would, according to NEC America, "place adjacent band PCS operations in jeopardy."¹⁰⁴ The Commission should closely examine these concerns and factor them into its ultimate decision in this proceeding.

XI. IF THE COMMISSION ADOPTS AN 800 MHZ BAND REALIGNMENT PLAN, IT SHOULD ADOPT MOTOROLA'S REALIGNMENT PLAN

The Commission should not adopt any 800 MHz band realignment plan. Rather, it should adopt the proposal outlined in Southern's Comments, which would alleviate interference

¹⁰¹Reply Comments of NEC America at 5-6.

¹⁰²Reply Comments of NEC America at 7.

¹⁰³Reply Comments of NEC America at 7.

in the short term through a market-based plan that utilizes technical solutions and limited license swaps, and eliminates interference in the long term through relocating all 800 MHz public safety licensees to the 700 MHz band. This remains the best solution for resolving public safety interference.

While Southern believes that any 800 MHz band realignment will not produce benefits which will justify the burdens imposed, it believes that Motorola's proposed realignment plan is more equitable than the other proposals.¹⁰⁵ Motorola's proposal does a better job of keeping licensees "whole" in terms of their frequency assignments. To that end, under Motorola's proposal, the size of certain "sub-allocations" within the 800 MHz band would not be fixed across the country.¹⁰⁶ Rather, the amount of spectrum available to various types of systems would vary by geographic market depending on the amount of spectrum currently licensed to each type of system.¹⁰⁷ This flexible allocation policy, for example, recognizes that the co-existence of Southern and Nextel in certain parts of the Southeast calls for a greater SMR allocation in those areas than in other areas of the country. Also, Motorola's plan expressly contemplates means of effectively accommodating systems such as Southern's that efficiently use non-contiguous channels and a mix of high and low sites.¹⁰⁸

¹⁰⁴ Reply Comments of NEC America at 7.

¹⁰⁵ Motorola's plan was submitted in its Reply Comments and Southern urges the Commission to issue a Further Notice of Proposed Rulemaking to fairly allow comment on all band plans submitted in the reply comment phase of this proceeding.

¹⁰⁶ Reply Comments of Motorola at 7.

¹⁰⁷ Reply Comments of Motorola at 7.

¹⁰⁸ Reply Comments of Motorola at 12-13.

XII. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Southern LINC respectfully requests that the Commission act in the public interest as set forth herein.

Respectfully submitted,

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Dated: September 23, 2002

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 23rd day of September 2002, I caused a copy of the foregoing "Reply Comments Of Southern LINC" to be mailed via first-class mail to each of the following:

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