

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 ON “CONSENSUS PLAN”

Carolina Power and Light Company (“CP&L”) and TXU Business Services (“TXU”) (collectively, “Utilities”), by their attorneys, hereby submit their comments¹ on the “so-called ‘Consensus Plan’”² (herein the “Proposal”) advanced by several parties (the “Proponents”) in their reply comments previously filed in this proceeding. As set forth below, this Proposal, although certainly a significant improvement over previous proposals offered by the Proponents, remains incomplete and inadequate.

I. THE PROPOSAL REPRESENTS NEITHER A “CONSENSUS” NOR A “PLAN.”

The Proposal is not the product of consensus among all incumbent 800 MHz licensees. Instead, it is offered by a coalition representing only a portion of the

¹ The Utilities hereby incorporate by reference their previous Comments (Comments of Carolina Power and Light Company and TXU Business Services, WT Docket No. 02-55 (May 6, 2002)) (hereinafter “Comments”) and Reply Comments (Reply Comments of Carolina Power and Light Company and TXU Business Services, WT Docket No. 02-55 (August 7, 2002)) (hereinafter “Reply Comments”).

² See *Wireless Telecommunications Bureau Seeks Comment on “Consensus Plan” Filed in the 800 MHz Public Safety Interference Proceeding*, DA 02-2202 (rel. Sept. 6, 2002); see also *Wireless Telecommunications Bureau Clarifies Scope of Comments Sought in 800 MHz Public Safety Proceeding (WT Docket 02-55)*, DA 02-2306 (rel. Sept. 17, 2002).

potentially affected licensees. Further, the Proposal includes enormous gaps as to the protection of utility and other critical infrastructure I/LT licensees (collectively, “Critical Infrastructure licensees”), who are not represented by the Proponents. While long on discussion as to the protections to be offered to “public safety” licensees, the Proposal is virtually silent as to what rights will be afforded to such Critical Infrastructure licensees.

Accordingly, while the Utilities are pleased that the Proponents of the Proposal have now recognized that Critical Infrastructure and other impacted licensees “should not bear the burden of relocation costs caused by the introduction of incompatible system architecture in the 800 MHz band,”³ the Proposal goes on to state that the Proponents “have no *formal* plans at this time” to accomplish this, but “are currently discussing funding issues with respect to private wireless relocation.”⁴ With all due respect, these are hardly just little details to be addressed later by some supplemental pleading to be submitted by a coalition of private entities. To the contrary, these issues are, or should be, at the core of the Proposal. Until there is even a proposal that addresses these issues, there is nothing that can be fairly called a “Plan” that is ripe for comment, much less Commission action.

II. CRITICAL INFRASTRUCTURE LICENSEES DESERVE THE SAME CONSIDERATIONS OFFERED TO OTHER PUBLIC SAFETY USERS IN THE BAND; THEY SHOULD NOT BE RELEGATED TO AN INTERFERENCE-PRONE “GUARD BAND.”

³ Proposal at 19.

⁴ Proposal at 19, n.56 (emphasis added). As far as we know, there is currently no such plan, “formal” or otherwise. A further defect in the Proposal is its failure to address how the Proposal can be implemented in Mexican and Canadian border regions. “[T]he Joint Commenters [state only that they] will provide the Commission with this information in a subsequent filing.” Proposal at 16.

As we explain below, the solution that the proposal offers for public safety users of the 800 MHz Band is inadequate. Even so, treatment of public safety licensees under the Proposal is far more reasonable than treatment of the Critical Infrastructure licensees. There is no basis for such a distinction, as the Critical Infrastructure licensees, as with other public safety entities, use their 800 MHz bandwidth for functions that are essential to public safety. Principles of fairness, along with the public welfare, dictate that the Critical Infrastructure licensees receive the same treatment under the Proposal as other public safety licensees. Absent such treatment, and contrary to the stated objectives of the Proposal's Proponents, all parties affected by the plan will not be "made whole."⁵

The Proposal would relegate I/LT, Business, and SMR licensees to interference-prone channels in the guard band frequencies.⁶ But these frequencies, as the Proponents concede, "have a greater likelihood of interference."⁷ For precisely this reason, the Proposal suggests that "daily, critical public safety communications"

⁵ Proposal at 18.

⁶ Proposal at 9-10, 13. The Proposal states that while it would be "prudent" to retune wide-area systems out of the guard band, such systems should nevertheless be placed in the guard band "if it is necessary to complete relocation due to a minimal amount of greenspace . . . or if it would otherwise provide access to additional public safety spectrum in the lower portion of the non-cellurized block." Proposal at 9 n.35. Further, under the Proposal, Critical Infrastructure and other I/LT licensees will be moved to non-guard band frequencies only after (and if) guard band frequencies have been filled. Proposal at 12-13. Under these conditions, it is plain that many Critical Infrastructure licensees will be forced into the guard band and those already licensed in that spectrum will have little chance to vacate it.

⁷ Proposal at 10 n.38. In conversation with counsel for some of the Proponents, counsel indicated that this statement was simply meant to say that there would be a greater chance of interference than at other locations in the band, but that, in fact, giving Nextel the adjacent spectrum would allow it to take greater steps than currently available to it to mitigate the risk of interference. Such assurances from Nextel, frankly, ring hollow, in light of both past assurances of Nextel, *see* discussion, *infra*, and the fact that other public safety licensees who are among the Proponents of the Proposal are vacating the guard band themselves.

relocate out of the guard band.⁸ Leaving Critical Infrastructure licensees to spectrum that the Proponents themselves see as unduly risky is not a satisfactory or equitable solution.

Furthermore, although the Proposal provides that the public safety entities will (1) be assured of no disruption of their operations; (2) be allowed to approve any relocation plan impacting their licensed system and (3) have all of their expenses covered by a third party,⁹ it does not make similarly unequivocal guarantees for Critical Infrastructure and other impacted licensees. The Proposal makes no mention of Critical Infrastructure licensees' right to be protected from disruption of their operations, or to approve any relocation plan impacting their systems, and is ambiguous with respect to their right to reimbursement for any move under the Proposal.

Specifically, while the Proposal provides that "incumbent licensees . . . should not bear the burden of relocation costs,"¹⁰ it only offers guarantees for the so-called public safety entities. Nextel's "pledge" of \$500 million is expressly designated for "public safety conversion costs."¹¹ Further, the discussion of specific principles guiding reimbursement addresses only public safety entities.¹² As a result, it is not at all clear that the Critical Infrastructure licensees and other similarly situated incumbents will be reimbursed for costs imposed on them by the Proposal.

There is no reason to treat the Critical Infrastructure licensees less favorably than the public safety entities.¹³ As the Commission has recognized, the Critical Infrastructure licensees "provide essential services to the public at large" and their

⁸ Proposal at 12.

⁹ Proposal at 15.

¹⁰ Proposal at 19.

¹¹ Proposal at 20.

¹² Proposal at 21.

communications systems are necessary to “public safety.”¹⁴ Hospitals, schools, businesses, and homes all expect and depend on reliable electric service. Maintaining and repairing electric lines is enormously hazardous work, and such work is regularly required during natural disasters and other extremely difficult conditions. As a result, safely maintaining utility service requires absolutely trustworthy communications.

Communications systems to be put at risk by the Proposal are also essential to maintaining plant security, which is in turn essential to the safety of plant workers and surrounding communities. CP&L, for example, employs frequencies that would be relegated to guard band status for plant security and other functions at a nuclear power plant. Placing that system at risk is not an acceptable situation. Yet, there appears to be no provision in the Proposal that would protect the system from interference nor any that would allow CP&L the ability and third party financing necessary to relocate the system to more protected frequencies.

Instead of fixing the problem of interference, the Proposal appears more likely to shift the burden to other entities. Assurances by the Proponents that interference isn't likely to be a problem are far from comforting when their public safety constituents are vacating the band. Warnings that those that stay must essentially accept the risk¹⁵ provide even less comfort. And, with all due respect to the assurance of Nextel that

¹³ See Comments at 3-5; Reply Comments at 4-5.

¹⁴ See *In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association*, Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 99-87, 15 FCC Rcd 22709, 22711-12 (2000); see also Comments at 20-21.

¹⁵ See Proposal at 12.

giving it more spectrum will help it avoid interference problems in the future,¹⁶ the Commission has been down this road before, with dubious results.

III. THE COMMISSION SHOULD GUARANTEE THAT COMPENSATION FUNDS CONTEMPLATED BY THE PROPOSAL ARE BOTH ADEQUATE AND SECURE.

As discussed above, third party payment of rebanding costs is essential to fair implementation of the Proposal. As a result, the Commission must require Nextel to provide sufficient and secure sums to cover these costs. Without such requirements, the rebanding solution contemplated by the Proposal is simply inadequate.

Accordingly, the amount “pledge[d]” by Nextel cannot be capped at \$500 million or limited to the costs incurred by public safety licensees. Instead, Nextel must be required to cover all rebanding costs that result from the Proposal. While Nextel may argue that such costs are uncertain, that is no reason to pass those costs onto the Critical Infrastructure licensees and other incumbent license holders. Instead, the costs must be borne by those responsible for the interference that the Proposal is meant to address. If those costs are too large or too uncertain for Nextel to bear, then Nextel should be forced to find another way to eliminate the interference it has generated.¹⁷

Furthermore, any funds provided to pay relocation costs must be guaranteed.¹⁸ In light of the recent turmoil in the telecommunications industry, the Commission must ensure that any compensation funds will be absolutely secure. Specifically, the Commission should require (1) an irrevocable performance bond from a major bank or other financial institution for the full amount of the estimated costs of relocation in frequency of all licensees required to relocate under the Proposal, including those now

¹⁶ See Comments at 9-10 & nn.17-20.

¹⁷ See also Reply Comments at 5.

in the proposed “guard band” who may be forced by the interference potential of that band to find alternative frequencies, which bond must be unaffected by any change in Nextel’s financial condition, including bankruptcy; and (2) a condition should be placed on all of Nextel’s licenses received in connection with this proceeding requiring full payment of relocation costs, including any amounts over and above the initial estimate. The licenses themselves should be pledged as security for such payment in a manner that avoids any possibility that Nextel’s payment obligations might be discharged through bankruptcy or other proceeding or third-party agreement without loss of the licenses (which could then be auctioned with the proceeds available for any additional necessary compensation).

In response to the above, the position of the Proponents, at least in informal discussion, appears to be that: (1) their estimates are (or will be, with respect to non-public safety entities) high end so that Nextel’s guaranty will be more than enough to cover the costs actually incurred; (2) while hardly clear in the Proposal, Critical Infrastructure and other licensees will not be forced to relocate without money in hand from Nextel to pay for the relocation. Yet, neither argument gives much comfort; indeed, both suggest the internal inconsistency of the Proponents’ position.

First, if the costs to be guaranteed by Nextel really are on the high side of the costs likely to be incurred by the Proposal, then Nextel need not insist so vigorously that its liability for cost reimbursement be capped. Could it be that Nextel knows that the funds it pledges will likely not be enough? Or that Nextel knows that the cost of equipment itself is not the only, or necessarily even the largest cost when going in to replace a system within a nuclear facility? Or that Nextel knows that when you relocate a system on frequencies it is often necessary to build a parallel system so that critical communications will not be lost during the conversion process? The fact is that neither

¹⁸ See also Reply Comments at 6.

the commenting Utilities nor the Commission have any basis in the record to know how the cost estimates of the Proponents have been made. But we do know that when the risk that these estimates are incorrect is placed on the Proponents, they are not willing to shoulder the consequences.

Second, the Proponents say that, not to worry, if the money runs out you won't be forced to move. But that hardly helps a licensee stuck in what the Proponents themselves see as an interference-prone guard band. Further, the very premise of the entire Proposal is that relocation is the only answer to solve the problems that Nextel has created. If that is so, then a Proposal which leaves Nextel with 10 MHz of exceedingly valuable spectrum in the 2 GHz band should not leave as voluntary Nextel's duty to solve the interference problems that it has created.

IV. THE FOCUS OF THIS PROCEEDING SHOULD REMAIN ON REQUIRING THOSE WHO ARE CAUSING INTERFERENCE TO ELIMINATE IT.

As the Proponents recognize, even in the best case scenario, public safety and other licensees will continue to be subject to potential interference for years to come in any rebanding transition process. If the money runs out, some licensees may be permanently at risk. Further, even if and when the Proposal is fully implemented, the Proponents concede interference will still be a problem, especially for those relegated to the proposed guard band frequencies.¹⁹

¹⁹ Proposal at 8 ("The Joint Commenters . . . believe separation of cellular-like architecture in the band from non-cellularized operating systems would relieve a *substantial portion* of interference experienced by public safety and other incumbent licensees.") (emphasis added); Proposal at 21 ("interference will be mitigated"); Proposal at 23 ("there will continue to be the potential for interference after the band shift is completed").

For that reason, as urged before by the Utilities and others, including the United Telecom Council (“UTC”), the thrust of this proceeding should be refocused on establishing rules that require interfering entities to fix the problems that they have created. Simply codifying the *Best Practices* guide, as suggested by the Proponents, clearly is not enough, because if the *Best Practices* guide were enough to solve the current interference problems, then why on earth should there be a need to engage in an enormously costly and inevitably disruptive forced relocation of licensees in the band? Instead, tougher and mandatory standards of the kind suggested by UTC should be adopted. Such standards may well obviate the need for the expensive and risky rebanding urged by the Proponents.

V. CRUCIAL ANALYSIS AND DECISION MAKING CANNOT AND SHOULD NOT BE DELEGATED TO A PRIVATE COMMITTEE.

The Utilities appreciate being afforded the ability to comment on the Proposal. At the same time, the Utilities urge that the Commission and, though it, the public should be allowed to play more than a passive role of reviewing the proposals of Nextel and the other Proponents. Of even greater concern to the Utilities are the suggestions throughout the Proposal that its Proponents will, at some later date (after the period for public comment has ended), fill in central details including whether and how Critical Infrastructure licensees will be compensated for their forced relocation. Such crucial determinations cannot be left to post-comment private committee recommendation.

Equally troubling is the suggestion that the Commission should deputize Nextel and others to develop a band plan for their Proposal to be submitted later to the Commission “for approval.” While the Utilities have recommended, and support, the creation of an advisory committee to review the interference issues raised in this

proceeding,²⁰ the makeup of such a committee should not be determined by private agreement, but by Commission action to insure that the committee will “be fairly balanced.”²¹ Furthermore, the Federal Advisory Committee Act requires that committees like the one proposed here “not be inappropriately influenced by . . . any special interest.”²² The inclusion of Nextel as the only non-coordinating entity in the Proponents’ proposed advisory group would clearly violate this stricture. At very least, non-Proponent representatives of affected Critical Infrastructure licensees and members of the Commission’s own staff should be included on any advisory committee. Further, as required by federal statute, the proceedings of that committee should be conducted in open public proceedings and not behind closed doors.²³

VI. CONCLUSION.

Critical Industry and other I/LT licensees in the 800 MHz band provide crucial public services and defend nuclear and other facilities that have been identified as targets of terrorist threat. The protection of the communications systems on which they rely deserves more than a footnote as an item to be addressed later. Such systems also deserve better protection than being relegated to a guard band being vacated by others because of the interference risk. Finally, the matter of such protection should not be left to the determination of a group of interested parties when – as their very silence on these issues makes clear – the focus of their concerns in this proceeding lies elsewhere.

²⁰ See Reply Comments at 9-10.

²¹ 5 U.S.C. App. §5(b)(2), (c).

²² 5 U.S.C. App. §5(b)(3), (c).

²³ 5 U.S.C. App. §10.

Respectfully submitted,
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