

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

COMMENTS OF KENWOOD COMMUNICATIONS CORPORATION

Kenwood Communications Corporation (Kenwood), a major manufacturer of quality products and systems for the wireless telecommunications industry, hereby respectfully submits its comments in response to the *Public Notice* (the Notice), DA 02-2202, released September 6, 2002. The Notice seeks comment on the so-called "consensus plan" filed in this proceeding by seventeen parties, proposing a solution to the incidents of harmful interference to Public Safety communications systems at 800 MHz. Kenwood filed comments earlier in this proceeding, and reaffirms those comments herein, to the extent that they address portions of the "consensus plan" proposal. It is to be noted as well that Kenwood is actively associated with the advocates of the consensus plan, and is a member of some of the associations represented in the group which developed the consensus plan. In the interest of Kenwood's authorized dealers and their customers, and Kenwood Systems' customers, Kenwood states as follows.

1. Kenwood appreciates the difficulty of arriving at a fair and equitable method of addressing the interference that has arisen at 800 MHz, and as well the amount of good faith effort that has gone into the development of the consensus plan. Most of all, Kenwood appreciates the importance of

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protecting public safety entities from interference in the 800 MHz band, as it has stated previously in this proceeding. Nevertheless, Kenwood is concerned about the plan from three perspectives: (1) it is fundamentally unfair and permanently damaging to a number of small business entities; (2) the extremely high costs are unfair to larger industrial entities; and (3) it is completely inconsistent with clear, long-entrenched and fair FCC policy in terms of cost allocation in order to accommodate newer technologies in mature, fully-deployed spectrum.

2. The Notice of Proposed Rule Making in this proceeding expressed a desire to minimize disruption of incumbent licensees and the existing licensing structure in the 800 MHz band. The consensus plan would cause traditional SMR and Business and Industrial/Land Transportation (B/ILT) users in the General Category channels at 806-809 MHz and 851-854 MHz to have to relocate to different channels, without any reimbursement offered at all from any source. This characteristic is unfair, and substantially disruptive to these incumbent licensees, and therefore fails to meet the "minimized disruption" goal stated in the Notice. Nor can the Commission meet its obligations under the Regulatory Flexibility Act if it adopts the consensus plan without modification.

3. While the consensus plan is aimed at solving the burgeoning problem of interference to public safety from cellular and low-site architecture in the 800 MHz band, the impact of the plan on traditional SMR and B/ILT incumbents is essentially ignored. Most would agree that public safety entities, being (1) the principle victim of the interference from cellular architecture systems at 800 MHz, and (2) least able to bear the cost of relocation, within or outside the 800 MHz band, should not bear the cost of interference resolution. It should be equally obvious that the traditional SMR and B/ILT incumbent licensees are in no better position to bear the relocation costs and expenses, and that these licensees, not being contributors to the incompatibility between cellular architecture licensees and other licensees in the band, should not have to bear the cost of relocation.

4. It is not only relocation expenses that are at issue in the case of traditional SMR licensees at 800 MHz. These are typically small business entities, which are competitors to cellular services and to

Nextel. Traditional SMR providers are in a difficult competitive posture, with razor-thin margins, and their customers are increasingly unwilling to bear relocation expenses. Even if the SMR licensee bears all of the expenses of relocation, passing none of them on to customers, the disruption to the customer's business from the rechanneling of the radios will inevitably cause the customer to look elsewhere for service. The customer base for 800 MHz traditional SMR providers is fragile. SMR providers actively compete for customers with cellular, PCS, and cellular-architecture SMR services. Any significant disruption of the service provided by conventional SMR companies will cause SMR customers to convert to a competing provider not subject to the disruption that retuning or replacement of equipment necessitates. The consensus proposal, therefore, is substantially disruptive to traditional SMR licensees, and works exclusively to the advantage of Nextel and cellular-architecture services, and to the disadvantage of competition in the provision of dispatch-type SMR service.

5. The record in this proceeding includes comments from companies such as INTEL and other B/ILT licensees, detailing the unreimbursed direct costs that would be incurred from the adoption of the consensus plan, or similar "rebanding" proposals. INTEL, for example, calculates (and Kenwood's own estimates support that calculation) that it would cost \$4.5 million to retune its equipment under any rebanding proposal. This unbudgeted cost comes at a time when the technology industry is in a difficult posture economically. More fundamentally, INTEL contributes not one whit to the interference problem at 800 MHz, but is asked to bear a tremendous expense so that the cellular architecture licensees (assuming for the moment that cellular architecture licensees are all contributors to public safety interference) which do contribute to the problem are bailed out. This is inequitable in the extreme. The consensus plan proponents argue at page 24 of their reply comments that the consensus plan would cause "minimum disruption to existing services." That contention is pure sophistry with respect to traditional SMR and B/ILT licensees whose business operations would be substantially disrupted and, in the case of the former, competitively

disadvantaged, and economically crippled at the worst possible time.

6. Incumbent licensees with substantial investment in channels and equipment in that band should not be disrupted. Commercial SMR facilities provide quality dispatch and interconnection service to customers, and do so competitively with cellular, PCS, other traditional SMR, and cellularized SMR services. This healthy competition benefits consumers. The imposition of retuning costs for SMR, Business, or I/LT licensees that are not reimbursed is an anticompetitive, as well as inequitable, solution.

7. The consensus plan makes several fundamental assumptions, which should not be made without further study. First, it assumes that there is fundamental incompatibility between and among 800 MHz licensees which can only be resolved by a wholesale "restructuring" of the band. Second, it assumes that the interference resolution burden must be shared among all or most incumbent 800 MHz licensees, regardless of the relative contribution of those licensees to the problem. Third, it assumes that, because of the necessity of legislation (which may or may not be forthcoming) and the inherent delay in relocation of public safety entities to the 700 MHz band, that alternative should be removed from the table. None of these assumptions is, in Kenwood's view, established by the record sufficiently that they can be reasonably accepted.

8. The most glaring inequity in the consensus plan is the lack of reimbursement for displaced traditional SMR and B/ILT licensees. Obviously, the fairest solution to public safety interference would be to require that it be resolved on a case-by-case basis. Fairness dictates that the last in time to arrive at the site who is a contributor to the EMC problem is the one obligated to resolve it and to bear the burden and expense of doing so. In this case, using a case-by-case approach, incumbent traditional SMR and B/ILT licensees would not have to relocate, or if they did, they would be reimbursed by the entity that created the problem, typically the last in time to arrive in the market. Even reimbursement would not address the problem of the traditional SMRs, to the extent that their customers would have to retune or obtain new equipment, which stands to eviscerate their customer

base.

9. Kenwood's comments in this proceeding earlier argued that the Commission has consistently, in cases involving relocation of incumbents to accommodate new (but incompatible) technologies, utilized a mechanism whereby displaced incumbents are reimbursed actual costs (and in the case of equipment that cannot be retuned or adapted to the new band or band segment, reimbursed for actual replacement cost). This was done, for example, in order to implement PCS at 2 GHz; in the 800 MHz auction proceedings; and most recently, in order to implement Mobile Satellite Service at 2 GHz in the bands formerly occupied by broadcast auxiliary licensees. *See, e.g. Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd. 6886 (1992); *Mobile Satellite Service at 2 GHz*, 12 FCC Rcd. 7388, 7396-7404 (1997); *Redesignation of the 17.7-19.7 GHz Frequency Band*, 15 FCC Rcd. 13,430 (2000) In the 17.7 GHz proceeding, the Commission reaffirmed its policy of placing the cost of involuntary relocation to comparable facilities on new entrants. 15 FCC Rcd. at 13,468, paragraph 78. This policy has been applied consistently in different contexts, and has been upheld each time on appeal. *See, Association of Public Safety Communications Officials International, Inc. v. FCC*, 76 F.3d 395, 397, 400 (D.C. Cir. 1996); *Small Business in Telecommunications, Inc. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001); *Teledesic, LLC v. FCC*, ___ F.3d ___, D.C. Cir. No. 00-1466, Decided December 28, 2001. The *Teledesic* case is instructive here, because it did not involve new spectrum sharing arrangements. According to the Court of Appeals for the D.C. Circuit:

In *Emerging Technologies*, the FCC acknowledged that incumbents that are forced to relocate involuntarily will not incur any costs as the result of forced relocation, and may even benefit in some instances if their aging equipment is replaced with state-of-the-art technology. *Third Report and Order and Memorandum Opinion and Order*, 8 F.C.C.R. 6589, 6595 p.16 (1993). The Commission viewed such a result as the legitimate byproduct of a process whereby important terrestrial services are uprooted against their will to accommodate newer technologies. The 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. *See 2 GHz MSS Relocation Order*, 15 F.C.C.R. at 12,352 p.109 (expressing the Commission's view, dating from the *Emerging Technologies* proceeding, that

existing operations should not be disrupted during the transition to emerging technologies).

...There is only one notable difference between Emerging Technologies and this case: emerging Technologies involved an entirely new service displacing incumbent licensees, while, in this case, satellite and terrestrial users already coexisted in the 18 GHz band on a co-primary basis (citation omitted). This is a difference without significance, however. Teledesic and other companies plan to launch comprehensive new satellite systems involving millions of earth stations that will be licensed on a blanket basis. To accommodate these new systems, existing terrestrial users must be displaced like the incumbents in Emerging Technologies. The compensatory and preservationist justifications for the "comparable facilities" requirement therefore apply equally in this case...

10. The situation here is virtually identical to that in *Teledesic*. Cellularized SMR is not an "emerging technology", low-site technology is the new entrant into a mature allocation, which is apparently, according to the consensus plan, incompatible vis-a-vis incumbent licensees at 800 MHz. The Commission has allowed the implementation of cellular architecture SMR systems which cause interference to incumbent users. Any displacement, whether of public service or non-public service licensees at 800 MHz, necessary to accommodate cellular architecture SMRs or other low-site facilities, should be reimbursed, so as to insure that the Commission's firm policy "that existing operations should not be disrupted during the transition to emerging (or in this case incompatible) technologies" is consistently applied.

11. Therefore, the consensus plan is incompatible with well-established Commission policy, as it does not provide for reimbursement of all expenses for retuning or replacement cost of equipment, should any displacement occur.

12. In sum, the consensus plan (and as well any 800 MHz rebanding plan) represents in some respects a "quick fix" for a complex problem. The solution in this case offered by the consensus plan would benefit public safety entities and cellular architecture systems, but would work to the severe competitive and economic disadvantage of incumbent licensees which are not contributors to the

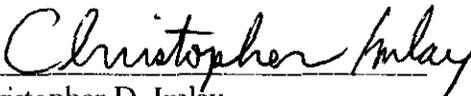
problem being addressed. It is, therefore, an incomplete solution, and one that is flawed in the above important respects. The Commission at 800 MHz has a competitive market for CMRS service. That level of competition is healthy for consumers and should not be disrupted by regulatory decisions that place a disproportionate burden on traditional SMR service providers, or which impose substantial costs and burdens on Business or Industrial/Land Transportation licensees where there is no necessary and offsetting benefit to them.

Therefore, the foregoing considered, Kenwood Communications Corporation respectfully requests that the consensus plan not be adopted in its present form.

Respectfully submitted,

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