

**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

Supplemental Comments of Small Business In Telecommunications To
Supplemental Comments of The Consensus Parties

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Summary

Pursuant to that Public Notice entitled *Wireless Telecommunications Bureau Seeks Comment On "Supplemental Comments Of The Consensus Parties" Filed In The 800 MHz Public Safety Interference Proceeding - WT Docket No. 02-55, DA 03-19* (released January 3, 2003), Small Business in Telecommunications (SBT) hereby submits a supplement to its Comments in opposition to that document entitled "Supplemental Comments of the Consensus Parties" (Supplement) dated December 24, 2002 filed within this proceeding by those parties referenced therein as the Private Wireless Coalition (PWC), which earlier SBT Comments were filed with the agency on January 10, 2003.

Within its earlier Comments, SBT addressed the main text appearing within the Supplement and did not venture extensive comments regarding the attached Appendices to the Supplement. Accordingly, in an effort to provide to the agency a full record and to provide substantive response to those matters identified and addressed within the Appendices to the Supplement, these Supplemental Comments are offered to show that SBT's objections within its earlier comments and the reasons therefore are fully supported by the following examination of the PWC's Appendices, each which demonstrate a basis, not for adoption, but for summary rejection of the PWC's proposals.

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¹ As recognized by the WTB, the parties style themselves the "Consensus Parties" and that the use of the word "consensus" only denotes temporary agreement among the signatories. To avoid confusion, SBT will refer to the group as the PWC.

to those matters identified and addressed within the Appendices to the Supplement, these Supplemental Comments are offered.

Appendix A

The opening sentence of this Appendix demonstrates that fallacy inherent in the PWC's premises. The PWC's proposals suppose that the figure calculated by the PWC members is necessary or reliable. Both suppositions are fully without merit. The amount which is necessary to finance relocation is only relevant to the extent that the agency has some notion as to the extreme costs to be visited on the industry arising out of any order to reband the 800 MHz spectrum. It is not, however, relevant for the purpose of demonstrating full funding of the PWC plan. To the contrary, it demonstrates that the PWC's attempt to cap commitments toward funding are based on speculation and questionable financial guesswork. That the calculations were performed, in the main, by Nextel Communications, Inc. ("Nextel"), calls into further question the results contained therein. Obviously Nextel has substantial reasons for keeping the level of its voluntary commitment toward funding as low as possible. That such arbitrary reduction in projected costs is apparent within the PWC methodology is noted at Appendix A-6 which concludes that cost of relocation of that subset of channels would be equal to approximately \$130 million, or, more directly, at a cost of around \$17,000 per channel. In accord with the agency's past efforts in the area of rebanding, the PWC's chart is allegedly reflective of "actual relocation costs' [which] would include but not be limited to: SMR equipment; towers and/or modifications; back-up power equipment; engineering costs; installation; system testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment; spare equipment; project management; and site

lease negotiation.”^{2 3} SBT strongly avers that the unsupported presumption at Appendix A-6, that all of these costs for each affected channel will average around \$17,000 per channel, is absurd.⁴ Therefore, either the estimated costs are intentionally reduced to minimize or limit Nextel’s voluntary contribution, or the type of rebanding suggested within the PWC comments does not mirror the “seamless” transition which the agency has mandated in the past.⁵ SBT avers that both conclusions are correct.

An analysis of Appendix A at A-10 demonstrates that the factors taken into consideration do not support costs of a seamless transition. Further, the figures shown therein suggest a method which would go like clockwork, without surprises, delays, coordination problems, and with the automatic approval of every affected site owner. This last element may be the most glaring omission. No where within the figures provided is there budgeted any monies for site acquisition costs. Accordingly, there exists an underlying presumption that site owners will necessarily be compelled to go along with rebanding and providing the use of tower and enclosure space, at no

² In the Matter of Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act - - Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act - - Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463, 1582 (1995).

³ The PWC employs a per unit cost of \$50 for reprogramming mobile and portable units which is justified by supposed “information provided by public safety entities during discussions with the Consensus [sic] parties.” Appendix A-12. What the PWC does not note is that the cost is higher for commercial operators who, unlike public safety entities, cannot command their customers to adhere to a rigid schedule and whose customers are often situated at greater distance from associated shops.

⁴ More ridiculous is the PWC total figures at Appendix A-12 which shows that the cost of rebanding will equal approximately \$12,000 per channel.

⁵ See, PR Docket 93-144

cost, to engage in the proposed activity. This is wholly unlikely and is belied by all experience to date.

What is clear is that the cost figures recommend, without directly stating same, that all affected analog operators must be made to suffer substantial disruptions in service to accommodate rebanding. The Commission found in its earlier decisions within PR Docket 93-144 that such disruptions cannot be justified for any purpose. Yet, the PWC has chosen to visit harmful disruption upon all analog operators without justification and, in fact, curiously glosses over this important issue in the Supplement. No where within the Supplement does the PWC fully identify its intentions regarding the relocation methods which would be imposed upon affected analog operators to meet the PWC's rosy cost estimates.

As stated above, SBT rejects fully the premise that any funding of 800 MHz rebanding should be limited or capped by an estimated dollar amount. There is no precedent for such a finding by the agency and the likelihood that capping would survive judicial scrutiny is slight, at best. If, therefore, no capping is appropriate, then the cost figures provided within Appendix A are only tangentially relevant, if at all. And just as the total amount of funding should not be capped, neither should the amount to individual licensees who will each require differing amounts due to unique circumstances. Finally, any rebanding of the 800 MHz band should be performed by seamless transition in accord with the agency's previous, relevant decisions. Innocent analog operators should not be made to suffer substantial disruption to their radio systems to accommodate interfering CMRS operators, which interference arises out of those operators' violation of 47 U.S.C. §301.

For the above reasons and for those reasons articulated within SBT's earlier Comments, SBT requests that the Commission find Appendix A to be wholly irrelevant to the issues within this

matter. Nor is it relevant for the Commission to explore other methods of calculating total costs to reband 800 MHz except as a demonstration of the enormity of the expenditures, which have ranged from a low of \$850 million to estimates of over \$3 billion. What is relevant and necessary is that the funding for any rebanding initiative should not be capped, should not be based on unenforceable promises of voluntary funding arising out of private contractual agreements, and should not be intended to produce less than a seamless transition for affected systems.

Appendix C

At Appendix C-2 the PWC demonstrates fully why its calculation of costs is arbitrarily low. At Section B, 1, the sketchy method for “reprogramming” does not appear to include the construction of redundant systems and does not include any requirement that any such system be built or tested to assure that service to end users is “comparable” as that term is presently defined under existing Section 90.699(d). Instead, this subsection of the PWC’s proposed rules is an exercise in limiting the responsibility of Nextel to providing a non-seamless transition which does nothing to avoid substantial interruption in communications. Were the agency to adopt the PWC plan, including the suggested rules, the agency would, in effect, be forgiving years of communications interruptions by Nextel in its harmful operation of low-site cellular systems that create electrical interference due to power density levels and use of hybrid combiners; by, concurrently, allowing Nextel to engage in a more direct means of interruption via rebanding techniques. Today, Nextel creates OOBE with impunity and without regard to the rights of affected licensees. Under the PWC plan, Nextel would trade this violation of the agency’s rules and Section 301 of the Act for the ability to disrupt communications to nearly 300,000 mobile units within the

channels 851.0125 - 853.9875 MHz alone⁶, including nearly every public safety mobile unit in operation, for an indefinite period until a “reprogramming” is made effective.

At subsection B, 2, of the PWC’s proposed rules, the term “coextensive” is not defined and the use is fully unclear. Since it is already known that the propagation characteristics of 900 MHz systems is not equal to 800 MHz systems, the use of this undefined term becomes even more problematic in its context. However, since the proposed rule recommends a “rebuttable presumption” in favor of the replacement channels, this area of the proposed rules is subject to intense scrutiny and likely disfavor. There can be no such presumption when the agency is fully aware of the basic difference in propagation. Nor can the presumption exist in view of differences in operation arising from channel spacing and combining methods. This matter was fully vetted in PR Docket No. 93-144 and Nextel is attempting, via the PWC, to obtain accommodations to lower the cost of rebanding within this rule making that the agency previously denied for good reason and cause.

At proposed Section C, the agency is not provided with a proposed rule section, but what amounts to a poorly constructed, albeit brief, proposed conclusion of law as to why the Commission should demand that affected operators provide proprietary information regarding operators’ systems to Nextel. What the Section lacks is a remedy section. If the drafters of this Section C were sincere in their promises that Nextel would suddenly change its tactics and not employ such information to raid customer lists, then an additional proposed rule revising the Commission’s forfeiture policies would be included, suggesting that any such activity be punishable by a fine of not less than \$20,000 per customer. The plain truth of the matter is that once proprietary system and customer information

⁶ See, Appendix A-10.

is allowed to be gathered, there exists no effective means for limiting its dissemination and misuse. The PWC would require operators to provide freely this information, and then if it is misused, require the adversely affected operator, who is already suffering reduced revenue due to the misuse, to bear the burden of proof to demonstrate the misuse in costly proceedings to obtain some form of remedy. This shifting of burdens is clearly inappropriate for any legitimate purposes.

Section D of the proposed rules is a lonely section. It lacks statutory authority, precedent, basis in law or fact, or any relevant connection to the realities of the marketplace or the cost of accomplishing the PWC's proposals. It does, however, beg so many questions as to be amazing in its brevity. For example, the language states that Nextel will provide "up to" \$850 million, therefore, the amount may be less, yet the language does not identify the basis for a future discount. The donated amount will "facilitate the relocations" but there exists no claim that the amount will fully compensate affected operators. The Administrator of the fund will have a "fiduciary duty" but the Section does not describe to whom the duty extends. In sum, this tiny, yet entirely important, Section of the PWC's proposed rules is so vague, so bereft of legal authority, so subject to abuse and misinterpretation, as to be wholly without merit. It is so poorly written as a financial basis for adoption of the PWC proposals that it would have rung less hollow if it has begun "scout's honor."

SBT will not belabor these Supplemental Comments further with the entirety of its objections to the proposals contained within the PWC's Appendix C, as its objections have, by and large, been made in its earlier Comments to the PWC's Supplement. The above objections are illustrative of the total failure of the PWC to balance properly the interests of affected analog operators and the business strategy of Nextel. The repeated failure to adequately consider the rights and concerns of analog 800 MHz operators is evident in each Section and subsection of the PWC's proposed rules.

And for these reasons and for good reasons shown herein and within its earlier Comments to the PWC Supplement, SBT respectfully requests that the agency reject summarily the PWC's proposals as without authority, reason, or even a passing nod toward equity. After all, in the final analysis, if the Commission properly rejects the capping of the funding or the PWC's statutorily unsupported method of funding, then the PWC's comprehensive proposals collapse. SBT is confident that the Commission will find that for all of its efforts, the PWC plan is constructed on legal sand and must be allowed to be swallowed up in the desert of equity in which it unfortunately exists.

Appendix F

The contents of Appendix F are predicated on post-rebanding mitigation of interference, relying on rebanding to provide the bulk of the remedial action which might be required from interfering CMRS operations. Insofar as the contents rely on rebanding as a starting point, SBT disagrees with the use of the Policies and Procedures therein and avers that remedial action should begin immediately via the Commission's enforcement of its existing rules and the dictates of 47 U.S.C. §301 to provide protection to 800 MHz systems suffering interference. Even in accord with the PWC's ambitious plans, backed by draconian practices, abbreviated procedures, and denial of licensees' rights to due process, the rebanding proposed by the PWC would require nearly four years to accomplish. In accord with Appendix F, those mechanisms proposed would do nothing to protect public safety operations until the end of that four-year period. For that reason alone, the PWC's proposals at Appendix F should be rejected as failing to fulfill the requests of the agency within its NPRM that requested both immediate and long-term solutions to the problem of harmful interference.

In that same vein, the “definition” of interference articulated within Section 1.2 is woefully inadequate. First, that definition is not applied to present circumstances and the PWC’s refusal to apply that definition immediately is unexplained. Second, harmful interference is already defined under Part 90 of the agency’s rules and this proffered definition does nothing but create excuses for past incidents of interference by attempting to create numerical, rather than functional, guidelines. If the definition was offered as an augmentation (*i.e.* a strict liability standard) to the present functional definition, then it would have greater credibility. As it stands, however, its post-rebanding application and numerical or quantitative approach evinces a lack of sincerity within the proposals. Accordingly, SBT recommends that if the agency determines that greater engineering of CMRS sites is required to meet given standards, that such standards, even if met, should not be deemed to be the final word on whether the CMRS operator is creating harmful interference.

The above stated, insofar as the contents of Appendix F, without regard to the associated rebanding proposal, have attempted to quantify methods for creating a more interference-free environment, SBT lauds those efforts. This approach to interference resolution is similar to that proposed by SBT in its comments within this proceeding, and properly places the burden of compliance upon interfering CMRS operators. SBT believes that once the agency removes the distraction of rebanding and focuses on engineering solutions and restrictions to be applied to interfering operators, the issue of harmful interference will be resolved more equitably and rapidly. Such application of engineering requirements would make unnecessary those suggestions contained within Section 2.1.2 of the PWC plan which creates a second-class status for licensees within the proposed “guard band.” The PWC has never explained why these operators’ systems should be

subject to greater threats of interference than other operators and the proposed criteria at Appendix F do not resolve this problem.

Nor does the PWC provide any method for operators suffering interference to identify the source(s) of that interference. Unlike the SBT proposal, the victimized operator is provided no method for determining the identity of the licensee of an interfering facility; notice of the construction of that facility; or any contact information for seeking immediate resolution of an interference problem. The delay inherent in gathering such information mitigates in favor of greater interference and less cooperation. Accordingly, some data collection and sharing method is necessary to assure that victimized operators, particularly public safety entities, can seek immediate relief.

Finally, the PWC's proposals again sound in testing, cooperation, more testing, additional cooperation, assignment of possible duties among potentially interfering parties, etc., etc..... under some revision in the wholly unsuccessful auspices of the Best Practices Guide. The PWC proposal falls short of the most obvious method of quickly providing a remedy to affected operators, the ability to have the interfering operator cease operations from the offending cell until such time as the problem is resolved. The burden should be upon the interfering operator to demonstrate that further operations shall be within the dictates of the agency's rules and Section 301 of the Act. The burden should not be on the victimized operators to demonstrate why or how their legitimately licensed and operated systems are receiving harmful interference; but rather, on the interfering operators to demonstrate how their systems will avoid and correct interference to those injured operations. And until such demonstration can be made, those facilities which have been shown to be the cause (either

individually or in concert with other facilities) should be shut down. Such requirement is fully consistent with the duties of all other Part 90 licensees and no exception should be made for Nextel.

Conclusion

SBT respectfully requests that the Commission reject the proposals contained within the PWC Supplement and further requests that the agency adopt a further notice of proposed rule making to explore more fully engineering solutions to resolve the cited interference problems without regard to any rebanding initiative.

Respectfully submitted

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