

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

<b>In the Matter of</b>	)	
	)	
<b>Improving Public Safety</b>	)	
<b>Communications in the</b>	)	
<b>800 MHz Band</b>	)	<b>WT Docket No. 02-55</b>
	)	
<b>Consolidating the 900 MHz</b>	)	
<b>Industrial/Land Transportation</b>	)	
<b>and Business Pool Channels</b>	)	
	)	
<b>Wireless Telecommunications Bureau</b>	)	
<b>Seeks Comment on “Supplemental</b>	)	<b>DA 03-19</b>
<b>Comments of the Consensus Parties”</b>	)	
<b>Filed in the 800 MHz Public Safety</b>	)	
<b>Interference Proceeding</b>	)	

**TO: The Commission**

**SUPPLEMENTAL COMMENTS OF CONSUMERS ENERGY COMPANY**

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Dated: February 10, 2003

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## EXECUTIVE SUMMARY

Although the Consensus Plan has been modified, it remains a profoundly flawed and inequitable approach to resolving the interference problems in the 800 MHz band because licensees that are complying with the FCC's regulations will be severely and negatively impacted.

For example, the Canadian Border Region is realigned in a manner that is likely to subject Consumers Energy Company ("Consumers"), and other Critical Infrastructure Industry licensees, to an extraordinary amount of interference. In Region 3, Consumers will be relocated to spectrum that is geographically proximate and spectrally co-channel to Nextel's operations, which is almost certain to cause interference to Consumers' communications systems. When the interference occurs, Consumers will have no recourse because the Consensus Plan does not establish any procedures to resolve interference to Business and I/LT licensees that are licensed above 861 MHz.

Also, the Consensus Plan uses Business and I/LT licensees as a shield to protect Public Safety licensees from interference. Instead of resolving the interference problems, the Consensus Plan will simply alter the object of the interference and guarantee Nextel the right to interfere with Business and I/LT operations. At a minimum, any needed Guard Band should be located in the 861-863 MHz portion of band allocated for cellular operations and any Business and I/LT operations below 861 MHz should be entitled to full interference protection.

The Consensus Plan could also jeopardize the continued effectiveness of Consumers' communications systems because of the draconian manner in which licensees would be relocated. Utilities could be required to relocate in as little as six months even

though this is a ridiculously short amount of time given the complexity of re-engineering the wide-area land mobile communications system that is typically used by utilities. Also, due to the proposed freeze, utilities like Consumers will not generally be able to license new 800 MHz spectrum during and after the relocation process, which will prevent them from reconfiguring their communications systems to meet any changes in their communications needs.

Although Nextel has pledged \$850 million to relocate incumbent licensees, it is doubtful that these funds will be sufficient to relocate all licensees. If the funds are depleted, it will stop the 800 MHz realignment plan and subject NPSPAC licensees to an even greater amount of interference. If the Commission is to proceed down the path of rebanding, which Consumers does not support, it must ensure that the relocation process is completed, Nextel should be required to reimburse all relocation costs for all licensees.

Another problem with the Consensus Plan is that it creates an illegal entity, the Relocation Coordination Committee (“RCC”), to implement and coordinate the realignment process. The RCC cannot be established because the Communications Act does not permit the Commission to delegate its functions to the RCC nor can the RCC meet the standards of the Federal Advisory Committee Act.

For the numerous reasons discussed above, the Commission should reject the Consensus Plan. Instead, the Commission should adopt a solution that facilitates the use of technical solutions. This will eliminate interference for all licensees instead of shifting the burden. The alternative is to wait years to implement a “solution” that gives Nextel the right to continue to interfere with other licensees.

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**SUPPLEMENTAL COMMENTS OF CONSUMERS ENERGY COMPANY**

Consumers Energy Company (“Consumers”), by and through its undersigned telecommunications counsel, hereby files these comments in the above referenced proceeding in response to the Federal Communications Commission’s Public Notice<sup>1</sup> requesting comments on the supplemental comments<sup>2</sup> filed by the proponents of the Consensus Plan.<sup>3</sup>

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<sup>1</sup> *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding, DA 03-19 (January 3, 2003) (*Supplemental Comment Public Notice*).

<sup>2</sup> Supplemental Comments of Aeronautical Radio Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of Public Safety Communications Officials - International, Forest Industries Telecommunications, the

As Consumers has maintained throughout this proceeding, resolving the interference problems that Public Safety licensees in the 800 MHz band are experiencing is critical. Consumers believes, however, that despite the modifications that have been proposed, the Consensus Plan is still a profoundly flawed and inequitable approach to the problem of interference in the 800 MHz band and should not be adopted. Specifically, the relocation proposed by the Consensus Parties would have a significant negative impact on Public Safety, Business and Industrial/Land Transportation (BI/LT) licensees in the form of disruption, costs and, in many cases, *increased* interference. The FCC should take steps to eliminate, rather than relocate, interference, and place the costs on the interfering party. The use of well-defined interference resolution obligations, vigorously enforced, will resolve the problem of interference to all parties rapidly and efficiently. Rather than the wasteful, self-serving Consensus Plan, the Commission should adopt a plan that implements and promotes technical and other solutions targeted to preventing and resolving interference.

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Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs Association, the National Sheriffs Association, the National Stone, Sand and Gravel Association, Nextel Communications, Inc., the Personal Communications Industry Association, and the Taxicab, Limousine and Paratransit Association, WT Docket No. 02-55 (December 24, 2002) (“*Supplemental Comments*”).

<sup>3</sup> As the Wireless Telecommunications Bureau notes, the Consensus Plan’s use of the word “consensus” in the name of the plan “merely denotes that the signatories [to the plan] have reached consensus on the contents of their filing” and does not indicate that all participants in this proceeding support the Consensus Plan. *Supplemental Comment Public Notice* at 1. For consistency and simplicity only, Consumers will also refer to this proposal as the Consensus Plan and the proponents of the Consensus Plan as the Consensus Parties.

## **I. INTRODUCTION**

Consumers provides electricity and natural gas to more than 6 million of Michigan's 9.5 million residents. In order to provide these services safely and efficiently, Consumers has constructed an extensive 800 MHz private land mobile radio system, licensed in the Industrial/Land Transportation Radio Service. The system consists of 67 tower sites serving 3,500 mobile and portable units. Of Consumers' 129 frequency pairs in the 800 MHz band, 52 are licensed in Border Region 3 and 42 are licensed in Border Region 7. Consumers has licensed a total of 23 frequency pairs at 58 sites in the 859-861 MHz band designated under the Consensus Plan to be a Guard Band, buffering Public Safety from Nextel interference. Additionally, Consumers has licensed 16 frequency pairs at 21 sites above 861 MHz, designated for Nextel's interference prone cellular operations. Accordingly, Consumers has an extraordinary stake in the spectrum affected by this proceeding.

Consumers uses its land mobile radio system to dispatch operating crews for daily operations such as routine construction and maintenance work. Consumers also uses the system to notify and direct field personnel responding to any problems. In times of emergency, Consumers uses the system to mobilize work crews to address such issues as system outages and downed power lines. Consumers must respond to these situations rapidly and maintain communications during assessment, containment, and repair in order to avoid further damage and risk to its employees and the public. The integrity of Consumers' 800 MHz system is vital to its ability to deliver electricity and natural gas to its customers in a safe and efficient manner. Consumers' utility operations and the communications that support them have a direct impact on

the well being of the public in its service area. As such, Consumers' communications needs must be protected.

**II. THE COMMISSION SHOULD FACILITATE THE USE OF TECHNICAL STANDARDS AND SOLUTIONS TO RESOLVE THE INTERFERENCE PROBLEMS RATHER THAN ENGAGE IN COSTLY AND WASTEFUL REALIGNMENT**

The Consensus Parties have proposed that the Commission radically realign the 800 MHz band in order to prevent Nextel from interfering with Public Safety licensees. Under their proposal, licensees that are complying with the FCC's regulations and operating without causing interference will be required to relocate and be subject to increased interference themselves. As Consumers has stated repeatedly throughout this proceeding, the Commission must adopt a solution that eliminates interference for *all* licensees and that does not simply shift the problem to different licensees.

To accomplish this goal, the Commission should endorse and further facilitate the use of technical solutions by Nextel to eliminate and resolve interference. Technical solutions are currently being used and can be further facilitated immediately.<sup>4</sup> In this regard, Consumers has dealt with numerous instances of interference to its system stemming from a variety of causes. In virtually every case that was not caused by the use of an unlicensed frequency, technical solutions have resolved the problem. In a recent example, Nextel's installation of an auto tune combiner resolved interference at Consumers' service headquarters in Livonia, Michigan. Interference comes from many sources, not the least of which is the use of unlicensed frequencies. Most interference incidents must be investigated and resolved in some way. The

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<sup>4</sup> See e.g. Comments of City of Portland, Oregon, WT Docket No. 02-55 at 3 (May 6, 2002).

FCC could improve this situation by implementing procedures for the recovery of the costs associated with this process.

In Consumers' experience, the effort associated with the implementation of such measures pales in comparison to the costs and effort that would be associated with wholesale realignment, the efficacy of which has not been demonstrated. Furthermore, the clarification and strengthening of the FCC's rules prohibiting interference, coupled with consistent enforcement in instances of non-compliance, will add predictability to the process such that parties will be motivated to limit interference before it arises. Attached hereto as appendices are suggested rules and license conditions that illustrate how a rebanding process could be implemented in a way that is consistent with the FCC's rules and would not rely on "voluntary" commitments. Although Consumers does not believe rebanding is necessary to resolve Nextel's interference problems, the model rules attached merely illustrate that the complex scheme proposed by the Consensus Parties would not be necessary in any event.

If the Commission decides to realign the 800 MHz band, it will take years to determine whether or not this decision actually reduced the amount of interference. Based on Nextel's willingness to commit \$850 million to eliminate interference in the 800 MHz band, it appears that funding is currently available to resolve the interference problems through technical solutions.<sup>5</sup> Instead of using the money to relocate whole classes of licensees regardless of whether they are causing or receiving interference, these funds could be used more efficiently to implement the technical solutions on a targeted basis.

Although Nextel states that its \$850 million is contingent upon it receiving a nationwide license for 10 MHz of spectrum in the 1.9 GHz band, it has not sufficiently justified an

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<sup>5</sup> *Supplemental Comments* at 5.

entitlement to compensation for fixing a problem that *it* created.<sup>6</sup> Instead, the Commission should enforce Section 90.173 of its regulations and require Nextel to cooperate with other licensees in order to resolve the interference problems through mutually satisfactory technical arrangements.<sup>7</sup>

While offering some useful elements, the “post realignment” interference mitigation rules put forth by the Consensus Parties are flawed in that they: (1) are predicated upon the realignment of the 800 MHz band in accordance with the Consensus Plan and (2) require the offended party to meet technical standards that may not be attainable in order to be entitled to protection.<sup>8</sup> Licensees should enjoy a clear right to be free from interference and only have to make adjustments to their systems to the extent that they negotiate them with the interfering licensee. Nextel and the Consensus Parties have simply failed to make the case that the rights of incumbent licensees should be undermined as set forth in the Consensus Plan.

### **III. THE REALIGNMENT PLAN FOR THE CANADIAN BORDER REGIONS IN WHICH CONSUMERS IS A LICENSEE IS SEVERELY FLAWED**

Consumers conducts a significant portion of its utility operations in Border Regions 7 and 3 and has a vital interest in the administration of the 800 MHz spectrum in those Regions. As it impacts Consumers, the Consensus Parties’ solution for the Canadian Border (hereinafter the “Border Plan”) is to configure Region 7 in accordance with the non-border portions of the country and to relocate BI/LT licensees in Region 3 to spectrum above 861 MHz. Consumers

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<sup>6</sup> *Id.* at 6.

<sup>7</sup> 47 C.F.R. § 90.173(b).

<sup>8</sup> *Supplemental Comments* at Appendix F.

urges the FCC to reject these proposals and facilitate resolution under the existing spectrum allocations.

**A. Consumers Objects To Realignment In Region 7**

Consumers' objections to the proposed treatment of Region 7 are essentially the same as its objections to realignment generally. That is, the proposal would require unnecessary, disruptive and costly measures of questionable benefit to any licensee other than Nextel. Additionally, the realignment would essentially use BI/LT licensees as a buffer from Nextel caused interference to Public Safety licensees without adequate protection. For the reasons discussed below and in Consumers' other filings in this docket, the FCC should reject the Consensus Parties' proposal for Border Region 7 and establish clear interference resolution obligations.

**B. Relocation Of Business And I/LT Licensees In Region 3 To The 860.9-864.1 MHz Band Will Have Devastating Consequences For Consumers**

The Consensus Parties' proposal for Region 3 along the Canadian Border is to relocate I/LT and Business licensees from separate allocations at 851-856.25 MHz to a common "High Site Business, ILT/SMR" pool at 860.9-864.1 MHz. The Commission should not adopt this proposal because Business and I/LT licensees in Region 3 will: (1) be subject to extraordinary levels of interference while receiving no countervailing protection from it; (2) be unable to acquire equipment to operate their communications systems; and (3) have the performance of their land mobile communications systems impaired. In the event that the FCC does impose realignment in Region 3, the FCC must take steps to protect Consumers' operations by allowing Consumers to remain on or relocate to the spectrum at 851- 856.25 MHz and establish a Guard

Band in the spectrum allocated to low site, low power use at 864-866 MHz. In any case, the FCC must confirm a clear obligation and procedures to resolve interference that are not dependent upon modification of the offended parties' facilities.

If the Consensus Plan is adopted, Business and I/LT licensees in Region 3 will be forced to use channels in a common pool located immediately adjacent to a contiguous pool of frequencies designated solely for Nextel's low-site, low-power architecture. There is no question that Nextel's operations causes interference and the proposal for a Guard Band outside the border regions demonstrates the enhanced risk associated with spectral proximity to Nextel operations on contiguous channels. Under the proposal for Region 3, Business and I/LT licensees have no choice but to operate under these circumstances. There are no channels available for Business and I/LT use more than 3.25 MHz from the Nextel block. Furthermore, Nextel will use the same spectrum allocated to Business and I/LT in Region 3, 861-864 MHz, in the adjacent non-border area for its cellular operations. Accordingly, Consumers and other Critical Infrastructure Industry licensees<sup>9</sup> will be geographically proximate and spectrally co-channel to Nextel's cellular operations in many instances, giving rise to an extremely high likelihood of interference to Consumers' operations.

The Consensus Plan, however, does not establish any policies or procedures to address interference problems in Region 3 for Business and I/LT licensees. The proposed regulations were drafted such that they assume that Business and I/LT licensees can operate only below 861

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<sup>9</sup> The term "Critical Infrastructure Industries" has been defined alternately as "the water, gas and electric power utilities" or as "the electric, gas and water utilities, petroleum and natural gas pipelines and railroads. *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, *Notice of Proposed Rule Making*, 17 FCC Rcd 4873, 4894 (2002). Consumers urges the use of the more expansive definition for this purpose but notes that it falls within either.

MHz while cellular operations would be permitted only above 861 MHz. As a result, the interference protections that are provided will not address Consumers' operations in Region 3. This is unacceptable. As a utility, Consumers' land mobile communications have been recognized by Congress as serving a special role in serving the public interest.<sup>10</sup> A substantial portion of Consumers' service territory is located in Region 3, including the highly populated Detroit metropolitan region.

Relocating Business and I/LT licensees to the 860.9-864.1 MHz band is also problematic because it greatly reduces the available separation between the highest and the lowest frequency on which Business and I/LT licensees can operate. Currently, the high and low end of the Business and I/LT spectrum in Region 3 is separated by almost *14 MHz*. Under the Border Plan, the available spectrum will be compressed into a 3.2 MHz band. As a result, Consumers' ability to use its combiners will be impaired because combiners work best with 500 kHz of separation between channels. Only Business and I/LT licensees that use *seven discrete channels or fewer* would have sufficient separation between their frequencies. Other licensees, such as Consumers, would have to increase their transmit power or add additional sites in order to maintain their communications systems' current performance. Unfortunately, Consumers cannot increase its transmit power because the equipment is already operating at its design level. In addition, it is extremely doubtful that Consumers could build additional sites under the Consensus Plan because of spectrum scarcity and the licensing freeze that the Consensus Parties request. As a result, requiring relocation of all of Consumers' operations to the 860.9-864.1 MHz band would severely undermine the performance of its land mobile communications systems.

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<sup>10</sup> Balanced Budget Act, § 3001 *et seq.*, Pub. L. No. 105-33, Title III, 111 Stat. 251, 258 (1997); *codified at* 47 U.S.C. § 309(j)(2)(a).

Furthermore, Business and I/LT licensees in Region 3 will likely have long term difficulty acquiring equipment that will operate in the 860.9-864.1 MHz band. The *Supplemental Comments*' interference protection guidelines suggest that the Commission should establish regulations requiring manufacturers to develop equipment that will reject adjacent frequencies.<sup>11</sup> If this is instituted, equipment manufacturers are likely to design equipment for non-cellular users that rejects signals above 861 MHz because the vast majority of the United States would have been realigned in this manner. The Consensus Parties even recognize that Public Safety licensees should be located below 861 MHz so that new Public Safety equipment can be deployed nationwide that will reject signals above 861.<sup>12</sup> Because equipment manufacturers generally design equipment to serve both Public Safety and Business and I/LT licensees, however, Business and I/LT licensees operating above 861 MHz are likely to find that suitable equipment is not available.

Based on the foregoing, even if the FCC adopts rebanding for non-border areas, Consumers urges the FCC not to adopt the Consensus Parties' proposal for Region 3. Instead, the FCC should reinforce interference resolution obligations in that region, facilitating the use of technical solutions to interference issues. If the FCC adopts the requested realignment, it must establish measures to protect Consumers' operations by: (1) establishing a guard band in which no low-site, low-power architecture is permitted at 864-866 MHz and (2) according Consumers the same treatment in Region 3 as Public Safety, allowing Consumers to remain or relocate to 851-856 MHz, as appropriate. These measures would be critical to the continued viability of

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<sup>11</sup> *Supplemental Comments* at Appendix F-8.

<sup>12</sup> *See Id.* at 36.

Consumers' 800 MHz communication system, as the unchecked interference that would result from the Consensus Plan proposal for Region 3 would render it essentially useless.

**C. The Consensus Plan Improperly Reallocates Spectrum In The Border Region**

Under the proposed Border Plan, Business and I/LT frequencies in the Canadian border regions will be permanently *reallocated* from Business and I/LT licensees to Nextel for low-site, low-power operations. In Region 3, the Consensus Plan would allocate exclusively for Nextel's use 177 channels, diminishing the relative allocation for Business, and I/LT licensees from 170 channels to a combined pool of 128 channels that must also be shared with high site SMR licensees. The proposal for Region 3 makes no net change to the size of the Public Safety allocation. The Consensus Parties' justification for this reallocation is that it is based on the "existing spectrum usage."<sup>13</sup>

Consumers objects to this result. Nextel has asserted an objective of increasing spectrum available for Public Safety in this proceeding.<sup>14</sup> It is telling, however, that the Region 3 plan serves only to benefit Nextel by permanently allocating additional frequencies for its use. Furthermore, the mere fact that Nextel may have been able to acquire a number of Business and I/LT channels at *specific locations* does not support a wholesale and permanent reallocation of the number of frequencies allocated to the private services. BI/LT licensees in Region 3 currently have the right to short-space or, in the event of cancellation, license the spectrum Nextel is using to justify the diminution in frequencies available for BI/LT use. Any approach to

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<sup>13</sup> *Id.*

<sup>14</sup> Promoting Public Safety Communications -- Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio - Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs at 4-5 (Nov. 21, 2001) ("*Nextel White Paper*").

interference resolution in Region 3 should maintain the relative service allocations for BI/LT licensees.

**IV. THE CONSENSUS PLAN CONTINUES TO HAVE FUNDAMENTAL PROBLEMS IN GENERAL AND SHOULD NOT BE ADOPTED AS A MEANS OF RESOLVING THE INTERFERENCE PROBLEM**

In addition to its Border Region activities, Consumers also has extensive utility operations throughout most of the non-border portion of Michigan and would be significantly impacted by the Consensus Plan generally. Even as supplemented, the Consensus Plan is flawed as a solution to interference issues and the FCC should not adopt it.

**A. Utilities Should Not Be Required To Operate In A Guard Band**

The Consensus Plan would establish a Guard Band outside of the Border Regions to separate Public Safety licensees from cellular operations providing that only “communications systems that can best tolerate some interference” should utilize the Guard band.<sup>15</sup> Despite recognizing this limitation, the *Supplemental Comments* would require Business and I/LT licensees, including critical infrastructure licensees, to relocate into, or remain in, the Guard Band. Under this scenario, Business and I/LT licensees would be used as a shield to protect Public Safety licensees from interference. Instead of finding a solution to the interference problems, the Consensus Parties propose to change who is harmed by the interference. As discussed below, Consumers and other critical infrastructure licensees should not be required to operate in a Guard Band because they are not provided with adequate interference protection.

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<sup>15</sup> Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55 at Appendix II p. 4 (August 7, 2002).

Instead, the Commission should establish the Guard Band in the spectrum allocated for Nextel's use above 861 MHz, which will provide interference protection to all relocated licensees.

1. Licensees In The Guard Band Are Not Adequately Protected From Interference

Licensees in the Guard Band are protected from interference only if they use receivers that meet the TIA Class A specifications and only in areas where the licensee receives a significantly robust signal. The signal strength starts at -98 dBm at 859 MHz and increases linearly to -92 dBm at 859.5 MHz and to -59 dBm at 860.5 through 861 MHz.<sup>16</sup> As discussed above, Consumers cannot increase its transmit power because its equipment is already operating at its design level. As a result, Consumers will not be protected from interference because its signal strength will not be sufficiently strong throughout its service territory. This would essentially give Nextel free reign to interfere with Consumers' operations and probably most other private licensees in the Guard Band. It is outrageous for the Consensus Parties to propose such a result in a proceeding necessitated by a problem that Nextel is causing.

In addition, Consumers will not be provided with "comparable facilities" if it is relocated into the Guard Band. The Consensus Parties state that relocated licensees are entitled to the same quality of service.<sup>17</sup> For licensees that are relocated into the Guard Band, the quality of service will decrease significantly or be eliminated because the amount of interference protection that is provided is reduced substantially or eliminated.<sup>18</sup> This would impair Consumers' ability

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<sup>16</sup> This assumes that the licensee is operating an "existing" system. *Supplemental Comments* at 41-42; Appendix F-2 - F-3.

<sup>17</sup> *Id.* at Appendix C-2.

<sup>18</sup> Similarly, licensees that are required to remain in the Guard Band are not provided with comparable facilities because they are required to operate under different conditions and are not protected from harmful interference.

to use its communications system effectively and this could hamper its efforts to provide critical services.

## 2. Critical Infrastructure Licensees Must Be Protected From Interference

The services provided by critical infrastructure licensees affect everyone within their service territory. Without electricity or gas, other industrial and business operations simply cannot be performed. The National Telecommunications and Information Administration recognized that any “system disruptions [to critical infrastructure licensees] that are not quickly restored pose potential threats not only to public safety, but also to the Nation’s economic security.”<sup>19</sup> By way of example, the Report cautioned that a disruption in a power generating station’s control computer could be “just as devastating” to the Nation’s economy as the September 11, 2001, terrorist attacks on the World Trade Center.<sup>20</sup> It is in the public interest and necessary to take measures to ensure that utilities are able to continue to use their communications systems effectively. As discussed above, this will not occur if critical infrastructure licensees are relocated into the Guard Band.

Public safety licensees are allowed to relocate out of the Guard Band because they perform critical functions and only “interference-resistant” licensees should operate in the Guard Band.<sup>21</sup> Similarly, critical infrastructure licensees use their communications systems to perform

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<sup>19</sup> Marshall W. Ross and Jeng F. Mao, Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Response to Title II of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 Public Law 106-553, U.S. Department of Commerce, National Telecommunications and Information Administration at 3-3 (Jan. 30, 2002).

<sup>20</sup> *Id.*

<sup>21</sup> *Supplemental Comments* at 10.

emergency services and should be adequately protected from interference. Accordingly, the Commission should allow critical infrastructure licensees to relocate into the 854-859 MHz band under the same conditions as Public Safety licensees.

3. The Commission Should Establish A Guard Band Above 861 MHz

Even if the Commission allows critical infrastructure licensees to relocate out of the Guard Band, Consumers still believes that no licensees should be required to operate in a guard band where they are subject to harmful interference. Consumers recommends that, outside the border regions, licenses in the 859-861 MHz band should have the same interference protection that is provided to licensees in the 854-859 MHz band, and a “Guard Band” should be established *in the 861-863 MHz portion of the cellular band*. This is an appropriate solution because, as even Nextel acknowledges, the measures proposed in this proceeding are the result of Nextel’s conduct and it is patently unfair to impose upon non-interfering licensees the burdens and uncertainty associated with occupying a Guard Band.<sup>22</sup>

**B. The Consensus Plan Will Cause Tremendous Harm To Vital Communications Systems**

The relocation process that is proposed by the Consensus Parties will harm utilities and should not be adopted because the amount of time that utilities are given to relocate is insufficient and the proposed licensing freeze could jeopardize the continued effectiveness of the utilities’ communications systems.

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<sup>22</sup> As Nextel should be well aware, the guard band established for the 700 MHz band is intended to limit transmission from the guard band into the adjacent non-commercial band. [CITE]

1. Utilities Should Not Be Required To Relocate In As Little As Six Months

Under the *Supplemental Comments*, licensees could be required to relocate in as little as six months but no longer than twelve months. Because of the complexity of re-engineering wide-area land mobile communications systems, it would be grossly unfair to expect Consumers and other utilities to relocate in one year or less. The Commission recognizes that this timeframe is unrealistic and allows licensees twelve months to construct a *single station* and up to five years to build a wide-area communications system, such as Consumers has constructed.<sup>23</sup>

The Consensus Parties also acknowledge that licensees might not be able to relocate in this short a period and state that *Public Safety licensees* can request an extension if circumstances beyond their immediate control, such as delays in equipment delivery, prevent them from meeting the deadline.<sup>24</sup> Business and I/LT licensees, however, are not permitted to request an extension even if faced with circumstances identical to those that would justify an extension for a Public Safety licensee.

Consumers is particularly concerned with the possibility of having to relocate under the proposed deadlines when the logistics of relocating Consumers' system easily rival the original system implementation, a process lasting years. Additionally, Consumers is uncertain if it could acquire the equipment necessary to relocate in such a short period. Consumers' land mobile communications system uses crystal controlled base station repeaters in approximately half of its facilities. It is not clear that Consumers could obtain adequate quantities of crystals in time to meet the prescribed deadlines. If the crystals cannot be manufactured quickly enough,

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<sup>23</sup> 47 C.F.R. §§ 90.155; 90.629.

<sup>24</sup> *Supplemental Comments* at 30 n. 50.

Consumers would risk losing its license even though the delay is completely out of its control. This would severely disrupt Consumers' operations.

2. Utilities Will Not Generally Be Able To Access New 800 MHz Spectrum

The Consensus Parties are requesting that the Commission impose a licensing freeze to facilitate the relocation process and Public Safety's access to new spectrum. If this occurs, Business and I/LT licensees may not be able to apply for new licenses for Business and I/LT spectrum or modify their existing licenses without a waiver for at least three years from the Report and Order's adoption.<sup>25</sup> In addition, the *Supplemental Comments* would effectively freeze any new licensing by Business and I/LT licensees for an additional five years.<sup>26</sup>

If a licensing freeze is implemented, it will be extremely difficult or impossible for utilities to expand or modify their communications systems. This would jeopardize the continued effectiveness of the utilities' communications systems because the system in essence becomes "landlocked" and cannot be readily reconfigured to meet a utility's changing needs. Past freezes have shown the tremendous difficulty associated with seeking even minor system adjustments. A freeze on Business and I/LT spectrum not directly involved in the relocation of Public Safety licensees would not serve a legitimate policy purpose. In the event that the FCC is inclined to adopt one, however, Consumers urges the FCC to exempt critical infrastructure licensees such as Consumers so that they can maintain their vital utility communications.

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<sup>25</sup> *Id.* at 26.

<sup>26</sup> *Id.* at 12.

3. The Interference Protection Afforded To Utilities Should Not Be Reduced

The *Supplemental Comments* also provide that licensees in the 854-859 MHz band will be protected from interference only if they meet a required signal strength of -98 dBm.<sup>27</sup> Although the required signal strength is less than what is required in the Guard Band, Business and I/LT licensees would still not be protected from interference unless they use certain receivers and their signal is sufficiently strong. Consumers strongly believes that licensees should not be stripped of any of their interference protection just because Nextel is unable to manage its interference. Instead, the Commission should require Nextel to alter its operations so that it can comply with the FCC's regulations and operate in a non-interfering manner.<sup>28</sup>

As discussed above, Consumers' system was designed to operate with signals as low as -110 dBm. Changing the standard would require system redesign and the addition of sites. Given the extraordinary channel congestion in Consumers area, which will only be exacerbated by the Consensus Plans' proposed freezes, this will likely be impossible to implement. If it were, this should be subject to reimbursement by Nextel as is the case with relocation. Consumers finds it interesting that Nextel would require these measures as far away from its operations as 854 MHz. This raises a question as to whether *any* relocation will be sufficient to remedy interference.

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<sup>27</sup> This assumes that the licensee is operating an "existing" system. *Id.* at Appendix F-2.

<sup>28</sup> See 47 C.F.R. § 90.173(b).

### **C. The Proposed Funding Mechanism Would Be Insufficient To The Stated Purpose**

Nextel has agreed to contribute up to \$850 million to relocate incumbent licensees. The \$850 million will be divided between Public Safety licensees (\$700 million) and non-Public Safety licensees (\$150 million).<sup>29</sup> However, as discussed below, it is doubtful that the funds will cover the relocation costs of all the licensees. If the funds are insufficient, the relocation process will be halted prior to completion, which could *increase* the amount of interference that Nextel inflicts on other licensees and impair interoperability as between Public Safety licensees that are relocated and those that are not. Instead, the Commission should require Nextel to guarantee the relocation costs of all licensees.

#### **1. There Is Serious Question As To Whether The \$850 Million Pledged By Nextel Will Be Sufficient To Relocate All Licensees**

The Consensus Parties state that the \$850 million should cover the “relocation costs of all 800 MHz incumbents required to relocate pursuant to the Consensus Plan” and that the \$150 million will cover the reasonable costs of retuning and relocating Business, I/LT, and high-site SMR licensees.<sup>30</sup> Notwithstanding these claims, Nextel’s steadfast insistence on a funding cap indicates that it has little confidence that the amounts identified will be sufficient. The \$150 million for all non-Public Safety licensees is particularly suspect. Relocation of Consumers’ own system, which is just one of numerous wide area utility systems in the 800 MHz band, could reach upwards of \$5 million.

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<sup>29</sup> *Supplemental Comments* at 5.

<sup>30</sup> *Id.* at 5-6.

Also questionable is whether or not the \$700 million will be sufficient to relocate all Public Safety licensees because it is uncertain how many mobile radios will have to be replaced.<sup>31</sup> The relocation costs could vary dramatically depending upon this number.<sup>32</sup> Similarly, the relocation costs for non-Public Safety licensees could fluctuate greatly depending upon slight variations in the number of radios that are replaced.

## 2. The Relocation Process Could Be Halted Prior To Completion

If the relocation costs are not sufficient, then the Consensus Plan will come to a halt because licensees will not be relocated in a NPSPAC region unless “full funding” is available to relocate all licensees.<sup>33</sup> As a result, if the \$150 million that is available for non-Public Safety licensees is depleted, these licensees will continue to operate on their General Category frequencies. NPSPAC licensees would then be unable to relocate into the 851-854 MHz band even if funds dedicated to relocate Public Safety licensees are available because relocating NPSPAC licensees is dependent upon sufficient funds being available to first relocate non-Public Safety licensees.

If the relocation process is halted, NPSPAC licensees and Nextel will be operating in both the 851-854 MHz band and the 866-869 MHz band. The benefits of having a specific band dedicated for NPSPAC licensees would not be realized and NPSPAC licensees would be subject to interference from Nextel in both bands. Instead of resolving the interference problems in the 800 MHz band, the Consensus Plan would aggravate the situation if the relocation process were

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<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 11-12.

stopped. The Commission must ensure that, if it adopts a relocation plan, Nextel will fully fund it through to completion.

3. Nextel Should Be Required To Guarantee To Reimburse Comprehensive Relocation Costs For All Licensees

The only way to guarantee that the Consensus Plan's realignment process will reach its conclusion is to guarantee that sufficient funds exist to relocate all licensees. Nextel should be required to reimburse licensees for all their relocation costs because Nextel's operations have given rise to the realignment plan.

Nextel has stated that it cannot guarantee reimbursement to licensees for all their relocation costs because it is a publicly traded corporation and is therefore prohibited from incurring open-ended debts.<sup>34</sup> Ironically, the Nextel-driven Consensus Plan would subject numerous publicly traded corporations to theoretically unlimited costs in the form of downtime, disruption and costs that fall outside of scope of reimbursement. Nonetheless, Nextel could demonstrate its confidence in its cost figures, and avoid the open-ended debt issue by doubling or tripling its commitments, secure in the knowledge that its actual outlay would never approach these amounts. Of course, Nextel will not do so because, in light of the massive scale of the realignment and the complexity and uncertainty associated with relocating so many licensees, there is a strong likelihood that the costs will far exceed Nextel's funding "commitment." With the Consensus Plan, however, Nextel has cleverly ensured that such an overrun will not be its, or its shareholders', problem.

Furthermore, the costs that Nextel would reimburse are extremely vague. While the Consensus Plan provides that they will be "similar to those enumerated in WT Docket No. 93-

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<sup>34</sup> *No Easy Answers for 800 MHz Re-Banding*, Wireless Data News, November 20, 2002, at 1.

144,”<sup>35</sup> this gives Nextel substantial latitude within which to negotiate with each incumbent. If there is to be mandatory relocation, these costs should be specified to include all costs reasonably related to a required relocation or system upgrade required to receive interference protection.

#### 4. Nextel’s Promise To Provide \$850 Million Contribution Is Illusory

Even if the Consensus Parties could guarantee that the \$850 million would be sufficient to cover the relocation costs of all licensees, the procedures that would govern the relocation fund are such that Nextel’s “promise” to pay \$850 million in relocation costs is illusory. Under the Consensus Plan, Nextel will secure its funding commitment by placing the license that it will receive for the spectrum in 1.9 GHz band in a new corporate entity and pledge the stock of that company to a trustee with instructions to sell the corporate assets (the 1.9 GHz license) if Nextel fails to meet its funding obligations. However, Nextel can substitute securities or other assets with a value equal to or greater than Nextel’s remaining obligation.<sup>36</sup>

This arrangement is severely flawed because there are no guarantees that the sale of the 1.9 GHz license would generate \$850 million in relocation funds. For example, Winstar purchased 15 LMDS licenses for over \$57 million. Subsequently, these 15 licenses along with the entire company, which included over 1,750 other licenses, was sold for approximately \$38 million dollars.<sup>37</sup> As the telecommunications industry declines, the value of any particular spectrum band is highly speculative.

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<sup>35</sup> *Supplemental Comments* at C-23.

<sup>36</sup> *Id.* at 8 n. 9.

<sup>37</sup> *In the Matter of Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission’s Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17; DA-887; Order*; 17 FCC Rcd 7084 (2002).

In addition, Nextel is able to substitute other collateral such as securities for the spectrum. This too is a risky proposition. A few years ago, the economy was booming and stock prices were rising daily. Now, the market has crashed and many stock prices are at all time lows. Also, the stocks of many companies are worthless because the companies have gone out of business. If the relocation costs were backed by these securities, there would be a minimal amount of funds available to relocate licensees. Nextel, however, would be unharmed because it would have its nationwide license for 10 MHz of spectrum.

The only way to guarantee that \$850 million will be available to fund the relocation costs would be to require Nextel to deposit the full amount in cash into an escrow account before the relocation process begins. Consumers recommends that, if the Commission adopts the Consensus Plan, Nextel be required to deposit \$850 million into an escrow account within 5 days of the effective date of the Report and Order adopting the Consensus Plan.

**D. The Creation And Operation Of The RCC Would Be Illegal**

Under the *Supplemental Comments*, the Relocation Coordination Committee (“RCC”) would be established to implement the 800 MHz realignment plan. This arrangement, however, violates the law because the Commission may not delegate these responsibilities to the RCC and, even if the RCC could be legally established, its composition would violate the requirements of due process.

1. The Communications Act Does Not Authorize The Delegation Of The FCC’s Functions To The RCC

The Consensus Parties propose that the RCC should be created to designate and coordinate frequencies, resolve disputes, conduct arbitration hearings, determine the priority

level of each NPSPAC region, coordinate all license modifications in the 800 MHz band, and submit license applications to the FCC.<sup>38</sup> However, the Communications Acts provides that the *Commission* is to regulate the use of the spectrum and that, absent an *express statutory provision*, it can delegate its responsibilities only to “a panel of commissioners, an individual commissioner, an employee board, or an individual employee.”<sup>39</sup> The RCC cannot be given these responsibilities because it does not meet the criteria of an entity to which the Commission’s functions can be delegated.

## 2. The RCC Violates The Federal Advisory Committee Act

Although it is unclear what exactly legal status the RCC would have, it appears that it would most closely resemble an advisory committee.<sup>40</sup> However, the authority that the Consensus Parties propose to delegate to the RCC exceeds the scope of what the Commission is permitted to delegate to an advisory committee. Under the Federal Advisory Committee Act, an advisory committee is supposed to “advise” the agency and is prohibited from making binding policy decisions.<sup>41</sup> However, the Consensus Parties have proposed that the RCC should designate frequencies, resolve any disputes, and determine the priority levels of each NPSPAC

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<sup>38</sup> *Supplemental Comments* at 15-24.

<sup>39</sup> 47 U.S.C. § 155(c)(1). Several other provisions in the Communications Act recognize section 155(c)(1) as the only statutory authority permitting the FCC to delegate its functions. *E.g.*, 47 U.S.C. § 405 (governing petitions for reconsideration of orders, decisions, reports, or actions by any designated authority pursuant to a delegation under section 155(c)(1)); *Id.* § 409(b)-(c)(1) (governing adjudications designated by the FCC for hearing under section 155(c)(1), although this provision inadvertently refers to section 155(d)(1), which was the proper citation prior to the amendments to the Communications Act in 1961).

<sup>40</sup> Consumers does not believe, however, that, as proposed, the RCC could even qualify as an advisory committee because it does not meet the established criteria. Specifically, the RCC does not have an adequate staff to perform its functions and it does not include a government representative. 5 U.S.C. App. 2 §§ 5(b)(5); 10(e).

region without any significant FCC oversight or input. Each of these decisions is clearly a policy decision that the Commission must make. As a result, the establishment of the RCC would violate the Federal Advisory Committee Act.

### 3. The Membership Of The RCC Violates Due Process

Even if the RCC could be legally established, the composition of the RCC violates due process. As discussed above, the RCC will be entrusted to coordinate the entire 800 MHz realignment plan. In order to ensure that the rights of all parties are protected, licensees have a right to an impartial decision-maker.<sup>42</sup> In this case, the RCC would be comprised of Nextel and four members of the Land Mobile Communications Council, two representing Public Safety licensees and two representing private wireless licensees.<sup>43</sup> Each member is supposed to represent the views of its own “constituency.”

Business and I/LT licensees will not be meaningfully represented in the RCC as the Consensus Parties claim. Under this arrangement, however, Nextel will have the swing vote as between the two Public Safety members and the two private wireless members. By structuring the RCC in this manner, Nextel is the most powerful member and can be expected to determine every major controversy and the Consensus Parties have ensured that the RCC’s decisions will not be the result of a fair and impartial process.

For example, Nextel and Public Safety licensees have a mutual interest in minimizing the relocation costs that are awarded to Business and I/LT licensees. Licensees are not required to relocate unless there is adequate funding to cover the relocation costs of all licensees in each

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<sup>41</sup> 5 U.S.C. App. 2 § 2(b)(6).

<sup>42</sup> See *Connally v. Georgia*, 429 U.S. 245 (1977); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

<sup>43</sup> *Supplemental Comments* at 15-16.

NPSPAC region. If the funding for Business and I/LT licensees is depleted, Business and I/LT licensees will not vacate their General Category channels, which will prevent NPSPAC licensees from relocating to the 851-854 MHz band. Similarly, Nextel will not be able to acquire the spectrum in the 866-869 MHz band if the NPSPAC licensees cannot be relocated. Public Safety licensees and Nextel are harmed if the relocation funds for Business and I/LT licensees are insufficient.

Under the Consensus Plan, Business and I/LT licensees must negotiate with Nextel regarding their relocation, including the amount they will be reimbursed to cover their costs. If the parties cannot reach an agreement on the relocation costs, the matter will be resolved through binding arbitration by a panel selected by the RCC.<sup>44</sup> Nextel and the two Public Safety representatives can be expected to select arbitrators that award Business and I/LT licensees minimal relocation costs to ensure that the \$150 million provided to Business and I/LT licensees will be sufficient to cover all the relocation costs. Similarly, Nextel and the two Public Safety members could decide on a relocation plan that gives the best frequencies to Public Safety licensees so that Nextel's competitors are left with inferior spectrum. The composition of the RCC provides the incentives to make biased decisions that protect the controlling parties' own interests and violate the due process requirements.

## **V. CONCLUSION**

In conclusion, the Commission should not adopt the Consensus Plan as it is a wasteful, inefficient and unfair approach to a problem that is chiefly caused by one licensee. The FCC should ensure that the responsibility for resolution of the interference that is the subject of this

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<sup>44</sup> *Id.* at 22.

docket lies with Nextel and that Nextel meets this responsibility. Consumers submits that this can best be accomplished through the enforcement of the FCC's interference rules.

**WHEREFORE, THE PREMISES CONSIDERED,** Consumers respectfully requests that the Commission consider these comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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## APPENDIX A

### Interference Resolution Procedures

<b>Suggested License Conditions and Rule Changes</b>	<b>Discussion of Suggested License Conditions and Rule Changes</b>
<p><b>I. Interference from Low-Site Digital Transmitters</b></p> <p>A. The licensee of any system in the 806-824/851-869 MHz band that installs a digital transmitter with an antenna height less than 200 feet (60.96 meters) AGL shall provide the Commission and the frequency coordinator(s) for the 800 MHz band with the following information within 30 days after installation:</p> <ol style="list-style-type: none"> <li>1. Licensee Name;</li> <li>2. Licensee Point of Contact Name, Address, and Telephone Number</li> <li>3. Geographic coordinates of all antenna structures on which it has installed transmitting antennas less than 200 feet (60.96 meters) AGL; and</li> <li>4. Certification that the licensee has performed an engineering analysis pursuant to generally accepted industry practices, by which it has determined that its operations, either alone or in conjunction with systems of other licensees operating in close proximity, will not cause co-channel, adjacent channel, or intermodulation interference to other licensees in</li> </ol>	<p><i>Irrespective of whether the band is realigned according to the program outlined above, the rules should provide that licensees of low-site digital transmitters have an obligation to cooperate in avoiding and mitigating interference to other licensees. This obligation extends across the entire 806-824/851-869 MHz band, and would include Nextel's post-realignment operations in the 816-824/861-869 MHz band. The primary enforcement tool is the creation of a database, to be maintained by the Commission and the coordinators, of the geographic locations of all low-site digital transmitters. Since this database would only be used to resolve interference complaints, it only needs basic information regarding station location and point-of-contact information for the licensees. Licensees of low-site digital systems would also be required to analyze the potential for interference to other systems with service areas in the vicinity of the low-site digital transmitter. Interference studies need not be filed with the Commission, but must be produced upon Commission request.</i></p>

the 806-824/851-869 MHz band with service areas that overlap a 5,000 foot radius around the digital transmitter site. Documentation supporting this certification need not be filed with the Commission but must be made available to the Commission upon request. Licensees are responsible for the continuing accuracy of the information included in this notice.

B. If the licensee of a system in the 806-824/851-869 MHz band reasonably believes, based on generally accepted engineering analysis, that it is experiencing interference from a system low-site digital system at a specific location or locations, the licensee may serve written notice of interference on the digital licensee(s) having facilities within 5,000 feet of the area(s) of interference.

1. Initial notification: A licensee receiving interference seeking the participation of low-site digital licensees in evaluating an alleged interference occurrence shall post a standard interference complaint to an e-mail address operated jointly by the licensees of low-site digital systems. The complaint shall contain (a) the specific geographical location where the interference is occurring in terms of latitude and longitude, (b) the FCC license information for the offended party, and (c) the offended party's point of contact ("POC") for technical information.

2. Initial response: All operators receiving notice of the complaint

*A licensee experiencing interference could initiate interference resolution procedures by serving notice on licensees of nearby low-site digital transmitters. The requirements for notification and mitigation are largely modeled on the procedures recommended by Nextel and the other "Consensus Parties."*

shall respond to the complaint within two business days and shall confirm whether they have equipment operating within 5000 feet of the location of the alleged interference. The equipment may be either cell site equipment or repeaters.

3. On-site analysis. The complaining entity's technical POC shall contact the potential contributors and arrange for an on-site analysis to take place within five business days (or later, at the discretion of the complaining entity). All potential contributors to the interference shall support the analysis effort. On the agreed-on day the complaining entity's technical POC and the POCs from the potential contributors shall conduct an analysis of the interference.
4. Mitigation steps. When the analysis shows that one or more of the potential contributors are interfering with the system in question, the contributors to the interference shall correct the interference per industry-standard mitigation techniques. If the analysis shows that a suspected contributor is not part of an interference problem, the suspected contributor will be relieved of responsibility for correcting interference at that site. If the analysis shows that a suspected contributor is causing interference, that entity shall contribute to resolving the interference. The resolution of the interference shall be documented and copies provided to each

contributor and the complaining licensee.

5. Active management. If mitigation of interference at a site requires that contributors make changes which are easily reversed (e.g., changing of transmitter frequencies to avoid intermodulation ("IM") product formation on a particular frequency, or a reduction in on-street power), then the contributor making the change shall coordinate both with the other contributors and the complaining entity before making further changes to the site.
6. Interference from equipment not belonging to CMRS providers. If the interference is found to be caused by something other than the equipment belonging to a CMRS provider (e.g., a bi-directional amplifier ("BDA") installed by a third party), the owner of the equipment shall be responsible for mitigating the interference.
7. The licensee alleging interference shall have a duty to cooperate in the implementation of the most cost-effective solution.
8. If an agreement between the parties is not reached within 60 calendar days after receipt of the written notice of interference, either party may submit the matter to the FCC for resolution.

## APPENDIX B

### Rebanding Transition Procedures

<b>Suggested License Conditions and Rule Changes</b>	<b>Discussion of Suggested License Conditions and Rule Changes</b>
<p>I. <b>Definitions</b> . As used herein-</p> <p>A. The "Report and Order" is the Report and Order adopted in WT Docket No. 02-55.</p> <p>B. An "incumbent system" is a radio system licensed to any entity other than Nextel or its affiliates in the 806-824/851-869 MHz band as of the effective date of the Report and Order in WT Docket No. 02-55.</p> <p>II. <b>Condition on Nextel's Licenses</b>. All licenses in the 806-821/851-866 MHz band held by Nextel Communications, Inc., as well as its affiliates, subsidiaries, and other entities substantially controlled by or under common control with Nextel (collectively referred to herein as "Nextel"), as of the effective date of the Report and Order, shall be subject to the following conditions:</p> <p>A. <u>Relocation of Incumbent Systems</u>. Nextel shall, at its own expense, and subject to the comparability standards of Section 90.699(d)(1)-(4):</p> <ol style="list-style-type: none"> <li>1. Relocate all incumbent systems from the 806-809/851-854 MHz band to equivalent spectrum in the 809-816/854-861 MHz band;</li> <li>2. Relocate all incumbent systems from the 821-824/866-869 MHz band to equivalent spectrum in the 806-809/851-854 MHz band</li> </ol>	<p><i>The <u>Report and Order</u> should impose certain conditions on Nextel's licenses requiring it to relocate incumbents in the 800 MHz band such that NPSPAC channels would be relocated to designated replacement spectrum (e.g. the 806-809/851-854 MHz band), and Nextel would relocate from below 816/861 MHz to spectrum above 816/861 MHz, including the former NPSPAC channels. Nextel would have certain rights to relocate incumbents, but would also be subject to certain obligations to protect incumbents' interests throughout the relocation process.</i></p> <p><i>Nextel would be required to relocate incumbents from the former General Category channels and the former NPSPAC channels, as well as any licensees in the 814-816/859-861 MHz "guard band" that request relocation during the first year after the rules are adopted.</i></p>

<p>pursuant to a channel plan that maps on a one-for-one basis each channel in a Public Safety Regional Plan to a new channel in the 806-809/851-854 MHz band while maintaining channel spacing as provided in the Regional Plan; and</p> <p>3. Relocate an incumbent system from the 814-816/859-861 MHz band to equivalent spectrum in 809-814/854-859 MHz band upon written request of the incumbent licensee made within 12 months after the effective date of the Report and Order. In any event, a licensee relocating to or electing to remain in the 814-816/859-861 MHz band shall be entitled to the same levels of interference protection as any other licensee in the 806-816/851-861 MHz band.</p> <p>B. <u>Guaranteed Payment.</u> No incumbent system licensee is required to relocate unless all estimated relocation costs are paid in advance by Nextel, or unless the parties agree otherwise.</p> <p>1. To guarantee adequate funding for this process, Nextel shall place in an irrevocable escrow account sufficient funds to cover the projected relocation costs. The Commission may authorize adjustments to the escrow amount to ensure that the escrow account contains sufficient funds to cover the reasonably projected costs of relocation. In the event of bankruptcy, insolvency, or other inability or unwillingness of Nextel to complete the necessary relocations, funds from this escrow may be used to reimburse incumbent licensees for all</p>	<p><i>To ensure that no one is forced to relocate without funding, all relocation expenses would be paid in advance unless the parties agree otherwise. Because a partial realignment of the 800 MHz band could lead to worse interference conditions than exist today, Nextel should be required to establish an escrow account to guarantee its complete performance of the required relocations.</i></p>
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reasonable steps to complete the transition. The escrow agreement shall provide for the return of funds to Nextel only on order of the Commission.

C. Upper Band Replacement Spectrum.

Nextel shall be authorized to commence operation in the 821-824/866-869 MHz band in a given Public Safety Planning Region only upon certification to the Commission that it has entered Relocation Agreements with respect to all incumbent systems in that Region as provided in paragraphs A.1. through A.3. above.

D. Cancellation of Other Licenses.

1. Nextel's authorization for channels in the 806-816/851-861 MHz band within a given Public Safety Planning Region shall cancel automatically, and Nextel shall cease operations on all such channels, within eighteen (18) months after it has entered agreements for the relocation of incumbent Public Safety systems in that Region from the 821-824/866-869 MHz band as required in paragraph A.2. above.

2. Neither Nextel nor any of its affiliates, subsidiaries, and other entities substantially controlled by or under common control with Nextel shall be eligible to acquire, directly or indirectly, any licenses for channels in the 806-816/851-861 MHz band upon the effective date of the Report and Order in WT Docket No. 02-55, except to the extent channels are exchanged with incumbent systems for purposes of the relocations

*Nextel's modified license would provide it with replacement spectrum in the former NPSPAC channels at 821-824/866-869 MHz. However, it could not access this spectrum in a Public Safety Planning Region until it has entered agreements to relocate all incumbent systems in that region.*

*To ensure that Nextel promptly exits the spectrum below 816/861 MHz, it would lose the right to operate below 816/861 MHz 18 months after it has entered agreements to relocate Public Safety systems out of the former NPSPAC band.*

*In recognition of the contiguous nationwide spectrum it would obtain as a result of this process, neither Nextel nor its affiliates would be permitted to re-license channels below 816/861 MHz.*

described in paragraphs A.1. through A.3. above.

**III. Availability of Vacated Channels.**

- A. Channels in the 809-816/854-861 MHz band vacated by Nextel will become available for routine licensing to other entities in a particular Public Safety Region only after all of the incumbent systems in the 806-809/851-854 MHz and 821-824/866-869 MHz bands, as well as incumbent systems in the 814-816/859-861 MHz band electing relocation, have been relocated in that Region.
- B. Upon relocation of all incumbent systems from these bands in a particular Public Safety Region, the Commission will issue a Public Notice announcing the completion of the relocation process for that Region, and will make any remaining channels vacated by Nextel in the 809-816/854-861 MHz band in that Region available for licensing to other entities eligible for Public Safety, Business, or Industrial/Land Transportation licenses.

**IV. Relocation Procedures**

- A. Relocation Period. The Relocation Period shall commence on the effective date of the Report and Order in WT Docket No. 02-55.
- B. Relocation Notice. Nextel may commence the relocation of an incumbent system at any time during the Relocation Period by providing the licensee with written notice of an

*Although Nextel would not have authority to operate on these channels once its licenses cancel, these vacated channels could be used only for relocation purposes until the Commission determines the relocation process has been completed in a particular NPSPAC region.*

*The relocation rules are modeled after the relocation rules previously used to clear the 2 GHz band for PCS and the Upper 200 SMR channels, and depend on the balancing of rights and obligations between the incumbents and the "new" licensee initiating the relocations. However, since*

intent to relocate.

C. Mandatory Negotiations. Following receipt of notice, the parties shall negotiate in good faith to develop a Relocation Plan.

1. Under the Relocation Plan, Nextel shall, at its own expense, provide the incumbent with equivalent replacement spectrum as specified in Section II.A. above, and shall assume liability for or reimburse the incumbent licensee for all costs, including legitimate and prudent transaction expenses and the licensee's internal resources devoted to the relocation process, and costs associated with coordination, engineering, and facilities that may be necessary to provide the incumbent licensee with performance and capacity that is comparable to what was provided by the incumbent's existing system prior to the relocation, using the same factors to assess comparability as defined in Section 90.699(d)(1)-(4) of the Commission's Rules.

Authorization for a replacement channel shall contain no additional restrictions or encumbrances beyond those that were applicable immediately prior to the effective date of the Report and Order to the channel to be vacated by the incumbent licensee.

2. The replacement channels for incumbent systems in the 806-809/851-854 MHz band shall consist of designated replacement channels formerly licensed to Nextel. These may include channels from the 809-816/854-861 or 816-821/861-866 MHz

*the intent of this process would be to promptly initiate action to mitigate interference, there would be no "voluntary" negotiation period; i.e., parties would be under an obligation to negotiate in good faith.*

*Comparability of replacement systems would be gauged by the existing definition of comparability in Section 90.699. Moreover, replacement channels would have to provide the incumbent licensee with at least the same opportunity to operate and modify facilities as with its existing license. Thus, for example, an EA licensee in the 806-809/851-854 MHz band should receive an EA-based license that contains no encumbrances or technical restrictions that differ from the encumbrances or conditions (if any) that exist with respect to the incumbent's license immediately prior to the effective date of the Report and Order.*

*While it has been assumed that Nextel has sufficient channels to be vacated for replacement purposes, if those channels are insufficient in any market, it would be required to provide replacement channels*

<p>band.</p> <p>3. The Relocation Plan shall establish timeframes for relocation intended to minimize disruption of the incumbent's operations. For this purpose, three years shall be presumed to be a reasonable period of time to relocate a system that was licensed for, or would qualify for, extended implementation under Section 90.629(a). Unless the parties specifically agree otherwise, the Relocation Plan shall provide for each mobile and portable to be re-tuned only once.</p> <p>D. <u>Good Faith</u>. Once mandatory negotiations have begun, a party may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, <i>inter alia</i>, the following factors:</p> <ol style="list-style-type: none"> <li>1. Whether Nextel has made a bona fide offer to relocate the incumbent system to comparable facilities as defined in Section 90.699(d);</li> <li>2. If the incumbent licensee has demanded a premium, the type of premium requested (e.g., whether the premium is directly related to relocation, and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (i.e., whether there is a lack of proportion or relation between the</li> </ol>	<p><i>from its "Upper 200" SMR channels.</i></p> <p><i>A key part of any Relocation Plan is the timeframe within which the incumbent will relocate, giving due regard to the size of the system and the need to avoid disruption to ongoing operations.</i></p> <p><i>The requirement to negotiate in good faith is modeled after the mandatory negotiation rules for the 2 GHz microwave band. These rules place an emphasis on a negotiated solution, but provide safeguards against overreaching by either party, with allowance for complaints to the FCC should one party believe the other party is not negotiating in good faith.</i></p>
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<p>two);</p> <ol style="list-style-type: none"> <li>3. What steps the parties have taken to determine the actual cost of relocation to comparable facilities;</li> <li>4. Whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process.</li> </ol> <p>E. Any party alleging a violation of the good faith requirement must attach an independent estimate of the relocation costs in question to any documentation filed with the Commission in support of its claim. An independent cost estimate must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee.</p> <p>F. <u>Involuntary Relocation Procedures</u>. If no agreement is reached during the mandatory negotiation period, Nextel may request involuntary relocation of the incumbent's system. In such a situation, Nextel must:</p> <ol style="list-style-type: none"> <li>1. Guarantee payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the incumbent licensee that are directly attributable to an involuntary relocation.</li> <li>2. Provide for the completion of all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure, and obtaining, on the incumbents' behalf, new</li> </ol>	<p><i>If the parties cannot reach an agreement within the one-year mandatory negotiation period, Nextel could initiate involuntary relocation procedures by guaranteeing to pay all relocation costs, providing for all steps necessary to complete the transition, and ensure that the replacement facilities meet the standards for comparability.</i></p>
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<p>frequencies and frequency coordination; and</p> <p>3. Ensure that the replacement system is built and tested for comparability with the existing 800 MHz system.</p>	
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## **CERTIFICATE OF SERVICE**

I, Christine Bisio, do hereby certify that on this 10th day of February 2003, I caused a copy of the foregoing "Supplemental Comments of Consumers Energy Company" to be hand-delivered to each of the following:

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