

**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)

**COMMENTS OF HARBOR WIRELESS, L.L.C. ON THE
SUPPLEMENTAL COMMENTS OF THE CONSENSUS PARTIES**

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SUMMARY

Harbor Wireless, L.L.C. opposes the Supplemental Comments filed with the Commission on December 24, 2002 by Nextel Communications., Inc. and other parties who have dubbed themselves the "Consensus Parties." Harbor respectfully submits that the Consensus Plan is fundamentally unfair to non-Nextel holders of 700 MHz Guard Band spectrum, contrary to the public interest and the Communications Act, and fails to provide the empirical data that would be required before the Commission could possibly justify giving valuable scarce spectrum to a single party in a private barter transaction.

Harbor holds a 700 MHz Guard Band license covering the Alaska MEA. Nextel purchased at auction 40 of the 52 B Block 700 MHz Guard Band licenses in the United States. Nextel now proposes to relinquish its 700 MHz Guard Band licenses and to redesignate the relinquished band for public safety use. The Consensus Plan, in effect, sounds a death knell for the Guard Band Managers before the innovative 700 MHz Guard Band service plan has been given a fair opportunity by the Commission to develop.

If the 700 MHz Guard Band spectrum becomes shared, on a co-primary basis, with public safety users as proposed, non-Nextel 700 MHz Guard Band Managers will be stranded on that spectrum – unable to develop the innovative nationwide service the Commission envisioned when it fashioned the Guard Band proposal. The departure from the band by Nextel, the largest spectrum holder, will make equipment manufacturers and investors unlikely to continue to view the spectrum as viable for nationwide commercial development.

In addition, fundamental revisions in the regulatory structure applicable to the 700 MHz Guard Band spectrum at this late juncture would severely undermine the integrity of the auction process. Prior FCC policy statements have correctly concluded that bidders are only able to participate in a rational manner in an auction if they can evaluate all allocated and allocable spectrum at the time of the auction with the assumption that the authorized uses will continue for a reasonable time. The Consensus Plan completely contradicts this sound policy by allowing Nextel to acquire spectrum designated for one use and then to convert it a short time later to a radically different use while failing to propose any avenue of relief for non-Nextel Band Managers.

The Consensus Plan's proposed changes to the funding mechanism for relocation expenses also are contrary to the public interest. In its original proposal, Nextel committed to fully fund relocation expenses with cash deposited - up front - into an escrow account. That commitment has been watered down: Nextel now would contribute only \$25 million to the relocation fund up front -- *less than 3%* of the costs the Consensus Parties estimate will be incurred by relocating incumbents. Nextel offers thereafter to make "periodic contributions" to the fund to satisfy its commitment -- creating, in effect, an installment payment plan to satisfy its obligation to the U.S. Government and incumbents. The request flies in the face of Commission decisions discontinuing the use of such installment arrangements. And, the "security" Nextel will pledge to guarantee its performance is illusory, at best, and fails to provide the Government or incumbents with the assurances that are necessary in order for hundreds of parties to undertake relocation projects costing almost one billion dollars.

The Consensus Parties also propose that Nextel get a credit of over \$350 million for surrendering its 700 MHz Guard Band licenses, even though the spectrum will be reassigned free of charge to public safety users rather than being auctioned off to raise cash which could be used to reimburse relocating parties. Nextel, in effect, seeks credit for a cash contribution without having generated any cash.

Finally, the Consensus Plan violates Section 309(j) of the Communications Act of 1934, as amended, which requires the use of auction procedures for initial spectrum licensing. While the Commission has a certain amount of flexibility to determine what spectrum is subject to auction procedures, and who may participate in such auctions, application of such discretion to permit Nextel to circumvent this statutory requirement would eviscerate the underlying principle supporting the use of auctions: that spectrum is expected to be put to its best and highest use by those who value it most. To compound the issue, Nextel makes this proposal without having submitted sufficient data regarding the value of the spectrum it seeks to surrender or to acquire. At the very least, the Commission must require Nextel to step up and produce such evidence.

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To: Chief, Wireless Telecommunications Bureau

**COMMENTS OF HARBOR WIRELESS, L.L.C. ON THE
SUPPLEMENTAL COMMENTS OF THE CONSENSUS PARTIES**

Harbor Wireless, L.L.C. ("Harbor"), by its attorneys and pursuant to the *Public Notice* released January 3, 2003¹ and the *Order* released January 16, 2003,² hereby submits its Comments on the Supplemental Comments ("Supplemental Filing") submitted by the Consensus Parties³ on December 24, 2002. The Supplemental Filing

¹ *Public Notice*, 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 (rel. Jan. 3, 2003).

² *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 MHz Industrial/Land Transportation and Business Pool Channels*, Order Extending Time for Filing of Comments, DA 03-163 (rel. Jan. 16, 2003).

³ The self-denominated "Consensus Parties" include Aeronautical Radio, Inc., the American Mobile Telecommunications Association, American Petroleum Institute, the Association of Public-Safety Communications Officials – International, Inc., the Forest Industries Telecommunications, the Industrial Telecommunications Association, International Association of Chiefs of Police, the International Association of Fire Chiefs/International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriff's Association, the National Sheriff's Association, National Stone, Sand and Gravel Association, Nextel Communications, Inc., the Personal Communications Industry Association, and the Taxi, Limousine and Paratransit

(continued...)

fails to resolve outstanding questions regarding the efficacy of the proposed spectrum swap vis-à-vis 700 MHz Guard Band Managers and raises new questions regarding the viability of the proposed funding mechanism for the relocation of 800 MHz incumbents and the valuation of spectrum subject to reassignment. The following is respectfully shown:

I. INTRODUCTION

Harbor was formed in the year 2000 to develop wireless services and systems in the 700 MHz band. The principals of Harbor are experienced communications entrepreneurs with an established record of constructing and operating broadband wireless networks. Harbor first participated in FCC Auction No. 33 and won a 4 MHz license in the 700 MHz Guard Band covering the Alaska MEA. Harbor next participated in FCC Auction No. 44 and acquired 14 Lower Band 700 MHz licenses in a variety of markets across the U.S.

Nextel also participated in FCC auctions for 700 MHz Guard Band spectrum, and purchased 40 of the 52 B Block (4 MHz) licenses in those auctions. The Consensus Parties' proposal requests that the Commission permit Nextel to exchange, *inter alia*, its 700 MHz Guard Band spectrum for contiguous blocks of spectrum at 800 MHz and 1.9 GHz, and redesignate the 700 MHz Guard Band spectrum for public safety use. The Supplemental Filing also proposes certain changes to the relocation funding mechanism

(...continued)

Association. The Association of American Railroads became a signatory to the Supplemental Filing on December 31, 2002 and thus also is included in the term "Consensus Parties." Harbor must note from a review of the record in this proceeding that there is far from a consensus in this docket.

and contends that the value of the spectrum Nextel would turn in, plus the funds it would contribute, is equal to the value of the contiguous spectrum it seeks to acquire at 800 MHz and 1.9 GHz.

Harbor, as a 700 MHz Guard Band Manager, will be directly adversely affected by the Consensus Parties' proposal regarding the redesignation of the 700 MHz Guard Band spectrum. Harbor also will be harmed competitively if Nextel is able to acquire spectrum outside of an auction context for less than a fair market value when Harbor has been required to purchase spectrum for market prices at auction. Based upon these interests and its experience in the valuation of spectrum resources, Harbor is well positioned to provide informed comment on the Supplemental Filing.

II. THE PROPOSED SPECTRUM SWAP IS FUNDAMENTALLY UNFAIR TO NON-NEXTEL HOLDERS OF 700 MHz GUARD BAND SPECTRUM

The Consensus Parties proudly state that the "Consensus Plan is the only proposal before the Commission that enjoys the support of organizations representing over 90 percent of the 800 MHz Land Mobile Radio licensees affected by CMRS – public safety interference." Supplemental Filing, p. 3. This claim is carefully crafted to create the false impression with the Commission and others that the proposal is supported by all constituencies affected by the plan. But this is not true. The proposal has a disastrous effect on non-Nextel holders of 700 MHz Guard Band spectrum. Nevertheless, the legitimate concerns of 700 MHz Guard Band Managers are neither reflected in nor addressed by either the original proposal or the Supplemental Filing. Apparently, the Consensus Parties do not want to acknowledge the cruel truth that the Consensus Plan is the death knell of the 700 MHz Guard Band service. Indeed, Harbor contacted representatives of Nextel to express its concern over the negative impact of Nextel's

proposal on the 700 MHz Guard Band service. Nextel was either unable or unwilling to address those concerns.

The Supplemental Filing contemplates that Nextel will return its 700 MHz Guard Band licenses to the Commission and that the relinquished spectrum will be redesignated for public safety use. Supplemental Filing, p. 13. The Supplemental Filing makes a fleeting reference to the fact that Nextel's 700 MHz Guard Band footprint is not fully nationwide, but does not discuss what will happen to the non-Nextel 700 MHz Guard Band licenses. The Plan appears to mean that Harbor will retain primary status as a 700 MHz Guard Band Manager in its area while the Nextel licenses are converted to co-primary status with public safety and, ultimately, converted to public safety use. Under this scenario, Harbor and other non-Nextel 700 MHz Guard Band Managers will be stranded in the band with no prospect of creating the innovative nationwide service that the Commission had in mind when it fashioned the Guard Band proposal. The Commission envisioned that the 700 MHz Guard Band spectrum would allow for "effective and valued use of the spectrum" residing between public safety users and the newly reallocated 700 MHz spectrum that would be used for the provision of advanced services.⁴ The changes in the regulatory and licensing framework proposed in the Consensus Plan will substantially reduce the value of the spectrum that the 700 MHz Guard Band Managers acquired only recently at auction, without any compensation for such injury. Action of this nature, without just compensation, constitutes a regulatory taking in violation of the Fifth Amendment of the United States Constitution.

⁴ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Second Report and Order*, 15 FCC Rcd. 5299, para. 4 (2000).

Further, changing the rules in this manner and at this late juncture undermines the integrity of the auction processes in which Harbor and other 700 MHz Guard Band Managers participated, and is thus contrary to the public interest. The FCC's Office of Plans and Policy, in its well-reasoned report entitled "Using Market Based Spectrum Policy to Promote the Public Interest" (January 1997), emphasized the importance of maintaining reasonable administrative certainty in the rules governing spectrum usage if the FCC auction process is to work efficiently.⁵ Indeed, the report noted the mischief that can be caused when spectrum is acquired under one set of regulatory rules and then converted to other uses.⁶ The report properly concluded that bidders will only be able to participate in a rational manner in an auction if they can evaluate all allocated and allocable spectrum at the time of the auction with the assumption that the authorized uses will continue for a reasonable time. The Consensus Plan, if implemented, will undermine the goal of promoting rational auctions. Removing the exclusive nationwide allocation from the 700 MHz Guard Band spectrum significantly changes the value of that spectrum, and certainly undermines the integrity of the auction at which it was acquired.

The Consensus Plan also makes it all but certain that the 700 MHz Guard Band service will never have an opportunity to develop. With the largest holder of 700 MHz

⁵ Gregory L. Rosston and Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87 (1977).

⁶ Notably, Nextel is renowned for using this tactic to build value in its company. It cobbled together a disparate set of private radio licenses and sold the Commission a bill of goods by asserting that it could convert them to cellular-type common carrier usage without creating interference. Now it is using the interference it created as a pretense to garner contiguous spectrum, while converting 700 MHz Guard Band spectrum it acquired to another non-conforming use. Given the success it has enjoyed through these bait and switch tactics it is hard to blame Nextel for trying, but difficult to believe that the FCC will fall for this gambit again.

Guard Band spectrum departing the band and the service, it is unlikely that equipment manufacturers will devote any time or attention to the development of equipment or innovative services for use by 700 MHz Band Managers, or that sources of financing will support the development of the band. As the Commission is aware, the 700 MHz Guard Band licenses are subject to certain technical restrictions that will require manufacturer support to address. The Consensus Plan effectively reallocates the 700 MHz Guard Band channels to public safety use throughout most of the nation. This eliminates any prospect for the development of the innovative commercial services originally envisioned by the Commission. And, the plan also seriously restricts the secondary market for these licenses, thus leaving current license holders in the untenable situation of being unable to build-out, finance or sell the assets they acquired. Non-Nextel Guard Band Managers could not have foreseen this situation when they bid on the spectrum a mere two years ago.

Notwithstanding the direct financial injury the Consensus Plan will cause to non-Nextel Guard Band Managers, the plan does not address these harms or offer any viable solution or avenue of relief or remedy to those spectrum holders. Nextel should not be permitted to single-handedly eviscerate the Commission's 700 MHz Guard Band service and cause direct financial harm to its participants in furtherance of Nextel's own spectrum aspirations. The Consensus Plan should either eliminate the exchange of 700 MHz Guard Band spectrum for 1.9 GHz licenses or, alternatively, offer a viable avenue of relief to all spectrum holders that would be harmed by this exchange. For example, the Commission could allow all 700 MHz Guard Band Managers to exchange their spectrum for an equivalent amount of spectrum in the 1.9 GHz band, thus addressing the concern

that the non-Nextel Guard Band Managers would be stranded in the 700 MHz band. Any solution must address the harm associated with the radical alteration of the licensing scheme.

**III. THE PROPOSED CHANGES TO THE FUNDING MECHANISM
ARE CONTRARY TO THE PUBLIC INTEREST AND THE
COMMUNICATIONS ACT, AND ARE
NOT SUPPORTED BY SUFFICIENT VALUATION EVIDENCE**

Even if the Commission accepts the premise that Nextel should be given contiguous wireless spectrum outside of any auction process in a private barter transaction, the plan now proffered by the Consensus Parties is seriously flawed. The Supplemental Filing proposes significant changes in the mechanism by which relocating 800 MHz incumbents will be reimbursed. In its original proposal, Nextel committed to put \$500 million of committed reimbursement monies immediately into escrow to guarantee that public safety licensees would have an available cash reserve to draw upon to fund relocation expenses. The changes proposed in the Supplemental Filing severely undercut this commitment. While Nextel characterizes the proposed modifications to the funding mechanism as additional protections, closer analysis reveals that the changes leave relocators and the Government with fewer assurances that Nextel will meet its commitments.

Nextel has withdrawn its commitment to place the full amount of the committed reimbursement funds into escrow in advance. Instead, the Consensus Parties propose to establish a Relocation Fund largely supported by IOUs. The Relocation Fund will not be fully funded at any point: rather, Nextel will make an initial deposit of only \$25 million in cash (less than 3% of the amount Nextel estimates will be needed for relocation

reimbursement),⁷ and promises “periodic contributions” to the fund in the future for payment of retuning costs. Supplemental Filing, p. 7. However, Harbor is unable to find in the Supplemental Filing any schedule of additional contributions to which Nextel will be held. This lack of obligation to make contributions to the fund with any regularity or at specified timeframes will make incumbents reluctant to relocate since they will not know if and when funds will be available to reimburse their expenses.

Properly viewed, Nextel’s proposal is an installment payment plan by which Nextel can extend performance of its financial obligation to the U.S. Government over time. As such, it flies in the face of the Commission’s express policy decision to terminate the use of these arrangements⁸ -- a decision which, no doubt, has been further solidified by the recent Supreme Court ruling in the NextWave litigation.⁹ If there is one lesson to be learned from the painful saga of the NextWave case it is that the FCC should never dole out spectrum in exchange for a promise to pay an obligation over an extended period of time.

Nextel attempts to allay concerns regarding its potential non-performance by agreeing to establish a separate corporate entity, the shares of which would be pledged to an escrow agent. The assets of the company would consist of the 1.9 GHz license or, at

⁷ In Harbor’s view, the Nextel estimate is low and requires further quantification.

⁸ *Amendment of Part 1 of the Commission’s Rules: Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 374, 400 (1998) (eliminating installment payment option for designated entity licenses in wireless auction proceedings).

⁹ *Federal Communications Commission v. NextWave Personal Communications, Inc., et al.*, Case No. 01-653, ___ U.S. ___, 2003 U.S. LEXIS 1059, 71 U.S.L.W. 4085 (Jan. 27, 2003) (FCC unable to cancel licenses of company under protection of the bankruptcy laws for failure to pay obligations due the U.S. Government).

Nextel's option, cash or cash equivalents. Nextel may, with certain consents, replace those assets with other assets or equity securities, and retain the 1.9 GHz license free and clear. If Nextel fails to meet its funding obligations, the escrow agent may sell the shares of the company to reimburse relocators. Contrary to the Consensus Parties' assertions, this proposal provides far less protection to relocators and the Government than the fully funded cash escrow originally proposed. First, since there is no established timeframe in which Nextel must reimburse relocators, there is no way to determine when a "failure to perform" would be deemed to occur, thereby triggering the escrow agent's right to sell the pledged securities to raise cash for reimbursement purposes.

Second, even if there was clarity on when the escrow agent could foreclose on the pledged securities, there is a serious risk of delay associated with the sale of the company's stock, particularly if the current unfavorable economic climate for wireless assets continues. The delay will be exacerbated if the company still holds the 1.9 GHz FCC license at the time of foreclosure, which would require the submission and approval of an FCC transfer of control application prior to the consummation of the sale of the stock. Such delays would cause relocation efforts to grind to a halt as relocating parties lose confidence that they will be reimbursed. The result could well be a complete failure to effect the spectrum swap in the timeframes promised by the Consensus Parties.

Third, there is absolutely no guarantee that the assets securing Nextel's obligations will be adequate. Unlike cash, which can be managed by the escrow agent in a manner that gives it a predictable value, the 1.9 GHz license offered by Nextel as security is likely to have a fluctuating and uncertain value. Worse yet, the proposal permits Nextel to replace the 1.9 GHz license as the asset securing its obligations with

“securities or other assets with value equal to or greater than the amount of those remaining funding obligations.” Supplemental Filing, n. 9. But there is no indication of the point in time at which those securities or assets will be valued, or whether, if their values decline before the escrow agent forecloses on the company’s stock, whether Nextel will contribute additional assets to bridge the gap. The Commission should require Nextel to address these fatal risk factors in its new plan.

Fourth, Nextel proposes that it be deemed to have contributed \$354,711,000 to the Relocation Fund by virtue of its contribution of its 700 MHz Guard Band licenses. Harbor questions why Nextel’s contribution of that spectrum should even be deemed a contribution to the Relocation Fund. The spectrum is not an asset that will produce cash (*e.g.*, through an auction) that may be used to reimburse relocators. Rather, under the Consensus Parties’ plan, the spectrum will be redesignated for public safety use and relicensed to public safety operators in exchange for their existing spectrum. So, in effect, the Relocation Fund will actually only have cash available to reimburse relocators up to \$495,289,000 – far less than the estimated \$850,000,000 of relocation expenses the Consensus Parties envision will be incurred.

In sum, Nextel’s funding proposal has changed from one that called for immediate capitalization of a cash relocation fund, with Nextel’s obligations secured by an escrow arrangement, to one requiring only partial upfront funding and ambiguous back-end commitments that are not effectively secured.

Even if the Commission were satisfied with the mechanics of the Relocation Fund, it must ask itself whether, as a matter of policy, it wants to go down the road of allowing a private party to swap a collection of disparate licenses for contiguous

spectrum in a private barter transaction. The Commission cannot be sure on the current record that Nextel's cash contributions to the Relocation Fund, plus the return of certain of Nextel's spectrum, constitutes an even exchange for the 800 MHz and nationwide 1.9 GHz licenses Nextel seeks. And, a serious question exists as to whether Nextel's request to acquire new spectrum without participating in an auction process violates Section 309(j) of the Communications Act of 1934, as amended.

The Communications Act generally dictates that the Commission use auctions to assign new or initial wireless broadband licenses. While the Commission has some flexibility in defining what constitutes "initial licensing," and to limit eligibility to participate in an auction, exercising that discretion to endorse the Nextel proposal would be contrary to the underlying purposes of the Act. Nextel claims that it is not seeking "new" licenses but, rather, modified licenses. This characterization is inconsistent with prior FCC rulings. Specifically, the FCC already has found that applications for new spectrum (*i.e.*, spectrum on which the applicant is not presently licensed) constitute "initial applications" subject to Section 309(j) auction authority. *See, e.g.*, 47 C.F.R. § 22.131. And, the Commission generally favors open eligibility for new mobile spectrum, and never has limited eligibility to participate in an auction to one party. In those rare instances where the Commission has restricted eligibility for new spectrum, the restrictions were rooted in statutory requirements and in most instances the Commission limited eligibility to a whole class of potential applications (such as designated entities) – not a specific applicant. The Commission should not permit Nextel to do an end-run around the statutory requirement to compete in public auction for new spectrum.

Even if Nextel navigates around Section 309(j), the Supplemental Filing does not contain any concrete valuation of the spectrum being relinquished or the spectrum being received. At the very least, it is incumbent upon the Consensus Parties to provide an independent professional appraisal of the relative spectrum values, and for that appraisal -- along with the data and assumptions underlying it -- to be put forward for comment by other knowledgeable parties. Absent a definitive valuation analysis by the Consensus Parties, the Commission must assume that Nextel is receiving more than it is giving. After all, Nextel is not a charitable institution.

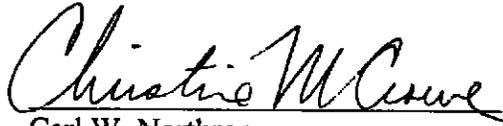
Comparing the spectrum being returned with the spectrum to be received compels the conclusion that Nextel is taking advantage of the Commission. The new spectrum is in contiguous blocks, nationwide (on 1.9 GHz), in spectrum bands more conducive to the type of service Nextel provides, does not require prior frequency coordination, permits Nextel's exclusive use of the spectrum (as opposed to use of only 49.9% of its 700 MHz Guard Band capacity), and is subject to fewer interference-based operational limitations. No succinct analysis is offered to equate the value of the spectrum being relinquished to the spectrum being acquired. Swapping spectrum without due consideration of the market value of that spectrum contradicts the fundamental principles underlying the Commission's licensing and auction authority. Spectrum is expected to be put to its best and highest use by those who value it most, but Nextel is seeking to circumvent the valuation process. The Consensus Parties' proposal would have the Commission award spectrum to Nextel based on Nextel's own unsupported assertions of the spectrum's value and without subjecting such award to competing bids from the marketplace. Harbor respectfully submits that, at the very least, the Commission must require Nextel to

demonstrate convincingly through independent expert analysis that the spectrum swap represents an exchange of assets with equal value. More appropriately, though, the licensing of new spectrum to Nextel should be subject to the competitive bidding procedures required by the Communications Act.

WHEREFORE, the foregoing having been duly considered, Harbor respectfully requests that the Commission: (i) deny Nextel's request to swap its 700 MHz Guard Band spectrum and modify the rules governing that spectrum; (ii) require Nextel to capitalize the Relocation Fund in full prior to initiation of relocation efforts; and (iii) order further investigation into the valuation of the spectrum subject to the spectrum swap.

Respectfully submitted,

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