Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Improving Public Safety Communications in The 800 MHz Band	)	
	)	
	)	WT Docket No. 02-55
Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	

To: The Commission

COMMENTS ON REVISED 800 MHZ CONSENSUS PLAN

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Filed: February 10, 2003

Summary

While the Consensus Parties have made improvements to the Consensus Plan, in order to address concerns raised in this proceeding, the Revised Plan does not adequately resolve the problems it attempts to address, and fails to address other important flaws in the original consensus plan. Because of these shortcomings, the Revised Plan still does not represent a true consensus of the industry, and should not be adopted.

The structure of the Revised Plan demonstrates that the rebanding of the 800 MHz band may never be completed on a nationwide basis. This is because the Revised Plan acknowledges the possibility that the $850 million proffered by Nextel ($700 million for public safety relocations and $150 million for incumbent Business/Industrial Land Transportation relocations) may be insufficient. Nextel's proffer is based, in part, upon certain assumptions regarding the amount of equipment that may require replacement versus retuning. Any inaccuracy in this assumption could have a profound effect on the overall cost. Based on the record in this proceeding, it is likely that the $850 million contribution will be exhausted. In light of this risk, Blooston is concerned that the incumbent B/ILT licensees could be left holding the bag for their relocation costs. While Nextel has indicated that it will pay for all relocations, the mitigation language in the Revised Plan appears to suggest that only Public Safety licensees would not be required to relocate if there were insufficient funds.

Because of the burdens that the relocations would have on small business, both in terms of personnel resources and financial resources, the Commission must take steps to ensure that any relocation plan complies with federal Small Business protections. This is because a vast number of affected B/ILT and analog SMR licensees are small businesses.

Finally, a grant of Nextel's proposed frequency exchange for the 1.9 GHz MSS spectrum could create uncertainty in resolving interference to public safety. Several parties in this proceeding have questioned the fairness and wisdom of giving Nextel a nationwide license that would no doubt sell for billions of dollars at auction, in exchange for what would now be an $850 million pledge and what is largely encumbered and non-contiguous spectrum, especially in light of the fact that Nextel is not undertaking any obligation to ensure that the rebanding of the 800 MHz band is accomplished on a nationwide basis. The resulting legal challenges could delay a resolution of interference to public safety operations for years.

Inasmuch as Nextel is proposing to pledge the relocation funds, which would be secured through assets of its own choosing, Blooston is concerned that if the Fund Administrator were ever required to levy upon the assets, that such assets could be "worthless" if Nextel pledges securities, spectrum, and other assets with volatile value. Blooston believes that the best course is to require Nextel to use cash or cash equivalents, such as irrevocable letters of credit in order ensure its obligation.

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COMMENTS ON REVISED 800 MHZ CONSENSUS PLAN

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (Blooston), on behalf of its clients listed in Attachment A hereto who utilize spectrum in the 800 MHz band for commercial and private internal uses, hereby submits the foregoing comments in the above-captioned proceeding, pursuant to the Federal Communications Commission's Public Notice entitled: "Wireless Telecommunications Bureau Seeks Comment on 'Supplemental Comments of the Consensus Parties' filed in the 800 MHz Public Safety Interference Proceeding," January 3, 2003 (DA-03-19)("Public Notice"). To its credit, the revised consensus plan proposed by Nextel Communications, Inc. (Nextel) and others (the Revised Plan) does recognize some of the shortcomings of the original plan, and attempts to address them. However, as demonstrated below and in the original record in this docket, the Revised Plan does not adequately resolve the problems it attempts to address, and fails to address other important flaws in the original consensus plan (the Original Plan). For example, the Revised Plan may contain a loophole that could require incumbent Business/Industrial Land Transportation (B/ILT) licensees to relocate without compensation if the $150 million commitment is exhausted and sufficient funds remain for public safety. Because of these shortcomings, the Revised Plan is unlikely to be effective, and still does **NOT** truly represent a consensus of the entire industry, as the Commission

correctly observes. Public Notice, at p. 1, n.3. There is no certainty that Nextel will be able to complete the proposed rebanding of the 800 MHz band, since the record reflects that the Revised Plan does not allocate sufficient funding. If the Revised Plan is partially implemented before this lack of adequate funding is confirmed, the Commission may find its current nation-wide 800 MHz allocation turned into a virtual "hodge-podge" without any reliable means of determining what frequencies are allocated to which services in a particular geographic area.

Rather, Blooston continues to urge the Commission to require the use of well-established technical solutions for resolving interference on a case-by-case basis. This method is less disruptive to 800 MHz licensees and is far less expensive than attempting to "reband" the 800 MHz band or relocating incumbent licensees to other frequency bands. Furthermore, this approach places the burden for solving the interference where it properly belongs – on the large cellularized SMR operators – whose system design is causing the interference at the heart of this proceeding. Whatever decision is made in this proceeding, it is critical to fully protect the rights of incumbent B/ILT licensees. Like public safety licensees, many B/ILT licensees provide critical infrastructure services (e.g., automobile emergency road services, electrical power, water and sewer services, waste hauling, etc.) to the public, which services could be substantially disrupted by a frequency relocation within or outside the 800 MHz band.

I. The Revised 800 MHz Consensus Plan Does Not Guarantee Adequate Funding to Ensure Elimination of Interference in the 800 MHz Band.

A. Nextel's Funding Proposal is Not Sufficient to Ensure Completion of the 800 MHz Rebanding.

As with the previous iteration of the Plan put forth by Nextel and others as part of a self-dubbed "consensus," the Revised Plan's funding mechanism appears to be inadequate, since it cannot guarantee completion of the proposed rebanding. While the Revised Plan bolsters the

amount of money Nextel would contribute for correcting 800 MHz interference to public safety systems, Blooston is concerned that the Revised Plan, as currently formulated, does not adequately protect all affected parties.

Second, the mechanism for funding the frequency swap is flawed on multiple fronts – with respect to public safety users as well as incumbent B/ILT and analog 800 MHz SMR users. The Revised Plan states that Nextel will "pledge and guarantee" a payment of up to $850 million to cover relocation expenses ($150 million of which is earmarked to relocate incumbent B/ILT users).[1] The Revised Plan does not obligate Nextel to provide additional funding if the $850 million fund is exhausted and no other funding is secured from other sources. And, while $850 million would seem to be a substantial sum, the Revised Plan itself recognizes, through its implementation methodology, that the $850 million will likely be insufficient. Revised Plan at 6-7. In this regard, the Revised Plan states that 800 MHz rebanding will be conducted on a National Public Safety Planning Advisory Committee (NPSPAC) regional basis, so that there

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[1] Nextel has indicated that it would secure its obligation to pay, with a pledge of the stock of the Nextel subsidiary which will hold the licenses for the 10 MHz of 1.9 GHz MSS spectrum (or cash or cash equivalents, e.g., irrevocable bank letters of credit from federally insured banks in place of pledged spectrum in an amount equal to its remaining funding obligation). Blooston is concerned that a pledge of the stock of the holder of the 1.9 GHz MSS licenses could become ineffective if Nextel is ultimately forced to file for bankruptcy protection from its creditors, much like other large, well established carriers in the industry (e.g., MCI-WorldCom and MetroCall) have been forced to do in order to restructure their debt. If this were to happen, Nextel's financial commitment under the Revised Plan could be extinguished, resulting in no funding to accomplish the 800 MHz rebanding. As a result, Nextel would likely be in a position to retain its new 1.9 GHz nationwide MSS license without having funded a solution to the interference problem it created.

Likewise, Blooston is also worried that the language of footnote 9 to the Revised Plan would permit Nextel to instead provide securities and other assets upon the "reasonable" consent of the remaining Consensus Parties. Blooston believes that the use of securities or any other asset with volatile values would be risky and unwise, especially in times of economic uncertainty. And, even in times of prosperity, Blooston would submit that reliance on risky securities would likewise be imprudent. Because of the need for economic certainty, Nextel must be required to put up either cash or cash equivalents, as described above.

will be no relocations to other spectrum unless and until there is sufficient funding to cover all relocation expenses within the particular NPSPAC region. Revised Plan at 7. As a result, if it turns out that the $850 million dollar commitment by Nextel is insufficient to complete the frequency relocation in all of the NPSPAC Regions, Nextel's implementation of the Revised Plan will have caused a major disruption to the entire 800 MHz band under the banner of protecting public safety, since Nextel is not obligated to make any further contributions to cover relocation costs above an aggregate of $850 million (or perhaps if either of the $700 million earmarked for public safety or the $150 million allocated for B/ILT is exhausted). The demand by Nextel in the Revised Plan that it be awarded the 1.9 GHz MSS nationwide license upon the effective date of a Report and Order in this proceeding, for a problem that the record well demonstrates is of Nextel's own making, is a non-starter. This is because once Nextel has obtained this new 3-G nationwide license, it will have no further incentive to ensure that the public safety interference issue is resolved on a nationwide basis, since under the terms of the Revised Plan, it could now wash its hands of the matter once the $850 million payment is exhausted. As a result, the Commission could easily find itself in the predicament of having given Nextel everything that it desires – namely the 1.9 GHz license – without having obtained the rebanding of the 800 MHz band on a nationwide basis. As a result, numerous public safety systems could still be subject to interference from cellularized public safety systems due to a lack of funding, leaving the Commission with no recourse against Nextel. It is for this reason that the Revised Plan, although improved over the previous iterations, is still not in the public interest.

B. The Revised Plan Does Not Adequately Protect B/ILT Licensees and Small SMRs.

With respect to B/ILT and analog SMR licensees, the Revised Plan has allocated $150 million to cover relocation expenses of "B/ILT and traditional SMR users." Revised Plan at 5.

While this constitutes a significant step in the right direction, Blooston is concerned that the $150 million may be woefully inadequate. Nextel's proffer is based upon an estimate that only 5 percent of incumbent B/ILT and traditional SMR equipment will require replacement (Appendix A to Revised Plan, p. 4), and the assumption that market area licensees have not constructed additional transmitters that will affect cost (Appendix A to Revised Plan, p. 6). As pointed out by the parties to the Revised Plan with respect to public safety, a change of a small percentage in the estimate of the equipment requiring replacement (versus retuning) could have a profound impact on the dollars required to fund the frequency relocation. Revised Plan at 6-7. In an apparent attempt to overcome this uncertainty, the Revised Plan states that frequency relocations will be accomplished on a NPSPAC region-by-region basis, and only if the relocations in the particular region are fully funded. Revised Plan at 7. [2] However, as discussed above, because Nextel is not guaranteeing funding to implement the rebanding of the 800 MHz band on a nationwide basis, the Revised Plan does not serve the public interest.

The record in this proceeding is clear that the $850 million pledged by Nextel is wholly inadequate to fund public safety relocation, much less the relocation of numerous B/ILT and analog SMR systems. See Comments of Boeing Company at 6-7 (Cost to relocate Boeing alone to another frequency band would be over $50 million alone, while retuning would cost several million dollars); Comments of Fairfax County at 5 (Fairfax County estimates that the $500 million originally pledged by Nextel would only cover five to ten percent of the total expected

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[2] Given the proposed timetables in the Revised Plan, incumbent licensees may not be made totally whole following relocation. In addition to the physical costs of retuning, there will be additional costs, e.g., legal, engineering, labor and administrative expenses, that should be the subject of compensation. See, e.g., 47 C.F.R. 101.69 et. seq. (2001) (microwave relocation rule). While Appendix A shows consideration for consulting fees (engineering, legal, etc.), it does not appear to include internal costs to the licensee including: Administrative costs, employee labor

cost that would be incurred by all public safety entities nationwide, which does not include the cost incurred by incumbent B/ILT and analog SMR users; and the additional $200 million for public safety does not appear to make up for the anticipated difference); Consumers Energy Company at 20 (Estimated equipment costs for CEC's frequency relocation are $40 million, including cost for construction of additional tower sites, if required to relocate to 900 MHz band).[3] As a result, Blooston fears that the lack of adequate funding will ultimately cause the proposed 800 MHz rebanding to fail. Alternatively, small B/ILT licensees and cellular licensees, neither of whom are the root cause of the interference problem, will be forced to pay for their own relocation costs and/or contribute a substantial amount of money to relocate public safety licensees, as envisioned by Nextel's original plan. See Nextel White Paper at 39 and 41; NPRM at 15. However, these entities are not slated to receive a free 3G nationwide license worth billions of dollars. Nextel must at a minimum be prepared to pay the full relocation costs its plan will create. Without guaranteed funding to (a) fully implement any 800 MHz rebanding and (b) protect all licensees, Blooston believes that there can be no true industry consensus on this issue.

The Revised Plan is not clear as to whether B/ILT users would be required to relocate if there are sufficient funds to relocate Public Safety licensees but the $150 million allocation for B/ILT relocations is exhausted. The Revised Plan's mitigation language suggests that only public safety licensees would not be required to move without full compensation. Revised Plan

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costs, lost productivity associated with downtime, costs associated with customer convenience, etc.

[3] If the parties to the Revised Plan believe that Congress or the Administration will make up any shortfalls, such a request is likely to fall on deaf ears. This is because funding may not be available (even if Congress and the Administration agree that funding for this purpose is important) if tax revenues continue to fall short as governmental expenditures in prosecuting the war on terrorism (and now potentially Iraq) increase significantly.

at 7. This is inconsistent with the Revised Plan's statement that Nextel is "funding the relocation costs of all 800 MHz incumbents required to relocate pursuant to the Consensus Plan, not just public safety communications licensees." Revised Plan at 5 – 6.

C. There is no Assurance that Nextel Partners Will Contribute its 800 MHz Spectrum.

As previously demonstrated in the record and **not** contradicted by Nextel, neither the Original Plan nor the Revised Plan demonstrates that Nextel will be able to carry through on a promise to contribute the 800 MHz spectrum licensed to Nextel Partners. This is because Nextel only holds a minority interest in its affiliate, Nextel Partners, and there is no certainty that Nextel will be able to convince Nextel Partners to give its concurrence to any spectrum swap that is being proposed as part of the industry compromise, especially since Nextel Partners is notably absent as a party to the Revised Plan. The lack of such concurrence could result in a collapse of the Revised Plan if Nextel is relying on this spectrum to facilitate the frequency swap, because Nextel would be unable to surrender sufficient spectrum for the proposed swap.

II. Nextel's Proposed Frequency Exchange for 1.9 GHz MSS Spectrum Could Create Uncertainty in Resolving Interference to Public Safety.

The linchpin to the Revised Plan for resolving public safety interference is the underlying premise that Nextel must be made whole through an alternative spectrum allocation of 10 MHz at 1910-1915/1990-1995 MHz, a contiguous nationwide license in the 1.9 GHz MSS Band, Original Plan at 18-19, which license Nextel demands must be granted upon the effective date of a Report and Order in this proceeding. Revised Plan at 13, 34.[4] Throughout this proceeding,

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[4] Blooston cautions that it would be premature for the Commission to immediately issue a report and order adopting a "Consensus Plan." While the Commission requested comment on rebanding the 800 MHz band in order to resolve interference issues to public safety, the Commission has not yet formulated proposed rules to implement any consensus plan, which

several parties have questioned (and continue to question) the fairness and competitive impact of giving Nextel a nationwide license that would no doubt sell for billions of dollars at auction, in exchange for what now would be an $850 million pledge and what is largely encumbered and non-contiguous spectrum. See Joint Comments of Cingular Wireless, LLC and ALLTEL Communications, Inc. at 11-13; Comments of Supreme Radio Communications, Inc. at 12-13; Comments of United States Cellular Corporation at 4-5; Comments of Verizon Wireless at 13-15; Comments of Southern Linc at 50-52; Comments of AT&T Wireless Services, Inc. at 20-21. A critical question beyond fairness is whether this proposal would be legal, under Section 309(j) of the Communications Act of 1934, as amended (the Act), for the Commission to award Nextel the requested 10 MHz license in the 2.1 GHz MSS Band through means other than competitive bidding. Section 309(j) of the Act requires the Commission to grant initial licenses which are the subject of mutually exclusive applications through competitive bidding. Joint Comments of Cingular Wireless LLC and ALLTEL Communications, Inc. at 11-12; Comments of Verizon Wireless at 13-15; Comments of United States Cellular Corporation at 5; Comments of Southern Linc at 54-56; Reply Comments of ALLTEL Communications, Inc. et. al. at 10 – 11.

The Original Plan states that the grant of a 1.9 GHz license would be the result of a swap for spectrum surrendered as part of a realignment plan, and the Revised Plan makes this license award part of a non-negotiable "take-it or leave-it" proposal to the Commission in order to resolve the very interference created by Nextel to public safety licensees in the 800 MHz band. Cingular Wireless, LLC, Alltel Communications, Inc., Verizon Wireless and others have asserted

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must be subject to a Notice of Proposed Rulemaking that requests public comment. See Section 1.413 of the Commission's Rules, 47 C.F.R. §1.413 (2001). The Revised Plan and the comments requested to date in this proceeding do not satisfy this requirement, since the public has seen no draft rules that would implement the proposed substantive change to very important portions of the spectrum.

that Nextel should be required to bid on this valuable spectrum, since there is no doubt that there would be multiple applicants. Joint Comments of Cingular Wireless and ALLTEL Communications, Inc. at 12; Comments of Verizon Wireless at 15. See also, Reply Comments of ALLTEL Communications et. al. at 10 - 11. Because of the concerns raised by these parties and other cellular and two-way CMRS carriers, the grant of the 10 MHz nationwide 1.9 GHz MSS Band license to Nextel, without a competitive bidding process, could result in protracted litigation before the Court of Appeals, and potentially, the United States Supreme Court. This litigation would create uncertainty in the 800 MHz band and would substantially delay any permanent interference solution that the Commission adopts, since the solution would no doubt have been tied to a surrender of certain spectrum by Nextel for use in relocating incumbent licensees within the 800 MHz band. As a result, it could be several years before the Commission is able to resolve, with any certainty, the interference issues that currently plague the public safety licensees within the 800 MHz band.

III. The Revised Consensus Plan Could Contravene Policies Protecting Small Businesses.

As part of the Commission commence the required rulemaking to reallocate spectrum as proposed in the Revised Plan, the Commission must address the adverse impact of this proposal on small businesses. Congress and the Commission have long recognized that small businesses make up an important element of the U.S. economy. See Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344-45 (1979). Congress has passed legislation designed to protect small businesses, because of their contributions to telecommunications and their role in the economy. By imposing undue burdens on small businesses that would be

associated with the implementation of the Revised Consensus Plan, Congressional and Commission goals underlying this legislation would be frustrated.

In this regard, Congress also passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980) for the reason that "unnecessary regulations create barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." §2(a)(5). In passing this legislation, Congress found that the harmful effects of unnecessarily burdensome Federal Regulations on small businesses does not serve the public interest. Rebanding the 800 MHz band will disproportionately impact small businesses by causing them to devote their scarce personnel resources (and potentially scarce financial resources if Nextel exhausts the $150 million allocated to B/ILT users) to ensure a smooth transition of their radio operations, in order to prevent service disruptions. Through no fault of their own, small business owners will not be able to devote these resources to expanding their business, as they attempt to meet the cumbersome regulatory and business requirements imposed by the Revised Plan. Accordingly, the Revised Plan would contravene the legislative policy underlying the Regulatory Flexibility Act. As Congress observed:

> The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small business reduces the competitive capacity of small businesses, thereby placing the Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small [business], the public shares the burden in the form of higher prices.

126 Cong. Rec. 24,575, 24,558.

IV. Conclusion.

For the foregoing reasons, the Commission should ensure that any consensus plan that is adopted protects public safety communications in the 800 MHz band as well as incumbent B/ILT

communications. Likewise, the Commission should ensure that only those parties responsible for causing interference to public safety communications are responsible, financially and otherwise, for its mitigation. In this regard, because the proposed Revised Consensus Plan may be inadequately funded, the Commission should mandate the use of technical solutions to resolve the interference problem created by cellularized SMR operations.

Respectfully submitted,

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Attachment A

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3M Company
CC Communications
Southern Illinois RSA Partnership
Instant Signal & Alarm Co., Inc.

CERTIFICATE OF SERVICE

I, Althea Pierce, an employee of the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, do hereby certify that on Monday, February 10, 2003, the foregoing Comments To The Revised 800 MHz Consensus Plan were mailed to the following via First Class, United States Mail, postage prepaid, unless otherwise noted:

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