

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

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In the Matter of)
)
Improving Public Safety Communications)
in the 800 MHz Band)
)
Consolidating the 900 MHz Industrial/Land)
Transportation and Business Pool Channels)

WT Docket No. 02-55

To: The Commission

SUPPLEMENTAL COMMENTS OF SOUTHERN LINC

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EXECUTIVE SUMMARY

The "Supplemental Comments of the Consensus Parties" filed in this rulemaking by Nextel Communications, the Industrial Telecommunications Association, the Association of Public-Safety Communications Officials-International, and fourteen other parties fail to deliver a legal or workable framework for realigning the 800 MHz band. The new information in the Supplemental Filing reveals a proposed mechanism for accomplishing rebanding that is highly complex, fraught with legal infirmities, and precariously balanced on top of an unenforceable funding promise. The Commission cannot adopt it. Rather, it must adopt a more rational approach to resolving interference to public safety licensees in the 800 MHz band.

Southern acknowledges the attempt by the PWC Commenters to accommodate its system by proposing that it be allowed to continue to operate and expand its "cellularized" 800 MHz SMR system in what would become the "non-cellularized" portion of the band without having to go through a cumbersome waiver process. However, the majority of the proposals advanced in the Supplemental Filing are alarmingly ill-conceived, unrealistic, self-serving, and, ultimately, unlawful. The Supplemental Filing conclusively reveals what Southern has been contending all along: that the Consensus Plan is an overly costly, burdensome, ineffective, and complex vehicle for addressing interference to public safety licensees in the 800 MHz band. It does too little to resolve interference and too much to advance its signatories' private interests.

Southern continues to believe that rebanding in general, and the Consensus Plan in particular, will not solve public safety interference. The Consensus Plan would not substantially mitigate public safety interference, it lacks secure funding, and Nextel would receive a windfall of 1.9 GHz spectrum. The Consensus Plan is also misleadingly titled, as it does not actually

represent a true consensus of the licensees in the 800 MHz band. Indeed, licensees in nearly every type of service in the band -- including public safety entities -- have either opposed the plan or refused to endorse it.

The Supplemental Filing fails to remedy the many problems with the Consensus Plan. First, it fails to set forth a proposal for a viable, secure funding mechanism. Although Nextel pledges to fund the relocations contemplated by the plan with a contribution of \$850 million, the Commission lacks the authority to order or enforce such a commitment. Nextel's pledge is essentially part of a private contract with the other PWC Commenters that the Commission is being asked to sanction. Such sanctioning, however, would provide the Commission with no enforcement authority, which would be critical given the inherently tenuous nature of Nextel's commitment. Given that the funding will be doled out over a period of at least four years, any number of unforeseen circumstances -- bankruptcy, merger, etc. -- could jeopardize it. As such, the Commission would be embarking on a long, costly, and disruptive relocation process with nothing more than the hope that Nextel would adhere to its promise. Hope alone, however, cannot be enough for the Commission; it has to know to at least a reasonable certainty that all incumbents who are forced to relocate will be reimbursed and that the rebanding process will be successfully completed.

The Supplemental Filing also underscores another fundamental problem with the Consensus Plan: the manner in which it is being forced upon the Commission. In the Supplemental Filing, the PWC Commenters reiterate their warning that "[a]ny material modification" of the plan would eliminate their support for it, thus rendering it unworkable. This is a direct threat designed to suppress the rulemaking process and should be viewed as a tacit admission that the Consensus Plan is too flawed to survive any amount of scrutiny. The

Commission's duty is not to rubber-stamp private agreements drawn-up between a few parties behind closed doors. Rather, it is obligated to give due weight to the concerns and views of all parties and act in the public interest.

In addition to the foregoing overarching concerns with the Supplemental Filing, it is replete with component proposals that are legally untenable or practically unworkable. Foremost among these is the proposal for the Relocation Coordination Committee ("RCC"), a private sector entity that would have unprecedented authority to design and implement a revised 800 MHz band plan. The PWC Commenters ask the Commission to hand the RCC the reins for important band allocation and licensing decisions and permit it to operate with nearly total independence under procedures highly favorable to Nextel. Doing so, however, would violate the Government Corporation Control Act, the Federal Advisory Committee Act, and the Commission's subdelegation authority. Additionally, the RCC would be comprised of private sector entities (Nextel and almost certainly other signatories to the Consensus Plan) whom are obligated to advance the interests of themselves, their shareholders, or their members -- but not the public interest.

Rather than adopting the Consensus Plan or any other form of rebanding, the Commission should adopt the plan proposed by Southern and others. As detailed in Southern's Comments, the plan would immediately alleviate interference in the short term through a market-based plan that requires the entity causing interference to correct the problem promptly (this can benefit Business and Industrial/Land Transportation licensees as well as public safety entities). To eliminate interference in the long term, the plan would reallocate the Upper 700 MHz band for the public safety community and relocate 800 MHz public safety licensees to that band. The

plan would provide the public safety community with an additional 20.5 MHz of spectrum and enable the auction of vacated 800 MHz spectrum to partially fund public safety relocation.

If, despite the Consensus Plan's fundamental flaws, the Commission adopts a form of rebanding based on it, Southern should be treated similarly to Nextel and allowed to move its operations to a contiguous band immediately adjacent to the PWC Commenters' proposed "cellularized" band. If the Commission provides Nextel with large blocks of contiguous spectrum in the 800 MHz NPSPAC band and the 1.9 GHz band designated for "commercial operations," Southern must be given comparable spectrum that would enable it to remain competitive with Nextel and other CMRS carriers. Given that the portion of the band in which Southern is located (below 816/861 MHz) would likely become "non-cellularized," the Commission would need to consolidate Southern's frequencies to contiguous positions immediately below 816.5/861.5 MHz and designate that spectrum as an extension of the "cellularized" portion of the band. In that manner, Southern will approach parity with Nextel and other carriers by having comparable contiguous spectrum that is operable pursuant to the CMRS-oriented technical rules of a "cellularized" environment.

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SUPPLEMENTAL COMMENTS OF SOUTHERN LINC

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission, Southern Communications Services, Inc., d/b/a Southern LINC ("Southern") respectfully submits these Supplemental Comments in response to the *Public Notice* released January 3, 2003 in the above-captioned matter.¹

I. INTRODUCTION

In the *Public Notice*, the Commission seeks comment on the "Supplemental Comments of the Consensus Parties" ("the Supplemental Filing") filed in this rulemaking by Nextel Communications, the Industrial Telecommunications Association, the Association of Public-Safety Communications Officials-International, and fourteen other parties (collectively "the PWC Commenters").² As the second largest licensee in the 800 MHz Land Mobile band,

¹ 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, *Public Notice*, DA 03-19 (Rel. Jan. 3, 2003). Unless otherwise indicated, all comments, reply comments, and other filings referenced herein were filed in WT Docket No. 02-55.

² The Consensus Plan as referenced herein is contained in the Reply Comments of the Industrial Telecommunications Association, which were filed August 7, 2002.

Southern has been highly active in this proceeding. Its system -- which serves over 260,000 customers, including police departments, emergency services, municipal and state governments, school districts, and some of the country's largest utilities -- will be significantly impacted, and possibly significantly harmed, by the so-called Consensus Plan. As indicated in its previous comments in this docket, Southern firmly believes that the Consensus Plan is an overly costly, burdensome, ineffective, and complex vehicle for addressing interference to public safety licensees. It also provides Nextel with an unjustified spectrum windfall.³ In short, the plan does too little to resolve interference and too much to advance its signatories' private interests.

Southern acknowledges the Consensus Plan's signatories' efforts to accommodate Southern's particular needs. In the Supplemental Filing, the PWC Commenters attempt to address several of the issues that Southern raised in its Further Comments concerning the anti-competitive impact of the Consensus Plan. For example, the Supplemental Filing provides that Southern would continue to be permitted to provide "cellularized" service below 816/861 MHz across its entire service territory without having to go through the Consensus Plan's cumbersome waiver process.⁴ These efforts, however, come too late and are part of a far too objectionable package. Southern's concerns should have been addressed when it first raised them at the beginning of this proceeding. Only now, when the PWC Commenters finally realize that many, many parties oppose their plan, are they attempting to address some of these pressing problems.

³ The Supplemental Filing reveals a new and disturbing aspect of Nextel's request for 10 MHz of 1.9 GHz spectrum: Nextel expects to receive the spectrum immediately upon adoption of a report and order in this proceeding. While Southern is vigorously opposed to giving Nextel 10 MHz of 1.9 GHz spectrum at all, it is even more opposed to giving it such spectrum immediately upon adoption of a report and order. In doing so, the Commission would remove a primary incentive for Nextel to fulfill its funding promise and participate in good faith in the relocation process.

⁴ Supplemental Filing at pp. 44-46.

As a responsible licensee, Southern cannot endorse a plan that is unequivocally contrary to the public interest.

The Consensus Plan is also misleadingly titled, as it does not actually represent a true consensus of the licensees in the 800 MHz band. Indeed, 800 MHz licensees of nearly every type have either opposed the plan or refused to endorse it. As of October 2002, **thirty-three public safety entities** filed opposition to it, including the State of Hawaii; the State of Maryland; the State of Michigan; the State of New York; the State of Virginia; Washington, D.C.; the City of Baltimore; the City of Philadelphia; and the City of San Diego. **Fifteen utilities and other critical infrastructure entities** who operate some of the largest systems in the band filed opposition to it, including the United Telecom Council ("UTC"); the American Water Works Association; Alliant Energy; Cinergy Corporation; and Exelon Corporation. **Eight Business and Industrial/Land Transportation ("B/ILT") entities** filed opposition to it, including the National Association of Manufacturers; MRFAC; 3M Company; and Boeing. And **many SMRs and nearly every major CMRS entity** filed opposition to it, including the Cellular Telecommunications & Internet Association ("CTIA"), AT&T Wireless; Cingular Wireless; and United States Cellular Corporation. In fact, out of hundreds of individual commercial and B/ILT licensees on the 800 MHz band, only Nextel and Aeronautical Radio have joined the PWC Commenters.

To truly advance the public interest, the Commission should adopt the interference elimination plan advocated by Southern and numerous other CMRS providers. As detailed in the prior comments of Southern, that plan would alleviate interference to public safety licensees in the short term through a market-based plan that codifies the responsibility of the entity causing

interference to correct the problem promptly.⁵ It also allows Nextel to implement spectrum swaps necessary to correct interference without the need for a "central committee" to oversee the process. To eliminate interference in the long term to 800 MHz public safety licensees, they should relocate to the Upper 700 MHz band. Among its benefits, this plan has the advantages of providing the public safety community with an additional 20.5 MHz of spectrum and enabling the auction of vacated 800 MHz spectrum to partially fund the public safety relocation.⁶

If the Commission decides to move forward with some version of rebanding at 800 MHz despite its drawbacks, any consideration of the Consensus Plan must include steps to correct the plan's fundamental flaws and modify the many other aspects of the plan that are inequitable, unlawful, self-serving, and contrary to the public interest. Apparently in anticipation of challenges from other parties, the PWC Commenters have already threatened that "materially modifying" the Consensus Plan will cause it to fall apart and,⁷ as a consequence, leave public safety licensees subject to continuing interference. The Commission must not be intimidated by this attempt to suppress the rulemaking process. Rather, its decision must be informed by *all* the commenters in this proceeding, not just the PWC Commenters. Moreover, it must advance the *public* interest, not just the private business interests of a select few.

⁵ See, e.g., Reply Comments of Southern LINC at 3-24. This portion of the plan can be applied to both public safety and B/ILT licensees.

⁶ For the amount of relocation costs that are not covered by auctioning vacated 800 MHz spectrum, alternative methods of funding could be explored, such as reimbursement from federal allocations for homeland security or auctions of other spectrum bands such as the 1.9 GHz band.

⁷ Supplemental Filing at 3-4.

II. SOUTHERN LINC SUPPORTS IMMEDIATE ADOPTION OF "BEST PRACTICES" RULES TO MITIGATE INTERFERENCE

Southern supports the immediate adoption of "Best Practices" rules as a first step to alleviate interference to public safety licensees in the 800 MHz band. Reinforced "Best Practices" rules will help all licensees address interference incidents on a day-to-day basis as they occur. To that end, Southern and numerous other parties have proposed such rules.⁸ The Commission should give strong consideration to these proposals.

III. THE SUPPLEMENTAL FILING PROPOSES A FUNDING MECHANISM THAT WOULD BE UNENFORCEABLE BY THE COMMISSION

As outlined in the Supplemental Filing, Nextel will fund the relocation of licensees that are required to relocate pursuant the Consensus Plan up to a total of \$850 million.⁹ Of that amount, \$700 million would be dedicated to public safety licensees and \$150 million would be dedicated to non-public safety licensees.¹⁰ For purposes of managing and disbursing the funding, the PWC Commenters would establish a "Relocation Fund."¹¹ The Relocation Fund would be "managed" by what the PWC Commenters describe as an "independent" administrator who meets the approval of Nextel, the Private Wireless Coalition, APCO, the International Association of Chiefs of Police, and the International Association of Fire Chiefs/International Municipal Signal Association.¹² Shortly after approval of the report and order in this proceeding, Nextel would contribute \$25 million to the Relocation Fund.¹³ Thereafter, Nextel would "make

⁸ See Comments of Southern LINC at 14-27.

⁹ Supplemental Filing at 5.

¹⁰ Supplemental Filing at 5.

¹¹ Supplemental Filing at 7.

¹² Supplemental Filing at 7.

¹³ Supplemental Filing at 7.

periodic contributions" necessary to maintain enough funding to make required disbursements to relocating licensees.¹⁴

In the Supplemental Filing, the PWC Commenters assert that Nextel will assure that its funding commitment will be met by setting up an outside corporation to secure the funding through collateralized assets.¹⁵ If Nextel stops making payments prematurely, the corporation's assets could, according to the PWC Commenters, be sold to raise the amount remaining on the funding obligation.¹⁶ The asset would initially be the 10 MHz of 1.9 GHz spectrum that Nextel is requesting, although Nextel would be able to make immediate use of the spectrum and, additionally, substitute other forms of collateral in its place.¹⁷

Nextel's funding is the foundation of the Consensus Plan. The PWC Commenters contend that if Nextel does not make those payments, their collective agreements and spirit of cooperation will dissolve, causing the plan to fail.¹⁸ The PWC Commenters' concern for the fragility of the Consensus Plan starkly highlights one of its fundamental flaws: it is dependent on funding that the Commission lacks the authority to order or enforce. If the Commission were to enact the Consensus Plan or some variation of it, the Commission would be doing so with nothing more than the *hope* that Nextel would adhere to its promise and that the plan would be carried through to completion.

Although the Commission has designed numerous relocation processes in the past, it has never before structured one in the manner proposed by the PWC Commenters. Rather, it has

¹⁴ Supplemental Filing at 7.

¹⁵ Supplemental Filing at 8.

¹⁶ Supplemental Filing at 8.

¹⁷ Supplemental Filing at 8 n.9.

¹⁸ Supplemental Filing at 3-4.

always designed relocation processes based on individual negotiations where both the incumbent and a potential new entrant have rights and can engage on equal footing.¹⁹ No party is able to gain an inequitable degree of leverage by holding its proposed funding over the heads of incumbent licensees and other affected parties.

The rationality of the Commission's usual type of relocation process is brought into even sharper relief when compared with the potential problems that could arise under the PWC Commenters' proposed funding process. If Nextel were to cease its funding at some point into the relocation process (prior to reaching the \$850 million cap), what then?²⁰ None of the Commission's authorizing statutes indicate that it would have authority to initiate an enforcement action or otherwise compel Nextel to make payment, to return its 1.9 GHz licenses, or to sell the licenses as collateral. If the process stopped midway, a partially realigned band would be a tremendous waste of time and resources. It would also be a spectrum wreck in which interference problems would be exacerbated and public safety's critical interoperability would be adversely affected.

¹⁹ See, e.g., In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd. 6886, 6890 (1992); In the Matter of Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8825, 8832-34 (1996); In the Matter of Amendment of Section 2.106 of the Commission's Rule to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *First Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 7388 (1997).

²⁰ This is not to suggest that Nextel has a present intention not to meet its funding promise. However, relocation is expected to take at least four years, and any number of circumstances unforeseen at this time (e.g., mergers, change of business direction, economic difficulty) could compromise Nextel's ability to continue funding the Consensus Plan.

Along these same lines, it would be a total departure from past precedent for the Commission to allow a party displacing incumbent licensees to cap the total amount it must pay to reimburse relocation costs. Pursuant to the Consensus Plan, if the \$850 million in funding is fully paid out before all licensees are relocated, the remaining licensees would be forced to relocate without reimbursement. That would be flatly contrary to the Commission's statements and actions in prior relocation proceedings.

In the 2001 case of *Teledesic LLC v. FCC*, the United States Court of Appeals for the District of Columbia Circuit reviewed the relocation reimbursement provisions in connection with reallocation of the 17.7-19.7 GHz band.²¹ In response to an argument by *Teledesic* that the Commission's reimbursement policies would confer a windfall on incumbents, the court noted that, "[a]ccording to the FCC, the justification for this policy is that existing users must be able to obtain replacement equipment at no cost in order to continue to provide service with a minimum of disruption."²² The court went on to observe that "[t]he Commission's consistent policy has been to prevent new spectrum users from leaving displaced incumbents with a sum of money too small to allow them to resume their operations at a new location."²³ In this case, permitting the PWC Commenters to cap the total reimbursement funds would violate Commission policy by leaving incumbents at risk of having a sum of money too small to resume operations at a new location; in fact, it would leave them at risk of receiving no reimbursement funding at all.

The Commission cannot ignore these concerns. Its duty is to act in the public interest, and the public interest surely does not include sending licensees down the costly, burdensome, and disruptive path of rebanding if the endpoint is fraught with uncertainty. The Commission

²¹ *Teledesic LLC v. FCC*, 275 F.3d 75 (D.C. Cir. 2001).

²² *Teledesic LLC v. FCC*, 275 F.3d 75, 85 (D.C. Cir. 2001).

²³ *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001).

cannot take the chance that Nextel *might* meet its funding commitment; it has to know with at least a reasonable certainty that all incumbents who are forced to relocate will be reimbursed and that the rebanding process, if started, will be successfully completed. It has no legal basis for achieving that certainty with regard to the Consensus Plan.

The use of an outside corporation and collateralized assets provides little additional security that Nextel's pledged \$850 million would be fully available. As with Nextel's funding commitment generally, the Commission cannot order nor enforce this proposal. Also, while Nextel may create this corporation with good intentions, its sustainability and the value of its assets may be beyond Nextel's control (especially considering that relocation will take at least four years). Therefore, the Commission cannot say with a reasonable degree of certainty that the corporation and its assets will enable Nextel to meet its funding commitment.

Another concern with the outside corporation is bankruptcy. If, for example, Nextel files for bankruptcy prior to the completion of relocation and full payout of the funds, would the assets of the outside corporation be reachable by Nextel's creditors? The Supplemental Filing is silent on this point. However, creditors in a bankruptcy situation would generally attempt to identify and have declared as part of the estate as many assets as possible in order to satisfy their claims. The estate may include everything a debtor owns upon the filing of the bankruptcy petition;²⁴ "every conceivable interest in property, future, nonpossessory, contingent, speculative, and derivative" is potentially within reach.²⁵ The Supplemental Filing contains no information

²⁴ See, e.g., *In re O'Dowd*, 233 F.3d 197, 202 (3d Cir. 2000) (citing to *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-05 (1983)).

²⁵ *In re Labrum & Doak, LLP*, 227 B.R. 391 (Bankr. E.D. Pa. 1998) (citing *In re Anderson*, 128 B.R. 850, 853 (Bankr. D.R.I. 1991)).

that enables the Commission or commenters to determine whether the assets of the outside corporation would be secure.

IV. THE PWC COMMENTERS' "ALL OR NOTHING" APPROACH TO ADOPTION OF THE CONSENSUS PLAN IS UNLAWFUL

In the Supplemental Filing, the PWC Commenters insist that "[a]ll provisions of the Consensus Plan are interrelated" and that "each of these parts is an essential component."²⁶ Furthermore, they warn the Commission that "[a]ny material modification" of the plan would eliminate the desire of its signatories to promote it and, thus, render it unworkable.²⁷ They imply that Nextel will take its \$850 million off the table, APCO will drop its support, all the other signatories will go their separate ways, and the Commission will have to figure out some other way to resolve public safety interference without their cooperation. In other words, the PWC Commenters have presented the Commission with a plan drawn up and agreed to amongst themselves, have asked the Commission to rubber-stamp it, and have threatened to abandon their interference mitigation effort entirely if their plan is not adopted *in toto* without any changes.

The PWC Commenters' position is an extortionate one and threatens to suppress the rulemaking process if allowed to prevail. Although the Commission has sought industry comment on the plan multiple times, the PWC Commenters have explicitly stated that making any "material modifications" to the plan will essentially nullify it. With this threat, they are attempting to turn the Commission's notice and comment proceedings into pointless exercises. This is fundamentally at odds with the Commission's obligation to act in the public interest.²⁸

²⁶ Supplemental Filing at 3.

²⁷ Supplemental Filing at 4.

²⁸ This also brings into stark relief the fundamental problem with even considering a plan that is based Nextel's willingness to *voluntarily* contribute funding, an action over which the Commission has no control.

The record in this proceeding is replete with divergent viewpoints. For example, in addition to Southern's opposition, a coalition comprised of other CMRS providers and Nokia stated that the Consensus Plan "does not eliminate interference, is unduly disruptive, and fails to provide public safety with sufficient spectrum resources. . . . [it] does not satisfy the Commission's public interest goals or other important public interest criteria and should be rejected."²⁹ Small Business in Telecommunications, a group whose members include small SMR operators, also opposes the Consensus Plan.³⁰ The City of Philadelphia protested that the Consensus Plan "places an unexpected, untimely and very expensive burden on the City, with no certainty of reimbursement even for equipment costs."³¹ The City of Baltimore "does not agree that the Consensus Plan is the correct solution to an interference problem the full scope of which has yet to be determined."³²

The Commission cannot legally ignore the many diverse viewpoints in this proceeding and simply rubber-stamp the Consensus Plan. Rather, it is required to fully consider *all* parties' comments and act in the public interest. The PWC Commenters' threat is not an idle one. Because the Commission has no authority to order Nextel to fund the relocations contemplated by the Consensus Plan, Nextel can drop its funding offer if the Commission alters the plan in a manner dissatisfying to Nextel. Indeed, Nextel has already expressly conditioned its funding on

²⁹ Further Comments of ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Southern LINC, United States Cellular Corporation, Coupe Communications, Inc., and Nokia Inc. at 1,3.

³⁰ Second Reply Comments of Small Business in Telecommunications.

³¹ Comments of the City of Philadelphia on the "Consensus Plan" Filed by the Association of Public Safety Communications Officials-International, Inc., et al. at 1.

³² Supplemental Comments of the City of Baltimore, Maryland at 2.

the Commission granting it 10 MHz of 1.9 GHz spectrum, one of the most controversial aspects of the plan.³³

V. THE CONSENSUS PLAN IS REPLETE WITH LEGAL AND PRACTICAL PROBLEMS THAT PROHIBIT ITS ADOPTION

The Supplemental Filing reveals numerous legal and practical problems that prohibit the Commission from adopting the Consensus Plan. Not the least of which are the many problems that revolve around the Relocation Coordination Committee ("RCC"), a private sector entity that would have unprecedented authority to design and implement a revised 800 MHz band plan. The PWC Commenters have set forth an unrealistic relocation timeline for affected licensees. Furthermore, the license preparation and frequency coordination monopoly that they would create would directly benefit certain members of the PWC. Finally, the Consensus Plan lacks fair and full-blown appellate recourse for affected licensees.

A. The Commission Lacks Authority To Create The RCC

The Commission cannot implement the RCC as proposed in the Supplemental Filing. In addition to running counter to the public interest, the RCC would violate the Government Corporation Control Act,³⁴ would be an impermissible subdelegation of authority, and would violate the Federal Advisory Committee Act.³⁵

As explained in the Supplemental Filing, the RCC would be a five member body consisting of Nextel, two members of the Land Mobile Communications Council ("LMCC") that

³³ Reply Comments of Nextel Communications at 9 n.7. Legg Mason Wood Walker estimated that if Nextel is awarded all the spectrum it requests in the Consensus Plan, it will realize a net increase in spectrum value of \$4.9 billion. Craig Mallitz, Blair Levin, Rebecca Arbogast, *Nextel Takes Another Step in Spectrum Swap Plan*, Legg Mason Wood Walker report (Dec. 31, 2002).

³⁴ 31 U.S.C. § 9102 (2000).

³⁵ 5 U.S.C. app. 2 (2000).

represent private wireless licensees, and two members of the LMCC that represent public safety licensees.³⁶ The LMCC members would be chosen by the LMCC.³⁷ Although unstated in the Supplemental Filing, Southern believes that those members would almost certainly be comprised of signatories to the Consensus Plan.

Pursuant to the Consensus Plan, the RCC would be vested with extraordinarily broad authority for a private sector entity. With essentially no oversight and little accountability, it would handle many duties reserved by statute to the Commission. Its decisions would be unappealable, giving it a level of untouchability not enjoyed by the very agency that would create it. The RCC's many functions would include:

- General oversight of the 800 MHz realignment process.³⁸
- Development and implementation of a revised 800 MHz band plan.³⁹
- Application preparation, frequency coordination, and, effectively, application approval.⁴⁰
- Dispute resolution in connection with the realignment process.⁴¹
- Establishment of an arbitration panel (or panels) to resolve relocation disputes between Nextel and incumbent licensees.⁴²
- Review and approval of relocation reimbursement requests.⁴³

³⁶ Supplemental Filing at 15-16.

³⁷ Supplemental Filing at 15.

³⁸ Supplemental Filing at 15.

³⁹ Supplemental Filing at 15. This would include, among other things, establishing a plan for relocating non-Nextel incumbent licensees from 806-809/851-854 MHz to existing Nextel channels at 809-816/854-861 MHz. Supplemental Filing at 19, 21. The RCC would also "develop a regional migration plan for relocating (i) all incumbent NPSPAC licensees to 806-809/851-854 MHz and (ii) Nextel to 821-824/866-869 MHz." Supplemental Filing at 28.

⁴⁰ Supplemental Filing at 15.

⁴¹ Supplemental Filing at 15.

⁴² Supplemental Filing at 21-22.

- Appointment and compensation of the Relocation Fund Administrator.⁴⁴
- Prioritization of the NPSPAC Regions for realignment purposes.⁴⁵

For the reasons set forth below, the Commission cannot implement the RCC as proposed in the Supplemental Filing.

1. **Creation of the RCC would violate the Government Corporation Control Act.**

The Government Corporation Control Act ("GCCA") provides that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."⁴⁶ The Supreme Court has taken a broad view of this statute, interpreting it "to restrict the creation of all Government-controlled policy-implementing corporations."⁴⁷ The United States General Accounting Office ("GAO") has cautioned that agencies are not permitted to circumvent the GCCA by "directing another organization to act as the incorporator."⁴⁸

The GCCA has been found to prohibit the Commission from creating certain entities in the absence of specific statutory authorization. In 1998, the GAO concluded that the Commission lacked authority to direct the National Exchange Carrier Association ("NECA") to create the Schools and Libraries Corporation and the Rural Health Care Corporation.⁴⁹ The

⁴³ Supplemental Filing at Appendix C-5.

⁴⁴ Supplemental Filing at Appendix C-5.

⁴⁵ Supplemental Filing at 16.

⁴⁶ 31 U.S.C. § 9102 (2000).

⁴⁷ *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 396 (1995).

⁴⁸ Letter from Robert Murphy of the U.S. General Accounting Office to the Honorable Ted Stevens of the U.S. Senate, B-278820, p. 5 (Feb. 10, 1998) ("*GAO Decision*").

⁴⁹ *GAO Decision* at 1.

Commission had argued that it had sufficient authority pursuant to Section 154(i) of the Communications Act of 1934 (the "general duties and powers" provision) and that NECA, not it, would be establishing the corporations.⁵⁰ The GAO disagreed, stating that Section 154(i) did not provide "the specific statutory authority needed."⁵¹ It also indicated that directing NECA to establish corporations that would be agents of the Commission was enough to trigger the GCCA; the Commission did not have to create the corporations itself.⁵²

In this case, the GCCA prohibits the Commission from creating the RCC because (1) the Commission would exercise control over the RCC and (2) there is no authorizing statute providing authority to create the RCC. With regard to the requisite amount of control, the Supreme Court has indicated that the requirements of the GCCA are invoked if an agency has sufficient control over a corporation to determine the organizational structure of its board and appoint a majority of its representatives.⁵³ Pursuant to the Consensus Plan, the Commission would appoint Nextel as a member of the RCC and require the other members to be LMCC members that represent public safety or private wireless interests and have "extensive prior experience in the planning and coordination of 800 MHz radio systems."⁵⁴ By establishing such strictly defined criteria, the Commission would narrow down the list of eligible candidates to little more than APCO, IAFC/IMSA, ITA, PCIA, and perhaps a few other organizations. Because the RCC would have Nextel and four other members, the Commission's promulgation of membership criteria under which barely more than four organizations would actually qualify

⁵⁰ *GAO Decision* at 4-5.

⁵¹ *GAO Decision* at 5.

⁵² *GAO Decision* at 5, 8.

⁵³ *Lebron*, 513 U.S. at 397-98.

⁵⁴ Supplemental Filing at 15, 18.

would be synonymous with the Commission appointing the members itself. Thus, application of the GCCA would be triggered by the high degree of Commission control over the RCC's organizational structure and membership.

With regard to statutory authority for creating the RCC, Sections 154(i), 303(f), and 303(r) of the Communications Act of 1934 grant the Commission authority to take a broad range of actions in the public interest.⁵⁵ None of these sections, though, provide the specific statutory authorization required by the GCCA to create the RCC, and there is no other statute authorizing creation of the RCC. Thus, the Commission lacks statutory authority to create it.

Southern recognizes that the Consensus Plan does not specifically require the Commission to incorporate the RCC. Given that the PWC Commenters' proposed rules would allow the RCC "to organize in corporate form and devolve such responsibilities to the new entity,"⁵⁶ it would inevitably incorporate itself in order to, among other things, help insulate its members from liability. A provision in the rules allowing the RCC to incorporate would thus be tantamount to the Commission actually directing the RCC to incorporate.

2. **Creation of the RCC would constitute an impermissible subdelegation of authority.**

Creation of the RCC would also constitute an impermissible subdelegation of authority. Although it would be a purely private sector body, the RCC would play roles normally reserved to the Commission. As described above, it would develop and implement a new band plan for the 800 MHz band without the need for true Commission approval.⁵⁷ While the RCC would file non-public safety license applications with the Commission in accordance with the new band

⁵⁵ 47 U.S.C. §§ 154(i), 303(f), and 303(r) (2000).

⁵⁶ Supplemental Filing at Appendix C-5.

⁵⁷ Supplemental Filing at 22-23.

plan, the filing would be strictly pro forma; the Commission would essentially be required to automatically grant all such applications.⁵⁸ The RCC would also review and either approve or disapprove all relocation cost reimbursement claims made by incumbents.⁵⁹

Under this scenario, the Commission would be delegating substantial authority to the RCC. Moreover, licensees who are aggrieved by it would have no recourse to the Commission or the courts, since the Consensus Plan provides no provision for appeals of RCC decisions. In fact, they would not even have recourse to the RCC-appointed arbitration panel; that panel would be available only for disputes with Nextel over "cost and timing issues" related to relocation agreements.⁶⁰ In short, the Commission would be handing to the RCC the reins for important band allocation and licensing decisions and permitting it to operate with nearly total independence.

The PWC Commenters do not set forth any authority -- nor could they -- under which the Commission is permitted to so thoroughly delegate its authority to a completely independent private sector body. Sections 154(i), 303(f), and 303(r) of the Communications Act of 1934 grant the Commission authority to take a broad range of actions in the public interest,⁶¹ but none of them permit it to completely abdicate its authority and responsibility for certain matters to private parties. The Commission's subdelegation authority is clearly set forth in Section 155(c)(1), which specifically lists the types of persons to which it is permitted to delegate: (1) a panel of commissioners; (2) an individual commissioner; (3) an employee board; and (4) an individual employee.⁶² Because private sector entities are absent from the list, the Commission

⁵⁸ Supplemental Filing at 22-23.

⁵⁹ Supplemental Filing at Appendix C-5.

⁶⁰ Supplemental Filing at 21-22.

⁶¹ 47 U.S.C. §§ 154(i), 303(f), and 303(r).

⁶² 47 U.S.C. § 155(c)(1) (2000).

cannot delegate authority to them absent the existence of authorizing statutes for particular situations.⁶³ In this case, Congress has not passed an authorizing statute that would allow the Commission to delegate authority to the RCC. Thus, the Commission cannot create it.

The foregoing limitation of the Commission's subdelegation authority is consistent with the general rule that public agencies are not usually permitted to delegate authority to private sector entities absent a specific charter or statute permitting them to do so. For example, in *Shook v. D.C. Financial Responsibility and Management Assistance Authority*, the United States Court of Appeals for the District of Columbia Circuit observed that "[w]e often have upheld an agency head's ability to delegate duties to subordinate officers, but these cases do not involve delegations of agency authority to outside parties."⁶⁴ Also, in *Sierra Club v. Sigler*, the United States Court of Appeals for the Fifth Circuit stated that "an agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest."⁶⁵ In this case, as explained below, the RCC would have significant conflicts of interest with regard to developing and implementing a new 800 MHz band plan.

⁶³ This is also supported by the well-established canon of statutory construction of *expressio unius est exclusio alterius* ("the mention of one thing implies the exclusion of another"). See, e.g., *Shook v. D.C. Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 782-84 (D.C. Cir. 1998) (applying the maxim to limit the subdelegation authority of the District of Columbia Board of Education).

⁶⁴ *Shook v. D.C. Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 783 n.6 (D.C. Cir. 1998).

⁶⁵ *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (citations omitted).

3. **Creation of the RCC would violate the Federal Advisory Committee Act.**

Creation of the RCC would also violate the Federal Advisory Committee Act ("FACA").⁶⁶ The FACA provides that "advisory committees" must follow certain rules to ensure that they are not inappropriately "employed to promote or endorse agency policies."⁶⁷ In particular, Congress expressed its concern about informal meetings of advisory committees held without the benefit of public scrutiny.⁶⁸ The potential dominance of special interest groups in such informal meetings could increase the likelihood "that subjective influences not in the public interest could be exerted on the Federal decision-makers."⁶⁹ The FACA provides that an "advisory committee" is "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee" which is "established or utilized by one or more agencies in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government"⁷⁰

The role and responsibility of the proposed RCC would exceed the delegation authority of the Commission under the FACA. Under Section 2 of the FACA, "the function of the advisory committees should be *advisory only*, and . . . all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved."⁷¹

⁶⁶ 5 U.S.C. app. 2 (2000).

⁶⁷ *Gates v. Schlesinger*, 366 F. Supp. 797, 799-800 (D.D.C. 1973) (citing 118 Cong. Rec. S14644 at S14649 (daily ed. Sept. 12, 1972) (Remarks of Senator Percy)).

⁶⁸ See H. Rep. No. 92-1017, at 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3496.

⁶⁹ *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1051 (D.D.C. 1974) (citing S. Rep. 92-1098, at 6 (1972)).

⁷⁰ 5 U.S.C. app. 2 § 3. The Commission utilizes a number of committees pursuant to the FACA, such as the Public Safety National Coordination Committee and the North American Numbering Council.

⁷¹ 5 U.S.C. app. 2 § 2(b)(6) (emphasis added).

The FACA thus prevents the delegation of implementation or policymaking authority to an advisory committee.

The proposed rules violate this limit on advisory committees because they would grant the RCC authority to implement 800 MHz relocation procedures and to make binding policy decisions. For example, the RCC would have authority to develop a new band plan, oversee arbitration between Nextel and incumbent licensees, and review and approve relocation cost reimbursement claims. This control over the rights and funding of the incumbent licensees would empower the RCC to determine the relative merit of reimbursement claims for various types of licensees, which is a duty that would far exceed the technical expertise specified for RCC members in the proposed rules. By improperly delegating implementation and policymaking authority to this advisory committee, the proposed rules would violate the FACA.

Even if, *arguendo*, the Commission found that the RCC would not exceed the Commission's delegation authority under the FACA, the RCC as proposed would still not be permissible because it would not adhere to the requirements set forth in the FACA. In particular, the FACA mandates that an advisory committee: (1) contain a fairly balanced membership; (2) avoid inappropriate influence of special interest groups; (3) have an adequate staff to perform its prescribed function; (4) include a Commission representative; and (5) follow the public access requirements in the FACA.⁷²

- **The RCC is not likely to be fairly balanced.** The proposed rules for membership in the RCC contain no protection against the selection of only Consensus Plan signatories. As evidenced by the comments and reply comments filed in opposition to the Consensus Plan, many parties do not share the signatories' views.

⁷² 5 U.S.C. app. 2 § 5(b)-(c).

- **The RCC could be inappropriately influenced by special interest groups.** The proposed rules contain no safeguards against undue influence by special interest groups, including the interests of its member organizations.
- **The RCC lacks adequate staff.** The proposed rules do not ensure that the RCC would have adequate staff to handle the immense workload associated with, among other things, creating a new band plan, creating relocation plans, and reviewing cost reimbursement claims within the short time frames proposed in the Supplemental Filing.
- **The RCC does not include a Commission representative.** The rules proposed for the RCC do not provide for a Commission representative to chair or attend each meeting, to call such meetings, or to give advance approval of them.
- **The RCC does not comply with public access requirements.** The proposed rules do not contemplate the Commission or RCC facilitating public access, such as publishing advance notice of meetings in the Federal Register and allowing interested persons to attend meetings.

B. The Commission Cannot Assure That The RCC Would Act In The Public Interest Because It Would Be Comprised Of Private Sector Entities That Are Obligated To Promote Private Interests

An additional problem with the RCC is that it would be comprised of private sector entities with very significant stakes in this proceeding who are obligated, first and foremost, to advance the interests of themselves, their shareholders, or their members -- not the general public. While their discrete private interests may sometimes intersect with the public interest, that often may not be the case. However, any party charged with developing and implementing an 800 MHz rebanding plan must *always* act in the public interest. Because the Commission cannot ensure that the RCC would always act in the public interest, it cannot authorize the creation of it.

As noted above, the members of the RCC would be Nextel, two members of the LMCC that represent private wireless licensees, and two members of the LMCC that represent public

safety licensees.⁷³ With regard to Nextel, as a publicly traded corporation, its directors and officers are legally obligated to promote the interests of the corporation and its shareholders, not the general public.⁷⁴ Nextel has a very significant corporate interest in the relocation process, and it is legally obligated to put that interest ahead of the public interest. Moreover, Nextel does not represent the interests of other commercial carriers who would not be members of the RCC. Accordingly, with regard to commercial carrier issues, Nextel will have free reign to advance positions favorable to itself and detrimental to its competitors.

While the four LMCC members of the RCC have not been determined, it is highly likely that they would be ITA, PCIA, APCO, and another large public safety organization that is a Consensus Plan signatory. As a general matter, ITA, PCIA, and APCO are trade associations and thus act in the interests of themselves and their membership.⁷⁵ Additionally, they all perform frequency coordination and stand to reap large pecuniary gains by performing coordination in connection with the relocation. In fact, the Consensus Plan provides that for non-public safety licensees, license applications and coordination *must* be performed by the RCC, *e.g.*, ITA and PCIA.⁷⁶ In a spectrum reallocation process, an obligation to promote the interests of the association through increasing frequency coordination revenue would conflict with the public interest.

⁷³ Supplemental Filing at 15-16.

⁷⁴ *See, e.g., Stat-Tech International Corp. v. Delutes*, 47 F.3d 1054, 1058-59 (10th Cir. 1995); *Byelick v. Vivadelli*, 79 F. Supp. 610, 623 (E.D. Va. 1999); *In re Hechinger Investment Co. of Del.*, 274 B.R. 71 (Bankr. D. Del. 2002).

⁷⁵ Additionally, the appropriateness of PCIA's role in this matter would be questionable given that it now bills itself as "PCIA - The Wireless Infrastructure Association" and states that its mission is the representation of "companies that develop, own, manage and operate towers, commercial rooftops and other facilities" *See* PCIA's web site at <http://www.pcia.com>.

⁷⁶ Supplemental Filing at 22.

C. The RCC Would Lack Oversight, Transparency, And Accountability

Another reason the Commission should not authorize creation of the RCC is that the RCC would lack oversight, transparency, and accountability. On an initial level, there is no indication in the Consensus Plan that parties outside the RCC would be privy to any relocation-related contracts between its members. For example, if Nextel has a contract with a frequency coordination member of the RCC for completing and coordinating Nextel's license applications, that contract could be material to the manner in which Nextel and that member vote or handle other RCC affairs (the member may be unduly deferential to Nextel so as to keep its business). Because the RCC would be performing a public service, arrangements that could create conflicts of interest would need to be made public.

On another level, there is no indication in the Consensus Plan that the decision-making process of the RCC would be open. Rather, it appears that it would hold meetings and make decisions behind closed doors. Not only would affected licensees be unable to attend these meetings, but also the Consensus Plan does not even specify that meeting minutes would be made available. This lack of openness would give rise to serious due process concerns, particularly since one of the RCC's tasks would be to establish a new band plan containing new frequency assignments.⁷⁷ That this would be a "closed-door" process is evidenced by the PWC Commenters' recommendation that any band plan submitted by the RCC "shall be certified by the Commission without public notice."⁷⁸ The problematic nature of this closed-door policy would be exacerbated by the lack of a process for appealing the RCC's decisions.

From a financial transparency standpoint, there are no requirements for the RCC to account for and disclose the manner in which it spends Nextel's \$850 million contribution.

⁷⁷ Supplemental Filing at 21.

Specifically, the RCC would use the contribution to pay for "[t]he reasonable expenses of the RCC and its . . . members," which presumably would include items such as license application fees, frequency coordination fees, arbitration fees, salaries, and travel.⁷⁹ These expenses could be substantial, and the bulk of them -- most notably license application and frequency coordination fees -- may be paid to members of the RCC who perform those functions.⁸⁰ Any situation where members of a committee have discretion to hire themselves and use committee funds to pay themselves opens the door to easy abuse.⁸¹ That is especially the case here, where available funds total \$850 million and there are no stated limits or parameters on what constitutes "reasonable expenses."

An example of the problems that can potentially ensue when an outside body lacks oversight is provided by the schools and libraries universal service support mechanism. Currently, the Commission is concerned that an insufficient amount of oversight over this program, which is administered by the Schools and Libraries Division of the Universal Service Administrative Company, may be a cause of waste, fraud, and abuse.⁸² Accordingly, the Commission is conducting a rulemaking to review whether it should require independent audits

⁷⁸ Supplemental Filing at Appendix C-17.

⁷⁹ Supplemental Filing at 15, n.22.

⁸⁰ The Commission should bear in mind that the Consensus Plan would *require* relocating non-public safety licensees to use the RCC for license applications and frequency coordination. The RCC is likely to subcontract those tasks to frequency coordinators within its own ranks.

⁸¹ The PWC Commenters also propose that *Nextel* be allowed to seek reimbursement from the Relocation Fund for expenses it has been incurring since December 24, 2002. Supplemental Filing at Appendix C-23.

⁸² In the Matter of School and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Notice of Proposed Rule Making and Order*, 17 FCC Rcd. 1914, 1937 (2002).

of recipients and service providers and whether other oversight techniques should be implemented.⁸³

D. The RCC Would Constitute A License Application And Frequency Coordination Monopoly

The Supplemental Filing provides that for non-public safety licensees being relocated from the General Category band, the RCC will prepare their license applications and perform (or contract for) their frequency coordination.⁸⁴ Licensees would have no choice in the matter. The RCC would essentially be free to charge whatever it wishes for completing license applications and performing coordination (whether its members handle those tasks themselves or subcontract them), especially given that it will have control over the fund which will be used to pay for the work.⁸⁵ This provision is unnecessary and legally untenable. With regard to completing applications, licensees have long been free to do the work themselves or hire outside contractors of their choosing. With regard to frequency coordination, they have been free to utilize frequency coordinators of their choosing.

Commission policy strongly favors giving licensees a choice of frequency coordinators. In a fairly recent proceeding in which the International Association of Fire Chiefs and International Municipal Signal Association ("IAFC/IMSA"), two of the signatories to the Consensus Plan, petitioned for authority to provide coordination of public safety frequencies, the Wireless Telecommunications Bureau stated:

[W]e believe the Commission has indicated a desire to foster competition between certified public safety frequency coordinators regarding public safety spectrum above 512 MHz. Further, we believe that introducing such competition in the 800 MHz public

⁸³ *Id.*

⁸⁴ Supplemental Filing at 22-23.

⁸⁵ See Supplemental Filing at 15, n.22.

safety spectrum will bring the benefits of lowering prices and improving the quality for frequency coordination, including speeding application processing time. In this connection, we note that the Commission introduced competitive coordination in the 800 MHz General Category frequencies to permit applicants the advantage of being able to choose a frequency coordinator on the basis of criteria such as cost and speed of service.⁸⁶

E. The RCC Is Not Likely To Be Fully Representative Of The Licensees On The 800 MHz Band

A further reason for not authorizing creation of the RCC is that it is not likely to be fully representative of the licensees on the 800 MHz band. As noted above, in addition to Nextel, it is highly likely that the other members of the RCC would be ITA, PCIA,⁸⁷ APCO, and another large public safety organization that is a Consensus Plan signatory. Such a body would not, for example, be truly representative of the interests of Southern, the second largest licensee on the 800 MHz band. Nor would it be truly representative of the interests of energy utilities, which have some of the largest non-commercial systems. Utilities' telecommunications interests are represented by the United Telecom Council, but given that it is not a signatory to the Consensus Plan, it would be unlikely to be selected for the RCC.

F. The Consensus Plan's Relocation Timelines Are Overly Ambitious And Unrealistic

The Supplemental Filing sets forth very short timelines for the relocation process and applies very severe penalties if those timelines are not met. Not surprisingly, the penalties would

⁸⁶ In the Matter of International Association of Fire Chiefs, Inc., and International Municipal Signal Association, *Order*, 16 FCC Rcd. 14530, ¶ 14 (2001).

⁸⁷ The degree to which PCIA would truly represent the interests of any 800 MHz licensees is questionable given the fact that, as noted above, it now bills itself as "PCIA - The Wireless Infrastructure Association" and states that its mission is the representation of "companies that develop, own, manage and operate towers, commercial rooftops and other facilities" See PCIA's web site at <http://www.pcia.com>.

apply only to incumbents and not to Nextel. The Supplemental Filing provides that within **45 days** of the effective date of a report and order in this proceeding, General Category incumbent licensees must provide the RCC with a "full description of their licensed systems."⁸⁸ Within **90 days** of the effective date of a report and order, the RCC would complete "a plan for relocating the 13 non-Nextel incumbent constructed EA licensees in the 1-120 channel block."⁸⁹ Within **120 days** of the effective date of a report and order, the RCC would complete "a detailed frequency plan setting forth post-relocation spectrum assignments for clearing the 1-120 channel block in each of the first 14 NPSPAC planning regions."⁹⁰ The incumbent General Category licensee would then have **9 months** to negotiate relocation timing, reimbursement, and disruption avoidance plans with Nextel.⁹¹ All of this, culminating in a relocation agreement with Nextel, must be completed within **13 months** of the effective date of a report and order.⁹² If it is not, the incumbent licensee will have its license revoked.⁹³

Once a license relocation application is submitted to the Commission, it will have **60 days** to "grant" the application. The Commission actually would have virtually no discretion in this matter, as the Supplemental Filing provides that applications would be "presumed in the public interest";⁹⁴ in other words, the RCC would decide whether to grant the application and

⁸⁸ Supplemental Filing at 18-19.

⁸⁹ Supplemental Filing at 19.

⁹⁰ Supplemental Filing at 21.

⁹¹ Supplemental Filing at 21.

⁹² Supplemental Filing at 22 n.37.

⁹³ Supplemental Filing at 24. The exception to this rule would be if a licensee was involved in arbitration or "otherwise subject to a Commission administrative process."

⁹⁴ Supplemental Filing at 22-23.

would expect the Commission to merely rubber-stamp its decision. After "grant" of the application, the licensee would have **6 months** to physically retune its channels.⁹⁵

The above-described time lines are far too short, starting with the 45 days that incumbent licensees are given to provide the RCC with a "full description of their licensed systems." The RCC seeks very detailed information on licensees' systems, and it will be very difficult for many licensees (and perhaps impossible for large licensees) to compile, review, and provide such information within 45 days.⁹⁶ The 9 months allocated for incumbent licensees to negotiate relocation timing, reimbursement, and disruption avoidance plans with Nextel is also unrealistic.⁹⁷ As a large licensee, Southern has negotiated numerous license exchanges and knows from experience that such negotiations can take significantly longer than 9 months. Additionally, coming to terms with Nextel on complicated and historically contentious issues such as reimbursement and disruption avoidance may be difficult, especially for companies that compete with Nextel.

Once an application is filed, the 60 days given the Commission for deciding whether to "grant" the application reflects the PWC Commenters' expectation that the Commission will do nothing more than rubber-stamp it. If the Commission is to have true discretionary authority to make informed decisions, the time period must be extended.

The Supplemental Filing also does not provide enough time for licensees to retune their channels once an application is granted. While a licensee with just a few frequencies might be

⁹⁵ Supplemental Filing at 23.

⁹⁶ As explained below, licensees should not be required to provide the amount of detail called for in the Supplemental Filing in the first instance.

⁹⁷ It should also be noted that the 9 month negotiation period is a fixed period of time; it is not dependent on whether Nextel initiates negotiations and there are no requirements for Nextel to initiate negotiations by any particular date.

able to complete retuning within 6 months, that time period could prove impossible for licensees with larger systems.

Additionally, the penalty of revoking an incumbent's license if it has not reached a relocation agreement with Nextel within 13 months of the effective date of a report and order is draconian. Given that any number of factors could cause negotiations to take longer than a certain set period of time (including unilateral actions or delays on the part of Nextel), the Commission should not automatically impose the harshest possible penalty.

Southern would also note that Nextel's own experience with licensee relocations demonstrates that the timelines set forth in the Supplemental Filing are unrealistic. Specifically, Nextel, as the winner of the vast majority of Upper 200 SMR EA licenses, took (and is possibly still taking) far longer to relocate Upper 200 incumbents than the amount of time allocated for relocations in the Supplemental Filing. Although the Commission announced the commencement of Upper 200 voluntary relocations on December 4, 1998,⁹⁸ Nextel still had not finished relocating incumbent licensees by December 31, 2001 -- a period of over three years.⁹⁹

G. The Proposed Arbitration Rules Are Unduly Restrictive

The Supplemental Filing's theme of proposing procedures highly favorable to Nextel and adverse to incumbents continues in its "arbitration" rules. Here it is proposed that if Nextel and a General Category incumbent licensee cannot come to terms on a relocation agreement within nine months, "either party may initiate binding arbitration of unresolved cost and timing issues

⁹⁸ Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band, *Public Notice*, 13 FCC Rcd. 23381 (1998).

⁹⁹ See Nextel Communications SEC Form 10-K for the year ending Dec. 31, 2001, p. 21 (filed Mar. 29, 2002).

before an arbitration panel established by the RCC, which would choose between relocation proposals submitted by two parties in a 'baseball-type' arbitration process."¹⁰⁰ The arbitrators would be paid "by the RCC and/or reimbursed from the Relocation Fund," and the loser would have only limited recourse to appeal.¹⁰¹ This arbitration process is seriously flawed and should not be adopted by the Commission.

The first problem is that the panel would be established by the RCC.¹⁰² As a member of the RCC, Nextel would have input in the selection of the arbitrators. The incumbent licensee, on the other hand, would not be on the RCC and would not have a say in the selection. It is simply inequitable to hold an arbitration hearing when the selection of the entire panel is heavily influenced by just one of the parties. This inequity is exacerbated by the fact that the RCC, and hence effectively Nextel, would be paying the arbitrators' fees.¹⁰³

The second problem is the PWC Commenters' desire to limit the type of arbitration to "baseball-style" arbitration, pursuant to which "each side submits its best proposal, and the arbitrator is required to select either one or the other; the arbitrator cannot 'pick-and-choose' from among the competing proposals nor develop its own."¹⁰⁴ The PWC Commenters provide no reason why a process which derives its name from its utility in determining the salaries of

¹⁰⁰ Supplemental Filing at 21-22.

¹⁰¹ Supplemental Filing at 22, n.35, Appendix C-22.

¹⁰² Supplemental Filing at 21-22.

¹⁰³ A more equitable plan would provide for a three-member arbitration panel. One arbitrator would be chosen by Nextel, one by the incumbent, and one by mutual agreement of the other arbitrators. This method of selecting an arbitration panel would be similar to the method set forth in the Commission's home run wiring rules. *See* 47 C.F.R. § 76.804(a)(3) (2001).

¹⁰⁴ Supplemental Filing at 21-22.

professional athletes is particularly suited to spectrum relocation matters.¹⁰⁵ Incumbent licensees with potentially millions of dollars (or even their entire businesses) on the line should not be forced into this highly constrained method of dispute resolution that could also involve complex technical issues.

Finally, under the proposed rules, the only portion of an arbitration panel's decision that could be appealed to the Commission would be that portion "with respect to whether replacement frequencies meet the definition of comparable facilities" as set forth in a Commission order enacting the arbitration rules.¹⁰⁶ There is no reason to severely limit appeals in this manner and exclude other key relocation issues, including timing, cost reimbursement, and the degree to which the licensee's operations would be disrupted.¹⁰⁷

H. Licensees Would Needlessly Be Required To Divulge Confidential and Competitively Sensitive Information Regarding Their Systems

The PWC Commenters propose that incumbent licensees provide the RCC and the Commission with "a full description of their licensed systems" for purposes of enabling the RCC to create and implement a new 800 MHz band plan.¹⁰⁸ The Supplemental Filing contains separate lists for what must be provided by public safety, B/ILT, and SMR licensees.¹⁰⁹ The proposed list of information to be provided by SMR licenses is completely unnecessary.

¹⁰⁵ See James Barker, Jr., Bernard Tenenbaum, and Fiona Woolf, *Regulation of Power Pools and System Operators: An International Comparison*, 18 Energy L.J. 261, 273 n.20 (1997).

¹⁰⁶ Supplemental Filing at Appendix C-22.

¹⁰⁷ Also, arbitration rules should be subject to the Federal Arbitration Act, which provides, among other things, that parties may seek federal court review of arbitration decisions allegedly tainted by problems such as corruption, partiality, refusal to hear pertinent evidence, or material miscalculations. 9 U.S.C. §§ 10 and 11 (2000).

¹⁰⁸ Supplemental Filing at 19.

¹⁰⁹ Supplemental Filing at Appendix C-7 - C-16.

Southern has participated in numerous spectrum exchanges with Nextel, and it has never needed to provide this type of information to consummate a transaction.

Another objection to providing the foregoing information is that Southern would be providing it to Nextel, its primary competitor. In addition to competing for many of the same customers, Southern and Nextel are often on opposing sides in Commission proceedings, including this one. Also, since the information would also be available to other RCC members and their representatives, incumbents seeking reimbursement would be forced to divulge proprietary information to potential adverse parties.

An additional objection to providing a great amount of system information is that its confidentiality could not be assured. Although the PWC Commenters state that "the Commission's Rules should be amended, as may be necessary, to provide for the confidentiality of this information," the Commission could only go so far in that regard.¹¹⁰ Materials submitted to the Commission are generally subject to being divulged pursuant to the Freedom of Information Act ("FOIA"), even if they are deemed confidential in some instances.¹¹¹ The only items not subject to FOIA, and hence to which the Commission can absolutely deny access, are those that fit within certain limited categories.¹¹² Otherwise, if a party submits a request to the Commission pursuant to FOIA for information marked "confidential," the Commission is required to "weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in light of the facts of the particular case."¹¹³

In this case, the requested system information would not fit within any of the FOIA-exempt categories to which the Commission could absolutely deny access. Also, the

¹¹⁰ Supplemental Filing at 19.

¹¹¹ 5 U.S.C. § 552 (2002).

¹¹² 5 U.S.C. § 552(b).

Commission could not simply promulgate a regulation prohibiting access to system information, because it is not empowered to enact regulations overriding FOIA, a federal statute. Thus, if a requesting party made a persuasive enough showing, the Commission would be required to provide access to the information.

Southern is also concerned with the catch-all requirement that SMR licensees provide "[a]ny additional information . . . about any aspect of the system(s) for which information is being provided that is critical to planning the costs and logistics of system relocation."¹¹⁴ If that provision is read to provide that the RCC or Nextel would make the determination as to what "additional information" is necessary, they could have extraordinarily broad authority to require Southern to divulge all manner of information regarding its system.

I. The Consensus Plan Does Not Provide For Sufficient Appellate Recourse

The Consensus Plan provides virtually no recourse for appeal to licensees being relocated. Specifically, there is no provision for appealing decisions of the RCC; apparently, those decisions would be absolutely final. As for decisions made by the arbitration panel, the only types of decisions that would be appealable would be those "with respect to whether replacement frequencies meet the definition of comparable facilities."¹¹⁵ This lack of appellate recourse would be in violation of Section 702 of the Administrative Procedures Act, which provides that "[a] person suffering a legal wrong because of agency action, or adversely affected

¹¹³ 47 C.F.R. § 0.457 (2001).

¹¹⁴ Supplemental Filing at Appendix C-16.

¹¹⁵ Supplemental Filing at Appendix C-22.

or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."¹¹⁶

In addition to violating Section 702, the lack of ability to appeal decisions of the RCC would essentially place the RCC above the law. Decisions of the Commission are fully appealable through well-established processes. Given that the RCC would be created by the Commission and would be performing duties on its behalf (e.g., creating and implementing a new 800 MHz band plan), it would be absurd for decisions of the RCC not to be subject to appeal.

VI. IN THE ALTERNATIVE, IF THE COMMISSION ADOPTS SOME VERSION OF REBANDING, SOUTHERN LINC SHOULD BE PROVIDED WITH COMPARABLE AMOUNTS OF CONTIGUOUS SPECTRUM IMMEDIATELY BELOW 816.5/861.5 MHZ

As discussed above, Southern is opposed to adoption of the Consensus Plan. Among other problems, the plan would not substantially mitigate public safety interference, it lacks secure funding, it would provide Nextel with a windfall of 1.9 GHz spectrum, and it is being forced on the Commission on an "all or nothing" basis. Furthermore, the proposed RCC structure cannot be adopted under *any* version of a plan for rebanding. However, if the Commission adopts the Consensus Plan or some version of rebanding and grants Nextel blocks of contiguous spectrum in the process, the need for regulatory parity requires that the Commission also provide Southern with an allocation of the same type of contiguous spectrum subject to the same operational rules. Specifically, the Commission should adopt a flexible band plan that extends the cellularized band below 816/861 MHz for certain geographical areas in the

¹¹⁶ 5 U.S.C. § 702 (2002).

southeastern United States.¹¹⁷ Southern would be given exclusive and sole use of this expanded commercial or "cellularized" band (including 816-816.5/861-861.5 MHz) and, accordingly, would relocate and consolidate all of its interleaved channels in it. Nextel would fund Southern's relocation to the expanded commercial band in accordance with its general funding commitment.¹¹⁸ All 800 MHz land mobile spectrum and all 900 MHz SMR spectrum currently licensed to or controlled by Southern that does not fall within these geographical areas would be returned to the Commission in order to facilitate rebanding in other areas of the country and to give the public safety community additional channels.

To demonstrate how the foregoing could be accomplished, Southern has broken its service territory into several "regions," and for each region has calculated the degree to which the cellularized band would need to be extended below 816/861 MHz to accommodate its operation. Appendix A (attached hereto) graphically illustrates the spectrum that Southern would receive. The amount varies from region-to-region.¹¹⁹ For example, for the state of Georgia, Southern should be provided with a contiguous block of 7 MHz of spectrum (813-816.5/858-861.5 MHz). For the Birmingham area, it should be provided with a contiguous block of 10 MHz of spectrum (811.5-816.5/856.5-861.5 MHz). A band plan for all licensees in the 806-824/851-869 MHz frequency range within the geographical area of Appendix A is shown in Appendix B (attached

¹¹⁷ This would be a limited extension, as these geographical areas would encompass only Georgia, Alabama, Mississippi, the panhandle area of Florida, and certain limited areas of Louisiana, North Carolina, South Carolina, and Tennessee.

¹¹⁸ In other words, Nextel would fund all of Southern's relocations done in connection with or related to any realignment of the 800 MHz band.

¹¹⁹ This methodology -- using average spectrum amounts to ascertain the appropriate size of new contiguous allocations -- is consistent with the methodology used by Nextel in its request for contiguous spectrum in the NPSPAC and 1.9 GHz bands. Southern's calculations are more representational of Southern's actual spectrum holdings, however, because unlike Nextel, it breaks out its service territory into discrete regions (both Southern's and Nextel's holdings vary from region to region).

hereto). For these geographical areas, Nextel would be allocated 15 MHz of 800 MHz spectrum from 816.5-824/861.5-869 MHz.¹²⁰

Some public safety and B/ILT licensees would need to be relocated to interleaved spectrum that would be vacated by Southern. Consistent with Nextel's general funding commitment, Nextel would fund these relocations. Consolidating Southern's licenses in a contiguous block immediately below 816.5/861.5 MHz would benefit public safety and B/ILT licensees by providing them with blocks of spectrum free of interleaved CMRS operations.

Southern again emphasizes that it does not believe that rebanding at 800 MHz is the best solution to solve interference. It also believes that the RCC process is fundamentally flawed and that a more legally appropriate procedure would need to be fashioned if the Commission proceeds with rebanding. However, in the alternative, if the Commission were to adopt the Consensus Plan or some version of rebanding, providing Southern with a contiguous block of spectrum immediately below 816.5/861.5 MHz would not be inconsistent with the Consensus Plan.¹²¹ In the Supplemental Filing, the PWC Commenters stated that in addition to relocating Southern's General Category licenses "as close as possible" to 816/861 MHz, it may also be desirable to relocate Southern's interleaved spectrum to that location to reduce potential public safety interference.¹²² Southern does not cause interference to public safety or B/ILT licensees

¹²⁰ Nextel claims to have a nationwide "running average" of 26 MHz of spectrum, thus requiring 16 MHz of post-realignment 800 MHz spectrum to keep it on par with its current holdings (taking into consideration what it will lose by returning or exchanging certain 700, 800, and 900 MHz channels and the 10 MHz it would receive at 1.9 GHz). For the particular areas of the country at issue here, however, Nextel only has an average of 25 MHz of combined 700, 800 and 900 MHz spectrum. As such, Nextel requires only 15 MHz of post-realignment 800 MHz spectrum to be "made whole."

¹²¹ Also, this proposal would be consistent with a proposal made by Motorola in an earlier filing in this proceeding. There, Motorola proposed a plan that indicated that Southern would be relocated to a contiguous block immediately below Nextel's allocation. Reply Comments of Motorola at 9-13.

¹²² Supplemental Filing at 45 n.80.

and has no reason to believe it will do so in the future. However, the PWC Commenters' statements in this regard indicate that all of them -- including APCO, ITA, and the other public safety and B/ILT associations -- would be amenable to the possibility of relocating Southern to just below 816/861 MHz and to working through any public safety or B/ILT relocations that such an effort would entail. If, *arguendo*, the Commission adopts the Consensus Plan -- which it should not -- and approves of this revision for certain areas of the southeastern United States, relocation issues specific to Southern's region could be addressed as part of an approved relocation process.

Providing Southern with a contiguous block of spectrum immediately below 816.5/861.5 MHz would also be necessary for purposes of regulatory parity. The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act") mandated that the Commission establish a uniform regulatory regime for all commercial mobile services.¹²³ Specifically, Section 6002(d)(3)(B) required the Commission to establish "regulatory parity" such that "services that provide equivalent mobile services are regulated in the same manner."¹²⁴ The Commission has applied regulatory parity not just among different types of CMRS services but also among licensees within the same service.¹²⁵

¹²³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993).

¹²⁴ H.R. Rep. No. 103-11 at 259, *reprinted in* 1993 U.S.C.C.A.N. at 586; *see also* H.R. Conf. Rep. No. 103-213 at 498 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 1187.

¹²⁵ *See, e.g.*, In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Remand*, 14 FCC Rcd. 21679, 21686 (1999) (holding that wide-area incumbent 800 MHz licensees should be treated the same as EA 800 MHz licensees for purposes of construction deadlines).

Currently, Southern and Nextel both operate SMR systems in the interleaved portion of the 800 MHz band (809-816/854-861 MHz).¹²⁶ Under the PWC version of rebanding, however, Nextel would vacate the interleaved portion of the band and move its operations to a contiguous block above 816/861 MHz, which would be designated as the only portion of the band in which "cellularized" operations are permitted. As such, the Commission would essentially be making the portion of the band above 816/861 MHz the CMRS band and the portion below 816/861 MHz the non-CMRS band. Even if, as proposed in the Consensus Plan, Southern were grandfathered and allowed to operate as a "cellularized" system below 816/861 MHz, it would operate pursuant to a special exception to the general rules.

Forcing Southern, a CMRS licensee, to remain in a non-CMRS band would be detrimental to it for several reasons. First, it would have to conform to the non-CMRS standards of the non-cellularized band. Even if it were granted blanket waivers (such as being allowed to operate a cellularized system), other general restrictions such as power and emissions limits could hinder its ability to competitively provide service and expand its system. Similarly, Southern would not be able to take advantage of the CMRS-specific aspects of the cellularized band. Thus, technical and other advantages such as licensing flexibility that could accrue to Nextel and other CMRS licensees would not be available to Southern. The Commission cannot adopt rules that allow this advantage to be available only to select CMRS competitors. Doing so would create regulatory disparities between similarly situated carriers. To state this same point differently, there is simply no way that regulatory parity between Southern, Nextel, and other CMRS licensees can exist if Southern is forced to remain on spectrum that is being reallocated for non-CMRS use. Extending the cellularized band below 816/861 MHz for certain

¹²⁶ Southern and Nextel also operate in the General Category and Upper 200 portions of the 800 MHz band.

geographical areas in the southeastern United States would solve this problem by providing Southern with comparable spectrum to its competitors.

VII. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Southern LINC respectfully requests that the Commission act in the public interest as set forth herein.

Respectfully submitted,

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Dated: February 10, 2003

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 10th day of February 2003, I caused a copy of the foregoing "Supplemental Comments Of Southern LINC" to be mailed via first-class mail to each of the following:

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