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MCDERMOTT, WILL & EMERY

November 25, 2003

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Notice of *Ex Parte* Meeting; Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55

Dear Ms. Dortch:

This is to notify you that on November 24, 2003, Shirley Fujimoto and Jeffrey Sheldon of McDermott, Will & Emery, counsel to Entergy Corporation and Entergy Services, Inc. ("Entergy"), met with Commissioner Martin and Sam Feder, Legal Advisor to Commissioner Martin, to discuss Entergy's position on the issues in the above-referenced proceeding. Specifically, Entergy noted the significant deficiencies in the "Consensus Plan" which Nextel has not yet addressed. Attached is a copy of the written presentation used in this meeting.

In accordance with the Commission's rules, one copy of this *ex parte* notice is being filed electronically for inclusion in the record of the above-referenced proceeding.

Very truly yours,

/s/ Shirley S. Fujimoto

Shirley S. Fujimoto

Attachment

cc (w/ attachment):

Commissioner Martin
Sam Feder

THE CONSENSUS PLAN: CRITICAL UNRESOLVED ISSUES

Nextel and the Consensus Parties have recently submitted two updates in this docket in an attempt to rectify a few critical failings in their realignment scheme. First, the Consensus Parties have rescinded the technical restrictions that would be imposed on licensees located in the proposed Guard Band at 859-861 MHz, such that licensees in this segment of spectrum would ostensibly have the same right to complain about interference as those located elsewhere in the band. Second, Nextel has attempted to shore up its financial proposal by offering to deposit $100 million in an escrow account to fund relocation, with $750 million in additional funds secured by an irrevocable letter of credit.

The Consensus Parties' recent concessions, while gratifying, nevertheless fail to address a significant number of flaws that must be remedied before a realignment plan of this nature could possibly be implemented. While these concerns have been raised by many parties in many filings to date, they have not been meaningfully addressed or rectified by the Consensus Parties. We reiterate these points here as they are absolutely essential components to any well-considered resolution of the Public Safety interference issue in the 800 MHz band, which must not be lost in the deluge *ex parte* submissions made of late.

- **The Licensing Freeze is Unwarranted and Unnecessary**

  - Nextel and its supporters have not addressed the pointed concerns raised by parties to this docket with respect to the two licensing freezes that the Consensus Plan would impose.

  - First, additional licensing in the 854-861 MHz band would be prohibited until the relocation process is completed.

    - This freeze is unnecessary for its intended purpose; there is not enough white space in the band to attract speculators who would seek to delay or profit from relocation.

    - This freeze would, however, prevent utilities and other licensees from fine-tuning and optimizing their systems.

  - Second, Public Safety would receive a five-year licensing preference *after* relocation is completed to the exclusion of other licensees. This freeze could prevent B/ILT system expansion for up to nine years after initiation of rebanding.

    - Limiting access to spectrum would impair utilities' ability to address system coverage issues, which could endanger worker and customer safety and the integrity of utility power grids.

    - The preference could result in a net *loss* of Business and I/LT frequencies, which is wholly unwarranted and inappropriate.

- **The Key Failings of the Proposed Relocation Coordination Committee (RCC) Remain Unaddressed**

  - The Consensus Parties have not addressed the serious issues raised by commenters regarding the proposed RCC – including questions about its legality and its composition.

  - The RCC would clearly wield policy-making authority in contravention of the Communications Act.

  - Its decisions appear to be unreviewable and largely unappealable (a privilege that the FCC itself does not enjoy with respect to its decisions by virtue of the Administrative Procedure Act). The decisions of the RCC or any body administering the relocation process cannot be made with impunity or insulated from review, by "certification" of the Commission, mandatory binding arbitration, or otherwise.

  - It is inadvisable and likely unlawful to delegate oversight of the relocation process to self-interested parties with no check on their authority.

  - The RCC adds a layer of complexity to the process that is unnecessary if the Rules are clearly written to identify all parties' rights and obligations.

- **The Relocation Time Frames are Wholly Unrealistic**

  - The timing imposed upon licensees forced to relocate fails to account for the complex nature of many of the systems.

  - The proposed timing is far shorter than other relocation time periods established by the FCC, including the relocation timing for the upper 200 channels of the 800 MHz band, which permitted licensees up to two years to negotiate their relocation.

  - Although the Plan imposes severe penalties on licensees who do not reach agreement or relocate according to the Plan's timetable, there are no similar penalties or deadlines imposed on Nextel's action under the Plan.

  - While the Consensus Plan permits Public Safety licensees additional time to address unforeseen problems, there are no provisions for extension of time for other licensees. Critical Infrastructure licensees and others must be permitted the time necessary to safely migrate their systems and to ensure their integrity.

- **The Prohibition on Cellular Technology Below 861 MHz Will Impair Spectrum Efficiency and Retard the Adoption of Advanced Systems Vital for Critical Infrastructure Licensees and Public Safety Licensees**

  - The proposed ban on cellular technologies below 816/861 MHz contravenes long-standing FCC policy to promote advanced technologies and frustrates the deployment

of innovative systems by Public Safety, Critical Infrastructure Industry, and other B/ILT licensees.

- This ban would stifle innovation, and would lock licensees into an increasingly outdated technology.

- The ban conflicts with the Spectrum Policy Task Force's recommendation that the FCC should encourage flexible spectrum use and avoid "command-and-control" spectrum management where possible.

- The definition of "cellular system architecture" is so broad that it would encompass some currently existing analog technologies.

- It is virtually impossible to obtain a waiver of the cellular prohibition, as a party must "conclusively" prove that a proposed cellularized system will not cause interference.

- A number of parties to this proceeding operate cellular systems in proximity to Public Safety systems without difficulty and several parties, including Public Safety entities, also operate "hybrid" systems.

- A wholesale ban on cellular architectures is inappropriate and has been proven unnecessary in practice.

- **Licensees Forced to Relocate to 859-861 MHz Will Still Be Subject to a More Hostile Interference Environment**

  - The Consensus Parties have recognized that the initially proposed technical requirements for the 859-861 MHz band are inappropriate and would penalize those licensees already located in this portion of the spectrum or forced to relocate there by seriously impairing their interference protection rights.

  - However, the Consensus Parties seem to concede that this portion of the 800 MHz band would remain more prone to interference post-realignment than other frequencies lower in the band.

  - While these parties' right to complain has been restored, the likelihood that they will be forced to exercise this right remains greater at 859-861 MHz than elsewhere in the band.

  - Therefore, it would be manifestly ill-advised to relocate critical communications systems, including those operated by Critical Infrastructure Industries into this portion of the band.

- **Informational Disclosures Required Are Invasive, and the Plan Lacks Safeguards to Ensure Confidentiality**

  - The Consensus Parties propose to require a substantial amount of information be supplied to the RCC to facilitate relocation.

  - The information requested is much broader than necessary to achieve this goal.

  - There are no provisions in place to guarantee the confidentiality of this information once it is in the hands of the FCC or the RCC.

  - Anticompetitive concerns could also arise by virtue of any government mandate to award Nextel access to sensitive, and commercially valuable, information.

  - Information of this nature is highly sensitive and possesses immense strategic value to competitors and those who would harm this Nation's utility infrastructure. This must not be permitted.

- **Nextel Has Still Capped Its Liability, and No Source of Funds Has Been Identified Should Relocation Costs Exceed $850 Million**

  - Nextel's liability under the plan would remain capped at $850 million.

  - A significant number of parties have estimated that relocations costs would far exceed this amount.

  - There has been no effort to plan for the eventual depletion of funds or to identify an alternate source of funding once the $850 million is exhausted.

  - Motorola now estimates that up to 30% of Motorola Public Safety NPSPAC radios will require replacement under the Consensus Plan, a figure far in excess of Nextel's assumptions for replacement in its cost estimates (*i.e.*, one percent of Public Safety radios).

  - If funds are exhausted prior to the completion of any relocation plan, the resulting partial realignment would be disastrous for Public Safety, Critical Infrastructure, and other licensees.

- **The Consensus Parties Have Not Addressed the Lawfulness of Such a Massive Spectrum Swap and Spectrum Give-Away for the Benefit of a Single Licensee**

  - Although the Consensus Parties claim the plan is ultimately intended to reduce Public Safety interference, it is apparent that Nextel is the principal advocate and beneficiary of the Plan.

- The Consensus Parties have cited no authority by which the FCC could embark on this spectrum give-away, raising concern that all licensees forced to relocate will be left without recourse should the Plan be invalidated in court.