

**THE NEXTEL SPECTRUM PROPOSAL POSES  
SERIOUS LEGAL PROBLEMS FOR THE COMMISSION**

**I. Grant of a new nationwide license in the 1.9 GHz band to Nextel cannot be legally accomplished through “modification” of its current licenses.**

- Nextel claims that it seeks 10 MHz of 1.9 GHz spectrum as “replacement spectrum” for the spectrum it is offering to relinquish in the 700, 800 and 900 MHz bands. Despite this claim, and regardless of the Commission’s decision on spectrum realignment, no award of 1.9 GHz spectrum could be reasonably characterized as “replacement” spectrum.
- The issue boils down to whether a grant of 1.9 GHz spectrum to Nextel can be considered a “like-kind exchange” or whether that spectrum is substantially different (or “different-in-kind”) from that which Nextel is proposing to relinquish. Because of both the major substantive differences and the huge disparity in value between the Nextel’s current spectrum and the 1.9 GHz spectrum, Nextel’s claim that the latter would merely “replace” its current spectrum is unsupportable. The new nationwide license Nextel covets is fundamentally superior to its current licenses in both qualitative and quantitative ways:

**Qualitative Differences:**

<b>Nextel Spectrum To Be Returned</b>	<b>Proposed New Nextel Spectrum</b>
Bands scattered – all but 700 MHz band are interleaved	Two contiguous 5 MHz blocks, immediately adjacent to PCS band
No cellular-type service allowed on 700 MHz guard band	No restrictions on cellular-type use
Protection of incumbents in all bands limits ability to use spectrum for wideband	Few incumbents to be cleared
Varying license expiration dates	New license term would apply
Non-nationwide scope	Nationwide scope

**Quantitative Differences:**

<b>Nextel Spectrum To Be Returned</b>	<b>Proposed New Nextel Spectrum</b>
Nextel’s non-contiguous 800 MHz spectrum is worth \$898 million	Contiguous 800 MHz spectrum is worth \$3.17 billion
Value of Nextel’s 700 MHz and 900 MHz spectrum holdings totals \$362 million	Value of 10 MHz of 1.9 GHz spectrum nationwide is \$5.28 billion

*Source:* Kane Reece Appraisal (summary attached)

- Under applicable court precedent, grant of a nationwide license in the 1.9 GHz band cannot be accomplished through modification of Nextel’s licenses.
  - The proposed new 1.9 GHz license would confer a “different set of rights” than Nextel’s enjoys under current licenses; differ in “significant way[s]” from Nextel current licenses, and constitute a fundamental change in the way Nextel is licensed. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (1999) and *Benkelman Telephone Company v. FCC*, 220 F.3d 601, 605 (2000).
  - As the U.S. Supreme Court has held, the Commission’s modification authority under the Communications Act has its limits:

The word “modify” – like a number of other English words employing the root “mod-“ (deriving from the Latin word for “measure”), such as “moderate,” “modulate,” “modest,” and “modicum,” – has a connotation of increment or limitation. Virtually every dictionary we are aware of says that “to modify” means to change moderately or in minor fashion.

*MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, 512 U.S. 218, 225 (1994) (citations omitted).

- In common sense terms, Nextel obviously would not offer to incur the costs that the Consensus Plan would entail if the 1.9 GHz spectrum were not of substantially greater value to it than the spectrum it would return to the Commission.
- Nextel suggests that, in order to “modify” its licenses as it proposes, the Commission need only find that the public interest would be served. If this were true, Section 316 could be used to circumvent other provisions of the Act.

## **II. Adoption of the Consensus Plan carries significant litigation risk for the FCC.**

- Under the Consensus Plan, the FCC would order massive spectrum relocation. In order for it to succeed, all public safety relocation costs would need to be reimbursed.
- Despite relocation cost estimates ranging as high as \$3 billion, Nextel’s funding committed is capped at \$850 million. There could be thousands of public safety entities whose systems could be adversely affected.
- The FCC may have to defend against lawsuits involving stays of the order, challenges to its validity, or seeking restitution.

## **III. The FCC’s authority to craft solutions, and the court’s deference to the agency’s expertise, is not boundless.**

- The FCC is obligated to seriously consider less restrictive alternative solutions to problems. *See Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (“At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.”); *Telocator Network of America v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982) (“We will demand that the Commission consider reasonably obvious alternative . . . rules, and explain its reasons for rejecting

alternatives in sufficient detail to permit judicial review.”) (quoting *NAACP v. FCC*, 682 F.2d 993, 998, (D.C. Cir. 1982)); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) (“*Cincinnati Bell*”) (“The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules”).

**IV. Leaving aside broader questions as to the relative merits of the competing plans for solving public safety interference and the relative value of Nextel spectrum, at a minimum, substantial and material questions of fact remain as to:**

- whether the Consensus Plan offers the best solution to the public safety interference problem; and
- whether the Consensus Plan offers sufficient relocation funding.
- whether the nationwide license sought by Nextel is worth substantially more than the spectrum it is offering to relinquish;

The Commission must be able to articulate a rational basis for any decision it makes on these issues.

## Kane Reece Appraisal of Consensus Plan

Kane Reece Associates, an appraisal firm, assessed the value of the spectrum that Nextel would receive under the Consensus Plan vs. the spectrum it would give up.

- **Nextel would give up 4 MHz of spectrum at 700 MHz, approximately 8.5 MHz at 800 MHz, and approximately 3.8 MHz at 900 MHz, in exchange for 6 MHz of improved spectrum at 800 MHz and 10 MHz at 1.9 GHz.**
- **The spectrum that Nextel would give up is non-national, heavily encumbered, largely non-contiguous, and in some cases, subject to substantial restrictions, while the spectrum it would receive is nationwide, flexible, and relatively free of encumbrances.**

### 700 MHz

- This spectrum is “guard band” spectrum, and therefore subject to substantial operational restrictions including that it can’t be used for cellular service.
- This spectrum is heavily encumbered with TV broadcasters.
- Kane Reece concludes that, given the restrictions, Nextel’s 700 MHz spectrum might be “economically worthless,” but for the purposes of its analysis, assigned it a value equal to **\$31 million**.
  - Valuation is based on prices paid for 700 MHz spectrum in auction #49, which concluded in June 2003.
  - Note: Auction #49 was for spectrum with wider bandwidths (2 x 6 MHz as opposed to 2 x 2 MHz) and substantially fewer restrictions than the guard band spectrum licensed to Nextel. Consequently, Nextel’s spectrum would likely be worth considerably less.

### 800 MHz

- The 8.5 MHz of spectrum that Nextel proposes to give up is significantly impaired due to existing encumbrances and the fact that it is interleaved with public safety and other private mobile services.
- Kane Reece estimates the value of Nextel’s interleaved 800 MHz spectrum at **\$898 million**.
  - Valuation is based on average industry spectrum values in other bands (i.e., cellular and PCS) less the impairments that are attributed to existing encumbrances and the decreased efficiency of non-contiguous spectrum; estimated to reduce the value by 75.3%.
  - Interestingly, prior to the FCC’s auction of 800 MHz SMR spectrum in 1997, the FCC discounted the upfront payments by 75% in recognition of the fact that the band was heavily encumbered. (See DA 97-1933, rel. September 5, 1997).
- Under the Consensus Plan, Nextel would receive 6 MHz of contiguous spectrum at 800 MHz, in addition to the spectrum it would receive at 1.9 GHz. This contiguous spectrum will support wideband technologies like CDMA whereas the existing interleaved bands will not.
- Kane Reece estimates the value of this contiguous spectrum at **\$3.17 billion**.

- Valuation is based on average industry spectrum values in other bands (i.e., cellular and PCS) with no impairments.
- Note: While \$3.17 billion is a good estimate of the fair market value of this spectrum to the industry, Kane Reece notes that the value to Nextel may be significantly higher (an additional \$1.0 billion or more) because it is immediately adjacent to 10 MHz of contiguous upper band 800 MHz spectrum for which it already holds licenses.

### **900 MHz**

- The 900 MHz spectrum that Nextel proposes to turn in is also interleaved with other services/licenses and significantly encumbered.
- Kane Reece estimates the value of Nextel's 900 MHz spectrum at **\$331 million**.
  - Valuation is based on average industry spectrum values in other bands (i.e., cellular and PCS) less the impairments that are attributed to existing encumbrances and the decreased efficiency of non-contiguous spectrum; estimated to reduce the value by 80%.

### **1.9 GHz**

- Nextel would receive 10 MHz of spectrum at 1.9 GHz (PCS band) that is subject to flexible rules, relatively free of encumbrances, and nationwide in scope.
- Kane Reece estimates the value of this spectrum at **\$5.28 billion**.
  - Valuation is based on average industry spectrum values in other bands (i.e., cellular and PCS) with no impairments.
  - Valuation is consistent with prices paid in recent secondary market transactions, e.g., Verizon Wireless/Northpoint and Cingular/NextWave.

### **Total windfall to Nextel would be \$6.5 billion if Consensus Plan were adopted.**

- Nextel would give up spectrum worth \$1.26 billion (\$31 M for 700 MHz; \$898 M for 800 MHz; \$331 M for 900 MHz).
- Nextel would receive spectrum worth \$8.45 billion (\$3.17 B for 800 MHz upper band; \$5.28 B for 1.9 GHz).
- This results in a windfall of \$7.19 billion, less \$700 million in relocation costs to realign the 800 MHz band (\$850 million put into present value terms).