

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of

Improving Public Safety Communications in  
the 800 MHz Band

Consolidating the 900 MHz Industrial/Land  
Transportation and Business Pool Channels

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WT Docket No. 02-55

To: The Commission

**EX PARTE PRESENTATION OF  
PREFERRED COMMUNICATION SYSTEMS, INC.**

PREFERRED COMMUNICATION SYSTEMS, INC.

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March 1, 2004

Attachments

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Commissioner Jonathan S. Adelstein  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Edmond J. Thomas, Chief Engineer, Office of Engineering and Technology  
John Muleta, Chief, Wireless Telecommunications Bureau  
Aaron Goldberger, Wireless Telecommunications Bureau  
Marlene H. Dortch, Secretary

## EXECUTIVE SUMMARY

### Consensus Parties' Proposal

- Impermissible Discrimination.
  - The Federal Communications Commission (“FCC” or “Commission”) lacks the authority to adopt the Consensus Parties’ movement methodology, which seeks to reserve all of the new Cellular Block Spectrum exclusively to Nextel Communications, Inc., Nextel Partners, Inc., its corporate affiliate, and licensees with whom it has executed purchase option and management agreements (“Nextel Control Group” or “NCG”) while simultaneously confiscating one or both of the spectrum rights of the Non-Nextel General Category and Lower 80 EA licensees and thus violating the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the FCC’s statutory obligation to maintain regulatory parity and promote diversity of CMRS license ownership and competition.
  - Based upon the Consensus Parties’ exclusive allocation of 1.9 GHz band spectrum exclusively to Nextel itself regardless of (1) the general application of their movement methodology and (2) its spectrum holdings in a particular EA market, it is clear that such allocation is based upon the desired result—exclusively allocating Clean and Contiguous Spectrum to Nextel—rather than modification of its spectrum holdings pursuant to an exchange on a “kHz-for-kHz” basis or as “replacement spectrum.” Such exclusive allocation therefore is based entirely upon the identity of the licensee rather than upon the identity, quantity, quality or operating method of the licenses sought to be exchanged.
  - In EA markets in which the NCG holds less than all of the EA-Licensed Spectrum, the Consensus Parties’ Proposal seeks to “squeeze” 11.5-19 MHz of EA and Site Licensed Spectrum into 6 MHz of spectrum within the new Cellular Block and some “other spectrum.” In the case of the Nextel Control Group, the “other spectrum” is an allocation of 5.5 MHz or more of 1.9 GHz band spectrum on a nationwide basis.
  - By contrast, the “other spectrum” for the Non-Nextel Control Group EA licensees is determined by the Consensus Parties’ new Cellular Deployment Test that requires only Non-Nextel Control Group EA licensees to demonstrate either that they already have constructed a cellular network or have obtained a firm financial commitment to do so. If a Non-NCG EA licensee fails to satisfy such new burdens or conditions upon its EA licenses, its EA and Site Licensed Spectrum is moved to the Non-Cellular Block and it loses both of its EA-Licensed Spectrum rights. If such licensee satisfies these new burdens or conditions upon its licenses, its EA and Site Licensed Spectrum is moved to the Upper 200 Channels beginning with Channel 401 on a geographic “footprint”

basis only. As a result, it loses one of its EA-Licensed Spectrum Rights. Under neither scenario, do the Non-Nextel Control Group EA licensees receive compensation for the confiscation of their spectrum rights.

- By moving the NCG's Site-Licensed Spectrum in a particular EA market to the new Cellular Block on a 1:1 Clean basis, the Consensus Parties' movement methodology effectively transfers one or both of the spectrum rights of the Non-NCG EA licensees in such market to the holders of the Nextel Control Group Site-Licensed Spectrum without any compensation for the loss of such spectrum rights. Part of the Consensus Parties' enhancement of the Nextel Control Group's 800 MHz band spectrum therefore results from their forced "sale" of the Non-Nextel Control Group licensees' EA-Licensed Spectrum rights to the NCG.
- By converting the NCG's noncontiguous General Category, Lower 80 and Business and Industrial/Land Transportation Site-Licensed Spectrum into EA-Licensed Spectrum within the new Cellular Block, the Consensus Parties' Proposal not only considerably (1) increases the Nextel Control Group's MHz/Pops Equivalent Spectrum—the quantity of its Spectrum but also (2) enhances the quality of such Spectrum by replacing it with Clean and Contiguous Spectrum with expanded geographic footprints, thereby providing only the Nextel Control Group with both a clear spectrum and operating advantage moving forward. Such exclusive qualitative spectrum improvement arguably not only triggers the competitive bidding provisions of Section 309(j) but also violates the FCC's statutory mandates to maintain regulatory parity and promote diversity of CMRS license ownership and promote competition.
- Spectrum Holdings' Assumptions.
  - Nextel's "running average" spectrum calculation, which serves as the basis of the Consensus Parties' Rebanding Proposal and is used by them to justify their exclusive reservation of 1.9 GHz band to the NCG is (1) inaccurate, (2) misleading, (3) misrepresented in several filings by the Consensus Parties. and (4) fails to support Nextel's and the Consensus Parties' argument that such exclusive allocation of new Cellular Block spectrum, including 10 MHz of 1.9 GHz spectrum, involves a "kHz-for-kHz" exchange of spectrum or mere "replacement spectrum" either on a quantitative, or more importantly, on a qualitative basis.
  - According to Nextel's own spectrum presentation, the Nextel Control Group holds a "running average" of 17.77 MHz of 800 MHz band spectrum, 3.56 MHz of 900 MHz SMR spectrum and 3.66 MHz of 700 MHz Guard Band spectrum or a total of 24.99 MHz of such spectrum on a nationwide basis, rather than the 26.5 MHz represented by the Consensus Parties. If the five MSA markets in Puerto Rico omitted from Nextel's spectrum calculations are included in this so-called "nationwide" analysis, Nextel's "running average" of 800 MHz spectrum decreases to 17.57 MHz and its total spectrum decreases to 24.77 MHz, some

1.73 MHz less than represented by the Consensus Parties in their filings. Moreover, this spectrum calculation does not take into account that a considerable portion of the NCG's spectrum is encumbered and non-contiguous.

- According to the FCC license database, the Nextel Control Group holds a “running average” in Channels 1-400 of only 6.49 MHz<sup>1</sup> of 800 MHz band spectrum on a Clean or Unencumbered basis. Both the 700 MHz Guard Band and 900 MHz SMR Spectrum proposed to be exchanged by Nextel is encumbered. Following adoption by the FCC of the Consensus Parties’ Proposal, the NCG would hold approximately 16 MHz of new Cellular Block Spectrum on a Clean and Contiguous basis.
- Allocation of 1.9 GHz Band Spectrum.
  - By allocating to Nextel 10 MHz of 1.9 GHz band spectrum in EA markets in which Nextel itself holds little or no
    - 800 MHz spectrum;
    - 800 MHz band EA-Licensed Spectrum;
    - 700 MHz Guard Band Spectrum; and
    - 700 MHz Guard Band spectrum and 800 MHz band spectrum,

the Consensus Parties’ Proposal effectively advocates that the Commission approve, not the modification of the Nextel Control Group’s licenses, but rather a private sale of spectrum in every EA market involving only Nextel in exchange for its promise to contribute up to \$850 million to defray total relocation costs. Such private sale would be limited to Nextel even in EA markets in which Preferred, Southern or other Non-Nextel Control Group EA licensees hold either (1) all or a majority of the 800 MHz EA-Licensed Spectrum, or (2) the 800 MHz General Category EA-Licensed Spectrum. Such a private sale cannot avoid the competitive bidding provisions of Section 309(j) under the guise of a spectrum “exchange” or as mere “replacement spectrum.”

- Total Relocation Cost Estimates.
  - The Consensus Parties’ total relocation cost estimate is seriously flawed due to the use of incorrect license data, unrealistically low cost assumptions and omission of certain cost items. As a result, the Consensus Parties’ Proposal fails to provide sufficient funding to cover anything close to the probable costs of implementing the Proposal.

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<sup>1</sup> This figure is artificially high because it does not account for the Border Regions, which have fewer channels available. The correct number is even lower.

- Based upon Motorola, Inc.'s estimate of the number of radios that will need to be replaced, the Consensus Parties' estimate of total relocation costs would be need to be increased by \$1.08 billion.
- Based upon a study of the Consensus Parties' total relocation cost estimate and their cost assumptions (Appendix A to their December 24, 2002 Supplemental Comment) by Concepts To Operations, Inc. ("CTO"), a Consulting and Engineering firm with an extensive background and experience in RF system design for Public Safety, as well as Commercial systems, the probable realistic costs of their Proposal is \$3.36 billion, or \$2.51 billion more than the \$850 million figure quoted by the Consensus Parties.
- Administration.
  - Confidentiality and security concerns are created by requirement that affected licensees reveal all system information to the Relocation Coordination Committee ("RCC").
  - Timelines in the Consensus Parties' Proposal apply only to Non-Nextel Control Group licensees. Such licensees are required to furnish all system information, enter into a relocation agreement and complete relocation within fixed timeframes. No such deadlines apply to the NCG.
  - Consensus Parties' Proposal fails to provide for extension of time deadlines.
  - If the RCC arbitrates disputes, the Nextel Control Group will have a decided advantage since it will be largely controlled by the NCG.
  - Complex disputes are likely to arise when the Relocation Coordination Committee tries to "mix" and "match" EA licensees and site-specific incumbents with potentially overlapping "footprints." Disputes are likely to be even more contentious for EA licensees who relocate to the Upper 200 Channels and are allocated their old "footprints" to share with Nextel on a co-primary basis.

Preferred's Recommended Solutions:

- The FCC should treat all General Category and Lower 80 EA licensees similarly with respect to movement within the 800 MHz band and fully protect their spectrum rights.
- The FCC should treat Critical Infrastructure licensees (as defined in Section 309 (j)(2)) similarly to Public Safety licensees with respect to movement within the 800 MHz band.

- The FCC should adopt a rebanding methodology that works legally, practically and mathematically for all EA licensees in every EA market.
- The FCC should adopt a proposal that provides more additional spectrum for Public Safety and Critical Infrastructure licensees than does the Consensus Parties' Proposal.
- All General Category EA licensees in Channels 1-150 would move to Channels 571-600, if held by Nextel or Nextel Partners and available to be vacated, and Channels 601-720 in the former NPSPAC Channels. This way, all such EA licensees would acquire Clean and Contiguous Spectrum. If Channels 571-600 are unavailable, such as in the Puerto Rico EA market, the General Category EA licensee should have the option of taking channels either in the 1.9 GHz band or the Upper 200 Channels beginning with Channel 401.
- Lower 80 EA licensees would have the option of moving to either 1.9 GHz band or the Upper 200 Channels beginning at Channel 401 or remaining in the new Non-Cellular Block.
- Site-specific SMR, Business and Industrial/Land Transportation and Public Safety licensees in Channels 1-150 would move to Interleaved Channels vacated by Nextel on a geographic "footprint" basis. These licensees would have a 5-year period to file applications in a particular EA market for additional sites and certain frequencies within the Interleaved Channels on a "first come, first served basis." Preferred would work with the FCC to persuade Congress to enact a narrow exception to the competitive bidding requirements of Section 309 to permit these applications. Site-Specific SMR, Business and Industrial/Land Transportation and Public Safety licensees should have a one-year period in which to elect to construct a digital cellular system or obtain a firm financial commitment to build one in order to qualify for treatment as an EA licensee. In such case, SMR licensees would be moved to the Upper 200 Channels, beginning at Channel 401, if available, on a Clean basis. A Business Category licensee would move to the upper end of the Interleaved Channels (Channels 321-400) on a Clean basis. A Public Safety licensee would move to the lower end of the Interleaved Channels.
- Public Safety should have exclusive access to the lowest 40 of the Lower 80 SMR Channels vacated by Nextel, as well as Channels 121-150.
- The FCC should adopt a proposal that is based upon realistic relocation cost estimates and provides more funding than does the Consensus Parties' Proposal. Initially, the Commission should consult with vendors and licensees and independently calculate total estimated rebanding costs. The FCC then should seek legislation authorizing it to earmark up to \$2.4 billion of the future 700 MHz band and 1.75 GHz band auctions' proceeds to defray total 800 MHz band relocation costs.

- The FCC should allocate 12 MHz of 1.9 GHz band spectrum to accommodate the Nextel Control Group and Non-Nextel Control Group General Category and Lower 80 EA licensees.
- The FCC should adopt a proposal that explicitly recognizes that 5.5 MHz of 1.9 GHz band spectrum is integral to any 800 MHz rebanding proposal (1) moving EA-Licensed Spectrum from the underlying Site-Licensed Spectrum held by EA licensees on a 1:1 Clean basis to the new Cellular Block and separating such Spectrum from the Site-Licensed Spectrum held by Non-EA licensees and (2) protecting fully the spectrum rights of all General Category and Lower 80 EA licensees. Unlike the Consensus Parties' Proposal, such an alternative proposal would open up participation in the allocation of such 1.9 GHz Band spectrum to all such licensees.
- The FCC should adopt a proposal that provides that all General Category and Lower 80 EA licensees who (1) forego reimbursement of their own relocation costs, and/or (2) promise to contribute funds to defray total relocation costs and/or, (3) return 900 MHz SMR spectrum and/or (4) in certain EA markets, lose 800 MHz frequencies, would be entitled to an allocation of additional 1.9 GHz band spectrum.
- Preferred is willing to forego reimbursement of its own relocation costs, contribute up to \$150 million to defray total relocation costs, return certain 900 MHz SMR licenses and give up some 800 MHz frequencies in the Puerto Rico EA market. In exchange, Preferred would receive 8 MHz of 1.9 GHz spectrum in the Puerto Rico EA market and 6 MHz of such spectrum in each of its other EA markets and certain other EA markets.

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To: The Commission

**EX PARTE PRESENTATION  
OF PREFERRED COMMUNICATION SYSTEMS, INC.**

During ex parte meetings with the Wireless Telecommunications Bureau and the senior advisors to the Commissioners in November 2003, Preferred Communication Systems, Inc. (“Preferred”) was invited to provide further comments concerning its objections to the Consensus Parties Proposal’s discriminatory treatment of Non-Nextel General Category and Lower 80 Economic Area (“EA”) licensees both with respect to movement within the 800 MHz band and their exclusive reservation of the allocation of 1.9 GHz spectrum to Nextel Communications, Inc. (“Nextel”). Moreover, Preferred was invited during these meetings to provide suggestions concerning how the Federal Communications Commission (“FCC” or “Commission”) might address not only these concerns but also the objections or reservations of other Commenters. As the discussion below indicates, Preferred has devoted considerable time and resources to preparing a response that not only sets forth its own position but also seeks to provide overall solutions concerning movement, funding, spectrum management and administration of any rebanding process.

## INTRODUCTION

The Consensus Parties' movement methodology fails to provide a legal, practical or even mathematical approach for realigning the 800 MHz band. Rather than seeking a legally permissible and equitable approach to rebanding, the Consensus Parties' Proposal is designed primarily to provide Nextel Communications, Inc. ("Nextel"), Nextel Partners, Inc., its corporate affiliate through common stock ownership, and licensees with whom Nextel has executed a purchase option or management agreement ("Nextel Control Group" or "NCG") with both a significant quantitative and qualitative spectrum enhancement and a competitive operating advantage over its current and prospective 800 MHz band digital cellular competitors.

The Consensus Parties' Proposal seeks to accomplish the above objective initially by separating the Nextel Control Group's EA and Site Licensed Spectrum from that of the Non-Nextel Control Group licensees. Having achieved that initial objective of "clearing off" the NCG's EA and Site Licensed Spectrum through the formulation of a new so-called "Cellular Deployment Test," the Consensus Parties' Proposal then employs that Test to allocate all of the new Cellular Block Spectrum exclusively to the Nextel Control Group. By contrast, the Non-Nextel Control Group EA-Licensed Spectrum is subjected to the Cellular Deployment Test pursuant to which it either would move to the (1) new Non-Cellular Block or (2) Upper 200 Channels beginning with Channel 401 within the new Cellular Block. In either case, the Non-NCG EA licensees lose their second purchased spectrum right: the right to recover "White Space" upon the termination or revocation of an underlying co-channel site-specific license.

In converting the Nextel Control Group's Site-Licensed Spectrum with limited spectrum rights and geographical and population coverage into Clean and Contiguous Spectrum covering the entire EA market and exclusively reserving the new cellular Block to the NCG, the Consensus Parties effectively force a sale by the Non-NCG EA licensees of one or both of their spectrum rights to the holders of such Site-Licensed Spectrum in their respective EA markets. Under such scenario, however, the "sales proceeds" attributable to the transfer of such spectrum rights from the Non-Nextel Control Group EA licensees to the Nextel Control Group are paid by Nextel into a relocation trust fund to defray the total relocation costs of the Consensus Parties' Proposal instead of to the Non-NCG EA licensees. In effect, the Non-Nextel Control Group EA licensees are providing all or a considerable portion of the \$850 million promised by Nextel to defray such total relocation costs through the uncompensated loss in value of their EA-Licensed Spectrum holdings while the Nextel Control Group enjoys a considerable enhancement both in the quantity, quality and value of its spectrum holdings that would be comprised of Clean and Contiguous Spectrum in both the 800 and 1.9 GHz bands.<sup>2</sup> Assuming that the recent appraisal of the Nextel Control Group's 800 MHz band spectrum holdings is valid, this spectrum enhancement would be from \$.45 MHz/Pop to \$1.82 MHz/Pop or a total of \$2.269 billion.<sup>3</sup>

Arguably, the Non-NCG licensees would be contributing the difference in the value of their EA and Site Licensed Spectrum if it moved in the same manner as that of the

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<sup>2</sup> For a discussion of the dollar amount of such spectrum enhancement of the Nextel Control Group, see Verizon Wireless, Inc.'s Ex Parte Presentation, February 20, 2004.

<sup>3</sup> *Id.* at p.8.

NCG's EA and Site Licensed Spectrum under the Consensus Parties' Proposal (\$1.82 MHz/Pop) and its lesser value as it would move under such Proposal (\$.45 MHz/Pop). This decrease in value would be attributable solely to the Non-Nextel Control Group's loss of their spectrum right to recover "White Space" created by the termination or revocation of a co-channel license in a particular EA market. Under this analysis, the difference in the value of Preferred's EA and Site Licensed Spectrum would be approximately \$242 million. The difference in value of Southern Communications Services, Inc. ("Southern")'s EA and Site Licensed Spectrum would be even greater. These EA licensees therefore are contributing approximately \$500 million of Nextel's promised contribution of \$850 million to defray the total relocation costs of the Consensus Parties' Rebanding Proposal.

Contrary to the repeated insistence of Nextel and the Consensus Parties in their respective filings, the exclusive allocation of 1.9 GHz band spectrum to Nextel in the Consensus Parties' Proposal is not based upon a modification of the Nextel Control Group's licenses pursuant to a "kHz-for-kHz" exchange or "replacement spectrum." Rather, in EA markets in which Nextel itself holds (1) no 800 MHz band spectrum, (2) little or no 800 MHz EA-Licensed Spectrum, or (3) no 700 MHz Guard Band spectrum, or even (4) no 800 MHz band and 700 MHz Guard Band Spectrum, the Consensus Parties' Proposal still exclusively allocates all 10 MHz of 1.9 GHz band spectrum to Nextel. The only constant the Consensus Parties' Proposal is able to maintain throughout all of the one hundred seventy-five (175) EA markets is Nextel's promise to contribute up to \$850 million toward defraying the relocation costs of the Consensus Proposal.

These results clarifies that instead of a spectrum exchange, the Consensus Parties' Proposal is a combination of the (1) forced sale of by the Non-Nextel Control Group licensees' of one or both of their EA-Licensed Spectrum rights and (2) the private auction or sale by the Commission of the 10 MHz of 1.9 GHz band spectrum to Nextel in exchange for its promise to pay up to \$850 million in total relocation costs and return spectrum unrelated to any reorganization of the 800 MHz band.

In its Presentation Preferred addresses the above critical flaws of the Consensus Parties' Proposal and presents solutions in its "Improvements" that would fully maintain the spectrum rights of all General Category and Lower 80 EA licensees and provide more additional spectrum to Public Safety and Critical Infrastructure licensees and promised funding than does the Consensus Parties' Proposal. Moreover, Preferred's Improvements recognizes that 5.5 MHz of 1.9 GHz band spectrum is allocated under the Consensus Parties' Proposal solely by reason of its movement methodology and therefore opens up the allocation of such spectrum to all General Category and Lower 80 EA licensees. Finally, Preferred recommends that the remaining 4.5-6.5 MHz of 1.9 GHz band spectrum should be made available to all General Category and Lower 80 EA licensees who meet one or more of the following conditions:

- Forego reimbursement of own relocations costs; and/or
- Promise to pay a portion of total relocation costs; and/or
- Return of 900 MHz spectrum; and/or
- In certain EA markets, lose 800 MHz frequencies.

## DISCUSSION

### I. FACTUAL AND LEGAL BACKGROUND

#### A. Present Configuration of 800 MHz Band

The 800 MHz Band (806.0125-823.9875 MHz/851.0125-868.9875 MHz) presently is comprised of four sub-bands of spectrum within some of which digital and analog-based commercial systems uneasily co-exist with private wireless and public safety licensees. Largely for historical reasons, commercial licensees can be found immediately adjacent to private wireless and public safety licensees both in the General Category Channels (Channels 1-150 or 806.0125-809.7375 MHz/851.0125-854.7375 MHz) and Interleave Channels (Channels 151-400 or 809.7625-815.9875 MHz/854.7625-860.9875 MHz). The Upper 200 Channels (Channels 401-600 or 816.0125-820.9875 MHz/861.0125-865.9875 MHz) was reserved for SMR or commercial use and today is populated largely by Nextel's digital cellular systems. The NPSPAC Channels (Channels 601-720 or 822.0125-823.9875 MHz/866.0125-868.9875 MHz as calculated on a 25 kHz bandwidth basis) was reserved for and is used today by Public Safety licensees.

#### B. Spectrum Rights and Responsibilities

##### 1 Site-Specific Licenses

The FCC originally licensed 800 MHz authorizations on a site-specific basis. A site-specific licensee was granted the exclusive right to use its licensed frequencies within its Co-Channel Interference Contour boundary. To provide co-channel interference protection, the Commission generally required that a co-channel licensee's site be located seventy (70)-miles from the site originally licensed for that particular frequency. As Fleet Call, Inc. and other regional Enhanced Specialized Mobile Radio ("ESMR") operators developed regional and, later, nationwide system(s), the FCC created exceptions to promote spectrum re-use and greater efficiency. These exceptions included (1) consent of the co-channel licensee; (2) waiver; and (3) compliance with the Commission's short-spacing technical requirements (PR Docket 90-34). This latter exception embodied the 40/22 dBu interference ratio. Today, with respect to EA market licensees, a site-specific licensee's Protected Service Area is defined in the Lower 230 Channels [Channels 1-150 and Lower 80 Channels (Channels 201-208, 221-228, 241-248, 261-268, 301-308, 321-328, 341-348, 361-368 and 381-388 or 811.0125-815.6875 MHz/856.0125-860.6875 MHz)] by its "originally-licensed" 22 dBuV/m field strength co-channel interference contour. The "originally licensed" contour is calculated using the maximum effective radiated power ("ERP") of 1,000 watts and the actual height above average terrain ("Actual HAAT").<sup>4</sup>

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<sup>4</sup> Amendment of Part 90 of the Commission's Rules to facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket 93-144, *Memorandum Opinion and Order of Reconsideration*, 14 FCC Rcd 17556 at 17569-72 ("800 MHz Memorandum Opinion"); 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, *Second Report and Order*, 12 FCC Rcd 19079, 19104-05, ¶¶ 65-67 (1997) ("800 MHz Second Report and Order").

With respect to other incumbents, a site-specific licensee's Service Area continues to be defined in the Lower 230 Channels by Section 90.621(b) of the Commission's rules.<sup>5</sup>

## 2. Extended Implementation Authority (1991-2001)

To promote the development of commercial systems in the early 1990s, the Commission promulgated Section 90.629 to allow licensees seeking both to (1) construct systems over large geographical areas and (2) employ a cellular design, additional time to construct such systems and to use their frequencies on sites within seventy (70) miles of a co-channel licensee if they met one of three exceptions set forth immediately above.<sup>6</sup> With the promulgation of service rules and standards for the holders of EA market authorizations and the Commission's response to the *Fresno Mobile Radio* decision by the D.C. Circuit Court of Appeals in 1999<sup>7</sup>, the holders of an extended implementation authority ("EIA") generally became subject to the same service rules and standards as the holders of EA market licenses. Upon the expiration of previously granted EIAs in 2001, the FCC allowed their holders effectively to convert their site-specific licenses to a geographic authorization the boundaries of which were the site-specific licenses' composite outer service area boundaries.<sup>8</sup>

## 3. Inter-Category Sharing and Waivers

Due to the growing demand for spectrum in the 800 MHz band in the late 1980s and early 1990s, the FCC promulgated Inter-Category Sharing rules that allowed SMR, Business and Industrial/Land Transportation access to each others' Pool of Channels if their respective system was fully loaded and no channels in their respective service Pool of Channels was available. Similar rules applied for SMR Category licensee's access to General Category Channels, which in 1974 had been designated for non-trunked system operations. The Commission allowed reassignment of constructed General Category Channels to SMR Category licensees. The FCC also allowed several constructed General Category systems to be combined into a single SMR trunked system.

Contemporaneously with the adoption of auction rules for the Lower 230 Channels, the Commission determined to restrict access of SMR Category licensees to Business Category Pool Channels by revising the eligibility rules for Inter-Category Sharing.<sup>9</sup> In 1999, the FCC determined to grant Nextel a limited waiver with respect to its purchase of certain

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<sup>5</sup> *800 MHz Memorandum Opinion* at 17570; *800 MHz Second Report and Order* at 19108, ¶ 76. As discussed below with respect to licenses subject to an Extended Implementation Authority, upon the conversion of the 800 MHz SMR licensing process to a geographical market approach, the FCC provided for a transition of site-specific licenses pursuant to which the holder thereof could file an application to convert them to a single geographic license encompassing its contiguous and overlapping 18 dBu contours of the previously authorized sites. *Id.* at 19109.

<sup>6</sup> In granting EIA requests, the FCC limited the scope of the requested systems to the geographic area defined by the contiguous and overlapping service areas of the underlying site-specific licenses that had been (i) constructed and placed in operation and/or (ii) currently licensed to and managed by the applicants. Such contiguous and overlapping service areas constituted the "footprint" of a requested wide-area system.

<sup>7</sup> *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

<sup>8</sup> See *800 MHz Memorandum Opinion* at 17571.

<sup>9</sup> *800 MHz Second Report and Order* at 19128, ¶ 141.

Business Category Channels.<sup>10</sup> Pursuant to such waiver, Nextel was allowed to use these Business Category Channels only to relocate site-specific incumbents' from the Upper 200 Channels.

#### 4. Omnibus Budget Reconciliation Act of 1993

In August 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993. Included in this legislation was an amendment of Section 332 of the Communication Act of 1934. This amendment changed the prior regulatory regime in two important respects. First, Congress replaced the Common Carrier and Private Radio definitions that had evolved under the prior version of Section 332 with two newly defined categories of mobile services: (1) Commercial Mobile Radio Services (“CMRS”) and Private Mobile radio Service (“PMRS”).<sup>11</sup> Second, Congress replaced traditional regulation of mobile services with an approach that brought all mobile service providers under a “comprehensive, consistent, regulatory framework” and gave the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers.<sup>12</sup>

In implementing the Congressional mandate to adopt changes to its technical, operational, and licensing rules for common carrier and private mobile radio services necessary to comply with the amendment of Sections 3(n) and 332 of the Communications Act of 1934 and to establish regulatory symmetry among similar mobile services, the FCC concluded that the appropriate analytical framework for determining whether services were substantially similar was to assess whether licensees in those services “actually or potentially compete to meet the needs and demands of consumers.”<sup>13</sup> The Commission then found that all reclassified private mobile radio services actually competed, or had the potential to compete within a reasonable time period, with existing commercial mobile radio services.<sup>14</sup> In other words, the FCC concluded that all CMRS—including one-way messaging and data and two-way voice, messaging and data—are competing services or have the reasonable potential to become competing services in the CMRS marketplace. Thus, on the basis of this comparative analysis, the Commission found that all reclassified private services are substantially similar to commercial services, for purposes of Section 332 of the Communications Act.<sup>15</sup>

In the *CMRS Third Report and Order*, the FCC concluded that its SMR rules should be, to the fullest extent possible, comparable to its rules governing competing commercial

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<sup>10</sup> In the Matter of Nextel Communications, Inc., Requests for Waiver of 47 C.F.R. §§ 90.617(c) and 90.619(b), *Order*, DA 99-1404 (rel. July 21, 1999)(“*B/ILT Waiver Order*”).

<sup>11</sup> CMRS was defined as “any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users to be effectively available to a substantial portion of the public.” PMRS was defined as “any mobile service” (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service.” §332(d)(2), 47 U.S.C. §332(d)(2).

<sup>12</sup> Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1417 (1994)(“*CMRS Second Report and Order*”).

<sup>13</sup> Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 7997 (1994)(“*CMRS Third Report and Order*”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 7997, ¶ 12, 8013, ¶ 43.

mobile radio service (CMRS) providers.<sup>16</sup> In proposing to implement a new framework for licensing SMR systems in the 800 MHz band, the Commission promulgated new rules to for the assignment of blocks of SMR spectrum in defined market-based service areas that would, in its words, “facilitate the development of wide-area, multi-channel SMR systems that are comparable to and compete with cellular and broadband Personal Communications Services (PCS) systems.”<sup>17</sup> In determining to allocate the Upper 200 Channels or 10 MHz of 800 MHz band spectrum in one or more contiguous blocks of spectrum for then MTA-based licensing, the Commission relied upon Nextel’s representations that (1) 10 MHz of spectrum constituted the minimum allocation necessary for an SMR licensee to compete with cellular and broadband PCS providers and (2) contiguous spectrum was essential to the competitive viability of wide-area SMR because it enables systems to use spread spectrum and other broadband technologies that are available to cellular and PCS but unavailable to systems operating on non-contiguous channels.<sup>18</sup>

In the *800 MHz First Report and Order*, the Commission reaffirmed its finding that wide-area systems need contiguous spectrum to obtain the flexibility to compete effectively with other CMRS providers, such as cellular and broadband PCS systems.<sup>19</sup> The FCC again emphasized the importance of contiguous spectrum in developing its rules for the Lower 230 Channels Auctions.<sup>20</sup> Moreover, in the *800 MHz First Report and Order*, the FCC recognized the importance of affording the holders of the new contiguous block licenses in the Upper 200 Channels the right to “clear” off site-specific incumbents to other sub-bands so that they might implement the advanced broadband wireless technologies that would be used by cellular and PCS operators in the future.<sup>21</sup> As a result, the Commission approved a voluntary relocation process to be followed, if necessary, by a mandatory relocation procedure.<sup>22</sup>

## 5. EA Market Authorizations

In promulgating service rules for EA Market Authorizations in the Upper 200 Channels, and General Category and Lower 80 Channels (collectively referred to as “Lower 230 Channels,” the Commission granted the holders of such Authorizations: a) the right to construct and operate their frequencies anywhere within their EA market, provided that they provide protection in compliance with Section 90.621(b) to all previously granted co-channel frequencies that are not associated with another EA licensee and comply with the other condition set forth in

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<sup>16</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket 93-252, *Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2863, ¶¶ 29-34, 64-66 (1994) (“CMRS Further Notice”).

<sup>17</sup> Amendment of Part 90 of the Commission’s Rules to facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket 93-144, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970, 7974, ¶ 1 (1994) (“*800 MHz Further Notice*”).

<sup>18</sup> See Nextel Communications, Inc., Reply Comments, March 1, 1995 at 25-26; *800 MHz Band Further Notice* at 7984, ¶ 16.

<sup>19</sup> Amendment of Part 90 of the Commission’s Rules to facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1473-74, ¶¶ 13-14 (1995).

<sup>20</sup> See *800 MHz Second Report and Order* at 19090, ¶ 21; *800 MHz Memorandum Opinion* at 17565, ¶ 12.

<sup>21</sup> See *800 MHz First Report and Order* at 1474, ¶ 14.

<sup>22</sup> *Id.* at 1486, ¶ 69.

90.683; and b) the right to recover “White Space” in the EA Market created by the termination or revocation of a co-channel license.<sup>23</sup>

### C. 800 MHz SMR Auctions

Beginning in 1995, the Commission determined to allocate geographic area licenses according to the 172 Economic Areas in the Upper 200 Channels and Lower 230 Channels over the previously granted site-specific licenses in these Channel Bands.<sup>24</sup> The allocation of these Authorizations by an auction procedure created what is referred to as a “geographic overlay” system in which EA Market Authorizations in the Upper 200 Channels, the General Category Channels and the Lower 80 Channels overlay the service areas of previously granted site-specific licenses. A winning bidder for a Frequency Block license in these Auctions therefore won the spectrum rights for the (1) unused or vacant frequencies and (2) the geographic areas outside of the previously granted site-specific licenses’ service areas for the particular frequency or frequencies.

In FCC Auction #16 (1995), the FCC auctioned 525 Frequency Block (175 20-, 60- and 120-channel block) licenses for the Upper 200 Channels. Nextel won 95% of these licenses in this Auction in which the participants’ winning gross bids totaled \$96.3 million or \$.38 per Pop or \$.038 per MHz/Pop. In FCC Auction #34 (2000), the Commission auctioned 1,050 Frequency Block licenses (25-channel block) for the General Category Channels. Nextel won 76% of these licenses in this Auction in which the participants’ winning gross bids totaled \$337.5 million or \$1.34 per Pop or \$.179 per MHz/Pop. In FCC Auction #36, the FCC auctioned 2,800 Frequency Block (5-channel block) licenses. Nextel won 92% of these licenses in this Auction, in which the participants’ winning gross bids totaled \$29.5 million or \$.12 per Pop or \$.048 per MHz/Pop.<sup>25</sup>

## II. CALCULATING SPECTRUM HOLDINGS

### A. Dual Ownership

The geographic overlay system created by the 800 MHz SMR Auctions added a level of complexity to determining the spectrum holdings of a SMR licensee in a particular EA market or across all 175 EA markets. Many frequencies in the General Category Channels, Lower 80 Channels and even the Business Category Channels are held by multiple licensees in a particular EA market. This dual, or in some cases, multiple ownership requires a somewhat sophisticated methodology to determine accurately the spectrum holdings of a particular licensee.

### B. Market Boundaries

Spectrum holdings in the 800 MHz band can be determined accurately only if appropriate market boundaries are used. In its 800 MHz Spectrum Report to Congress, the FCC used the

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<sup>23</sup> 47 CFR §90.683.

<sup>24</sup> The FCC added three “EA” markets to account for Guam and the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands and American Samoa.

<sup>25</sup> See Verizon Wireless, Inc., Ex Parte Comment, February 10, 2004, p. 15.

100 Most Urbanized Areas (“AUs”) in determining 800 MHz site-specific spectrum holdings and Basic Economic Area (“BEA”) markets in calculating 800 MHz Geographic Market Area or EA spectrum.<sup>26</sup> Nextel challenged the FCC’s Report, claiming the Commission had understated its spectrum holdings and submitted a Report in several of its filings in this proceeding in which it claimed a “running average” of 18.5 MHz of spectrum through the U.S. In this Report, Nextel used the 1990 Metropolitan Statistical Areas (“MSA”) and Rural Statistical Areas (“RSA”) ranked by population.<sup>27</sup>

Preferred submits that neither of the above approaches produced an accurate determination of 800 MHz band spectrum holdings. Both the Commission’s and Nextel’s methodologies fail to cover a large portion (approximately 75% of the territory) of the U.S. Preferred maintains that an accurate calculation of 800 MHz band spectrum holdings for the purpose of determining whether a particular rebanding proposal is legal, practical and mathematical must be based on EA market boundaries.<sup>28</sup>

### C. MHz/Pops Equivalent Spectrum

Like most analysts, Preferred determines the total 800 MHz spectrum held by a licensee in an EA market by the simple calculation of multiplying the number of paired frequencies held by a particular licensee by their bandwidth. This calculation provides a licensee’s “Total Spectrum” figure for that particular EA market. However, due to the licensing history of SMR spectrum, such a calculation does not take into account that (1) site-specific licenses cover less than the total population of the EA Market and (2) EA authorizations are encumbered by previously granted site-specific licenses. Preferred therefore seeks to determine the population coverage of each site-specific license and EA Market license by using the actual service area of both the original site-specific license as set forth in the Commission’s Memorandum Opinion and Order on Reconsideration<sup>29</sup> and its secondary sites determined by their actual ERP and actual HAAT. Preferred then multiplies the spectrum of each license by its population coverage to determine the “MHz/Pops Equivalent” of the license for a particular EA Market.

For example, assume that ABC Company owns 70 site-specific licensed frequencies in BEA Market #010 New York-New Jersey-Long Island. If the average percentage of Covered Pops for these 70 frequencies is 45.4%, the Channels or MHz/Pops Equivalent is 31.8 Channels/Pops Equivalent or 1.6 MHz/Pops Equivalent.<sup>30</sup>

#### **Formula:**

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<sup>26</sup> *Response to Congressional Request for Licensing Information on Land Mobile Frequencies 806/821 MHz-851/866 MHz*, Wireless Telecommunications Bureau (Jul. 26, 2002), available at: < <http://wireless.fcc.gov>.

<sup>27</sup> Nextel Communications, Inc, Reply Comments, August 7, 2002, Appendix I.

<sup>28</sup> Please refer to the Urban Areas Map, the MSA and RSA markets map and the EA markets map respectively attached hereto as **Exhibits A, B** and **C**. Interestingly enough, while the Commission was considering which geographic area market (MTA, EA or MSA/RSA) upon which to base its licensing of 800 MHz SMR spectrum, Nextel strongly opposed the use of MSA and RSA market boundaries. See Nextel Communications, Inc., Reply Comments, August 5, 1995 at 7.

<sup>29</sup> See *800 MHz Memorandum Opinion* at 17571; *800 MHz Second Report and Order* at 19101, 19105, ¶¶ 54, 67-68.

<sup>30</sup> For a more detailed presentation, please refer to **Exhibit D** attached hereto.

**(Channels) X (Percentage of Covered Pops) = (Channels/Pops Equivalent)**

**(70) X (45.4%) = (31.8)**

**(Channels/Pops Equivalent) / (20) = (MHz/Pops Equivalent)**

**(31.8) / (20) = (1.6)**

**Therefore the MHz/Pops Equivalent for those 70 Site-Licensed frequencies is 1.6 MHz.**

In May 2000, Preferred retained Concepts To Operations, Inc. (“CTO”), a Consulting and Engineering firm with an extensive background and experience in RF system design for Public Safety as well as Commercial systems to create an interactive database of 800 MHz licenses in the 806/821-851-866 MHz. CTO downloaded the raw data from the FCC’s license database in June 2000<sup>31</sup> and January 2003. Using Propagation and Mapping software, CTO plotted coverage on all frequencies using an estimated 15-mile radius for each tower site.<sup>32</sup> In the EA markets in which Preferred obtained the Frequency Block licensing rights through the auction process, CTO used actual HAAT and actual ERP. CTO then overlaid the 2000 Census Map and calculated the number of Pops in each coverage “footprint.” Once this process was completed, Preferred was able to calculate the MHz/Pops Equivalent of each frequency on each site in every EA market. Using such an approach, Preferred thus is able to calculate accurately the MHz/Pops Equivalent for both EA and site-specific spectrum in every EA market.

#### D. Challenges to Nextel’s Spectrum Numbers

As noted above, based upon the licensing information contained in Appendix I to Nextel’s Comment filed on August 7, 2002, Nextel incorrectly states that it has a “running average” of 18.5 MHz of 800 MHz on a nationwide basis. The actual average number set forth in such Appendix is actually 17.77 MHz.<sup>33</sup> The 18.5 MHz nationwide average referred to by Nextel, and subsequently the Consensus Parties in several filings, is actually only the median figure.<sup>34</sup> The use of “nationwide” is also incorrect, since as we pointed out above, Nextel’s calculation was based upon only most of the top 305 MSA Markets and certain 15 RSA Markets ranked by population.<sup>35</sup>

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<sup>31</sup> Preferred would have used 2003 data except that it determined that Nextel had impermissibly expanded its original General Category site-specific licenses beyond their 22 dBu contours in many of Preferred’s EA markets.

<sup>32</sup> Due to the difficulty in plotting actual coverage for every General Category frequency on every site in every EA market, CTO decided to use a 15-mile radius, which was determined to be within a 5%-10% margin of error.

<sup>33</sup> Nextel Communications, Inc. Comment, August 7, 2002, Appendix I, p. 7. See **Exhibit E** attached hereto.

<sup>34</sup> See, e.g., Consensus Parties, Comment, August 7, 2002, pp. 17-18; Nextel Communications, Inc., Comment, August 7, 2002, pp. 17-18; Nextel Communications, Inc., Comment, May 6, 2002, pp. 2-3. Initially, in its May 6, 2002 Comment, Nextel represented that it holds a “running average” of 18 MHz of spectrum in the 800 MHz band throughout the U.S. *Id.* at 3. Although Nextel and the Consensus Parties fail to explain their spectrum holdings calculation methodology in detail, it appears from an analysis of the FCC license database that Nextel employed a MHz/Pops Equivalent analysis to its Total Spectrum in most of the top 305 MSA and certain RSA markets.

<sup>35</sup> Moreover, Nextel’s spectrum calculation set forth in Appendix I to its August 7, 2002 Comment did not include several major MSA and RSA markets. Interestingly enough, the Nextel Control Group’s spectrum holdings in these

Moreover, the “running average” is based upon not only the spectrum rights Nextel owns, but also what it “controls,” which for this purpose includes the spectrum holdings of Nextel Partners, Inc. (“Nextel Partners”)<sup>36</sup> and licenses held by nonaffiliated parties pursuant to purchase option and management agreements (“Nextel Control Group” or “NCG”). As set forth below, Preferred seriously questions whether Nextel should be allowed to include Nextel Partners or non-affiliated third parties’ spectrum holdings in either its 800 MHz rebanding or allocation of 1.9 GHz spectrum computations, particularly when such inclusion is used in attempting to justify the Consensus Parties’ impermissible discriminatory treatment of Non-Nextel General Category and Lower 80 EA licensees.

Furthermore, Nextel apparently included what it called “proposed transmitter sites” in such calculation if Nextel, Nextel Partners or the third-party non-affiliated licensees, could construct a site with a particular frequency or frequencies and not expand the composite 22 dBu V/m contour of their adjoining actual sites<sup>37</sup>.

Finally, Preferred maintains that the concept of Nextel’s “running average” 800 MHz band spectrum is somewhat less than helpful to the Commission’s analysis. Not only are the figures incorrectly calculated and then misleadingly represented, but as noted below they also bears little relevance to the actual operation of the Consensus Parties’ Rebanding Proposal. Moreover, the Consensus Parties use the concept of a “running average” primarily to obscure the Nextel Control Group’s lack of Total and MHz/Pops Equivalent Spectrum to implement their Proposal.

#### E. Clean and Contiguous Spectrum

The central feature of the Consensus Parties’ Proposal is their separation of Nextel Control Group licensees’ EA and Site Licensed Spectrum from that of Non-Nextel Control Group licensees<sup>38</sup>. Much like the mandatory relocation procedure adopted by the Commission with

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markets is considerably less than its published nationwide “running average” figure of 17.8 MHz, much less the continually reported 18.5 MHz figure.

<sup>36</sup> Nextel presently owns approximately thirty-two percent (32%) of the total issued and outstanding stock of Nextel Partners, Inc. Timothy M. Donahue, Nextel’s Chairman and Chief Executive Officer also serves on Nextel Partners’ six (6)-member Board of Directors. Nextel Partners holds 800 MHz EA and Site-Licensed Spectrum in EA markets in which approximately 53 million persons reside. See Nextel Partners, Inc. Form 10-K for period ended December 31, 2002 available at [www.sec.gov](http://www.sec.gov). Nextel Partners’ covered population in these EA Markets is set forth in Chart #1 attached hereto as **Exhibit F**. As noted infra, Preferred strongly objects to the Consensus Parties’ affording spectrum not held by Nextel as a licensee (1) preferential treatment to with respect to movement within the 800 MHz band and (2) inclusion in Nextel’s exchange of 700 MHz Guard Band, 800 MHz band and 900 MHz SMR spectrum for a 10 MHz nationwide license in the 1.9 GHz band as the basis for their discriminatory treatment of while proposing that Non-Nextel Control Group General Category and Lower 80 EA licensees, who under the Consensus Parties’ Proposal, would lose one or both of the spectrum rights purchased by them in FCC Auctions #34, #36 and #43.

<sup>37</sup> Preferred is unclear whether Nextel’s use of the composite outer 22 dBu V/m contours of adjoining sites in determining “Proposed Transmitter Sites” and their respective geographical and population coverage is based upon the “original license” and its site as prescribed by the FCC in the *800 MHz Memorandum Opinion*. As discussed infra, Preferred would maintain that such “Proposed Transmitter Sites” should be included, if at all, in Nextel’s spectrum holdings only if the adjoining sites are licensed to Nextel itself and are the “original license” as prescribed by the Commission’s rules.

<sup>38</sup> For Nextel’s Clean Spectrum in Channels 1-400 in all of the one hundred seventy-five (175) EA markets, please refer to **Exhibit G** attached hereto.

respect to the Upper 200 Channels, this separation is intended to provide the Nextel Control Group with Clean and Contiguous Spectrum so that it might employ the advanced CDMA and/or spread spectrum technologies that will be deployed by cellular and PCS operators holding considerable amounts of such Spectrum.<sup>39</sup> In evaluating the Consensus Parties' Proposal both on a nationwide basis and upon an EA market-by-EA market basis, Preferred compiled a nationwide database of Nextel's and Nextel Partners' present Clean Spectrum. Preferred then compared their present 800 MHz Clean Spectrum Holdings to their new Cellular Block Spectrum following the FCC's adoption of the Consensus Parties' Proposal to determine the extent of their qualitative spectrum enhancement.

#### F. Cellular Ownership Today

If the Commission were to adopt a rebanding proposal based upon bifurcating the 800 MHz band into two separate spectrum blocks with vastly different spectrum rights, Preferred believes that it is important to note what 800 MHz band spectrum presently is eligible to offer, and is used to provide, cellular service:

First, pursuant to the Lower 230 Channels' Auctions, General Category and Lower 80 EA authorizations;

Second, site-specific licenses held by Lower 230 Channels' EA licensees;

Third, formerly site-specific licenses subject to an EIA that upon its expiration were converted into a single geographic or EA-Equivalent license; and

Fourth, site-specific licenses held by Non-EA licensees who have deployed such authorizations in a cellular architecture system.

Such spectrum does not include site-specific licenses held by Non-EA licenses that have not deployed such authorizations in a cellular architecture system. Moreover, such spectrum does not include certain Business and Industrial/Land Transportation licenses granted to SMR Category operators subject to restrictive use waivers.<sup>40</sup>

In terms of the priority of movement to the new Cellular Block, Preferred would submit that the Commission already has established such priority through its award of contiguous blocks of EA-Licensed Spectrum pursuant to the SMR Auctions conducted during 1997-2000. In promulgating the rules for the conduct of such Auctions, the FCC specifically noted the importance of such contiguous spectrum blocks to providing SMR licensees seeking to provide digital cellular service both with the spectrum capacity and technological flexibility to adopt the CDMA or spread spectrum technologies likely to be employed by cellular and broadband PCS

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<sup>39</sup> The FCC recently recognized the importance of Clean and Contiguous Spectrum in affording CMRS licensees the bandwidth necessary to offer advanced technologies and data services, including Mobile Internet access. *See* In the Matter of Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket 02-353, *Report and Order*, FCC 03-251, -268, ¶ 44 (“*AWS Report and Order*”). According to the Commission, the record in that proceeding indicates that at least 5 MHz of such spectrum is necessary to provide such services.

<sup>40</sup> *See, e.g., B/ILT Order.*

operators.<sup>41</sup> Providing such contiguous spectrum was considered essential by the Commission in fulfilling its obligation to maintain regulatory parity between such SMR licensees and their cellular and PCS competitors.<sup>42</sup> Thus, the FCC specifically earmarked EA-Licensed Spectrum to provide digital cellular service.

Following the movement of General Category and then Lower 80 EA-Licensed Spectrum to the new Cellular Block, Preferred would submit that the Site-Licensed Spectrum of General Category and Lower 80 EA licensees then would move on a MHz/Pops Equivalent basis to the new Cellular Block. Preferred believes that this priority is justified since in most, if not all cases, such Site-Licensed Spectrum presently is, or would be in the future, used as part of the SMR operators digital cellular systems.

Finally, Preferred would submit that non-EA licensees who already have deployed, or who during the next year construct, a cellular architecture-like system such as a Harmony system then would move to the new Cellular Block.<sup>43</sup> Preferred maintains that having either already made the financial commitment to deploy and operate such a digital cellular system or undertaking such a commitment within a twelve-month period following the FCC's adoption of a Report and Order in this proceeding, should entitle such Site-Licensed entities access to the new Cellular Block.

## **B. CONSENSUS PARTIES' PROPOSAL**

### *A. How The Consensus Parties Claim Their Proposal Works.*

The Consensus Parties Proposal seeks to mitigate, if not eliminate, the interference experienced by public safety and other systems in the 800 MHz Band by bifurcating the Band into two new blocks of spectrum: (1) Non-Cellular Block comprising 10 MHz of spectrum in Channels 1-400 or 806.0125-815.8975 MHz/851.0125-860.9875 MHz) and (2) Cellular Block comprising 16 MHz of spectrum in Channels 401-720 (calculated on a 25 kHz bandwidth basis) or 816.0125-823.9875 MHz/861.0125-868.9875 MHz).<sup>44</sup>

The Consensus Parties seemingly rely upon Nextel's calculation of the NCG's spectrum holdings as the basis for their Rebanding Proposal. Having incorrectly confirmed that Nextel holds a "running average" of 18.5 MHz of 800 MHz band spectrum on a nationwide basis,<sup>45</sup> the Consensus Parties then engage in a "slight of hand" analysis pursuant to which it contends that the Nextel Control Group is returning 8.5 MHz of 800 MHz spectrum in exchange for an allocation of 6 MHz in the new Cellular Block comprised of the former NPSPAC Channels. The Consensus Parties thus maintain that the Nextel Control Group has contributed a "net" 2.5 MHz of 800 MHz band spectrum to facilitate the relocation process. Upon Nextel's also returning a

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<sup>41</sup> See 800 MHz Second Report and Order at 19085-86, ¶¶ 10-12; 800 MHz Memorandum Opinion at 17566, ¶ 12.

<sup>42</sup> See 800 MHz Report and Order at 19085-86, ¶ 12.

<sup>43</sup> Preferred would maintain that the Commission should define "digital cellular system" or "digital cellular architecture" to specifically include Harmony systems manufactured by Motorola, Inc. that employ an iDEN technology.

<sup>44</sup> Under the Consensus Parties' Proposal, the new Cellular Block actually is comprised of 26 MHz with 10 MHz in the Upper 200 Channels, 6 MHz in the former NPSPAC Channels and 10 MHz in the 1.9 GHz band.

<sup>45</sup> See Consensus Parties, Comment, August 7, 2002, pp. 17-18; nn. 7, 23, 25 *infra*.

"running average" of 4 MHz of 700 MHz Guard Band and 900 MHz SMR spectrum<sup>46</sup> and its promising to pay up to \$850 million to defray the total relocation costs of their proposal, the Consensus Parties contend that Nextel must be "made whole" by the Commission's allocation of a 10 MHz nationwide license in the 1.9 GHz band. -

To avoid rejection of their Proposal based upon impermissible discrimination among similarly-situated EA licensees, the Consensus Parties seek to establish some objective criteria upon which Non-Nextel EA licensees also can gain entrance into the new Cellular Block. The result of such efforts is the new cellular Deployment Test, which effectively acts as their "gatekeeper" to the new Cellular Block Spectrum. The Consensus Parties concede that if a Non-NCG operates like Nextel or Nextel Partners then their EA and Site-Licensed Spectrum should move into the New Cellular Block<sup>47</sup>

According to the Consensus Plan, the new Cellular Block Spectrum therefore should be allocated to a licensee by the way it operates on its spectrum holdings and not by either (a) the type of license it holds or (b) the identity of the licensee.

Having established their eligibility criteria for the allocation of new Cellular Block Spectrum, the Consensus Parties then contend that under their Proposal the Nextel Control Group simply would be exchanging 16.5 MHz of "Before" Spectrum for 16 MHz of "After" Spectrum. They contend that even though the NCG is losing Total Spectrum and spectrum value, no sacrifice is too great when it comes to eliminating or minimizing interference to Public Safety systems.

To the laymen, all of this must appear to be reasonable. Certain Public Safety organizations apparently view the Consensus Parties' Proposal as being fair and equitable. If you add to this, the promise of (1) additional spectrum to Public Safety licensees; (2) their movement at no cost; and (3) upgraded equipment, the receptivity of certain Public Safety organizations and licensees to the Consensus Parties' Proposal is quite understandable. However, as Preferred demonstrates below "the devil is in the details."

### *B. How the Consensus Parties' Proposal Actually Works*

In reality, Consensus Parties' Proposal is based largely not upon ideas or concepts relating to the minimization or elimination of the interference experienced by Public Safety and Critical Infrastructure systems, but rather upon old ideas concerning how best to clear Nextel's spectrum of other licensees operating on the same frequencies in the 800 MHz band.

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<sup>46</sup> According to Nextel's own figures, it actually holds a "running average" of 3.66 MHz of 700 MHz Guard Band and 3.56 MHz of 900 MHz SMR spectrum. See Nextel Communications, Inc., Comment, May 6, 2002, Appendix A; Nextel Communications, Inc., Comment, August 7, 2002, Appendix I; **Exhibit E** attached hereto. In subsequent filings, the Consensus Parties represented that Nextel holds a "running average" of "approximately 4 MHz" of 700 MHz Guard Band spectrum and an identical amount of 900 MHz SMR spectrum. See Consensus Parties, Supplemental Comment, December 24, 2002, pp. 17-18.

<sup>47</sup> Consensus Parties, Reply Comment, February 25, 2003, pp. 27-28.

As discussed above, many commercial, private and public safety licensees operate in the 800 MHz band. This band arguably is the most diverse and complicated band within the entire electromagnetic spectrum band allocated by the FCC. Commercially speaking, 11.5 MHz of EA-Licensed Spectrum in the Lower 230 Channels has been auctioned to thirty (30) Companies<sup>48</sup>. However, after adoption of the Consensus Parties' Proposal all of the new "Cellular Block" Spectrum would be held only by one group comprised of Nextel, Nextel Partners, its corporate affiliate, and licensees with whom Nextel has executed purchase option and management agreements.

Adoption by the FCC of the Consensus Parties' discriminatory treatment of Non-Nextel Control Group General Category and Lower 80 EA licensees impermissibly would allocate all 11.5 MHz of new Cellular Block Spectrum to the NCG in much the same way as was proposed by the advocates of the so-called "Industry Proposal" while simultaneously confiscating one or both of the spectrum rights of Non-NCG EA licensees. Such a decision by the Commission would reverse several of its previous public interest determinations made in promulgating rules for the Upper 200 Channels and Lower 230 Channels Auctions.<sup>49</sup>

In promulgating rules for the conduct of these Auctions, the Commission expressly rejected the so-called "Industry Proposal" strongly supported by Nextel that would have allowed incumbent licensees to obtain the remaining unlicensed spectrum on the Lower 230 Channels through pre-auction settlement agreements. In declining to adopt this Proposal, the Commission noted that "allowing only incumbent licensees to obtain the rights to an entire EA while foreclosing opportunities for new entrants would be at odds with our goals of promoting economic competition in the 800 MHz service ... the approach we adopt herein, unlike the Industry Proposal, would encourage participation of new entrants, including small businesses, and therefore promote vigorous economic competition and avoid excessive concentration of licenses."<sup>50</sup>

Preferred maintains that the Consensus Parties' Proposal impermissibly discriminates against Non-Nextel Control Group EA licensees. Non-NCG EA licenses and commercial operators, who have paid approximately \$90 million to the FCC for their respective spectrum rights pursuant to a series of Commission-sponsored public auctions, have the same right to the New Cellular Block as does the Nextel Control Group. Yet the primary objective of the Consensus Parties' Proposal is to separate the NCG licensees' spectrum from that of the Non-NCG licensees and then exclude these licensees from any allocation of the New Cellular Spectrum.

There are three criteria the Consensus Parties could have chosen as the basis for allocation of the New Cellular Block Spectrum: (a) the class of license; (b) how a company operates its respective spectrum; or (c) the identity of the licensee.

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<sup>48</sup> In addition to the thirty (30) winning bidders in FCC Auctions #34, #36, and #43, pursuant to its operating arrangement with Nextel, Nextel Partners subsequently obtained EA authorizations in the General Category and Lower 80 Channels. For geographic maps of EA Markets won by Non-Nextel EA Licensees please refer to **Exhibit J** attached hereto.

<sup>49</sup> See, e.g., *800 MHz Second Report and Order* at 19103-104, ¶¶ 61-64.

<sup>50</sup> *800 MHz Second Report & Order* at 19103, ¶ 61.

As observed above, the Consensus Parties avoided openly selecting the identity of the licensee as its basis for allocating new Cellular Block Spectrum to circumvent rejection of their Proposal on grounds of impermissible discrimination. Although selection of the class or type of license criteria by the Consensus Parties clearly would lead to both a legally permissible and equitable result, they chose to reject it due apparently to Nextel's refusal to accept the principle that all similarly situated EA licensees should be treated in the same manner.<sup>51</sup>

Instead, the Consensus Parties chose how a licensee operates its respective spectrum holdings as their method for allocating new Cellular Block Spectrum.<sup>52</sup> However, the Consensus Parties then fail to apply their own criteria in exclusively reserving the 10 MHz of 1.9 GHz band spectrum to Nextel. The Consensus Parties allocate such spectrum to Nextel in exchange supposedly for a "running average" of 2.5 MHz of 800 MHz band and 4 MHz of 700 MHz Guard Band and 900 MHz SMR spectrum even though Nextel does not operate low-site and low power cellular architecture systems on its 700 MHz Guard Band and 900 MHz SMR spectrum holdings and apparently has no plans to do so. In Nextel's latest Form 10-K filed with the U.S. Securities and Exchange Commission for the period ended December 31, 2002, Nextel indicates that it will write off as worthless its 700 MHz Guard Band and 900 MHz SMR spectrum holdings if it cannot exchange them for more valuable 800 MHz band and other spectrum pursuant to the Commission's reorganization of the 800 MHz band.<sup>53</sup>

Having failed to apply their own criteria to the exclusive allocation of new Cellular Block Spectrum, Preferred maintains that the Consensus Parties' Proposal is impermissibly discriminatory and involves nothing more than a private bargain sale of 1.9 GHz band spectrum to Nextel in violation of the competitive bidding provisions of Section 309(j).

### C. Consensus Parties' Movement Methodology Fails Legally, Practically and Mathematically

The Consensus Parties' Proposal accomplishes a discriminatory regime by a series of spectrum steps or moves designed to benefit solely the Nextel Control Group and place all other EA and site-specific licensees at a considerable spectrum and operating competitive disadvantage. Preferred submits that the Consensus Parties' re-banding methodology has no rational basis to mitigating or eliminating interference with public safety or any other permissible objective.<sup>54</sup>

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<sup>51</sup> In early negotiations with the Consensus Parties, Preferred indicated it would agree with their Proposal provided that Preferred and all other similarly situated General Category EA licensees would move to the 6 MHz of 800 MHz band spectrum comprising the former NPSPAC Channels and then to the 1.9 GHz band spectrum. Initially, all of the Consensus parties except Nextel agreed with this counter-proposal. After receiving Nextel opposition to such counter-proposal, the Consensus Parties rejected it.

<sup>52</sup> If a General Category EA licensee satisfies the Consensus Parties' new Cellular Deployment Test, under its second prong or alternative, its frequencies would move to the Upper 200 Channels beginning with Channel 401 on a geographic "footprint" basis only.

<sup>53</sup> Nextel Communications, Inc., Form 10-K, December 31, 2002, pp.

<sup>54</sup> See, e.g., Consensus Parties' Reply Comment, February 25, 2003, p. 27 & n.59 for their rationale for the treatment of certain Non-Nextel General Category EA licensees.

Under the Consensus Parties' Proposal, the NCG would exchange their EA-Licensed Spectrum for new Cellular block Spectrum on a 1:1 Clean basis. The underlying Site-Licensed Spectrum held by a Non-NCG licensee would not move together with the NCG's EA-Licensed Spectrum. The net result is that the Nextel Control Group "clears" off or separates its Spectrum from the Non-Nextel Control Group's Site-Licensed Spectrum.

As discussed above, the NCG does not hold all of the EA-Licensed Spectrum in every BEA market. The Consensus Parties' Proposal remedies that "problem" by moving the Nextel Control Group's Site-Licensed Spectrum to the new Cellular Block while moving the Non-Nextel Control Group's EA-Licensed Spectrum to some "other spectrum" in such a way that it confiscates one or both of their spectrum rights. As a result, the Consensus Parties' Proposal also clears off or separates the NCG's EA and Site-Licensed Spectrum from the Non-NCG's EA-Licensed Spectrum and, in certain EA markets, increases the Nextel Control Groups' Total Spectrum Holdings.

Contrary to the repeated statements by the Consensus Parties and Nextel in their respective filings, this latter feature is not a "kHz-for-kHz" exchange of spectrum by the Nextel Control Group. Rather, it primarily is a conversion of (1) encumbered EA-Licensed Spectrum and (2) spectrum with limited spectrum rights and geographic and population coverage for Clean and Contiguous EA-Licensed Spectrum with coverage of the entire EA Market area. Moreover, in many markets in which Nextel lacks the spectrum holdings to implement the Consensus Parties' Proposal, the NCG would receive Cellular Block spectrum in exchange for spectrum not held by the Nextel Control Group in that particular EA Market, but rather "borrowed" from the NCG's "excess" spectrum above its so-called "running average" of 17.77, 17.8, 18.0 or 18.5 MHz/Pops Equivalent Spectrum in an unrelated EA market. For example: the Consensus Parties use the Nextel Control Group's "excess" spectrum in the Los Angeles, California EA market to bridge its spectrum gap in the Birmingham, Alabama EA market.

Preferred contends that Nextel/Consensus Parties' spectrum calculation methodology is based solely upon their attempt to reverse the results of FCC Auctions #34, #36 and #43 by (1) reserving Clean and Contiguous Spectrum with full EA-Licensed Spectrum Rights solely to the NCG and (2) confiscating one or both of the EA Licensed Spectrum Right from Non-NCG EA licensees<sup>55</sup>.

Contemporaneously with this movement within the 800 MHz band, the Consensus Parties' Proposal "makes Nextel whole" in its own words, by crediting Nextel with exchanging a total of 8 MHz of 700 MHz Guard Band and 900 MHz SMR spectrum on a nationwide basis. This second "exchange" also involves both a quantitative and qualitative spectrum enhancement for Nextel since its 700 MHz Guard Band and 900 MHz SMR spectrum are largely encumbered. By including this spectrum unrelated to any reorganization of the 800 MHz band, the Consensus

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<sup>55</sup> Contrary to Nextel's assertion in Appendix A to its May 6, 2002 Comment that it lacks the "running average" figure only in small markets like Enid, Oklahoma, it lacks such spectrum in most of the EA markets in which Southern Communications Services, Inc. ("Southern"), Preferred, Nevada Wireless LLC, Motient Corporation, A.R.C., Inc. ("A.R.C.") or Silver Palm Communications, Inc., either solely, or together with other winning bidders, won more than one Frequency Block license in FCC Auction #34 and in markets where Southern or Nevada Wireless, either solely or together with other winning bidders won a considerable minority or more of the Frequency Block licenses in FCC Auction #36.

Parties obscure both (1) how their Proposal's movement methodology actually operates and (2) the Nextel Control Group's lack of Total, Clean and Clean and Contiguous Spectrum to implement their Proposal legally, practically and mathematically. Further, by formulating its new Cellular Deployment Test that imposes additional burdens or conditions upon Non-Nextel Control Group EA licensees, the Consensus Parties' Proposal either confiscates one or both spectrum rights of such licensees. Under such Proposal, the NCG would hold the entire new Cellular Block spectrum either as Clean Channels (former NPSPAC Channels and 1.9 GHz band spectrum) or share it on co-primary basis (Upper 200 Channels).

Importantly, Nextel itself is allocated 10 MHz of 1.9 GHz band spectrum in EA markets in which it holds little or no 800 MHz band spectrum. Approximately 53 million persons reside in these EA markets.<sup>56</sup> This exclusive allocation occurs even though, as discussed above, under the Consensus Parties' Proposal 5.5 MHz of 1.9 GHz band spectrum is allocated based solely upon its movement methodology. Lacking 800 MHz band spectrum, under the Consensus Parties' movement methodology, Nextel would not be afforded that 5.5 MHz "slice" of the 1.9 GHz band spectrum. However, under the Consensus Parties' Proposal, in these EA markets Nextel and only Nextel is allocated 1.9 GHz band spectrum<sup>57</sup>.

Nextel also is afforded the allocation of 1.9 GHz band spectrum in Major Economic Area ("MEA") markets in which it holds no 700 MHz Guard Band spectrum. In several of these MEA/EA markets, Nextel itself also holds little or no 800 MHz band spectrum (Louisville, Kentucky; Kentucky; Lexington, Kentucky; Spokane, Washington, Billings, Montana; and Des Moines, Iowa;). In these markets, the Consensus Parties' allocation of 1.9 GHz band spectrum exclusively to Nextel therefore clearly is accomplished through something than a "kHz-for-kHz" exchange of spectrum or "replacement spectrum."

In other EA markets in which approximately 75 million persons reside, Nextel is allocated 1.9 GHz band spectrum even though one or more Non-Nextel Control Group EA licensees hold all, or at least a considerable majority of, the 800 MHz General Category EA-Licensed Spectrum. Absent the Consensus Parties' impermissible discrimination, under their generally applicable movement methodology these Non-NCG EA licensees would be allocated all or a portion of this 5.5 MHz "slice" of the 1.9 GHz band spectrum.

The net result of this discriminatory regime is (1) in certain EA markets the NCG would be allocated more Total Spectrum, (2) and in all EA markets more Clean Spectrum than they presently hold, and (3) in all EA markets would be granted considerably more Clean and Contiguous Spectrum than they presently hold while (4) in one hundred seventeen (117) EA Markets Non-Nextel EA licensees lose either one or both of their spectrum rights purchased in FCC Auctions #34, #36 or #43.

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<sup>56</sup> See **Exhibit F** attached hereto.

<sup>57</sup> Apparently only Nextel would receive an allocation of 1.9 GHz band spectrum under the Consensus Parties' Proposal. This result conflicts with the general application of the Consensus Parties' movement methodology pursuant to which as the holder of 800 MHz General Category and Lower 80 Channels' Spectrum in these EA markets, Nextel Partners would receive 6 MHz of Spectrum within the 800 MHz band comprised of the former NPSPAC Channels and 5.5 MHz of 1.9 GHz band spectrum. The Consensus Parties never address this issue.

Preferred maintains that due to the discriminatory purpose and results of the Consensus Parties' Proposal, its adoption by the Commission would violate the Takings, Due Process and Equal Protection Clauses of the Fifth Amendment to the U.S. Constitution<sup>58</sup> and the FCC's statutory obligation to maintain regulatory parity<sup>59</sup> and promote diversity of license ownership and competition.<sup>60</sup> Moreover, the Consensus Parties' Proposal has both serious practical and mathematical impediments.

#### D. Application of Consensus Parties' Movement Methodology to Specific EA Markets.

In addition, by failing to recognize the BEA market boundaries adopted by the FCC in auctioning 800 MHz spectrum in the Upper 200 as well as the Lower 230 Channels<sup>61</sup> or offering an alternative Market Boundary Calculation that encompasses the entire geographical area and population of the U.S., the Consensus Parties effectively obscure the Nextel Control Group's lack of spectrum in many EA markets necessary to implement their Proposal. In so doing, the Consensus Parties' Proposal fails to take into account, or even consider, the spectrum holdings of Non-Nextel Control Group EA and site-specific licensees. Rather, the Consensus Parties ignore the spectrum realities found in many EA markets by failing to apply their Proposal to any specific EA market to test its validity.

Preferred has sought below to demonstrate the Consensus Parties Proposal's discriminatory treatment toward Non-Nextel Control Group General Category and Lower 80 EA Licenses by applying the Consensus Parties' methodology to actual EA Markets. For such analysis, Preferred uses its Spectrum Methodology and the Spectrum Ownership Database compiled by CTO.

For its analysis Preferred compared the "before" and "after" Spectrum holdings (Total Spectrum, MHz/Pops Equivalent Spectrum, Cellular Eligible Service Spectrum and Clean and Contiguous Cellular Eligible Service Spectrum) of the (1) Nextel Control Group and (2) Non-Nextel General Category and Lower 80 EA Licensees. In applying the Consensus Parties' Proposal to specific EA markets, Preferred encountered difficulties due to the Proposal's attempt to "squeeze" as much as 19-20 MHz of Cellular Service Eligible Spectrum comprised of:

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<sup>58</sup> For a general discussion of these issues in the context of both licenses acquired through comparative hearing and lottery procedures, purchase in the secondary market as well as by an auction procedure, see William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Federal Communications Law Journal 2, 13-23 (1997) ("Fishman"). See also Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users, Why Did FCC License Auctions Take 67 Years?* 41 Journal of Law & Economics 529 (1998); Howard A. Shelanski and Peter W. Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 Journal of Law & Economics 581 (1998); and Glen O. Robinson, *Spectrum Property Law 101*, 41 Journal of Law & Economics 609 (1998).

<sup>59</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. §6002(d) (3) (B), 107 Stat. 397 (1993) (mandating that Commission establish a uniform regulatory regime for all commercial mobile services).

<sup>60</sup> 47 U.S.C. §309(j)(3)(B) and (4)(C). See Amendment of Part 90 of the Commission's Rules to Facilitate Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order and Second Notice of Proposed Rulemaking Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 at 1483, ¶ 23 & n. 88 (1995); *800 MHz Second Report and Order at 19087-88*, ¶¶ 10, 12, 15 & n. 35; *800 MHz Memorandum Opinion at 17564*, ¶ 11 & n. 30.

<sup>61</sup> See Nextel Communications, Inc., Comment, May 6, 2002, Appendix A and Nextel Communications, Inc., Comment, August 7, 2002, Appendix I.

- (1) General Category EA-Licensed Spectrum (7.5 MHz);
- (2) Lower 80 EA-Licensed Spectrum (4.0 MHz); and
- (3) General Category, Lower 80 and Business and Industrial/Land Transportation Category Qualifying Site-Licensed Spectrum (0 to 9.00 MHz).

or a total of as much as 19-20 MHz, into only 6 MHz of spectrum in the new Cellular Block comprised of the former NPSPAC Channels and some “other spectrum.” In the case of the Nextel Control Group, that “other spectrum” is an allocation of 1.9 GHz spectrum on a supposedly Clean kHz-for-kHz basis. For Non-Nextel Control Group EA licensees, which have not yet constructed their EA authorizations nor obtained a firm commitment, the some “other spectrum” is the Lower 80 Channels Nextel vacated in the Non-Cellular Block on a geographic “footprint” basis. For Non-Nextel Control Group EA licensees, who have met the construction or firm commitment requirement, the “other spectrum” is the Upper 200 Channels in the Cellular Block, beginning with Channel 401 on a geographic “footprint” basis.

#### 1. Market BEA160 Los Angeles-Riverside-Orange County

The Los Angeles, California BEA is representative of EA Markets where the NCG holds all the EA Licensed Spectrum<sup>62</sup>. In the EA markets in which the NCG holds all of the Lower 230 Channels’ EA-Licensed Spectrum, the Consensus Parties’ Proposal concerning rebanding within the 800 MHz Band is fairly simple and straightforward. Here the NCG would vacate its General Category EA-Licensed Spectrum and move Channels 1-120 on a 1:1 “Clean” basis to the former NPSPAC Channels in Channel 601-720 (on a 25 kHz Bandwidth basis) in the new Cellular Block and their remaining thirty (30) Channels to the 1.9 GHz Band.<sup>63</sup> The NCG’s Lower 80 EA frequencies would be exchanged on a 1:1 Clean basis for 1.9 GHz spectrum.<sup>64</sup>

According to the Consensus Parties’ Proposal, the Non-NCG’s Site-Licensed Spectrum in the General Category would move to the Nextel Control Group’s vacated Channels 121-150, Lower 80 Channels and Business Category Channels in the new Non-Cellular Block, and receive their former geographic “footprint.” The Non-NCG Lower 80 Channels’ site-specific licenses in these EA markets would remain in their present “location” with their present geographic “footprint.”

According to the FCC database, in the Los Angeles EA Market, Nextel holds 442 800 MHz SMR Frequencies with the MHz/Pops Equivalent of 19.8 MHz<sup>65</sup> exclusive of the Upper 200 Channels. This figure represents the total number of frequencies Nextel currently

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<sup>62</sup> For a list of these fifty-eight (58) EA markets, please refer to **Exhibit H** attached hereto.

<sup>63</sup> It is unclear under the Consensus Parties’ Proposal whether General Category Site-Licensed Spectrum “controlled,” rather than held by Nextel directly, would be considered as a license separate and apart from Nextel’s EA-Licensed Spectrum and therefore afforded a 1:1 exchange on a Clean basis.

<sup>64</sup> Although the Consensus Parties’ Proposal is largely silent concerning the treatment of Nextel vacating Channels 121-150 for relocation by site-specific licensees in Channels 1-120, it would appear that Nextel would be credited with this spectrum in its purported “exchange” of 700 MHz Guard Band, 800 MHz and 900 MHz spectrum for a 10 MHz of 1.9 GHz spectrum on a nationwide basis. *See* Consensus Parties, Supplemental Comment, December 24, 2002, pp. 5, 18.

<sup>65</sup> Based the MHz/Pops calculation methodology the MHz/Pop section of this filing.

uses in the operation of their low site and low-power cellular system in the Los Angeles EA market. However, after adoption by the FCC of the Consensus Parties' Proposal, Nextel would hold 520 Channels with a MHz/Pops equivalent of 25.9 MHz, a 6.1 MHz spectrum enhancement unexplained by its new Cellular Deployment Test.

If the Consensus Plan were to use the type or class of spectrum as its criteria with respect to determining whom receives allocation of the New Cellular Block Spectrum, in this EA Market the NCG would receive 11.5 MHz of such Spectrum in exchange for its General Category and Lower 80 EA-Licensed Spectrum. Instead unrelated to the reorganization of the 800 MHz Band, the Consensus Parties include Nextel's largely encumbered 700 MHz and 900 MHz SMR spectrum and its promise to pay \$850 million toward defraying the total 800 MHz band relocation costs, such inclusion of unrelated spectrum and promised contribution by the Consensus Parties', results in the NCG's receipt of 4.5 MHz of additional new Cellular Block Spectrum.

## 2. Market BEA013 Washington, D.C.-Baltimore-MD-VI-WV

The Washington, D.C. BEA is representative of EA Markets where the Non-NCG holds significant amounts of EA Licensed spectrum. In the one hundred seventeen (117) EA markets in which Nextel holds less than all of the EA Licensed Spectrum, the Consensus Parties' Proposal becomes much more convoluted.<sup>66</sup> Here the Nextel Control Group would exchange their General Category EA- and Lower 80 EA-Licensed Spectrum for spectrum in the former NSPAC Channels and 1.9 GHz spectrum on a Clean 1:1 basis. The Nextel Control Group's Site-Licensed Channels that encumber a Non-Nextel Control Group's EA-Licensed Channels, and their Business and/or Industrial/Land Transportation Category Channels also would be exchanged for spectrum in the former NSPAC Channels and/or the 1.9 GHz spectrum on a 1:1 Clean basis.

In sharp contrast, Non-Nextel Control Group EA Licenses would move according to a new Cellular Deployment Test advocated by the Consensus Parties. According to this Test, such Licensees would move to the Cellular Block only if they either already (1) have constructed their respective authorizations or (2) obtained a firm commitment with respect to the construction of their respective authorizations.<sup>67</sup> Although the Consensus Parties fail to clarify the meaning of "firm commitment," Preferred assumes that they intended to require that a Non-Nextel Control Group EA licensee have obtained a firm financial commitment from a recognized financial institution or the capital arm of a major equipment vendor. In setting forth this requirement, the Consensus Parties explained their rationale as follows:

"To the extent a non-Nextel EA licensee has not reached its five-year construction benchmark and has not constructed is network, it would not be eligible for relocation to the cellular block unless the licensee can demonstrate a binding commitment to deploy a low-site, low-power cellular design systems, in accordance with the cellular definition set forth above. The Commission must not permit realignment to be misused by speculators attempting to position

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<sup>66</sup> For a list of these one hundred seventeen (117) EA markets, please refer to **Exhibit I** attached hereto.

<sup>67</sup> See Consensus Parties' Reply Comment, February 25, 2003, p. 27 & n. 59.

themselves to create an exit strategy based on being returned to the cellular channel block....”<sup>68</sup>

This rationale directly contravenes the FCC’s public interest determination set forth in the Memorandum Opinion and Order on Reconsideration<sup>69</sup> that a “per channel” or 100 percent channel build-out requirement was unnecessary to prevent inefficient spectrum use and warehousing as well as the filing of speculative or fraudulently induced license applications. According to the Commission, the competitive bidding process “effectively allocates spectrum to the bidder that values it most and results in service being provided to the public expeditiously. An EA licensee would incur an opportunity cost if spectrum is not used as efficiently as possible and thus would have incentives to promote spectrum efficiently.”<sup>70</sup>

In advocating that the FCC retroactively impose additional conditions upon Non-Nextel Control Group EA licensees’ authorizations, the Consensus Parties effectively seek to confiscate the primary spectrum right sold by the Commission to the winning bidders in FCC Auctions #34, #36 and #43: the right to use any of the channels in a particular Frequency Block license won by such bidder throughout the particular EA market subject generally to the obligation under Section 90.621(b) to protect co-channel stations that are not associated with another EA licensee.<sup>71</sup>

If a Non-Nextel Control Group EA licensee meets either or both of the new requirements proposed by the Consensus Parties, their frequencies would be moved to the Upper 200 Channels within the new Cellular Block, beginning with Channel 401 (816.0125 MHz/861.0125 MHz). Once again the Non-Nextel Control Group EA licensee would be required to exchange its EA-Licensed Spectrum for spectrum with only its identical prior geographical “footprint” and thus lose its spectrum right to recover any “White Space.”

If a Non-Nextel Control Group EA licensee, such as Preferred, has neither constructed its EA authorizations nor obtained a firm commitment with respect to their construction, according to the Consensus Parties’ Proposal, they would be moved to Nextel’s to be vacated Lower 80 Channels, if available, in the new Non-Cellular Block. If such Channels are unavailable, as is the case in the Puerto Rico EA market, the Consensus Parties’ Proposal is silent as to the outcome. Upon such move, such Non-Nextel EA licensees would receive only their prior geographical footprint and thus would lose the second spectrum right sold by the FCC to winning bidders in the Lower 230 Channels Auctions: the right to recover so-called “White Space” upon the termination or revocation of a co-channel station within the particular EA market.<sup>72</sup>

The NCG holds 436 800 MHz SMR frequencies in Washington, D.C. EA Market, with a MHz/Pops equivalent of 17.7 MHz of 800 MHz band spectrum. After adoption of the

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<sup>68</sup> *Id.* at n. 60.

<sup>69</sup> 800 MHz Memorandum Opinion and Order at 17567, ¶ 15.

<sup>70</sup> *Id.* at 17569.

<sup>71</sup> 47 CFR §90.683(a)(1).

<sup>72</sup> 47 CFR § 90.683(b).

Consensus Parties' Proposal by the Commission, Nextel would hold a MHz/Pops Equivalent of 25.97 MHz of Spectrum, an increase of 8.17 MHz of such Spectrum.

This increase in the Nextel Control Group's MHz/Pops Equivalent Spectrum represents a considerable spectrum enhancement, particularly when according to their own Cellular Deployment Test; Nextel would be entitled to only 17.7 MHz of such Spectrum. Once again, the Consensus Parties' Proposal applies such "Test" only to separate Non-Nextel Control Group EA licensees' spectrum holdings from those of the NCG and then exclude them from the New Cellular Block. Following such separation and exclusion, the Consensus Parties discard the Test and refuse to apply it to the Nextel Control Group to determine the quantity of new Cellular Block Spectrum it should receive.

If Consensus Plan where to use the type or class of spectrum approach in EA Markets such as the Washington, D.C.,EA market, Nextel would be entitled to only 16.5 MHz of new Cellular Block Spectrum. This figure results from the acquisition of 5 MHz of EA-Licensed Spectrum by Preferred Communication Systems, Inc. at an auction conducted by the FCC.

However, under the Consensus Parties' Proposal, Nextel is allocated a total of 25.97 MHz/Pops Equivalent Spectrum by adding Nextel's exchanging its 4 MHz of 700 MHz Guard Band and 3.5 MHz of 900 MHz SMR spectrum even though both are encumbered by other licensees and not currently part of Nextel's operations. Moreover, one-half of the 700 MHz Guard Band spectrum is restricted to non-cellular operations by lessees. Once again, based upon the results of applying the Consensus Parties' new Cellular Deployment Test to the Nextel Control Group, it appears the amount of new Cellular Block Spectrum to be allocated to the NCG is determined neither by how it operates its spectrum holdings nor by the type or class of spectrum it holds. Rather, it appears that the amount of such Spectrum is determined by the willingness of the Consensus Parties to sell such Spectrum to Nextel in exchange for its promised \$850 million contribution to defray the total costs of their 800 MHz rebanding proposal.

### 3. Market BEA016 Staunton, VA-WV

The Staunton, Virginia EA market, much like the Washington, D.C. Market discussed above, is representative of EA Markets where the Nextel Control Group holds less than all the EA-Licensed Spectrum. It also represents an example of the EA Markets where Nextel does not own any 800 MHz band spectrum. Rather, its corporate affiliate, Nextel Partners does. Here (1) Nextel Partners holds some 800 MHz SMR EA and Site-Licensed Spectrum, (2) Nextel holds none but is promising to contribute funds to defray the relocation costs and exchange its encumbered 700 MHz Guard Band and 900 MHz SMR Spectrum, and (3) Preferred holds the greatest quantity of EA-Licensed Spectrum in the Lower 230 Channels.

Nextel Partners holds 16.4 MHz/Pops Equivalent Spectrum and only 13.5 MHz of EA-Licensed Spectrum in this EA market. However, under the Consensus Parties' Proposal all of the new Cellular Block Spectrum is allocated exclusively to Nextel Partners and Nextel. Based upon the Consensus Parties' movement methodology, 6 MHz of such Spectrum, comprised of the former NPSPAC Channels, would be allocated to Nextel Partners. Since

Nextel Partners holds 6.5 MHz of Lower 230 Channels Spectrum, it would appear that application of the Consensus Parties' movement methodology would allocate Nextel Partners at .5 MHz of 1.9 GHz band spectrum. However, according to the Consensus Parties' Proposal, all 10 MHz of the 1.9 GHz band spectrum would be allocated to Nextel. Nowhere do the Consensus Parties bother to explain this result.

Moreover, the Consensus Parties subject neither Nextel nor Nextel Partners to the Cellular Deployment Test. Again, this Test is reserved solely for the Non-Nextel Group EA licensee whose EA and Site-Licensed Spectrum moves either to the Non-Cellular Block or to the Upper 200 Channels beginning with Channel 401 within the new Cellular Block with only its existing "footprint" as if it were a site-specific license. Here Nextel's promised contribution of \$850 million transcends not only the spectrum rights of Non-NCG EA licensees but also the identity of the licensees holding 800 MHz band EA and Site-Licensed Spectrum.

#### 4. Market BEA040 Atlanta, GA-AL-NC

The Atlanta, Georgia EA market, shares all of the problems experienced in the 117 EA Markets where Nextel does not hold all the 800 MHz EA Licensed Spectrum. This EA market is important because it is representative of the somewhat special problems encountered in an EA market in which Southern and Nextel share EA and Site-Licensed Spectrum and Southern holds all or virtually all of the Business and Industrial and Land Transportation Category Channels. Southern held these Channels subject to an Extended Implementation Authority ("EIA") that upon its expiration was converted into one or more geographic market area licenses equivalent to EA-Licensed Spectrum.

Nextel holds 5.3 MHz of MHz/Pops Equivalent Spectrum in the Lower 230 and 9.1 MHz of such Spectrum in the Upper 200 Channels for a total of 14.41 MHz of MHz/Pops Equivalent Spectrum. Nextel holds only 4.3 MHz of Lower 230 Channels EA-Licensed frequencies in this EA market. However, under the Consensus Parties' Proposal, all of the new Cellular Block Spectrum comprised of the 6 MHz in the former NPSPAC Channels and the 1.9 GHz band are allocated exclusively to Nextel. In this EA market Nextel would be exchanging its 5.3 MHz/Pops Equivalent Spectrum in the Lower 230 Channels for 16 MHz of such Spectrum in the New Cellular Block. Here even when Nextel exchanges its 3.75 MHz of 900 MHz SMR and 4.00 of 700 MHz Guard Band spectrum, it falls short of a "kHz for kHz" exchange or mere "replacement Spectrum" rationale by 2.95 MHz. The Consensus Parties' Proposal fails either to account for this possibility or explain its rationale.

Moreover, the Consensus Parties subject Nextel to the Cellular Deployment Test. Again, this Test is reserved solely for the Non-Nextel Group EA licensee whose EA and Site-Licensed Spectrum moves either to the Non-Cellular Block or to the Upper 200 Channels within the new Cellular Block with only its existing "footprint" as if it were a site-specific license. Here Nextel's promised contribution of \$850 million transcends not only the spectrum rights of Non-NCG EA Licensees but also the lack of NCG's Total Spectrum.

#### 5. Market BEA174 Puerto Rico and the US Virgin Islands

The final example is the Puerto Rico EA Market. This EA market is important since it is the only EA market where a Non-NCG holds more Total Spectrum, Total MHz/Pops Equivalent Spectrum, and Total EA-Licensed Spectrum in the 800 MHz band than does either Nextel and/or Nextel Partners.

Nextel holds 4.7 MHz of MHz/Pops Equivalent Spectrum in Puerto Rico. Although Nextel holds only 4.0 MHz of such Spectrum in the Lower 230 Channels, under the Consensus Parties' Proposal it would be allocated 16 MHz of New Cellular Block Spectrum. Interestingly enough, this spectrum enhancement of 12 MHz of MHz/Pops Equivalent Spectrum is greater than Nextel's 700 MHz Guard Band and 900 MHz SMR spectrum (7.55 MHz), leaving 4.45 MHz unaccounted for and unexplained by the Consensus Parties.

Moreover, the Consensus Parties do not subject Nextel to the Cellular Deployment Test, since Nextel does not have a cellular operation on any of their Spectrum holdings in Puerto Rico. Again, this Test is reserved solely for the Non-Nextel Group EA licensee whose EA and Site-Licensed Spectrum moves either to the Non-Cellular Block or to the Upper 200 Channels within the new Cellular Block with only its existing "footprint" as if it were a site-specific license. In this Market, Nextel does not hold enough Upper 200 Channels' Spectrum to accommodate Preferred. Here Nextel's promised contribution of \$850 million transcends a complete failure of the Consensus Parties' Proposal.

#### E. Consensus Parties' Proposal Is Based Upon Erroneous Estimate of Total Relocation Costs and Is Therefore Seriously Underfunded

The second major tenet underlying the Consensus Parties' Proposal is that Nextel is funding all of the "reasonable" relocation expenses of Public Safety, Business and Industrial/Land Transportation and SMR licensees.<sup>73</sup> In Appendix A to its December 24, 2002 Supplemental Comment, the Consensus Parties set forth their \$850 million estimate of the total relocation costs of their Proposal. However, as noted by many commenters, the Consensus Parties' total relocation costs estimate was subject to a significant caveat from public safety organizations and licensees with respect to the number of public safety radios that would need to be replaced.<sup>74</sup> On November 3, 2003, Nextel sought to buttress its funding commitment by promising to increase the initial escrow deposit from \$50 to \$100 million and providing an irrevocable letter of credit from a recognized banking institution for the \$750 balance to be paid into a relocation trust fund over a seven-year period.<sup>75</sup> Despite considerable criticism of the \$850 million estimate and the survey methodology and assumptions by which it was

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<sup>73</sup> *But see* Consensus Parties, Supplemental Comment, December 24, 2002, p. 6-7 (Private Wireless Coalition was highly confident that the \$150 million commitment would cover the reasonable costs of retuning/relocating B/ILT and H-SMR incumbents to comparable channels in accordance with the realigned Non-Cellular Block as set forth in the Consensus Parties' Proposal. Only Nextel represented that it was highly confident that its commitment would cover the reasonable retuning costs set forth above as well as the required relocation of 800 MHz incumbent public safety licensees pursuant to the Consensus Parties' Proposal).

<sup>74</sup> See United Telecom, *Ex Parte* Comment filed on behalf of Thirteen Members of 800 MHz Users Coalition, August 7, 2003, pp. 4-5; Consensus Parties, Supplemental Comment, December 24, 2002, pp. 6-7.

<sup>75</sup> Nextel Communications, Inc., Supplemental Comments, November 3, 2003.

determined,<sup>76</sup> neither the Consensus Parties nor Nextel has revised the \$850 million total costs estimate.<sup>77</sup>

On November 3, 2003, Motorola submitted a letter to the Commission in response to its request for certain technical and other information. In this letter Motorola represented that for a variety of reasons thirty percent (30%) of its radios sold to public safety licensees utilizing the NPSPAC Channels would need to be replaced rather than retuned. Based upon Motorola's estimated seventy percent (70%) market share of the radios sold during the past ten (10) years to Public Safety licensees operating in the NPSPAC Channels and current licensing information obtained from the FCC's license databases, this increase in the replacement percentage from the one percent (1%) figure used by the Consensus Parties alone would increase their total relocation costs by \$1.514 billion.<sup>78</sup>

In February 2003, Preferred had retained the services of CTO, with offices in Annapolis, Maryland, to conduct a study to determine the probable total relocation costs of the Consensus Parties' Proposal. A copy of this Report is attached hereto as **Exhibit K**. Preferred selected CTO for this critical project due to its extensive background and experience in RF system design for public safety as well as commercial licensees.

In undertaking this Study, CTO initially downloaded the FCC's license database with respect to Public Safety and Business and Industrial/Land Transportation and SMR licensees in Channels 1-120 in the General Category Channels and determined the total number of (1) licensees, (2) discrete frequencies, (3) call signs, (4) frequencies (for Radio Retune/Replacement Cost Analysis), (5) discrete sites, (6) sites X frequencies (for Base Stations; to be used in Infrastructure Cost analysis) and (8) total number of radios. CTO then determined such figures for Public Safety licensees in the NPSPAC Channels and then in Channels 321-400.

Based upon current 800 MHz Band licensing information obtained from FCC license databases and generally utilizing the Consensus Parties' own cost and radio replacement assumptions,<sup>79</sup> CTO determined that the total relocation cost of the Consensus Parties' Proposal

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<sup>76</sup> For an almost complete listing and description of these adverse comments, *see generally* Ex Parte Comment filed by the United Telecom Council on Behalf of Thirteen Members of 800 MHz Users Coalition, August 7, 2003; for Motorola's earlier estimate of the total relocation costs of Nextel's "White Paper" and National Association of Manufacturers' Proposals, *see* Motorola, Inc. Comment, May 6, 2002, pp.25-31.

<sup>77</sup> Neither the Consensus Parties nor Nextel has sought to increase the total relocation costs estimate even after accepting the need to reimburse Motorola and other major public safety equipment manufacturers for their respective radio software research and development costs incurred to facilitate retuning of Public Safety and Critical Infrastructure licensees' radios.

<sup>78</sup> Public Safety licensees and consultants with whom CTO has communicated with respect to this issue, estimate that Motorola's share of radios sold to Public safety licensees operating in the NPSPAC Channels during the past ten (10) years may be as high as seventy-five percent (75%). According to these licensees and consultants, the radio replacement figure for the other major public safety equipment manufacturers is 5%-10%. If seven and one-half percent (7.5%) of such manufacturers' radios sold to Public Safety licensees operating in the NPSPAC Channels during the past ten (10) years need to be replaced rather than merely retuned, then the Consensus Parties' total relocation costs would need to be increased by an additional \$162.245 million.

<sup>79</sup> CTO utilized \$100 as the average cost to retune each radio rather than the \$50 figure used by the Consensus Parties and \$3,000 as the average cost to replace a radio rather than the \$2,500 figure used by the Consensus Parties. According to CTO, the upward revisions were based upon interviews with the major public safety equipment manufacturers and certain public safety licensees.

was actually \$1.120 billion rather than their published estimate of \$850 million. When CTO increased the radio replacement percentage figure for radios sold to public safety licensees operating in the NPSPAC Channels to the thirty percent (30%) figure used by Motorola for all radios sold during the past ten (10) years to Public Safety licensees operating in the NPSPAC Channels, it found that the total relocation costs of the Consensus Parties' Proposal was \$3.360 billion.<sup>80</sup>

#### F. Consensus Parties' Reservation of Allocation of 1.9 GHz Spectrum Exclusively to Nextel Ignores 800 MHz Band Spectrum Realities and Funding Requirements

As noted above, under the Consensus Parties' Proposal, only Nextel would be allocated 1.9 GHz spectrum under the precept that "Nextel must be made whole."<sup>81</sup> According to the Consensus Parties, Nextel is exchanging its "running average" of 4 MHz of 700 MHz Guard Band spectrum, 2.5 MHz of 800 MHz spectrum and 4 MHz of 900 MHz SMR spectrum and contributing \$850 million to defray total 800 MHz Band relocation costs and an additional amount representing its pro rata share to relocate Broadcast Auxiliary Service licensees in the 1,990-2,025 MHz Band and reimburse UTAM for an allocation of 10 MHz of "replacement" spectrum in the 1.9 GHz Band.<sup>82</sup>

As discussed above, the Consensus Parties' Proposal allocates 10 MHz of 1.9 GHz band spectrum to Nextel, and only Nextel, regardless of whether it holds any 800 MHz band spectrum and/or 700 MHz Guard Band spectrum in a particular EA market. In EA markets in which 53 million persons reside, Nextel would receive such an allocation even though it holds little or no 800 MHz band spectrum. Moreover, in MEA markets in which more than 20 million persons reside, Nextel would receive such an allocation even though it holds no 700 MHz Guard Band spectrum. Finally, in MEA/EA markets in which more than 10 million persons reside, Nextel would receive such an allocation even though it holds neither 800 MHz band nor 700 MHz Guard Band spectrum.

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<sup>80</sup> Preferred believes that while CTO's conclusion may be slightly too high since a lower percentage of other public safety equipment manufacturers' radios sold to public safety licensees operating in the NPSPAC Channels would need to be replaced, it would note that several commenters have estimated that as many as 25% of radios used by Business licensees in Channels 1-120 would need to be replaced. Moreover, Motorola previously estimated that 30% to 40% of all public safety radios would need to be replaced. *See* Motorola, Inc., Comment, May 6, 2002, pp. 21-31. For a discussion of several cost omissions and underestimates in Appendix A to the Consensus Parties' Supplemental Comment file don December 24, 2002, *see* United Telecom Council *Ex Parte* Comment filed on behalf of 13 Members of the 800 MHz Users Coalition, August 7, 2003. As a result, Preferred believes CTO's latter estimate (\$3.360 billion) of the total relocation costs of the Consensus Parties' Proposal may be realistic, and perhaps within a relatively small (3%-5%) margin of error.

<sup>81</sup> *See* Consensus Parties, Reply Comment, February 25, 2003, pp. 50-51.

<sup>82</sup> A shorthand version of this exchange would be that the Nextel Control Group is vacating 8.5 MHz of 800 MHz band spectrum and is receiving 6 MHz of such spectrum in return for a net contribution of 2.5 MHz and then is returning 4 MHz of both 700 MHz Guard Band spectrum and 900 MHz SMR spectrum on a nationwide basis for an allocation of 10 MHz of 1.9 GHz Band Spectrum on a nationwide basis, as noted above, however, that is not how the Consensus Plan Proposal operates. Rather, as a result solely of its 800 MHz band movement methodology it reserves exclusively to the NCG 11.5 of MHz in the new Cellular Block. Under the Consensus Parties' Proposal, Nextel then is exclusively allocated 3-5 MHz of additional 1.9 GHz spectrum due to its return of the 700 MHz Guard Band and 900 MHz SMR spectrum unrelated to any reorganization of the 800 MHz band and its promise to contribute up to \$850 million to defray the total relocation costs of the Consensus Parties' Proposal.

The Consensus Parties' Proposal also allocates 10 MHz of the 1.9 GHz band exclusively to Nextel itself in EA markets in which Non-Nextel Control Group EA licensees hold all, or a considerable majority of, the General Category EA-Licensed Spectrum. As discussed above, absent the Consensus Parties' impermissible discrimination, under their generally applicable movement methodology these Non-NCG EA licensees would be allocated all or a portion of the 5.5 MHz "slice" of 1.9 GHz band spectrum.

Based upon the Consensus Parties' exclusive allocation of 1.9 GHz band spectrum to Nextel itself regardless of (1) the general application of their movement methodology and (2) its spectrum holdings in a particular EA market, it is clear that such allocation is based solely upon the desired result—exclusively allocating such desirable Clean and Contiguous Spectrum to Nextel—rather than upon an exchange of its spectrum holdings on a "kHz-for-kHz" basis or as "replacement spectrum." Such exclusive allocation therefore is based entirely upon the identity of the **licensee** rather than upon the **identity, quantity or quality of the licenses** sought to be exchanged.<sup>83</sup>

Preferred maintains that reorganization of the 800 MHz band optimally should be accomplished without involving movement of licensees' spectrum holdings to other bands or the exchange of unrelated spectrum by Nextel and perhaps other 800 MHz band licensees. However, if the Commission determines to use the Consensus Parties' Proposal as a working model for its rebanding efforts, it necessarily must include the allocation of 1.9 GHz band spectrum as an integral part of such efforts. As discussed above, in the one hundred seventeen (117) EA markets in which the Nextel Control Group shares General Category and Lower 80 EA-Licensed Spectrum, the Consensus Parties' movement methodology seeks to "squeeze" 11.5 MHz of EA-Licensed Spectrum and 0-9 MHz of Site-Licensed Spectrum into 6 MHz of spectrum within the 800 MHz band reserved exclusively to the NCG and some "other spectrum."

Unless the FCC is willing to (1) sanction the confiscation of one or both of the spectrum rights of Non-NCG EA licensees in violation of its NPRM directive or (2) require Nextel to vacate completely a considerable number of its Upper 200 Channels' spectrum or (3) move Site-Licensed Spectrum together with EA-Licensed Spectrum to the new Cellular Block, it necessarily must include a minimum of 5.5 MHz of 1.9 GHz band spectrum and allocate it upon a nondiscriminatory basis as part of the exchange of spectrum by both the Nextel Control Group and Non-Nextel Control Group EA licensees. Without allocation of the 1.9 GHz spectrum by the Commission, the Consensus Parties' rebanding approach in many respects is similar to a game of spectrum "musical chairs," in which in many EA markets far too many players are left standing.

#### G. Consensus Parties' Administration of Movement Evidences Little Understanding of Public Safety and Critical Infrastructure Systems

The Consensus Parties set forth their proposed administration of 800 MHz rebanding in their December 24, 2002 Supplemental Comment. In coordinating their "two-step" exchange of

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<sup>83</sup> As a result, the Cellular Telecommunications & Internet Association's, Verizon Wireless' and other commenters' criticism of the Consensus Parties' allocation of 1.9 GHz band spectrum as violating the competitive bidding provisions of Section 309(j) appears valid.

Channels 1-120 and the NPSPAC Channels, the Consensus Parties initially recommend that the FCC “create” a private committee to be called the Relocation Coordination Committee (“RCC”) to be composed of four members from the Land Mobile Communications Council and Nextel. The RCC initially would prioritize NPSPAC Regions 1-14 in descending order based upon population as modified to give priority to those Regions experiencing the greatest incidence and severity of interference.<sup>84</sup>

Within 45 days of the effective date of the Commission’s Report and Order in this proceeding, all licensees in Channels 1-120 in NPSPAC Regions 1-14 would be required to submit detailed licensing and operating information to the RCC, which would forward it to a Phase I Planning Committee to be appointed by the RCC.<sup>85</sup> This Committee would be composed of a public safety certified frequency coordinator, a B/ILT frequency certified coordinator and Nextel.<sup>86</sup> Within 45 days thereafter, the Committee would establish a plan for relocating the Non-Nextel EA licensees to either (a) Nextel’s vacated Lower 80 Channels within the new Non-Cellular Block, or (b) the Upper 200 Channels in the new Cellular Block, beginning with Channel 401. Contemporaneously, the Committee also would establish a relocation plan for incumbent licensees operating certain wide-area systems that cross NPSPAC Region boundaries.<sup>87</sup> The Committee then would certify to the FCC the clearing plan for these licensees.<sup>88</sup> The Consensus Parties fail to address what the Committee is supposed to do if such Channels are insufficient or unavailable in certain EA markets. As noted above, the Consensus Parties’ Proposal simply ignores this problem by assuming that Nextel’s “running average” of spectrum is sufficient in every EA market to implement its rebanding methodology.

As discussed above, upon their relocation Non-Nextel EA licensees would receive only their prior geographic footprint or “White Space.” Under the first prong of the Consensus Parties’ Proposal with respect to Non-Nextel EA licensees, their licenses which neither have been constructed nor have become subject to a firm commitment would move to Nextel’s vacated Lower 80 Channels in the new Non-Cellular Block. Since Nextel would have vacated these Channels, it is unclear which, if any, licensee would be sharing these Channels with the Non-Nextel EA licensee following relocation of its frequencies. Moreover, if a Non-Nextel EA licensee were to share such relocated frequency on a geographic footprint basis with one or more relocated site-specific licensees, presumably such site-specific licensees also would receive only their respective previous geographic footprints. For this complex approach to work, the Committee would be required to mix and match often overlapping geographic footprints. This process is made even more problematical by Nextel’s expansion of its site-specific licenses’ coverage areas in EA markets in which it shares EA-Licensed Spectrum.<sup>89</sup> Determination of an

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<sup>84</sup> Consensus Parties, Supplemental Comment, December 24, 2002, p. 16. According to the Consensus Parties, approximately one-half of the incumbents to be relocated under their Proposal are in these fourteen NPSPAC Regions. *Id.* at 18 & n. 26.

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 18-19.

<sup>88</sup> *Id.* at 20.

<sup>89</sup> In the *Memorandum Opinion and Order on Reconsideration* and the *Second Report & Order*, the Commission determined that an incumbent site-specific licensee could expand the coverage of a particular frequency by adding secondary sites as long as they did not expand the original license’s 36 dBuV/m contour. The Commission contemporaneously determined that such contour would be based upon maximum power (1,000 watts ERP) and

EA licensee's and other site-specific licensees' respective geographic footprints therefore necessarily will involve countless disputes with Nextel, a member of the Committee, and perhaps other licensees and parties. The Consensus Parties' Proposal fails to mention whether Nextel should or would participate in Committee decisions under these circumstances.

Under the second prong of the Consensus Parties' rebanding approach, a Non-Nextel EA licensee's frequencies would have been constructed or have become subject to a firm commitment and moved to the Upper 200 Channels within the new Cellular Block beginning with Channel 401, if available. Here Non-Nextel EA licensees also would receive only their previous geographic footprint and share the Upper 200 Channels frequencies with Nextel. Here the potential for conflict would be even greater since Nextel would have every incentive to claim as great a geographic footprint as possible for its 800 MHz SMR General Category and Lower 80 site-specific licenses in Frequency Blocks won by other Auction bidders. The greater such footprint, the greater geographic coverage Nextel would retain for its frequencies in the Upper 200 Channels to which the Non-Nextel EA licensee's General Category or Lower 80 EA frequencies were relocated.

The process described above also would be used to relocate Channels 1-120 in NPSPAC Regions prioritized 15-55. In Phase II of the realignment framework proposed by the Consensus Parties, incumbent NPSPAC licensees would be relocated to Channels 1-120 and Nextel would be relocated from this spectrum to Channels 601-720 (calculated on a 25 kHz bandwidth basis) on a 1:1 Clean basis. Nextel's license apparently would cover the entire NPSPAC Region.<sup>90</sup> Within 120 days of the effective date of the Report and Order in this proceeding, NPSPAC licensees would be required to provide detailed spectrum and operating information to the RCC. Within eight months of the effective date of the Report and Order, the 800 MHz Regional Planning Committee in each of NPSPAC Regions prioritized 1-14 either would reconfirm the transfer of the current NPSPAC regional channel plan to Channels 1-120, or would complete and adopt any necessary or desired revisions to the plan. According to the Consensus Parties, during this time the RCC would appoint a Phase II Planning Committee to be composed of a (1) public safety frequency coordinator, (2) a representative for each of the NPSPAC Planning Regions, and Nextel.<sup>91</sup> The Committee, working together with the NPSPAC Regional Planning Committee would complete a Regional Migration Plan within ten (10) months of the effective date of the FCC's Report and Order in this proceeding. The Committee would certify each completed Regional Migration Plan to the Commission.

Relocation of NPSPAC incumbents in Regions prioritized 15-55 would proceed as described above with a longer timeline.<sup>92</sup> In Phase II, incumbent public safety licensees currently licensed on channels in the proposed Guard Band (Channels 321-400) would have the right to relocate on channels vacated by Nextel in Channels 121-320. According to the Consensus

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actual height above average terrain (HAAT). *Memorandum Opinion and Order at 17570-72*, ¶¶ 22-25; *800 MHz Second Report and Order at 19105*, ¶¶ 67-68. The Commission also determined to allow such modifications by site-specific incumbents on a "self-coordination" basis. Preferred has conducted research of its EA markets and determined that Nextel has impermissibly increased the coverage of its 800 MHz SMR General Category site-specific licenses in many of those markets.

<sup>90</sup> Consensus Parties, Supplemental Comment, December 24, 2002, p.27.

<sup>91</sup> *Id.* at 28

<sup>92</sup> *Id.* at 30.

Parties, these relocations would be carried out contemporaneously with and completed by the end of the Phase II relocation period.

#### H. Legal Infirmities of Consensus Parties' Proposal

Adoption by the FCC of the Consensus Parties' thinly disguised attempt to overturn the results of FCC Auctions #34, #36 and #43 through its adoption of a discriminatory movement methodology for General Category and Lower 80 EA licensees arguably would implicate the Takings, Due Process and Equal Protection Clauses of the Fifth Amendment to the U.S. Constitution<sup>93</sup> and the Commission's statutory requirement to maintain regulatory parity and promote diversity of license ownership and competition.<sup>94</sup>

As discussed above, the initial goal of the Consensus Parties' Proposal is to separate the Nextel Control Group's EA and Site Licensed Spectrum from that held by Non-Nextel Control Group licensees. The unstated reason for such separation and the Consensus Parties' subsequent exclusive reservation of 16 MHz of new Cellular Block Spectrum to the NCG is to maximize their allocation of Clean and Contiguous Spectrum. Given the desire of Nextel, Nextel Partners and other EA licensees to deploy an advanced version of CDMA technology within the next few years which requires broader bandwidth and Clean and Contiguous Spectrum, participation in the allocation of such Spectrum is viewed by them as critical primarily to remain competitive with cellular and PCS carriers and to limit their competition from other 800 MHz SMR licensees.<sup>95</sup>

Similarly, the Consensus Parties' requiring Non-NCG EA licensees satisfying their new Cellular Deployment Test to the Upper 200 Channels to share their frequencies with Nextel on a co-primary basis is designed both to maximize Nextel's Cellular Block spectrum holdings and to place such Non-Nextel Control Group EA licensees at a competitive spectrum and operating disadvantage. Preferred submits that neither of the above features of the Consensus Parties' movement methodology has any purpose other than to discriminate impermissibly against Non-NCG General Category and Lower 80 EA licensees.

In summary, with respect to EA-Licensed Spectrum, the Consensus Parties' Proposal impermissibly discriminates against Non-NCG EA licensees as follows:

1. Exclusive reservation of 16 MHz of new Cellular Block Spectrum to Nextel Control Group;
2. Through formulation of its new Cellular Deployment Test, confiscating both spectrum rights of Non-NCG EA licensees who have not already constructed their

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<sup>93</sup> For a general discussion of the Commission's and the courts' struggle to balance the FCC's authority to modify licenses under Section 316 of the Communications Act of 1934, as amended, and the property rights or interests of licensees, *see generally Fishman* at 11-23.

<sup>94</sup> *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. Section 6002(d) (3) (B), 107 Stat. 397 (1993) (mandating that Commission establish a uniform regulatory regime for all commercial mobile services); 47 U.S.C. §309(j)(3)(B) and (4)(C).

<sup>95</sup> *See* AWS Report and Order at 268, ¶ 44.

- licensed spectrum or obtained a firm commitment to do so even though such licensees are well within their five-year construction period<sup>96</sup>; and
3. Movement of Non-Nextel Control Group EA licensees satisfying such Cellular Deployment Test to the Upper 200 Channels within the new Cellular Block on a geographic “footprint” basis thereby confiscating their second spectrum right.

With respect to Site-Licensed Spectrum the Consensus Parties’ Proposal discriminates against Non-NCG EA and site-specific licensees as follows:

1. Exclusively moves the Nextel Control Group’s Site-Licensed Spectrum with its limited geographical and population coverage to the new Cellular Block on a 1:1 Clean basis; such Spectrum which underlies the Non-Nextel Control Group EA Spectrum effectively acquires either both of the spectrum rights confiscated from the Non-NCG EA licensees failing to satisfy the Consensus Parties’ new Cellular Deployment Test or the second spectrum right held by such Non-Nextel Control Group EA licensees satisfying such Test; and
2. By contrast, the Consensus Parties’ Proposal move Non-NCG’s Site-Licensed Spectrum according to the results dictated by the application of their new Cellular Deployment Test.

With respect to the allocation of 1.9 GHz band spectrum, the Consensus Parties’ Proposal discriminates against Non-NCG EA licensees as follows:

1. Exclusively allocates 5.5 MHz of 1.9 GHz band spectrum to Nextel based solely upon their impermissible discriminatory movement methodology;
2. In EA markets in which Nextel holds little or no 800 MHz spectrum, the Consensus Parties ignore their generally applicable movement methodology and still exclusively allocate 5.5 MHz of 1.9 GHz band spectrum to Nextel;
3. In EA markets in which Nextel holds no 700 MHz Guard Band spectrum, Consensus Parties ignore the lack if such spectrum and allocate 4.5 MHz balance of 1.9 GHz band spectrum to Nextel;
4. In EA markets in which Nextel holds no 700 MHz Guard Band spectrum and little or no 800 MHz band spectrum, Consensus Parties ignore lack of such spectrum and their generally applicable movement methodology and allocate all 10 MHz of 1.9 GHz band spectrum to Nextel;
5. Consensus Parties’ Proposal excludes Non-NCG EA licensees from (a) foregoing reimbursement of their own relocation costs; (b) promising to contribute funds to defray total relocation costs; (c) returning 900 MHz SMR spectrum; and (d) agreeing to lose 800 MHz frequencies in certain EA markets in exchange for

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<sup>96</sup> Given the uncertainty created by this rulemaking proceeding with respect to the future status of Non-Nextel Control Group EA-Licensed Spectrum, it has been difficult, if not impossible, for Non-Nextel Control Group EA licensees to obtain the significant equity capital and debt financing necessary to construct and operate major digital cellular systems. Given the forbearance shown Nextel by the FCC with respect to its 900 MHz spectrum, Preferred would request on behalf of all Non-NCG EA licensees an extension of their construction periods from the release by the Commission of the *NPRM* on March 15, 2002 on a day-for-day basis until it releases a Report and Order.

allocation of all or portion of 4.5 MHz of 1.9 GHz band spectrum in certain EA markets.

Although both the Commission and the courts have been reluctant to attribute constitutionally protected spectrum property rights to the holder of a FCC licensee, some courts have recognized that such a licensee may be entitled to greater protection if it acquired its license from the Commission pursuant to an auction procedure.<sup>97</sup> As noted above, a central tenet of the Consensus Parties' Proposal is to impose upon Non-Nextel General Category and Lower 80 EA licensees retroactively additional burdens upon their first spectrum right and abrogate their second spectrum right entirely.

As set forth above, the discriminatory movement methodology adopted by the Consensus Parties is based solely upon their desire to reserve 16 MHz of new Cellular Spectrum on a nationwide basis to the Nextel Control Group. Absent another permissible basis or rationale for such methodology, adoption by the FCC of the Consensus Parties' proposal arguably would be both constitutionally and statutorily infirm.<sup>98</sup>

#### I. Practical and Mathematical Infirmities of the Consensus Parties' Proposal

Even if the legal infirmities of the Consensus Parties' Proposal could be overcome, it suffers from serious practical and even mathematical infirmities. As noted above, in the one hundred seventeen (117) EA markets in which the Nextel Control Group shares EA-Licensed Spectrum, the Consensus Parties' Proposal seek to "squeeze" 11.5 MHz of EA-Licensed Spectrum and 0-9 MHz of Site-Licensed Spectrum into only 6 MHz of spectrum in the new Cellular Block and some "other spectrum." By exclusively reserving this spectrum and the 1.9 GHz band spectrum to the NCG, the Consensus Parties' Proposal movement methodology necessarily confiscates one or both of the Non-Nextel Control Group's EA licensees' spectrum rights.

By exclusively reserving such spectrum to the NCG, the Consensus Parties' Proposal treats the NCG as holding all 21.5 MHz of EA-Licensed Spectrum throughout the U.S. As a result, the Consensus Parties' Proposal necessarily fails practically and even mathematically in the one hundred seventeen (117) EA markets in which the Nextel Control Group shares EA and Site Licensed Spectrum with one or more Non-Nextel Control Group EA licensees.

To justify their exclusive reservation of 1.9 GHz band spectrum to the NCG, the Consensus Parties contend that the Nextel Control Group is exchanging a net "running average" of 2.5 MHz of 800 MHz band spectrum and 4 MHz of 700 MHz Guard Band and 900 MHz SMR spectrum or a total "running average" of 10.5 MHz of spectrum for a single 10 MHz nationwide license in the 1.9 GHz band. As demonstrated above, the Consensus Parties' Proposal exclusively

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<sup>97</sup> See *Fishman* at 22-23; cf. *Monroe Comm. Corp. v. FCC*, 900 F.2d 351, 359 (D.C. Cir. 1990) (Silberman, J., concurring) (stating if license holder paid for a license, incumbency might bear weight in a comparative hearing case); *Bell Atl. Tel. Cos. V. FCC*, 24 F. 3d 1441, 1444, n.1 (D.C. Cir. 1994) (discussing in dicta that claims of government taking of private property are compensable in district court and/or the U.S. Claims Court).

allocates 6.0 MHz of spectrum in the new Cellular Block within the 800 MHz band and 5.5 MHz in the 1.9 GHz band to the Nextel Control Group based solely upon the operation of their discriminatory movement methodology, rather than as repeatedly insisted by the Consensus Parties in their respective filings, Nextel's exchange of 700 MHz Guard Band and 900 MHz SMR spectrum unrelated to any reorganization of the 800 MHz band and its promise to contribute up to \$850 million toward defraying the total relocation costs of the Consensus Parties' Proposal.

Even if the spectrum "logjam" created by the Consensus Parties' rebanding methodology could be resolved so that their Proposal could be considered legally permissible, practical and mathematical, their erroneous cost estimates and resulting severe underfunding pose serious risks to the Commission. Under the Consensus Parties' Proposal, the Non-Nextel Control Group General Category EA licensees and Non-Nextel Control Group site-specific licensees would move first by vacating Channels 1-120. The Consensus Parties have budgeted \$150 million to cover the costs of this movement.<sup>99</sup> Following such movement, Nextel would exchange its "temporary" Channels 1-120 on a 1:1 Clean basis with Public Safety licensees operating in the former NPSPAC Channels beginning with NPSPAC Regions prioritized as 1-14 as discussed herein. According to the Consensus Parties' Proposal, no NPSPAC Channels within a Region would be moved unless adequate funding was available to cover the relocation costs of all of the Public Safety licensees in that particular Region.<sup>100</sup> However, if the Consensus Parties' \$700 million total relocation costs estimate for Public Safety licensees proves incorrect and, for any reason, Nextel fails to provide additional funding, the relocation process either would (1) cease with Public Safety licensees operating in the NPSPAC Channels in some of the 55 NPSPAC Regions having moved to Channels 1-120 with such licensees in the remaining NPSPAC Regions remaining in place or (2) require Congressional appropriation of several billion dollars to defray the 800 MHz Band's remaining relocation costs.<sup>101</sup> As many commenters have pointed out, adoption by the FCC of an underfunded 800 MHz rebanding proposal could create more interference and other problems for Public Safety licensees than they presently experience, or would otherwise experience in the future.<sup>102</sup>

#### **IV. PREFERRED'S "IMPROVEMENTS"**

##### **A. All General Category and Lower 80 EA Licensees Maintain Their Spectrum Rights**

Preferred believes that if the Commission adopts a rebanding proposal as one of the solutions to interference with 800 MHz Band public safety systems, it is important for it adopt a rebanding approach that maintains the full spectrum rights presently enjoyed by all General Category and Lower 80 EA licensees.

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<sup>99</sup> Consensus Parties, Supplemental Comment, December 24, 2002, p. 5.

<sup>100</sup> *Id.* at 7.

<sup>101</sup> See United Telecom Council filing on behalf of Thirteen Members of 800 MHz Users Coalition, Ex Parte Presentation, August 7, 2003, pp. 5-6.

<sup>102</sup> *Id.* at 5-6, 10-11, 13.

1. “One-Step” Movement Fits All General Category and Lower 80 EA Licensees and EA Markets

Preferred would recommend that in such a rebanding all General Category EA licenses comprising Channels 1-150 would move to Channels 571-600 in the Upper 200 Channels (821.2625-821.9875 MHz/865.2625-865.9875 MHz) if held by Nextel and available to be vacated, and then to the former NPSPAC Channels (Channels 601-720 as calculated on 25 kHz bandwidth basis). Under this approach, all General Category EA licensees, rather than only Nextel and Nextel Partners, would exchange their General Category EA frequencies for the former NPSPAC Channels on a 1:1 Clean or Unencumbered and Contiguous basis. If Channels 571-600 are not held by Nextel and therefore unavailable to be vacated in a particular EA market, then the General Category EA licensee would have the choice or election to move to (1) 1.9 GHz spectrum on a 1:1 Clean or Unencumbered and Contiguous basis<sup>103</sup>, or (2) the Upper 200 Channels beginning with Channel 401 on a 1:1 Clean and Contiguous Basis.<sup>104</sup>

Lower 80 EA licenses either would move, at the election of each licensee, either to (1) 1.9 GHz spectrum on a 1:1 Clean and Contiguous basis, or (2) Upper 200 Channels beginning with Channel 401 on a 1:1 Clean and Contiguous Basis, or could elect to remain in the Non-Cellular Block on their present channel assignments.

SMR, Business and Industrial/Land Transportation and Public Safety site-specific licenses held by General Category and Lower 80 EA licensees (in the case of such frequencies in the General Category Channels or Lower 80 Channels, these licenses would be in Frequency Blocks held by another EA licensee) would move, at the election of each licensee, either to (1) 1.9 GHz spectrum on a geographic “footprint” basis, or (2) the Upper 200 Channels beginning with Channel 401 on a geographic “footprint” basis.<sup>105</sup>

2. Provide Needed Operational and Technological Flexibility to SMR, Business and Industrial Land Transportation and Public Safety Licensees

SMR, Business and Industrial/Land Transportation and Public Safety site-specific licenses in Channels 1-150 held by other licensees would move to the Interleave Channels (Channels 151-400, 809.7625-815.9875 MHz/854.7625-860.9875 MHz) to be vacated by Nextel under the Consensus Parties’ Proposal on a 1:1 basis ensuring that replacement channels meet at least the level of “comparable facilities” as defined in Section 90.699(d) of the FCC’s Rules.

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<sup>103</sup> Preferred assumes that the 1.9 GHz spectrum to be allocated by the FCC would have a 30 kHz channel bandwidth or greater. In this *Ex Parte* Presentation, it is proposing a 1:1 kHz exchange on a Clean and Contiguous Spectrum basis.

<sup>104</sup> As noted above, Preferred would not oppose the Commission’s extending the new Cellular Block from Channel 401 to Channel 321. In such case, a General Category EA licensee could elect to move up to eighty (80) of its EA and site-specific frequencies to these Channels before moving any remaining General Category spectrum to either the former NPSPAC Channels or the Upper 200 Channels, beginning with Channel 401. Such alternative exchanges of spectrum would, of course, be on a 1:1 Clean and Contiguous basis.

<sup>105</sup> As noted above, Southern’s Business and Industrial/Land Transportation Channels were subject to an EIA which, upon its expiration, was converted into a geographic area license equivalent in spectrum rights to EA-Licensed Spectrum. As a result, Southern’s Business and Industrial/Land Transportation Channels would move in the same way as its other EA-Licensed Spectrum and be exchanged for Clean and Contiguous Spectrum either in the (1) 1.9 GHz band or (2) the Upper 200 Channels beginning with Channel 401.

Unlike the Consensus Parties' Proposal, each category of licensee would be granted operational flexibility and expansion possibilities through providing a five (5)-year period to file applications in a particular EA market for certain vacant frequencies within the Interleave Channels. Moreover, Preferred strongly favors the Commission granting SMR, Business and Public Safety licensees a one (1)-year election during which they either could (1) construct a system qualifying as a digital cellular system, or (2) obtain a firm commitment to qualify for treatment as a General Category or Lower 80 EA licensee.

If such a SMR licensee met either of such requirements, its frequencies would be moved to the Upper 200 Channels, if held by Nextel and available to be vacated, beginning with Channel 401 on a 1:1 Clean basis. In the case of a Business licensee, its frequencies would be moved to the Upper End of Channels 321-400 (814.0125-815.9875 MHz/859.0125-860.9875 MHz) in the Interleave Channels on a 1:1 MHz/Pops Equivalent basis. In the case of a Public Safety licensee, its frequencies would be moved to the Lower End of the Interleave Channels (Channels 151-320) (809.7625-813.8975 MHz/854.7625-858.9875 MHz) on a 1:1 MHz/Pops Equivalent basis.

### 3. Additional Spectrum for Public Safety and Critical Infrastructure Licensees

Under Preferred's Improvements in most EA markets, Nextel's vacated spectrum comprising Channels 201-208, 221-228, 241-248, 261-268 and 281-288, or a total of forty (40) Channels, would be reserved for Public Safety and Critical Infrastructure licensees.<sup>106</sup> Under its approach, Channels 121-150 would be reserved for Public Safety licensees in every EA market. Moreover, in most EA markets, Nextel's vacated spectrum comprising Channels 301-308 and 321-328 would be reserved for Business and Industrial/Land Transportation Category licensees. Unlike the Consensus Parties' Proposal, which creates additional spectrum only for Public Safety licensees in the 800 MHz Band primarily through the confiscation of one of the two primary spectrum rights held by Non-Nextel General Category and Lower 80 EA licensees, Preferred's Improvements makes additional spectrum available for Public Safety and Critical Infrastructure licensees in every EA market and maintains the full spectrum rights of all General Category and Lower 80 EA licensees in every EA market.

### 4. Comparison of Preferred's Improvements to Consensus Parties' Proposal

Preferred maintains that its Improvements Proposal addresses fully the legal, practical and mathematical infirmities of the Consensus Parties' Proposal with respect to rebanding of the 800 MHz Band. It treats all General Category and Lower 80 EA licensees similarly and therefore minimally disrupts the Commission's present licensing structure as directed by the FCC in its *NPRM* directive. Moreover, it works practically and mathematically in every EA market regardless of FCC Auction #34, #36 and #43 results. In addition, it requires less movement of Business and Industrial/Land Transportation and Public Safety licensees and therefore less relocation costs than does the Consensus Parties' Proposal. Finally, as the Channel Movement Charts demonstrate, it provides more additional spectrum for Public Safety within the 800 MHz Band itself on a nationwide basis than does the Consensus Parties' Proposal. Preferred

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<sup>106</sup> Critical Infrastructure licensees could be defined as those categories of private land mobile users that meet the definition of "public safety radio services" in Section 309(j)(2).

therefore submits that its Improvements far more closely meet the Commission's *NPRM* directive than does the Consensus Parties' Proposal.

#### B. Provides Full Funding for the Realistic Costs of 800 MHz Rebanding

Together with many other commenters, Preferred believes that it is imperative for the Commission to base its rebanding determination upon its probable realistic costs. As a first step toward that end, Preferred strongly would recommend that the FCC contact the major public safety and other equipment manufacturers to obtain from them detailed information concerning the infrastructure equipment and subscriber equipment sold by them to SMR, Business and Public Safety licensees operating in Channels 1-120, Public Safety licensees operating in the NPSPAC Channels and Channels 321-400 and estimates of their probable software research and development costs. Preferred also would urge the Commission to seek detailed relocation cost estimates from the major Public Safety and Critical Infrastructure licensees, many of whom have questioned the Consensus Parties' cost estimate methodology and assumptions.<sup>107</sup> Preferred also would suggest that the FCC seek such information from Public Safety and Critical Infrastructure licensees operating in the Canadian and Mexican Border Areas.

Without repeating the criticism of the Consensus Parties' methodology and estimates, it is apparent to most industry participants that Appendix A to the Consensus Parties' Supplemental Comment on December 24, 2002 is incomplete and misleading. Despite such criticism and the subsequent inclusion of additional cost line items such as the software research and development costs of the major public safety equipment manufacturers, the Consensus Parties have not raised their estimate of the total relocation costs of their Proposal. Rather, in an *Ex Parte* Comment filed on November 3, 2003, Nextel proposed to shore up its promised contribution of \$850 million by proposing to pay \$100 million of this amount into an escrow account and provide an irrevocable letter of credit for \$750 million balance to be into a relocation trust fund over a seven-year period.

On the same day, Motorola filed a letter with the Commission in response to its request for certain technical and other information. In this letter Motorola represented that for a variety of reasons thirty percent (30%) of its radios sold to public safety licensees operating in the NPSPAC Channels would need to be replaced rather than reprogrammed. Since Motorola is the leading public safety equipment manufacturer and the Consensus Parties' total relocation cost estimate was based upon the assumption that only one percent (1%) of public safety radios would need to be replaced, it became obvious that the probable realistic costs of their rebanding proposal far exceeded their \$850 million estimate.<sup>108</sup>

Once the Commission determines the probable realistic costs of rebanding, which Preferred has concluded lies between \$3.192 billion and \$3.360 billion, Preferred would strongly urge it to

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<sup>107</sup> See generally, United Telecom Council on behalf of Thirteen Members of 800 MHz Users Coalition, *Ex Parte* Comment, August 7, 2002.

<sup>108</sup> Assuming that Motorola sold seventy percent (70%) of the radios used by Public Safety licensees in the NPSPAC Channels during the past ten years, its thirty percent (30%) replacement estimate would translate into the replacement of 504,763 radios at a cost of \$3,000 per radio or a total cost of \$1.514 billion. See Concepts To Operations, Inc., Relocation Cost Analysis of the Consensus Parties' Rebanding Proposal attached hereto as **Exhibit K**.

work together with Preferred, other commercial operators, Public Safety organizations and licensees and Critical Infrastructure organizations and licensees in seeking Congressional legislation to (1) earmark up to \$2.4 billion in proceeds from the future 700 MHz Band and 1.75 GHz Band Auctions toward payment of a portion of the 800 MHz Band relocation costs and (2) appropriate an amount to be determined to provide an incentive for UHF broadcasters operating in Channels 60, 63-64 and 68 to vacate such spectrum early and utilize HDTV transmission on their respective digital broadcasting licenses. Such an incentive would provide the means for Public Safety licensees to obtain early access to the 24 MHz of 700 MHz Upper Band spectrum previously allocated to it by the Commission. With such early access, the Public Safety community could begin working much sooner than otherwise would be possible to implement a nationwide interoperable public safety system.

Nextel has promised up to \$850 million toward total relocation costs and has buttressed such offer as indicated above in its November 3, 2003 filing. In its Comment filed on September 25, 2003, Preferred offered to contribute up to \$50 million to defray total relocation costs. In this filing, Preferred increases its offer up to \$150 million to be paid over a seven-year period following the date when the FCC's Report and Order adopting Preferred's Improvements would become final.<sup>109</sup>

#### C. Provides for Participation by All General Category and Lower 80 EA Licensees in Allocation of 1.9 GHz Spectrum

As explained above, the spectrum "logjam" resulting from the movement of 11.5 MHz of EA-Licensed Spectrum and the varying (up to 0-9 MHz of spectrum) Site-Licensed Spectrum held by the Nextel Control Group and Non-Nextel Control Group EA licensees in one hundred seventeen (117) EA markets in which approximately 133.459 million persons resides, an allocation by the Commission of a minimum of 5.5 MHz of 1.9 GHz spectrum is required as an integral part, or condition precedent, of 800 MHz rebanding that respects the full spectrum rights of Non-Nextel Control Group EA licensees, is practical and mathematical. Preferred therefore maintains that all General Category and Lower 80 EA licensees should be entitled to participate in the allocation of such 1.9 GHz band spectrum in EA markets in which they share EA-Licensed Spectrum. Preferred understands that some, or perhaps many Non-NCG EA licensees would not wish to avail themselves of an allocation of such Spectrum. To account for such cases, Preferred would recommend that the FCC provide that each General Category and Lower 80 EA licensee would have the election to receive an allocation of either 1.9 GHz band spectrum or,

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<sup>109</sup> If the Commission decides not to adopt a Rebanding Proposal that moves all General Category and Lower 80 EA licensees similarly and accept Preferred's offer to (1) forego reimbursement of its own relocation costs, (2) contribute up to \$150 million over a seven (7)-year period to defray total 800 MHz and relocation costs, (3) return 900 MHz SMR spectrum in certain MTA markets, and (4) in certain EA markets, lose 800 MHz frequencies in exchange for the allocation of 1.9 GHz spectrum discussed above, Preferred alternatively would submit that its offer in its September 25, 2002 Comment and in this *Ex Parte* Presentation otherwise has triggered the competitive bidding mutual exclusivity provisions of Section 309(j) of the Communications Act of 1934, as amended. Given the public interest considerations in minimizing, if not eliminating, interference with Public Safety and Critical Infrastructure systems and Preferred's proposed contributions, it believes that the Commission would have the statutory authority under Section 309(j) to limit eligibility to participate in such Auction to only those General Category and Lower 80 EA licensees satisfying one or more of the four conditions set forth immediately below.

alternatively, an identical amount of spectrum within the Upper 200 Channels in the new Cellular Block. Under either alternative, the electing EA licensee would be allocated new Cellular Block Spectrum on a 1:1 Clean and Contiguous basis.

Moreover, in this proceeding, the Commission is seeking to move General Category EA and Lower 80 EA licensees and other licensees to address the interference experienced by Public Safety and other licensees in the 800 MHz Band and to rationalize the Band by separating Low-Site and Low-Power systems (“Cellular Systems”) from High-Site and High-Power systems (“SMR Systems”). To facilitate such movement and to treat all such EA licensees equitably, the FCC effectively is asking, rather than ordering, these EA licensees to undertake acts beyond the terms and conditions of their respective licenses and refrain from actions permitted by such licenses. The Commission is requesting such undertakings from these licenses because they go beyond its authority to order or require them. For example, the Commission is seeking to cover the probable realistic costs of at least a portion of the total 800 MHz Band relocation costs by asking these EA licensees to forego their own relocation costs and pay a portion of the total relocation costs. The FCC also effectively is requesting that some of these EA licensees return 800 or 900 MHz spectrum in certain EA markets to provide enough spectrum to accommodate SMR, Business and Public safety site-specific licensees. Finally, in certain EA markets, the Commission is asking certain EA licensees such as Preferred to lose 800 MHz frequencies. In other words, to affect an 800 MHz rebanding, the FCC is asking these EA licensees to agree to modify their licenses.

Preferred strongly believes that since Nextel and its Control Group lack sufficient spectrum to accommodate the movement envisioned by either the Consensus Parties’ Proposal or Preferred’s Improvements and is committing to pay only one-quarter of the Consensus Parties Proposal’s probable realistic costs, all General Category and Lower 80 EA licensees should be eligible to receive an allocation of 1.9 GHz spectrum. Furthermore, if such licensees meet one or more of the following conditions, they would be allocated an additional portion of the 12 MHz of 1.9 GHz spectrum to be allocated in EA markets in which they won a Frequency Block license in FCC Auction #34 and/or #36 and in certain cases, adjoining EA markets:

- Promise to forego reimbursement of own relocation costs;
- Promise to contribute funds toward payment of total relocation costs;
- Return of Certain 800 and 900 MHz spectrum to the FCC; and
- In certain EA markets, loss of 800 MHz frequencies.

Preferred meets all four of the above conditions. It will forego reimbursement of its own relocation costs, which will be incurred when the Commission’s Report and Order in this proceeding becomes final following the resolution of all regulatory and judicial challenges to its decisions set forth in such Report and Order. Moreover, Preferred promises to pay up to \$150 million to defray the total 800 MHz Band relocation costs. In addition, it will return certain 900 MHz SMR Major Trading Area market licenses to the FCC. Finally, in the Puerto Rico EA market it will lose certain 800 MHz frequencies whether under the Consensus Parties’ Proposal or Preferred’s Improvements. To modify its EA and site-specific licenses, Preferred would receive an allocation of 8.00 MHz of 1.9 GHz spectrum in the Puerto Rico EA market and 6.00 MHz of the total 12 MHz of such spectrum to be allocated in EA markets in which Preferred

won a Frequency Block license in FCC Auction #34 and in certain other EA markets in which 70 million persons reside<sup>110</sup>.

#### D. Provides for Greater Input and Involvement By Public Safety Organizations and Licensees in Administering Movement

Communication provides a vital function, which supports the provision of police, fire and emergency medical public safety services in responding to emergency situations and for the provision of other municipal, county and state services. Once a call for public safety services is received, response action must be taken. This generally involves dispatching of proper personnel/vehicles to cope with the involved incident. The overall system, from input to response, must provide effective and efficient communication in order to cope with emergency situations and conduct of day-to-day operations.

Mobile and portable radio communications play a primary role in public safety communications systems. The channel waiting time, coverage and interference problems of these radio systems are important factors in determining the ability of mobile and portable radios to perform this role. Overall reliability of the radio system is paramount in these communications systems.

The process of rebanding or changing frequencies of mobile and portable radios, in certain cases, can be easily accomplished by all personnel switching their units by just changing the position of a selector switch at the same time that base equipment is switched to new frequency(s). This way no calls are lost and the overall system reliability remains high. This approach assumes that the radios cover the same bands to which the relocation is to occur and that turning a selector switch changes the operating frequency(s). This approach also can involve programming each radio to operate on the new frequency(s) and should lead to little or no downtime if there are spare radios that can be exchanged (one or several at a time) for presently-used portable and mobile radios. However, if filter cavities are used for receiver multiplexer and transmitter combiners, the changeover to new rebanding frequencies becomes more complex.

The changeover will require retuning of cavities and use of different cable lengths for receiver multiplexers and transmitter combiners. The retuning and recabling can take about one (1) to two (2) hours per site if the cables are pre-cut to proper lengths and all connections are installed. Reduced coverage will occur while each site is modified. This can be a serious problem in areas where the coverage becomes very poor. If several sites are involved the

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<sup>110</sup> Preferred believes that the FCC has ample statutory authority under Sections 316 and 309 of the Communications Act to so modify General Category and Lower 80 EA licensees' authorizations as a class as long as it provides a reasoned explanation how such modification serves the public interest. *See* Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1318 (D.C. Cir. 1995). Preferred also believes that most of the commenters criticizing the Consensus Parties' proposal to allocate 1.9 GHz band spectrum as part of a rebanding of the 800 MHz band would lack the requisite legal standing to raise their arguments on an appeal of the Commission's Report and Order to the D.C. Court of Appeals, or another federal appellate court. *See* Ranger Cellular v. FCC, 348 F.3d 1044 (D.C. Cir. 2003)(if it is "merely speculative" that injury will be redressed by a favorable decision, complainants would lack standing to challenge FCC's allocation of 1.9 GHz spectrum to 800 MHz General Category and Lower 80 EA licensees modifying their authorizations as set forth above.)

changes could be made simultaneously at all sites, but unless duplicate base equipment is used the system would be off the air for a long time period. Another approach might be to use a zone-by-zone cutover at a specific time but the cutover would require all subscriber units assigned to that zone to change frequency at the same time. This would only affect operations in one zone at a time. This would be repeated until the entire area is cutover.

If the system is trunked a cutover of several channels, perhaps one half of the total, could be done leaving the area with significantly less traffic handling capacity. When all of these channels are changed the subscriber units would change to the new frequencies and the remainder of the base stations and repeaters would then be changed. The reduced capacity would continue until all channels have been cut over.

In a number of cases new subscriber equipment and fixed-end equipment may be required because of the inability of present equipment to handle the rebanded frequencies. If this is the case both present and rebanded equipment must be in place and once this is accomplished cutover to the rebanded frequencies can occur. This may present problems for space in vehicles for accommodating both systems. In addition space at the various sites may be inadequate to handle both present and rebanded equipment. Additional equipment shelters may be required.

Considering that a mix of the above and other situations can occur in a region, it is questionable that each specific region can be rebanded in a short period of time as indicated in the Consensus Parties Proposal without serious degradation in operational capabilities of safety of life services.

## **V. CONCLUSION**

In several of their respective comments and reply comments, the Consensus Parties and Nextel respectively assert that the Consensus Parties' Proposal is the only detailed, practical and sustainable means for improving public safety communications in the 800 MHz band and meeting all of the Commission's objectives in this proceeding.<sup>111</sup> As this Presentation demonstrates, if the Commission determines to adopt a version of rebanding as one of the solutions to interference experienced on an increasing basis by Public Safety, Critical Infrastructure and other licensees in the 800 MHz band, the Consensus Parties' Proposal as presently written fails on several critical issues to provide a workable model. Preferred has sought through its Improvements to address these critical issues and provide solutions that it believes far better protect the full spectrum rights of all General Category and Lower 80 EA licensees, are based on realistic cost assumptions and estimates and provide both Public Safety and Critical Infrastructure licensees more additional spectrum than does the Consensus Parties' Proposal. Preferred therefore urges the Commission to include Preferred's Improvements as part of any rebanding proposal it should choose to adopt in this Proceeding.

Respectfully Submitted,

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<sup>111</sup> See, e.g., Nextel Communications, Inc., Reply Comment, February 25, 2003, p. 28.

PREFERRED COMMUNICATION SYSTEMS, INC.

/s/ Charles M. Austin  
Chief Executive Officer