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April 8, 2004

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On April 2, 2004, Nextel Communications, Inc. ("Nextel") submitted a Supplemental Response in the above-captioned proceeding.¹ The Supplemental Response (1) claims the Federal Communications Commission has no authority to require Nextel to remedy the problems it is causing to public safety; (2) repeats implausible claims that contiguous spectrum is not more valuable than interleaved spectrum; and (3) challenges the adequacy of the Verizon Wireless In Band Realignment proposal in providing a suitable solution to public safety interference. These claims have no merit. As discussed in detail below:

- the Commission has clear authority to require Nextel to pay for 800 MHz rebanding costs;
- independent valuations of the "Consensus" Plan confirm that Nextel would receive a windfall if the proposal were adopted and that contiguous spectrum that Nextel would obtain is far more valuable than the non-contiguous spectrum Nextel would give up;
- Nextel's further response to the Kane Reece analysis of the windfall Nextel would receive is flawed and not credible; and

¹ *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Response of Nextel Communications, Inc., WT Docket No. 02-55 (filed April 2, 2004) ("Supplemental Response").

- the In Band Realignment proposal would provide precisely the same interference solution as the Consensus Plan, but with more certainty and less risk of litigation.

I. THE FCC CLEARLY HAS AUTHORITY TO REQUIRE NEXTEL TO PAY FOR 800 MHZ REBANDING COSTS

Nextel claims that the FCC lacks legal authority to require it to pay for the costs of relocating public safety and other users in order to alleviate interference caused by its deployment of cellular-type operations in the 800 MHz band. However, as documented in the attached white paper (an amended version of the filing of February 27, 2004) there is over half a century of Commission precedent for the proposition that a licensee causing interference to other users—even if operating consistent with license terms and not seeking “new” spectrum—has the obligation to pay for fixing the problem. Accordingly, the Commission clearly does not need Nextel’s consent to actions necessary to protect public safety interference from its operations.

II. INDUSTRY ANALYSTS HAVE CONCLUDED THAT NEXTEL WOULD SIGNIFICANTLY BENEFIT FROM THE CONSENSUS PLAN, AND THE FCC, NEXTWAVE, AND ANALYSTS ALL AGREE THAT CONTIGUOUS SPECTRUM IS MORE VALUABLE TO NEXTEL THAN NON-CONTIGUOUS SPECTRUM

The Commission has several times acknowledged that contiguous SMR spectrum holdings are more valuable than non-contiguous ones.² In addition, Nextel previously and repeatedly

² See *Development of SMR Systems in the 800 MHz Band, Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 17556, ¶ 12 (1999) (“[B]locks of contiguous spectrum allow for more flexibility in terms of technological applications and innovation. Single channel licensing would not foster the kind of technological advancements that would allow SMR licensees, which typically operate multichannel systems, to compete with other CMRS licensees.”) (footnote omitted); *id.* at n.32 (citing Nextel support for the licensing of contiguous spectrum); *Development of SMR Systems in the 800 MHz Band, Third Report and Order*, 9 FCC Rcd 7988, ¶ 103 (1994) (“[A]ssigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers.”); *Development of SMR Systems in the 800 MHz Band, Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970, ¶ 77 (1994) (“[B]ecause of the non-contiguous nature of the channels, there does not appear to be a high degree of interdependency among them; and,

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has maintained that its interleaved spectrum is less valuable than contiguous spectrum.³ For example, Nextel has stated: “The Commission already recognized that this fragmented SMR spectrum is ‘not currently equivalent to cellular or broadband PCS spectrum.’ Because the channels are encumbered, non-contiguous and assigned on a site-by-site basis, an SMR licensee faces more obstacles than its competitors in configuring a wide area system.”⁴ Similarly, Nextel also previously asserted that “the Commission in 2001 still cannot equate SMR channels with exclusive use, contiguous cellular or PCS channels available throughout entire Major Trading Areas (“MTA”), Basic Trading Areas (“BTA”) or Metropolitan Statistical Areas (“MSA”).”⁵

Moreover, a number of independent financial analyst reports confirm that the grant of contiguous spectrum would confer a sizable competitive benefit to Nextel. According to Bear Stearns:

We believe that Nextel would use this to eventually build a CDMA 3G network for voice and data which, as discussed above, could alleviate growth problems for the company but cost as much as \$3 billion in capital. Alternatively the

(Continued . . .)

the limited geographic scope of the licenses is likely to make them less valuable than the licenses for the MTA blocks.”).

³ In addition to its various filings with the FCC, Nextel noted in its 2003 10-K filing with the Securities and Exchange Commission (“SEC”): “We may not be able to obtain the spectrum necessary to implement new technologies or pursue our long-term business plan. . . . Certain next generation technologies that we may deploy in the future would require that we hold contiguous spectrum before those technologies could be deployed on our network, making it necessary for us to acquire contiguous spectrum before we could provide additional products or services to our customers or provide other benefits that can only be provided with these technologies.” *Form 10-K of Nextel Communications, Inc.*, filed with the SEC on March 11, 2004, at 29-30.

⁴ Reply Comments of Nextel Communications, Inc., WT Docket No. 98-205, at 4 (filed June 4, 2002) (footnotes omitted).

⁵ Comments of Nextel Communications, Inc., WT Docket No. 01-14, at 3 (filed May 6, 2002).

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company could use the spectrum for a high-speed broadband strategy, which it is testing today in Virginia using leased 1900 MHz spectrum. We would view the approval of the spectrum swap as a transforming event for Nextel.⁶

Similarly, Legg Mason estimates that “the net benefit to Nextel will fall into the \$1.5 billion to \$3.2 billion range or approximately \$1.31 to \$2.77 per share.”⁷ Legg Mason also predicts that “the new spectrum would give the company more operational flexibility not only to formulate a data strategy but also to more effectively manage its voice service and improve quality over time.”⁸

Likewise, with regard to the Consensus Plan, Moody’s Investor Services reports:

Moody’s believes that should the Consensus Plan be adopted as proposed this would bring tremendous long term benefits to the company through the aggregation of its spectrum holdings into two contiguous blocks, one adjacent to the cellular band and the other adjacent to the PCS band. This would permit the company to more effectively utilize its spectrum and also to invest in next generation technologies on a more even footing with its competitors.⁹

Finally, Morningstar predicts that by “gain[ing] a chunk of valuable spectrum in the 1.9-GHz band,” Nextel would “lower its capital spending, reduce caller interference, and [become] a more attractive acquisition target.”¹⁰ Each of these market analysts has

⁶ Bear Stearns, *Spectrum Swap Reported in Nextel’s Favor*, Mar. 9, 2004, at 3.

⁷ Legg Mason, *Logjam Breaks on FCC Consideration of Nextel Spectrum Swap*, Mar. 10, 2004, at 2.

⁸ *Id.* at 3.

⁹ Moody’s Investor Service, *Moody’s Assigns B2 Rating to Nextel Communications \$500 Million 5.95% Senior Notes Due 2014*, Mar. 24, 2004.

¹⁰ Morningstar Analyst Report, Feb. 25, 2004, at 2.

concluded that adoption of the “Consensus Plan” by the FCC will confer a significant competitive benefit to Nextel.

III. NEXTEL’S LATEST ATTEMPT TO ATTACK THE KANE REECE APPRAISAL IS ITSELF SEVERELY FLAWED

Nextel’s Supplemental Response states that “Nextel would receive little direct value, if any, from replacing 8.5 MHz of non-contiguous spectrum with 6 MHz of contiguous spectrum.”¹¹ In support of this conclusion, Nextel cites a recently submitted report prepared by Dr. Gregory Rosston.¹² However, as set forth below, Dr. Rosston’s analysis is flawed, and Nextel’s assertion is undermined by the Commission’s own prior findings, Nextel’s past representations, as well as the recent assessments of independent industry analysts.

In the attached report, Kane Reece Associates describes how Rosston’s analysis is not consistent with standard appraisal industry and investment banking industry practice. Moreover, it incorporates numerous flawed assumptions, invalid application of financial and economic theory, and logical inconsistencies. Kane Reece points out that Rosston wrongly focuses on an investor value definition for the spectrum Nextel proposes to give up while employing an erroneous methodology for determining the fair market value of the spectrum it proposes to receive. Fair market value is the only spectrum valuation that is relevant to the Commission’s analysis in this proceeding, and the methodology employed by Kane Reece is the only one that is consistent with standard practice. As Kane Reece notes, this methodology is consistent with Nextel’s own calculations of its license value in its 10K filing to the SEC.

As Kane Reece explains, Rosston also wrongly assumes that its appraisal is dependent upon Nextel deploying CDMA, and that the costs associated with transitioning to this new technology were not included in Kane Reece’s analysis. Since Kane Reece conducted a fair market value analysis, it did not make any assumptions about who would use the spectrum or what specific technology would be deployed. However, wireless infrastructure costs associated with transitioning to new technology are already included in Kane Reece’s analysis.

¹¹ Supplemental Response, 15.

¹² *Improving Public Safety Communications in the 800 MHz Band*, Ex Parte Letter of Nextel Communications, Inc., WT Docket No. 02-55 (filed March 18, 2004).

While Rosston acknowledges that there is a difference in value between contiguous and non-contiguous spectrum, he does not attempt to quantify this value and simply argues that Nextel may choose not to deploy the new, more efficient technologies that contiguous spectrum would allow, and thus, would not enjoy the benefit of that higher valued spectrum. Kane Reece notes that the value of the spectrum is determined by its potential use, not by how Nextel chooses to use it. A parcel of land in Manhattan does not have a low value simply because the current landowner chooses to use it for a run-down warehouse when its potential use is much greater.

IV. THE IN BAND REALIGNMENT PLAN IS BASED UPON NEXTEL'S OWN CONSENSUS PLAN

Nextel also asserts that the Verizon Wireless In Band Realignment proposal would not eliminate public safety interference, would disrupt public safety communications, would not provide additional spectrum for public safety operations, and reduces Nextel's usable 800 MHz spectrum allocation.¹³ However, our proposal would realign the 800 MHz band in exactly the same way as recommended by the Consensus Plan. The same process described by the Consensus Plan to clear the lower band of current incumbents, to move NPSPAC licensees to this cleared spectrum, and to relocate Nextel to the vacated NPSPAC spectrum is the very same process that would be employed under In Band Realignment. The key point of our In Band Realignment proposal is that spectrum outside of 800 MHz is not required to facilitate band realignment. If In Band Realignment would not eliminate public safety interference, but would disrupt public safety communications, then the Consensus Plan suffers from these same infirmities. In Band Realignment would also provide the same amount of additional spectrum for public safety in the 800 MHz band. Like the Consensus Plan, it would require Nextel to give up 2.5 MHz of spectrum.

Nextel contends that In Band Realignment will not resolve interference because it does not provide for additional spectrum outside of the 800 MHz band. However, any need for such "green space" spectrum is remarkably absent from Nextel's Consensus Plan. In its proposed Consensus Plan, Nextel describes the process by which the 800 MHz band would be realigned to separate cellularized ("low site") and non-cellularized ("high site") systems. During Phase I of realignment, all incumbent licensees in the 806-809/851-854 MHz band are relocated either to spectrum vacated by Nextel or to other spectrum in the 800 MHz band. During Phase II, the incumbent public safety licensees ("NPSPAC") at 821-824/866-

¹³ Supplemental Response at ii, iii.

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869 MHz are moved to the 806-809/851-854 MHz block that was vacated during Phase I, and Nextel moves into the vacated public safety spectrum. Consequently, as proposed by the Consensus Plan, the only “green space” required to facilitate realignment of 800 MHz is in the 800 MHz band. This is provided by Nextel voluntarily vacating spectrum in the lower band. As described in the Consensus Plan, the 1.9 GHz spectrum is not required as “green space,” and in fact won’t even be available for use immediately.

Nextel claims that In Band Realignment would reduce the amount of useable spectrum available to Nextel. First, and foremost, In Band Realignment would reduce Nextel’s 800 MHz spectrum holdings by the same amount proposed under the Consensus Plan – i.e., 2.5 MHz. Since this arrangement was proposed by Nextel, we find no merit in its current claim that the loss of such spectrum would “greatly hamper Nextel’s ability to serve its customers.” Second, as we have noted previously, the realignment of 800 MHz will provide Nextel with substantially improved spectrum that would increase, not decrease, its effective use. Setting aside these issues, we do not believe that it would be necessary to take spectrum from Nextel on a permanent basis to facilitate realignment. In Band Realignment is possible, in the same manner described by the Consensus Plan, without increasing or decreasing anyone’s spectrum holdings at 800 MHz.

In short, despite any protestations by Nextel, in band realignment simply modifies the Consensus Plan in one significant manner – it eliminates the need for the 1.9 GHz band to be used to resolve interference caused by Nextel in the 800 MHz band. If there are limitations or other deficiencies in the technical merit of in band realignment, they would apply equally to the Consensus Plan and should be borne by the party causing harmful interference to public safety entities and the source of the plan – Nextel.

Sincerely,

/s/

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