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NEXTEL®

April 22, 2004

Via Electronic Filing

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

Re: WT Docket No. 02-55
Written Ex Parte Presentation

Dear Ms. Dortch:

Nextel Communications, Inc. ("Nextel") hereby responds to Verizon Wireless' ("Verizon's") two most recent attempts to delay and distract the Federal Communications Commission (the "Commission") from completing its efforts to improve public safety communications in the 800 MHz band.

Verizon latest suggestions – that the Commission assign Nextel replacement spectrum at 2.1 GHz rather than at 1.9 GHz, and its purported offer to bid $5 billion in an auction of the 1.9 GHz spectrum[1] – are intended to derail the Commission's deliberations and delay its decision. Verizon's motive is to use this proceeding to create and perpetuate a competitive advantage over Nextel in offering advanced wireless services. Verizon's actions will cause our nation's first responders to continue to face interrupted, garbled and unintelligible radio communications in life-threatening situations, *unless* the Commission sees through Verizon's transparent tactics and acts now to adopt the Consensus Plan.

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[1] *See* Letter from R. Michael Senkowski, Counsel to Verizon Wireless, to Marlene H. Dortch, FCC Secretary (Apr. 14, 2004) (disclosing discussion of 2.1 GHz band as replacement spectrum for Nextel); Letter from Margaret P. Feldman, Verizon Wireless, to John B. Muleta, Chief, FCC Wireless Telecommunications Bureau, attached to letter from Donald C. Brittingham, Verizon Wireless, to Marlene H. Dortch, FCC Secretary (Apr. 8, 2004) ("Feldman Letter"). (Unless otherwise indicated, all comments and *ex parte* presentations referenced herein were filed in WT Docket No. 02-55.)

There is almost nothing in the record in this proceeding on the use of the 2.1 GHz band as replacement spectrum for Nextel, and basic administrative law requires that the Commission develop a record on this issue before even considering this replacement option. This detour will only delay eliminating interference to public safety communications and the availability of additional 800 MHz channels for public safety use. The limited information available now, however, identifies numerous technical and operational obstacles that raise doubts about the use of this spectrum for CMRS operations; indeed, Verizon and other cellular carriers have rejected the use of some of this spectrum for advanced CMRS services.[2] At this late hour, the Commission should not shift its focus away from the band realignment elements that will truly yield a comprehensive, integrated solution to the interference problems currently plaguing public safety communications in the 800 MHz band. Replacement spectrum for Nextel at 1.9 GHz and Nextel's voluntary funding of public safety and private wireless relocation are two of these critical elements.

Verizon appears to be pursuing the same anti-competitive tactics in this proceeding as it used in Auction 35. One analyst has explained that Verizon's high Auction 35 bids were designed to block competitors from acquiring spectrum and to protect the dominant market share of Verizon's incumbent local exchange carrier parent.[3] Verizon's efforts in this proceeding are similarly anti-competitive. Verizon has consistently ignored the Consensus Plan's substantial public interest benefits, instead focusing almost exclusively on one aspect of the Consensus Plan in isolation – Nextel receiving replacement spectrum at 1.9 GHz.

Verizon's objective is to deny Nextel compensatory replacement spectrum in order to hamper Nextel's ability to compete, thus helping to advance Verizon's competitive position. A very recent analyst report from UBS Investment Research ("UBS Report") characterizes Verizon's offer to bid $5 billion at an auction of the 1.9 GHz spectrum as "just more noise."[4] The UBS Report states that "auctioning off the 1.9 GHz spectrum does nothing to solve the interference issue at 800 MHz."[5] It further states that "Verizon Wireless may not simply be in the market for nationwide spectrum, but could also be attempting to keep Nextel from getting it."[6] The UBS Report further indicates that an auction of the 1.9 GHz spectrum would be unlikely to attract any major

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2 *See infra* at 10; Comments of Verizon Wireless, ET Docket No. 00-258, at 8-9 (Apr. 14, 2003) ("Verizon 2.1 GHz Comments").

3 Lemay-Yates Associates, Inc., "Evolution of Spectrum Valuation for Mobile Services in Other Countries," at 10-11 (March 2003) ("Lemay-Yates Report"), *available at*: <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/microcellsch_c.pdf/$FILE/microcellsch_c.pdf>.

4 UBS Investment Research, "Nextel Communications, Inc. – Proposed Spectrum Swap: Working Through the Noise" at 4 (Apr. 15, 2004) ("UBS Report").

5 *Id.*

6 *Id.* at 11.

bidders aside from Verizon;[7] this would effectively amount to a "set-aside auction" for Verizon.

Verizon, of course, never acknowledges that Nextel has committed to contribute both spectrum and funding with a total value of $5.4 billion to effectuate the Consensus Plan. Verizon prefers to disregard the facts and assert that Nextel would receive 1.9 GHz spectrum for free. Not only is Verizon's allegation demonstrably false, it misses a critical point: Nextel's contributions solve the 800 MHz public safety interference problem and provide more channels for public safety communications; Verizon's purported auction bid would do neither. It would do nothing to solve the public safety communications problems that are at the heart of this proceeding.

The Commission should disregard Verizon's anti-competitive "noise." Although this proceeding has raised many issues and generated a voluminous record, as the UBS Report observes, "it can be simplified into one question: 'How does the FCC best solve the interference issue in the 800 MHz band?'"[8] The UBS Report recognizes that the Consensus Plan is the only viable plan before the Commission that will remedy this interference problem, and that Nextel's contributions in achieving this pressing public interest goal are "essential."[9] In return for these substantial contributions, it is reasonable, equitable, and lawful for Nextel to be assigned the 1910-1915/1990-1995 MHz band.

I. The Commission Does Not Have a Sufficient Record to Consider the 2.1 GHz Band as Replacement Spectrum for Nextel

In August 2002, the public safety community, private wireless parties, and Nextel filed the Consensus Plan with the Commission.[10] The Consensus Plan proposed a comprehensive realignment plan that would achieve all of the Commission's objectives in this proceeding. It would remedy 800 MHz interference, minimize disruption for incumbent licensees, and provide additional spectrum for public safety parties. Nextel committed to make critical contributions to this plan, including funding public safety and private wireless relocation costs and surrendering spectrum rights to facilitate the realignment process and provide public safety with additional spectrum.

In return for its substantial contributions, the plan proposed that Nextel be made whole by assigning it replacement spectrum at 1910-1915/1990-1995 MHz.[11] No other band has received any significant attention as replacement spectrum for Nextel in the

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7 *Id.* at 13.

8 *Id.* at 4.

9 *Id.* at 1.

10 Reply Comments of the Industrial Telecommunications Association, Inc., *et al.* (the "Consensus Parties") (Aug. 7, 2002) ("Consensus Plan").

11 Consensus Plan at 18-19.

record of this proceeding since the Consensus Plan was filed over 18 months ago. Although the Consensus Plan has generated considerable debate, and the Commission has considered variations to the Consensus Plan, the sole focus for purposes of providing Nextel replacement spectrum has been the 1.9 GHz band spectrum.[12]

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[12] In its "White Paper" submitted in November 2001, Nextel identified the possibility of being assigned replacement spectrum at 2020-2025/2170-2175 MHz. *Promoting Public Safety Communications – Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs*, ET Docket Nos. 00-258 and 95-18, IB Docket No. 99-81, and WT Docket No. 99-87, at 29 (Nov. 21, 2001) (the "*White Paper*"). This option made sense at that time, because it appeared that this replacement band would be adjacent to the projected Advanced Wireless Services ("AWS") downlink band at 2110-2170 MHz. Since Nextel's White Paper filing, however, circumstances have changed significantly. In July 2002, NTIA recommended that the AWS allocation be limited to 90 MHz (including 1710-1755 MHz), and four months later the Commission adopted that allocation at 1710-1755/2110-2155 MHz. *See* "An Assessment of the Viability of Accommodating Advanced Mobile Wireless (3G) Systems in the 1710-1770 MHz and 2110-2170 MHz Bands," National Telecommunications and Information Administration (July 22, 2002), *available at*: <http://www.ntia.doc.gov/ntiahome/threeg/va72222002/3Gva072202web.htm> ("NTIA Viability Report"); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23193 (2002). As a result of this allocation decision, there was no longer any adjacency between the replacement option at 2.1 GHz and this new AWS spectrum, thereby eliminating the equipment efficiencies and economies of scale that such adjacency would have engendered.

Meanwhile, the Commission itself in March 2002 proposed use of the 1.9 GHz band as replacement spectrum for Nextel, among other alternatives. *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels,* Notice of Proposed Rulemaking, 17 FCC Rcd 4873, ¶¶ 50-57 (2002) ("*NPRM*"). The Consensus Plan was then developed and proposed by the leading public safety and private wireless organizations and Nextel as a comprehensive solution to CMRS – public safety interference, and, as indicated above, this proposal included the assignment to Nextel of replacement spectrum at 1910-1915/1990-1995 MHz. In conjunction with the Consensus Plan, Nextel has agreed to take on substantially greater obligations with respect to funding 800 MHz incumbent relocation, the surrender of spectrum rights, and the prevention of post-realignment interference; these commitments have all been made with the understanding that its assignment to the 1910-1915/1990-1995 MHz band is part of this integrated solution. As stated above, since the filing of the Consensus Plan more than 18 months ago, no other band has received Commission consideration as replacement spectrum for Nextel in the record of this proceeding.

Verizon's latest antics are solely about delaying the Consensus Plan in order to delay Nextel receiving *any* replacement spectrum in this proceeding. Verizon is well aware that the record herein does not support substituting 2.1 GHz spectrum for 1.9 GHz replacement spectrum for Nextel; accordingly, considering this alternative would significantly delay a solution to the public safety interference problem while the Commission develops a record on whether awarding Nextel 2.1 GHz replacement spectrum is technically feasible and a fair exchange.

Thus, Verizon's tactics are intended to prevent Nextel, for as long as possible, from offering advanced wireless services on this replacement spectrum – whether 2.1 or 1.9 GHz – or even on its existing contiguous 800 MHz channels. Nextel has held up launching advanced wireless broadband services on its contiguous 10 MHz of 800 MHz channels, because doing so could exacerbate the public safety interference problem. Verizon is attempting to use Nextel's behavior as a responsible corporate citizen to perpetuate a competitive advantage over Nextel. Verizon's attempts to paint Nextel as using the public safety interference problem for corporate advantage are a smokescreen for Verizon's own attempts to manipulate Nextel's responsible corporate position and partnership with public safety to fatten its own bottom line.

In any case, substituting the 2.1 GHz band for the 1.9 GHz band as replacement spectrum for Nextel would not facilitate realignment of the 800 MHz band to remedy the public safety interference problem. It would not minimize disruption to incumbent licensees and it would not provide them additional spectrum. Nor would it address the legal issues that have arisen in this proceeding. In the past few months, various parties have debated whether the Commission has statutory authority to assign Nextel the 1.9 GHz channels as replacement spectrum under the Consensus Plan or a variation of the Plan; some have indicated that they will challenge in court a Commission decision assigning this spectrum to Nextel. The Commission should, of course, assess and respond appropriately to this threat, but assigning Nextel replacement spectrum at 2020-2025/2170-2175 MHz rather than in the 1.9 GHz band is irrelevant to this legal issue.[13] It would not reduce litigation risk one iota.

In fact, this change might actually *increase* the Commission's litigation risk. There have been a number of filings in this proceeding that attempted to estimate the value of Nextel's contributions to the 800 MHz realignment plan and the 1.9 GHz spectrum Nextel would receive in exchange. For example, Nextel submitted an expert study prepared by the Sun Fire Group LLC that concluded that Nextel's contributions and

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[13] Nextel has submitted filings in this proceeding demonstrating that such an assignment is lawful under sections 316 and 309(j) of the Communications Act and established precedent. *See* Reply Comments of Nextel at 61-68 (Aug. 7, 2002) ("Nextel August Reply"); Reply Comments of the Consensus Parties at 50-51 (Feb. 25, 2003); Letter from Regina M. Keeney, Counsel to Nextel, to Marlene H. Dortch, FCC Secretary, at 3-9 (Dec. 16, 2003).

the 1.9 GHz spectrum constitute a fair and reasonable exchange.[14] To support this conclusion, the Sun Fire Group study estimated the value of the 1.9 GHz spectrum Nextel would receive based on FCC spectrum auctions and private market transactions involving comparable 1.9 GHz spectrum.[15] Verizon and other parties have submitted their own estimates of the 1.9 GHz spectrum. *There is nothing in the record, however, regarding the value of the 2.1 GHz spectrum the Commission is apparently now considering as replacement spectrum for Nextel.* This band is worth significantly less than the 1.9 GHz spectrum. For example, as discussed further in Section II below, the 2.1 GHz band is at a higher set of frequencies and therefore has less favorable propagation characteristics for mobile communications.[16]

The Commission does not have a sufficient record to consider the 2020-2025/2170-2175 MHz band as replacement spectrum for Nextel. In contrast, a comprehensive record exists supporting the assignment of 1.9 GHz spectrum to Nextel in return for its contributions to the realignment plan. Nextel's substantial spectral and financial contributions are a critical element to achieving the Commission's objectives in this proceeding. Nextel's commitments, however, have been predicated on being assigned the 1910-1915/1990-1995 MHz band – *not* 2.1 GHz spectrum – to make it whole for its contributions.

Substituting the 2.1 GHz band as replacement spectrum for Nextel would thus undermine the Commission's ability to address the pressing public safety issues in this proceeding. Switching horses at this late date would only further the cellular industry's anti-competitive effort to derail the exhaustive work by the Commission, the public safety community, private wireless operators, and Nextel to develop a viable plan that fully addresses the 800 MHz interference problem. This shift would also play into Verizon's effort to acquire the 1910-1915/1990-1995 MHz band to further its own competitive interests,[17] a development that would do nothing to address the public safety issues before the Commission.

II. Technical and Operational Issues Raise Serious Doubts About the Use of the 2.1 GHz Band as Replacement Spectrum for Nextel

As Nextel has previously described, the 1910-1915/1990-1995 MHz band is encumbered with incumbent licensee operations, and the build-out of a commercial network in that spectrum would require a considerable investment.[18] The technical and

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[14] Dr. Kostas Liopiros, Sun Fire Group LLC, "The Consensus Plan: Promoting the Public Interest – A Valuation Study," attached to Letter from Lawrence R. Krevor, Nextel, to Marlene H. Dortch, FCC Secretary (Nov. 20, 2003) ("Sun Fire Group Study").

[15] Sun Fire Group Study at 20-22, 31-33.

[16] *Id.* at 19.

[17] *See* Petition for Auction of 1.9 GHz Spectrum, Verizon Wireless, at 2-3 (Mar. 31, 2004) (non-docketed filing) ("Verizon Petition for Auction").

[18] *See* Sun Fire Group Study at 19.

operational issues facing a new licensee at 2020-2025/2170-2175 MHz would be much more substantial, however, raising serious doubts about the feasibility of using that band as replacement spectrum for Nextel.

A. The Cost of Clearing Incumbents from the 2.1 GHz Band Would Be Significantly Greater than the Cost of Clearing the 1.9 GHz Band

While the 1910-1915/1990-1995 MHz band is significantly encumbered, the cost of clearing incumbent licensees from relocation spectrum at 2.1 GHz would substantially exceed the relocation costs at 1.9 GHz. As shown below, while there is no difference in Broadcast Auxiliary Service ("BAS") relocation costs at 1990-1995 MHz and 2020-2025 MHz, the cost of clearing point-to-point Fixed Service ("FS") licensees from the 2170-2175 MHz band would be far greater than Nextel's retuning obligation at 1910-1915 MHz.

If the Commission assigned Nextel replacement spectrum at 1.9 GHz, Nextel would be required to reimburse UTAM, Inc. for its *pro rata* share of the cost of clearing fixed microwave incumbents at 1910-1930 MHz.[19] This share would be approximately $15 million. In comparison, it would likely cost Nextel, at a minimum, more than $150 million to clear the 2170-2175 MHz band.[20] In this process, Nextel would not only have to relocate the approximately 900 microwave links used by incumbent FS licensees at 2170-2175 MHz, it would also have to retune those facilities' paired microwave links within the 2110-2155 MHz band, which last year was reallocated to AWS. While Nextel presumably would have the right to be reimbursed for its retuning costs at 2110-2155 MHz by AWS licensees subsequently initiating operations in that band, the Commission has not addressed this issue and the timing of such reimbursement would be uncertain. The AWS downlink band at 2110-2155 MHz is paired with AWS uplink spectrum at 1710-1755 MHz, and relocation complexities at 1.7 GHz – particularly the relocation of federal government communications users – will delay the licensing and deployment of AWS systems in these bands.[21] As a result, it would be many years before Nextel could expect compensation for its retuning efforts within the 2110-2155 MHz band.

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[19] *See, e.g.*, Reply Comments of Nextel Communications, Inc. and Nextel Partners Inc., at 18-19 n.43 (Feb. 25, 2003).

[20] This estimate assumes a direct retuning of existing 2.1 GHz microwave paths to 6 GHz. Nextel anticipates that the relocation of FS licensees to the 6 GHz band could be more expensive, however, given that propagation characteristics at 6 GHz support shorter hops than the 2.1 GHz band and therefore require the construction of additional towers and microwave links to support incumbent microwave communications paths. The record contains no information on these issues, and, accordingly, Nextel can only provide very preliminary estimates of 2.1 GHz FS retuning costs.

[21] *See, e.g.*, Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, NTIA, to Hon. Richard B. Cheney, Senate President (Apr. 15, 2004) (identifying major actions that should be completed to facilitate the effective deployment of AWS in the United States, including Congressional passage of a spectrum relocation fund for Federal systems, a Commission decision on relocation

In addition, while the record contains no information on how long FS retuning would take, Nextel's preliminary estimate is that this process would likely take three years or more to complete in the top 30 U.S. markets, at least one year longer than it would take to clear BAS licensees at 1990-2025 MHz. As a result, an extra year would likely elapse before Nextel could initiate service on its replacement spectrum, a fact that further militates against a conclusion that the 2.1 GHz band constitutes fair replacement spectrum for Nextel.

Another factor complicating FS relocation from the 2.1 GHz band is the limited availability of replacement spectrum for these FS microwave links. In the PCS relocation in the 1990's, microwave facilities in the 1.9 GHz band were moved to the 6 GHz band. This band has become congested in recent years, however, and the Commission has not developed any record in this proceeding concerning whether FS systems at 2.1 GHz could be accommodated in that band. Nextel is not aware of any study of the feasibility of additional microwave relocation to 6 GHz, and without such an analysis and record, a Commission order requiring Nextel to retune FS licensees to that band would create a substantial legal, financial, and practical risk for all parties involved.

B. Deploying a CMRS network at 2.1 GHz will be Substantially More Costly than a 1.9 GHz Deployment

Even after completing the band-clearing process, Nextel's cost of deploying a CMRS network in the 2.1 GHz band would be substantially greater than the cost of developing a wireless network at 1.9 GHz. First, the 2.1 GHz band has less favorable propagation characteristics than the 1.9 GHz band. As a result, Nextel would have to deploy more cell sites at 2.1 GHz than it would at 1.9 GHz in order to provide the same level of service.[22] This would add substantially to the cost of Nextel's network

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spectrum for these Federal operations, and a Commission auction of AWS spectrum); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Fourth Notice of Proposed Rulemaking, 18 FCC Rcd 13235 (2003); NTIA Viability Report.

[22] As pointed out in the Sun Fire Group Study, the lower value of higher spectrum frequencies is reflected in the Commission's decision relocating the Digital Electronic Message Service ("DEMS") from the 18 GHz band to the 24 GHz band. The Commission recognized that this higher frequency band would have inferior propagation characteristics that would impose greater operational burdens on DEMS licensees. The Commission consequently granted relocating DEMS licensees a *fourfold increase* in their spectrum assignments "to maintain DEMS system performance in the 24 GHz band at a level equivalent to that at which it had operated in the 18 GHz band." *In re Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service,* Memorandum Opinion and Order, 13 FCC Rcd 15147, ¶¶ 13, 45-54 (1998).

deployment, given that Verizon itself has stated that it "can cost between $800,000 and $1 million per site to add new base stations."[23]

Second, the cost of developing network and customer equipment for service at 2.1 GHz would be much higher than equipment costs at 1.9 GHz. Nextel would have to invest in the design and manufacture of new network infrastructure and handsets, since currently there is no terrestrial wireless equipment that can operate in this frequency band. Significantly, unlike at 1.9 GHz, Nextel's efforts at 2.1 GHz would not benefit from spectral proximity to an existing CMRS band. The Commission itself has pointed out that licensees at 1910-1915/1990-1995 MHz would enjoy certain advantages as a result of their location adjacent to the existing 1.9 GHz PCS bands; last year, the Commission noted that the pairing of these five megahertz band segments "could allow for use of existing PCS equipment with little modification and easier manufacture and design of equipment, thereby enabling significant economies of scale."[24]

In contrast, at 2020-2025/2170-2175 MHz, Nextel would be on a spectrum "island," far removed from any band currently featuring CMRS operations. In addition, the 150 MHz duplexer gap between Nextel's mobile and base station transmit bands would be unique in the commercial wireless industry. Given these factors, any manufacturer developing handsets and other equipment for Nextel's 2.1 GHz system would likely be doing so for Nextel's network alone, since such equipment could not be used in conjunction with any other CMRS network, thereby eliminating important manufacturing economies of scale.

While the interference probabilities and equipment requirements of the 1.9 GHz paired channels are well understood, Nextel would have to analyze the interference potential both to and from spectrum neighbors on either side of the proposed 2.1 GHz uplink and downlink channel blocks. As discussed above, the Commission's decision in the AWS proceeding changed the spectrum adjacencies Nextel anticipated in its White Paper in this proceeding.[25] Nextel would also have to undertake an extensive assessment of both network infrastructure and handset requirements at 2.1 GHz. This could involve seeking information or proposals from manufacturers, lab testing of network and handset designs and possible field assessments to definitively understand the technical requirements and the economics of this channel pairing for commercial mobile services. This process would take many months, if not longer.

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[23] Comments of Cellco Partnership, d/b/a Verizon Wireless, WT Docket No. 02-276, at 9 (Oct. 11, 2002) ("Cellco Comments").

[24] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶ 48 (2003).

[25] *See* note 12, *supra.*

In short, proponents of substituting 2.1 GHz replacement spectrum for 1.9 GHz are essentially attempting to relegate Nextel to spectrum that appears to carry with it significantly higher costs and potential operating obstacles. This proposed substitution offers no advantages in achieving the Commission's public interest goals of eliminating CMRS – public safety interference with minimal incumbent disruption and providing public safety additional spectrum; its purpose is to make Nextel less competitive with other CMRS providers.

Verizon itself is well aware of the competitive disadvantages of a 2.1 GHz deployment *vis-à-vis* the 1.9 GHz band, given its prior comments on the suitability of this spectrum for CMRS services.[26] *Verizon in fact has dismissed the utility of the 2020-2025 MHz band for CMRS operations and even suggested reallocating it to the Federal Government.*[27] In its comments on the *MSS Reallocation NPRM*, Verizon said that "there is no optimal band pairing arrangement available for the 2020-2025 MHz band that would make it particularly suitable for [advanced wireless services]. Consequently, the 2020-2025 MHz band may be best used if it were reallocated to the Federal Government, providing additional spectrum for the Department of Defense."[28] According to Verizon, this reallocated band could serve as a new home for Department of Defense systems relocating out of the 1710-1755 MHz band, thereby accelerating the clearing of that 3G spectrum.[29] Alternatively, Verizon suggested that the 2020-2025 MHz band could be reallocated to unlicensed uses.[30] All of these suggestions, of course, undercut Verizon's proposal that Nextel relocate its licensed CMRS operations to 2020-2025/2170-2175 MHz.

C. The Risk of New Interference from CMRS Operations at 2020-2025/2170-2175 MHz is Uncertain

As described above in Section I, since the Consensus Plan was filed more than 18 months ago, there has been scant discussion in this proceeding on the potential interference effects of new CMRS operations at 2020-2025/2170-2175 MHz. As a result, a record has not been developed as to whether such operations would threaten harmful interference to nearby systems or would itself be subject to such interference.

From what little *has* been filed in this proceeding on this issue, however, and from what was filed in April 2003 in response to the *MSS Reallocation NPRM*, it appears that CMRS operations at 2020-2025/2170-2175 MHz could raise interference concerns. In particular, early in this proceeding and in filings last April, the Society of Broadcast

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26 Verizon 2.1 GHz Comments at 8-9.

27 *Id. See also* Comments of Cingular Wireless LLC, ET Docket No. 00-258, at 9 (Apr. 14, 2003).

28 Verizon 2.1 GHz Comments at 8.

29 *Id.* at 8-9.

30 *Id.* at 9.

Engineers ("SBE") asserted that there is a significant risk of mutual interference between CMRS operations at 2020-2025 MHz and adjacent BAS operations above 2025 MHz.[31] Specifically, according to SBE, BAS transmitters on electronic newsgathering trucks could cause harmful interference to CMRS base station receivers at 2020-2025 MHz. In addition, SBE expresses concern that, in the absence of sufficient filtering in handsets, CMRS out-of-band emissions could cause harmful interference to refarmed BAS receive-only facilities above 2025 MHz. Other parties, such as the Wireless Communications Association International ("WCA") and Ericsson, have subsequently agreed with SBE's technical analysis.[32] In addition to potential BAS-CMRS interference issues at 2025 MHz, there does not appear to have been sufficient examination of the potential for interference to and from the likely neighbors of CMRS base stations at 2170-2175 MHz.

The Commission consequently lacks a sufficient record on these interference issues to assign Nextel replacement spectrum at 2020-2025/2170-2175 MHz. The record regarding the 1.9 GHz spectrum, in contrast, is fully developed, and the Commission can be confident that Nextel's operations in this band would not result in interference problems.

D. Assigning Nextel Replacement Spectrum in the 2.1 GHz Band Would be Arbitrary and Capricious and Delay Resolution of the 800 MHz Interference Problem

It is elemental administrative law that the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[33] In informal rulemakings such as the instant proceeding, "the most critical factual material that is used to support the agency's position must have been made public in the proceeding and exposed to refutation," and courts are required to "strike down, as arbitrary, agency action that is devoid of needed factual support."[34] In this case, the Commission has little or no

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[31] Comments of the Society of Broadcast Engineers, Inc. at 1-3 (May 6, 2002); Comments of the Society of Broadcast Engineers, Inc., ET Docket No. 00-258, at 1-2 (Apr. 14, 2003); Reply Comments of the Society of Broadcast Engineers, Inc. ET Docket No. 00-258, at 1-3 (Apr. 28, 2003).

[32] Comments in Response to Third Notice of Proposed Rulemaking, The Wireless Communications Association International, Inc., ET Docket No. 00-258, at 22-23 (Apr. 14, 2003); Reply Comments of Ericsson Inc., ET Docket No. 00-258, at 3 (Apr. 28, 2003).

[33] *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

[34] *Association of Data Processing Service Organizations v. Bd. of Governors of the Federal Reserve System*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J.); *see also Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, 738 F.2d 481, 484, 487 (D.C. Cir. 1984) (finding that an Interstate Commerce Commission order did

"relevant data" or "factual material" to support assigning Nextel replacement spectrum in the 2.1 GHz band, and, without such factual support, it is not in a position to provide a "satisfactory explanation" for this assignment. As described in the previous sections, the Commission lacks a sufficient record regarding the valuation of the 2.1 GHz spectrum, the cost of clearing incumbents and deploying a CMRS network from this spectrum, and the risk of interference from operations in this band.

There is consequently a significant risk that the Commission's 800 MHz realignment plan would be overturned on appeal if it assigned the 2.1 GHz spectrum as replacement spectrum for Nextel. This would only frustrate the Commission's goal of expeditiously remedying CMRS – public safety interference in the 800 MHz band. Nor should the Commission seek further comment on these 2.1 GHz issues at this very late date. The Commission issued its *NPRM* in this proceeding over two years ago, and has issued two public notices seeking further comment on the Consensus Plan since that time. Issuing yet another request for comment will delay a solution to the life-threatening problem of 800 MHz interference. It would also contradict the Commission's stated intent "to move swiftly" to remedy this interference problem,[35] which arose over four years ago and continues to place first responders and the public at grave risk.

III. The Commission Cannot Lawfully Impose an Involuntary Funding Obligation on Nextel

In recent filings, Verizon maintains that the Commission can require Nextel to pay the retuning costs of 800 MHz public safety and private wireless licensees, and that the Commission can take spectrum from Nextel without providing replacement channels. As demonstrated in Nextel's April 2, 2004 Supplemental Response to Verizon's 800 MHz-only in-band realignment proposal, however, there is no legal basis for a *requirement* that Nextel (or any CMRS licensee) cover involuntarily the retuning costs of public safety and private wireless licensees in the 800 MHz band.[36] Nextel formally incorporates herein the legal arguments contained in its Supplemental Response.

In fact, Verizon itself has recognized that the Commission cannot impose involuntary obligations on any particular licensee to fund the relocation costs of *other* licensees as part of 800 MHz band realignment. Specifically, Verizon stated earlier in this proceeding that the Commission could not require it and other cellular providers to pay a portion of the retuning expenses of incumbent 800 MHz licensees.[37] Verizon's

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not constitute reasoned decision-making where "the Commission lacked – and balked at gathering – sufficient record evidence, . . . blind[ing] itself to the facts necessary to its statutorily mandated duty").

35 *NPRM* ¶ 3.

36 Supplemental Response of Nextel Communications, Inc. at 3-6, 17-20 (Apr. 2, 2004) ("Supplemental Response").

37 Comments of Verizon Wireless at 16-17 (May 6, 2002). Verizon's comments were in response to the suggestion that Nextel and 800 MHz cellular licensees – all of

recent attempts to pin all retuning costs on Nextel while denying Nextel a fair exchange of replacement spectrum is irreconcilable with its previous position.

In another memorandum filed recently with the Commission, Verizon claims that an involuntary payment obligation can be imposed on Nextel pursuant to the Commission's "longstanding . . . 'last in fixes it' policy."[38] This argument is also without merit. As Nextel has previously explained, the "last in fixes it" principle is useful in isolated individual instances of anomalous interference.[39] It is not applicable where, as in the case of CMRS – public safety interference at 800 MHz, interference problems are inherent to a spectrum allocation scheme and are so widespread that they affect all of the services within that band. In any event, in many markets, Nextel converted to iDEN® service and was operating prior to the deployment of nearby 800 MHz public safety systems, which presumably would make the public safety systems responsible for the interference under Verizon's "last in fixes it" proposal. This untenable result further illustrates the inadequacy of a simplistic "last in fixes it" solution to a bandwide, allocation-based, technology-driven interference problem.

IV. The Commission Should Reject Verizon's Latest Posturing Concerning the 1.9 GHz Band

Verizon has filed numerous, contradictory proposals in this proceeding, none of which provides a feasible means of remedying 800 MHz interference.[40] Verizon has now filed a letter with the Commission opposing the assignment of the 1910-1915/1990-1995 MHz band to Nextel as part of the plan to realign the 800 MHz band. Its letter further claims that it would bid $5 billion for this 1.9 GHz spectrum at an auction.[41] Verizon states in its letter that its "willingness to bid depends on the Commission's designation of the band for a nationwide Broadband PCS license and the adoption of the PCS rules for the spectrum."[42]

The Commission should give no weight to Verizon's claims. Contrary to Verizon's assertions, the assignment of the 1.9 GHz spectrum to Nextel is a lawful and integral part of the plan to realign the 800 MHz band, fund public safety and private

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whom contribute to the interference problem – should jointly fund 800 MHz incumbent retuning costs, whether as part of an in-band-only realignment or a realignment involving replacement spectrum outside 800 MHz.

38 *See* Letter from R. Michael Senkowski, Counsel to Verizon, to Marlene H. Dortch, FCC Secretary, and attached memorandum entitled "The Federal Communications Commission Lawfully May Order Nextel to Pay the Costs of Relocating Incumbent 800 MHz Licensees" at 7 (Apr. 7, 2004).

39 *See* Nextel August Reply at 47-48.

40 Supplemental Response at 6-7.

41 *See* Feldman Letter.

42 *Id.* at 1-2.

wireless relocation costs, and provide additional spectrum to public safety communications. The record in this proceeding shows that these steps will result in enormous public interest benefits – on the order of *over $1 billion every year.*[43] This far exceeds Verizon's far-fetched valuations of the 1.9 GHz spectrum.

Verizon's posturing about how much it would bid for the 1.9 GHz spectrum ignores the public interest benefits of the Consensus Plan and is irrelevant to the Commission's public interest objectives in this proceeding. As the UBS Report observes, Verizon is incorrect in suggesting that "'cash is king' in this situation. . . . [T]he FCC's primary objectives are to solve the interference problem in the 800 MHz [band] and get public safety more spectrum with a plan that is self-financing. So, contrary to how Verzion Wireless is playing this out in the press, we don't think the issue is solely about money."[44] It is, in fact, about much more than this. It is about helping to ensure the safety of first responders and the public they serve through effective public safety communications.

Verizon's purported willingness to bid $5 billion also lacks credibility. It is orders of magnitude greater than any amount the Commission has previously received in an auction of a comparable spectrum block.[45] It is also conditioned on an *immediate* auction of a *nationwide* 1.9 GHz license that would be governed by the broadband PCS rules. These conditions provide Verizon several ready excuses to retract its bid offer.

Verizon has recognized that the Commission must complete pending rulemaking proceedings and take a number of regulatory steps before an auction of the 1.9 GHz spectrum could be held.[46] For example, the Commission must first establish service rules governing the 1.9 GHz spectrum, and then seek comment on the mechanics for auctioning this spectrum. All of this would take time, of course, and Verizon could readily claim that circumstances (*e.g.,* a falling stock price, an increased debt burden, regulatory delays) had changed in the meantime and justify the withdrawal of its $5 billion bid offer. Verizon could also renege on its offer by claiming that the service and licensing rules the Commission adopts are not to its liking. For example, if the Commission were to decide not to license the spectrum in a nationwide block – as has been the case in prior CMRS spectrum auctions – Verizon would have an easy way out of its outlandish $5 billion "commitment." Verizon's $5 billion bid offer would evaporate as expediently as it has appeared in the record of this proceeding.

It would not be the first time Verizon has withdrawn an exorbitant bid amount. In Auction 35, which ended in January 2001, Verizon bid an eye-popping $8.8 billion for the "reauctioned" C and F Block PCS licenses that had been reclaimed from NextWave

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43 Sun Fire Group Study at 7-11.

44 UBS Report at 2, 13.

45 The Commission has never received more than $1 billion for an auctioned 10 MHz spectrum block – *five times* less than Verizon's $5 billion offer.

46 *See* Verizon Petition for Auction.

and other licensees.[47] Yet, after the downturn in the stock market and continuing uncertainties regarding the litigation over the FCC's cancellation of NextWave's licenses, Verizon was beseeching the Commission to cancel the results of the auction, waive its rules, and return the amounts Verizon had bid without penalty.[48] It even submitted an expert report asserting that the value of the spectrum it had acquired in Auction 35 had plummeted 56%.[49] The Commission granted all of the relief Verizon requested,[50] even though Verizon should have been fully aware of the NextWave litigation and the capital market risks going into Auction 35. Given Verizon's track record, the Commission should take its offer to bid $5 billion on the 1.9 GHz spectrum with a grain of salt.

Verizon's bidding in Auction 35 is instructive in another sense. As the Commission itself has observed, the "large sums of money committed in Auction 35 surprised many in the investment community. As one analyst commented in reference to Verizon Wireless's $8.8 billion in bids, "What Do They Know We Don't Know?'."[51] Some analysts believe Verizon's very high bids were motivated by an effort to block entry by competitors in its controlling investor's incumbent local exchange carrier ("ILEC") territory. As Lemay-Yates Associates Inc. has explained,

> In [Auction 35], Verizon in particular had bid and won many of the markets in which it is the incumbent provider and original "Bell" licensee dating from the first awards of analogue cellular spectrum. Verizon bid in a number of the very large and attractive markets where it operates as the incumbent local exchange carrier (ILEC). ... The high value to an incumbent of protecting its core markets clearly played out.
>
> Verizon overbid the other bidders to win markets in which it is the ILEC, and – through a fortuitous series of events – has subsequently seen its bids dismissed. Verizon initially eliminated the possibility of another bidder entering its core markets, and it has now been relieved of the cost of having done it.[52]

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47 *See* "FCC C & F Block Auction #35 Final," *available at*: <http://wireless.fcc.gov/auctions/35/charts/35press3.pdf>.

48 *See* Cellco Comments.

49 *Id.*, Attachment B, at 26.

50 *Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made In Auction No. 35*, Order and Order on Reconsideration, 17 Rcd 23354 (2002).

51 *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Sixth Report, 16 FCC Rcd 13350, 13369-70 (2001) (*quoting* John M. Bensche and Courtney B. Kelleher, *Wireless Services Industry Update: C and F Block Re-auction Concludes, Nets $16.9B,* Equity Research, Lehman Brothers, Jan. 29, 2001, at 2).

52 Lemay-Yates Report at 10-11.

The same anti-competitive animus that motivated its Auction 35 bidding strategy could very well be also driving Verizon's lobbying strategy in this proceeding: (1) oppose the public-safety supported Consensus Plan at every turn; (2) propose numerous and contradictory alternatives, none of which provides a viable means of remedying 800 MHz band interference; (3) at the last minute, offer to bid $5 billion for spectrum that it is a critical part of the Consensus Plan's efforts to make Nextel whole in return for its substantial contributions; (4) hope that this "bid" distracts the Commission to the point where it fails to provide Nextel suitable replacement spectrum, thereby undercutting the only effective solution to the public safety interference problem, hampering Nextel's ability to compete by imposing on it the continuing burden of dealing with public safety interference on a case-by-case *ad hoc* basis, and delaying Nextel from offering new advanced services; and (5) renege on its $5 billion commitment, citing changed circumstances.

A clever lobbying ploy, perhaps, but Verizon's tactics have nothing to do with the pressing public safety concerns at the heart of this proceeding. As the UBS Report notes, "Verizon's $5 billion bid could be part of the price it is willing to pay to keep Nextel from getting the [1.9 GHz] spectrum."[53] If successful, Verizon's gambit would result in the Commission auctioning the 1.9 GHz spectrum at time when, according to the UBS Report, other carriers have little interest in participating in such an auction.[54] Verizon could then claim the 1.9 GHz spectrum at a low price, having withdrawn its $5 billion commitment based on "changed circumstances."

Even if this strategy fails to play out, at the very least Verizon may be seeking to inflate the value of the 1.9 GHz spectrum consistent with its previous, unfounded argument that the Consensus Plan would give Nextel a "windfall." As the record in this proceeding shows,[55] however, the Commission has a strong public interest justification

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53 UBS Report at 13.

54 *Id.* The UBS Report states that

> we doubt whether a new entrant in the wireless space would be able to fund a business plan that would include a potential multi-billion dollar spectrum purchase as well as a nationwide buildout at this late date. . . . Sprint PCS and T-Mobile USA have enough spectrum currently. . . . In terms of Cingular and AT&T Wireless, we believe should their merger transaction be approved . . ., the carrier will have more than enough spectrum.

Id. *See also* Legg Mason, "After Nextel: A Catalogue for Wireless Carriers Shopping for Spectrum" at 1 (Apr. 8, 2004) ("We believe none of the big carriers is desperate for immediate spectrum that cannot be satisfied by tapping the secondary markets or NextWave's remaining spectrum if necessary.").

55 *See, e.g.*, Sun Fire Group Study; "What Windfall? A Review of the Valuation Components of the Consensus Plan," attached to Letter from Regina M. Keeney, Counsel for Nextel, to Marlene H. Dortch, FCC Secretary (Mar. 19, 2004).

for assigning Nextel the 1.9 GHz spectrum. Nextel's spectral and financial contributions are not only an integral part of remedying 800 MHz interference and providing additional public safety spectrum, they are also comparable in value to the value of the 1.9 GHz spectrum. The Commission should consequently reject Verizon's anti-competitive tactics, as they would only undermine the Commission's public interest objectives in this proceeding.

V. Conclusion

One of the primary challenges in realigning the 800 MHz band is funding public safety and private wireless retuning costs. These parties cannot afford to bear these costs, and the Commission lacks statutory authority to require other licensees to pay them. Working with the public safety and private wireless communities, Nextel has made a voluntary commitment to fund their relocation costs provided it is made whole for its contribution to the realignment plan, including assigning it the 1910-1915/1990-1995 MHz band. The Commission's consideration of the 2.1 GHz band as replacement spectrum for Nextel, as well as Verizon's latest anti-competitive claims, threaten to upset the careful balance developed by these parties to achieve the Commission's goals in this proceeding. The Commission should remain focused on its key public interest objectives in this proceeding and adopt an effective realignment plan, including granting Nextel replacement spectrum at 1.9 GHz, as set forth in the Consensus Plan.

Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), this *ex parte* presentation is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

/s/ Robert S. Foosaner
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