



April 23, 2004

BY ELECTRONIC FILING

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

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

Dear Ms. Dortch:

Preferred Communication Systems, Inc. ("Preferred") hereby requests that this filing be associated with WT Docket 02-55, *Improving Public Safety Communications in the 800 MHz Band*.

On March 19, 2004, Nextel Communications, Inc. ("Nextel") filed an Ex Parte Submission with the Federal Communications Commission ("FCC" or "Commission") seeking to respond to Preferred Communication Systems, Inc.'s ("Preferred") Ex Parte Comment filed with the FCC on March 2, 2004. Due to Nextel's apparent confusion with respect to several of the major points set forth in Preferred's Ex Parte Comment and certain misrepresentations in its Ex Parte submission, we hereby submit a brief and hopefully clarifying response.

1. Position re Interference Experienced by Public Safety and other Licensees in the 800 MHz Band.

Preferred Communication Systems, Inc. ("Preferred") is one of the founding members of what has become known as the 800 MHz Users Coalition and continues to support the Coalition's Balanced Approach, which relies upon technical solutions and mitigation tactics to minimize, if not eliminate, intermodulation, out-of-band emissions and desensitization interference within the 800 MHz Band with Public Safety, Critical Infrastructure and other systems. Preferred also strongly supports Motorola, Inc.'s ("Motorola") "Toolbox" Proposal.

However, during the past few months, it has become apparent that the FCC has determined to adopt a version of rebanding as at least one of the solutions to the interference experienced by Public Safety, Critical Infrastructure and other licensees within the 800 MHz Band. During this period, the Commission also highlighted other long-term benefits of realignment including addressing the shortcomings of haphazard spectrum allocation decisions and reducing future handset costs for Public Safety systems.¹ It also has become apparent to Preferred and other industry observers that the FCC is inclined to adopt the Consensus Parties' Rebanding Proposal or at least use it as a guide in formulating an improved version of such Proposal. Preferred therefore analyzed the Consensus Parties' Proposal and its underlying tenets and sought to propose improvements to the Commission as suggestions as to how best address, and perhaps resolve, the considerable criticism of such Proposal with respect to its (1) discriminatory treatment of Non-Nextel General Category and Lower 80 EA licensees with respect to rebanding within the 800 MHz Band; (2) unrealistic estimate of total relocation costs and lack of full funding; (3) allocation of 1.9 GHz spectrum to Nextel.

In formulating such Improvements, Preferred kept in mind the FCC's directive in the *Notice of Proposed Rulemaking*² and sought to (1) maintain the full spectrum rights of all General Category and Lower 80 EA licensees; (2) provide a

¹ *NXTL (U/C) & FCC moving towards negotiated agreement on spectrum issues*, Goldman Sachs Analyst Comment, October 5, 2003, p. 2.

² *Improving Public Safety Communications in the 800 MHz Band and Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, Notice of Proposed Rulemaking, 17 FCC Rcd 4873 at 4875 (2002) ("*NPRM*"): "we solicit proposals on best to remedy interference to 800 MHz public safety

realistic cost estimate and full funding for 800 MHz rebanding; (3) provide additional spectrum for Public Safety both in the 800 MHz band and an incentive to UHF broadcasters to move early from Channels 60, 63-64 and 68 to free up 24 MHz within the 700 MHz Upper Band previously allocated by the Commission for use by Public Safety licensees. Preferred also proposes to open up the allocation of 1.9 GHz spectrum to all General Category and Lower 80 EA licensees, who agree to modify their EA and site-specific licenses by (a) foregoing reimbursement of their own relocation costs; and/or (b) promising to pay a portion of total 800 MHz Band relocation costs; and/or (c) returning 800 or 900 MHz spectrum to the FCC; and/or (d) in certain EA markets, losing 800 MHz frequencies.

2. Specific Responses to Nextel's Ex Parte Submission.

a. Interference.

On page 2 of Nextel's Ex Parte Submission, it mischaracterizes Preferred's position with respect to how to mitigate interference with Public Safety, Critical Infrastructure and other systems in the 800 MHz band. As noted above, Preferred continues to support the use of the "Best Practices" Guide endorsed by APCO International, Inc., equipment manufacturers such as Motorola, Inc., Public Safety licensees, as well as the United Telecom Council, Cellular Telecommunications & Internet Association and the major cellular and PCS operating companies. Contrary to Nextel's assertion that Preferred's filing "without any explanation, breaks from that approach,"³ in its conclusion to its Ex Parte Comment filed on March 2, Preferred pointed out that "if the Commission determines to adopt a version of rebanding as one of the solutions to interference increasingly experienced 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, is 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."⁴ Preferred believes that only adjacent channel interference can be eliminated by rebanding. While rebanding would reduce somewhat intermodulation interference to portable and mobile radios, it would not eliminate such interference.

Further, because of the wide bandwidth front end of the present portable and mobile radios, desensitization interference can and will occur when they need to receive messages and are close to Enhanced Specialized Mobile Radio transmit sites. "Best Practices" or replacement radios are necessary to eliminate desensitization. These measures also will further reduce intermodulation interference.

In summary, Preferred's position is that rebanding alone will not solve the interference experienced by Public Safety, Critical Infrastructure and other licensees in the 800 MHz band. Preferred believes that if the Commission adopts rebanding as a solution to interference with Public Safety, Critical Infrastructure and other systems in the 800 MHz band, it also should adopt the technical solutions and mitigation tactics set forth in the Balanced Approach and Motorola, Inc.'s "Toolbox" Proposal.

b. Relocation Cost Analysis.

With respect to Nextel's criticism on pages 3-4 of its Ex Parte Submission of the Relocation Cost Analysis Study prepared by Concepts To Operations, Inc., a consulting firm with extensive experience in designing and constructing public safety systems, Preferred would note the following:

1. The Relocation Cost Analysis Study attached as Exhibit K to Preferred's Ex Parte Comment filed on March 2 provides a thorough analysis based primarily upon the Consensus Parties' Supplemental Comment filed on December 24, 2002 and its Appendix A, as modified through February 25, 2003. CTO submitted its Report to Preferred on October 31, 2003. Contrary to Nextel's assertions, the assumptions stated therein are clear,

systems consistent with minimal disruption to our existing licensing structure and assurance of sufficient spectrum for critical public safety communications."

³ Nextel Communications, Inc., Ex Parte Submission, March 19, 2004, p.2.

⁴ Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, p. 52.

reasonable and amply supported by the major public safety manufacturers and Public safety licensees in either written filings in this proceeding or in conversations with CTO or Preferred.⁵

2. The \$100 cost to retune a radio was based upon CTO's and Preferred's conversations with the major public safety equipment vendors and Public Safety licensees. Nextel only partially quotes Motorola, Inc. in its November 3, 2003 letter. While Motorola, Inc. agrees that \$50 is a reasonable cost assumption, Nextel fails to point out that figure is for each time the radio is touched and that each radio needs to be touched twice for a total cost of \$100 per radio. CTO also would note that simulcast-type systems, which are prevalent in Southern California and Florida as well as among Public Safety systems utilizing NPSPAC channels, require more than two touches and thus a higher retune figure per radio.
3. The number of Public Safety replacement radios (or those radios requiring upgrade to provide "Best Practices") is based upon percentages varying from 1% to 30%. The 30% replacement figure was used to indicate the maximum cost that may be incurred given the line items presented. Although Nextel indicates that Motorola, Inc. offered no analysis or survey of the existing population of 800 MHz public safety systems to support the 30% figure, in its November 3, 2003 Ex Parte letter Motorola, Inc. estimates that 30% of the Motorola, Inc. NPSPAC radios sold by it during the past ten years could fall in the replacement category. In conversations with Motorola, Inc. officials, the 30% figure for such radios was given as a minimum figure. As noted in Preferred's Ex Parte Comment, such estimate increases the Consensus Parties' total relocation cost estimate from \$850 million to \$2.391 billion.⁶
4. Even if a lower than maximum retuning and/or "Best Practices" modifications are required, the minimum cost still would be considerably higher than the \$850 million offered to be contributed by Nextel. As noted in the Relocation Cost Analysis Study, use of correct FCC license database figures and the Consensus Parties' own assumptions set forth in Appendix A to its December 24, 2002 Supplemental Comment results in a total 800 MHz band relocation cost of \$1.120 billion, an increase of \$270 million over the \$850 million offered by Nextel to fund all of the "reasonable" costs of the Consensus Parties' Proposal.
5. Preferred's Improvements recognize this higher cost and provide for additional funding through Preferred's promise to contribute up to \$150 million over seven years toward total 800 MHz band relocation costs.

In Preferred's Ex Parte Comment, we suggested that the Commission contact all of the major public safety equipment vendors and Public Safety, Critical Infrastructure and other 800 MHz licensees and seek detailed information concerning the various relocation costs items to obtain the most accurate costs figures possible before embarking on realignment of the 800 MHz band.⁷ We repeat that recommendation here.

c. Spectrum Holdings Analysis.

According to Nextel's Ex Parte Submission, Preferred uses an "unintelligible mixture of license data and therefore significantly misrepresents the state of 800 MHz licensing both from December 2002 and today."⁸ Due to the Consensus Parties' failure to (1) analyze the spectrum holdings of Nextel and other 800 MHz band licensees according to the 175 Economic Area ("EA") markets used by the Commission to allocate the Upper 200, General Category and Lower 80 Channels' authorizations in three separate auctions conducted during 1997-2000 and (2) base their Proposal upon a comprehensive and accurate 800 MHz license database made a part of the public record of this proceeding, Preferred was required to develop its own such 800 MHz license database. As explained in the Ex Parte Comment, Preferred initially retained CTO to develop such license database in preparation for its participation in FCC Auction #34. In early 2003, Preferred requested that CTO update such database in preparation for an Ex Parte filing in this proceeding. To account for the geographic and population coverage of 800 MHz SMR, Business and Industrial/Land Transportation and Public Safety site-specific licenses, CTO initially sought to employ 2003 license data from the Commission's license databases.

However, as noted, in its Ex Parte Comment, CTO determined that due to Nextel's extensive improper short-spacing or "daisy chaining" of its General Category site-specific licenses in EA markets in which Preferred had won one or more Frequency Block licenses in FCC Auction #34 during 2000-2003, it would use the 2003 FCC license database but include

⁵ The Congressional Budget Office recently contacted Alex Calderon, CTO's President, and requested permission to use CTO's *Relocation Cost Analysis of the Consensus Parties' Proposal* as part of the record to be developed in upcoming Congressional hearings on the FCC's proposed reorganization of the 800 MHz band. Apparently, the CBO does not share Nextel's dismissive views of CTO's Relocation Cost Analysis Study.

⁶ Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, p. 36 and n.78.

⁷ Preferred Communication Systems, Inc. Ex Parte Comment, March 2, 2004, p. 47.

⁸ Nextel Ex Parte Submission, March 19, 2004, p. 2.

only General Category and Lower 80 secondary sites constructed as of June 2000.⁹ Preferred would maintain that its comprehensive 800 MHz SMR license database not only is accurate as of January 2003 but in certain EA markets probably conservative in overstating Nextel's site-specific licenses' geographic and population coverage by its inclusion of short-spaced or secondary sites.¹⁰

Further, Preferred would contend that such approach not only is desirable but required if the FCC is to determine accurately the number of channels Nextel, or any other EA or Site licensee is to receive in the new Cellular Block in exchange for its respective site-specific licenses. According to the Consensus Parties' Proposal such calculation was unnecessary since it exchanged all of the Nextel Control Group's EA- and Site-Licensed Spectrum on a 1:1 Clean basis while moving the Non-Nextel Control Group to the Upper 200 Channels in the new Cellular Block on a geographic "footprint" basis only. However, CTO and Preferred quickly determined that a legally permissible, practical and mathematical movement proposal necessarily would be based both upon an accurate and comprehensive license database. For the reasons set forth in Preferred's Ex Parte Comment, such proposal moved the Nextel Control Group's and all other licensees' Site-Licensed Spectrum on a MHz/Pops Equivalent basis only. Otherwise, as CTO and Preferred found when it tested the Consensus Parties' Proposal against actual EA market license data, more site-specific channels needed to be moved to the new Cellular Block than could be accommodated. The Consensus Parties' approach simply fails on the numbers.

As Preferred discovered when it tested the Consensus Parties' Proposal in many EA markets, contrary to the repeated assertions of Nextel and the Consensus Parties in their respective filings,¹¹ the allocation of a minimum of 5.5 MHz of 1.9 GHz Band spectrum to Nextel under the Consensus Parties' Proposal is based solely upon their 800 MHz band movement methodology.¹² The remaining 4.5 MHz or less of such spectrum allocation is attributable to Nextel's return of 700 MHz Guard Band and 900 MHz SMR spectrum unrelated to any reorganization of the 800 MHz band and its promise to pay up to \$850 million toward defraying the total relocation costs of the Consensus Parties' Proposal. In formulating an alternative approach to rebanding that (1) treats all General Category and Lower 80 EA licensees similarly and protects their full spectrum rights and (2) retains an incentive for at least some of them to contribute significant funds toward the payment of 800 MHz band total relocation costs, Preferred maintains that the Commission's expansion of eligibility to participate in the allocation of 1.9 GHz spectrum to all General Category and Lower 80 EA licensees not only would be beneficial practically and as a matter of policy, but also legally required.

d. Allocation of 1.9 GHz Band Spectrum.

⁹ See Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, p. 20 and n.31. As noted in its Ex Parte Comment, CTO would have used each original license's ERP and HAAT to determine its actual service area but for the difficulty in obtaining such information and time involved in developing such a license database. However, if the FCC desires to review such a license database before releasing a Report & Order in this proceeding Preferred would retain CTO to develop such a license database and provide it to the Commission at its own expense.

¹⁰ As noted in Preferred's Ex Parte Comment, in promulgating the rules for the Lower 230 Channels' auctions, the FCC determined a site-specific licensee's protected service area by reference only to its original license. For this purpose, even permissible short-spaced or secondary sites were to be disregarded. See *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 Report on Reconsideration, 14 FCC Rcd 17556 at 17569-72, ¶¶ 65-67 (1999) ("800 MHz Memorandum Opinion").

¹¹ See, e.g., Consensus Parties, Comment, August 7, 2002, pp. 18-19.

¹² In the twenty-nine (29) EA markets in which Nextel holds all of the EA-Licensed Spectrum, 11.5 MHz of its General Category and Lower 80 EA-Licensed Spectrum would be squeezed into the 6 MHz of new Cellular Block composed of the former NPSAC Channels and 5.5 MHz of 1.9 GHz band spectrum. In the one hundred seventeen (117) EA markets in which Nextel shares EA-Licensed Spectrum, both Nextel's EA- and Site-Based Spectrum and that of the Non-Nextel EA licensees would be squeezed into the same 6 MHz of new Cellular Block Spectrum and some "other spectrum." In these EA markets as much as 7.8-10 MHz of 1.9 GHz band spectrum would be allocated based solely upon movement. In the twenty-nine (29) EA markets in which Nextel Partners, Inc. either holds all of the EA-Licensed Spectrum or shares it with a Non-Nextel EA licensee, Nextel would purchase all 10 MHz of the 1.9 GHz band spectrum for cash. Preferred would maintain that at a minimum, the Commission would have no authority to sell the 1.9 GHz band spectrum to Nextel when such spectrum is needed to modify the authorizations of other EA licensees in EA markets in which Nextel holds little or no 800 MHz band spectrum.

In footnote 2 on page 1 of Nextel's Ex Parte Submission, Nextel refuses to address Preferred's contention that since a minimum of 5.5 MHz of 1.9 GHz band spectrum is allocated under the Consensus Parties' Proposal due solely to its "squeezing" of 11.5-19 MHz of EA- and Site-Licensed Spectrum into 6 MHz of new Cellular Block Spectrum comprised of the former NPSPAC Channels and "some other spectrum" and the FCC is without constitutional and statutory authority to adopt the Consensus Parties' Proposal, which without any offered or discernible rationale discriminates among similarly situated EA licensees, if the Commission determines to allocate 1.9 GHz band spectrum as part of this proceeding, it is legally required to make such spectrum available to all General Category and Lower 80 EA licensees and Site licensees electing to be treated as ESMR licensees in the future. Nowhere do the Consensus Parties or Nextel, either in the Ex Parte Submission or in any other filing, provide a rationale for denying other EA licensees and Site licensees participation in the FCC's allocation of such spectrum other than to suggest that only Nextel would be exchanging 700 MHz Guard Band, 800 MHz SMR and Business and Industrial/Land Transportation and 900 MHz SMR on a "kHz-for-kHz" basis for 10 MHz of 1.9 GHz band spectrum. Interestingly enough, Nextel chose not to repeat that argument following Preferred's filing of its Ex Parte Comment.¹³

Based upon several press reports, we understand that the WTB draft Report and Order excludes the return of Nextel's 700 MHz Guard Band and 900 MHz SMR spectrum from any purported exchange of Nextel's spectrum for an allocation of 1.9 GHz band spectrum.¹⁴ If such is the case, Preferred certainly can understand why Nextel chose not to provide any rationale for its exclusive allocation of 1.9 GHz band spectrum in its March 19 Ex Parte Presentation.

In its Ex Parte Comment, Preferred pointed out that in many EA markets, Nextel would receive an exclusive allocation of 1.9 GHz band spectrum despite its not holding:

- (1) the majority of General Category EA-Licensed Spectrum; and/or
- (2) the majority of Lower 80 EA-Licensed Spectrum; and/or
- (3) any 800 MHz band spectrum.¹⁵

Based upon Chairman Powell's letter to Congress in response to the letter signed by twenty-three (23) members of Congress, it appears that the WTB draft Report & Order exclusively allocated 10 MHz of 1.9 GHz band spectrum to Nextel. According to Chairman Powell's letter, the FCC is relying upon its inherent authority under Section 316 to modify licenses and its authority under Section 309(j)(6)(E) to avoid the competitive bidding requirements of Section 309(j) where it finds subsection's methods to be "in the public interest."¹⁶ However, as

¹³ Excluding Non-Nextel EA licensees from an allocation of 1.9 GHz band spectrum based solely upon the payment of relocation costs necessarily leads to challenges by Verizon Wireless and perhaps others to allocate the 1.9 GHz band spectrum pursuant to a public auction. If the FCC fails to provide Non-Nextel EA licensees the election to participate in the allocation of 1.9 GHz band spectrum, it clearly lacks the authority to sell such Spectrum exclusively to one EA licensee. See Cellular Telecommunications & Internet Association, Ex Parte Comment, December 4, 2003. For Nextel's rationale for the Commission's exclusive allocation of 1.9 GHz band spectrum, please review Nextel Communications, Inc., Ex Parte Presentation, December 16, 2003.

¹⁴ See, e.g., *FCC Eyes Draft Giving Nextel 1.9 GHz, but at Higher Pricetag*, COMMUNICATIONS DAILY, Mar. 11, 2004 ("*Communications Daily*"); Legg Mason, *Logjam Breaks on FCC Consideration of Nextel Spectrum Swap*, Mar. 10, 2004 ("*Legg Mason*"); Bear Stearns, *Spectrum Swap Reported in Nextel's Favor*, Mar. 9, 2004 ("*Bear Stearns*").

¹⁵ Preferred repeats its objection to Nextel's justifying its exclusive allocation of 1.9 GHz band spectrum through resort to its "Nextel Control Group" concept and use of Nextel Partners, Inc.'s EA- and Site-Licensed Spectrum in EA market areas in which 53 million persons reside. In EA markets in which Nextel holds no 800 MHz band spectrum, an exclusive allocation of 1.9 GHz band spectrum clearly would be nothing more than a cash sale of spectrum in contravention of the competitive bidding provisions of Section 309(j)(1) of the Communications Act. See, e.g., Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, p. 21 and n. 36.

¹⁶ Neither Chairman Powell nor Nextel have cited any Commission or judicial precedent in support of their position. See Nextel Communications, Inc. Ex Parte Presentation, December 16, 2003, pp. 3, 7-8. Interestingly, when Nextel seeks to buttress its position with Commission decisions, it refers to decisions that uphold the principle espoused by Preferred in its March 2, 2004 Ex Parte Comment: the FCC is empowered to modify a class of licenses held by several licensees by reallocating spectrum in another frequency band even if it results in an expansion of their respective authority if it provides a reasonable explanation that such modification serves the public interest. See *Establishing Rules and Policies for the Use of*

noted in Preferred's Ex Parte Comment and immediately above, the Consensus Parties' Proposal and the WTB's draft Report and Order seek to allocate 1.9 GHz band spectrum exclusively to Nextel in EA markets where it lacks any 800 MHz band spectrum to modify. In those EA markets, Preferred would maintain that the Commission clearly lacks any authority under Section 316 for such exclusive allocation. Moreover, Preferred would question whether the FCC has the authority to use Section 309(j)(6)(E)'s methods to exclusively allocate 1.9 GHz band spectrum to Nextel in the EA markets in which holds 800 MHz spectrum where such allocation clearly would violate the Commission's statutory mandates to (1) maintain regulatory parity and (2) promote diversity of license ownership and promote competition. Preferred would contend that the FCC's reliance upon Section 309(j)(6)(E) in these circumstances and its public interest determination could not withstand judicial review.

Unlike other commenters in this proceeding which chose only to criticize the Consensus Parties' allocation of 1.9 GHz band spectrum, Preferred offered a recommended Improvement that would provide Nextel the opportunity to acquire most of the 1.9 GHz band allocation it sought, provide additional funding to defray total 800 MHz band relocation costs, and afford the FCC much stronger legal authority for its allocation of 1.9 GHz band spectrum as part of its realignment of the 800 MHz band. By opening up the allocation of 1.9 GHz band spectrum to all General Category and Lower 80 EA licensees and Site licensees electing in the future to be treated as ESMR licensees, the Commission could rely upon its modification authority under Section 316 in every EA market, avoid violating the statutory mandates of maintaining regulatory parity and promoting diversity of license ownership and competition. In our view, adoption of Preferred's Improvement by the Commission likely would assure judicial approval of the FCC's public interest determination under Section 309(j)(6)(E).¹⁷

Preferred, as do many commenters in this proceeding, realizes that certain cellular and PCS companies will challenge any allocation of 1.9 GHz band spectrum as part of an 800 MHz band rebanding. Such challenges may take as long as 2-3 years to resolve. During such period, Preferred believes that it is unlikely that any rebanding would be possible due to the need of Nextel, Preferred and other EA licensees in certain EA markets to receive an allocation of 1.9 GHz band spectrum to afford them sufficient spectrum capacity to expand or even maintain their respective ESMR systems.

Instead of addressing these issues in its Ex Parte Submission, Nextel sought in footnote 2 to characterize Preferred's Improvement on this issue as a "perplexing, ill-conceived notion that it too should receive replacement spectrum in the 1.9 GHz band based on its Economic Area ("EA") license holdings, its willingness to forego its own retuning costs, and its 'offer' to contribute \$150 million to incumbent retuning." Nextel initially questions Preferred's forbearance of its own relocation costs due to its lack of presently constructed and operating systems. Preferred is committed to constructing its EA- and Site-Licensed Spectrum in all of its EA markets. As it noted in its Ex Parte Comment, the uncertainty with respect to the future status of its licenses created by Nextel's filing of the White Paper in November 2001, a scant eleven (11) months after Preferred fully paid its net winning bids in FCC Auction #34 and the Commission's release of its Notice of Proposed Rulemaking in this proceeding in March 2002, to date has precluded Preferred and other Non-Nextel EA licensees from constructing many of their authorizations. Upon the FCC's release of a Report and Order following its NPRM directive and Preferred's Improvements, Preferred and other Non-Nextel EA licensees would be positioned to approach the private equity market and financing arms of certain major equipment vendors commercial banks to raise the equity capital and arrange the debt

Spectrum for Mobile Satellite Services in the Upper and Lower L-Band, Report and Order, IB Docket No. 96-132, 17 FCC Rcd 2704 (2003), ¶¶ 21-29 ("MSS L-Band Order"); *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*, Order, ET Docket No. 97-99, 12 FCC Rcd 3471 (1997), ¶ 14; see also *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, IB Docket No. 01-185, 18 FCC Rcd 1962 (2003). With the exception of the *MSS L-Band Order*, none of these authorities supports the Commission's authority exclusively to allocate spectrum to only one of the licensees whose authorizations it is modifying. In the *MSS L-Band Order*, the FCC specifically noted that the Section 309(j)(1) licensing rights of other parties were not an issue because it had never proposed "to open this spectrum for competing applications and we have not done so." *Id.* at ¶ 27.

Since the Commission apparently is not accepting Nextel's offer to return its 700 MHz Guard Band and 900 MHz SMR licenses as part of a spectrum exchange and is allocating at least a portion of the 10 MHz of 1.9 GHz band spectrum solely for cash, it strikes Preferred as "curious" if not downright "perplexing" that Nextel and apparently the Commission believes that an exclusive allocation of the 1.9 GHz band spectrum would pass judicial muster.

¹⁷ See, e.g., *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1318 (D.C. Cir. 1995).

financing necessary to launch their respective ESMR systems.¹⁸ During the 2-3 years probably required to resolve all of the expected challenges to any allocation of 1.9 GHz band spectrum,¹⁹ and perhaps other issues, Preferred will construct and be operating major ESMR systems in its EA markets within three years of the release of the Commission's Report and Order. Based upon its conversations with CTO on this matter, Preferred believes that it will incur a minimum of \$20 million in relocation costs. As set forth in its Ex Parte Comment, Preferred is willing to forbear recovery of these costs even though it is not legally required to do so. Moreover, Preferred repeats its offer to pay \$150 million over a seven year period commencing upon the date the Commission's Report and Order becomes final (all challenges successfully resolved) and its share of BAS licensee relocation costs estimated at an additional \$30 million. Given the factual background, Preferred finds nothing, to use Nextel's words, "ironic" or "curious" about its suggested Improvement.²⁰

Nextel is seeking an allocation of 1.9 GHz band spectrum so that it might increase its spectrum capacity, improve the cost efficiency of its network and offer a fixed high-speed broadband wireless service utilizing Flarion Technologies, Inc.'s OFDM technology.²¹ Preferred has made a similar determination and is seeking comparable treatment that the Commission is legally required to provide.²² Preferred would maintain that in order to meet its statutory requirements under the Communications Act to maintain regulatory parity and promote diversity of license ownership and competition, the FCC must open up participation in the allocation of 1.9 GHz band spectrum to all General Category and Lower 80 EA licensees and Site licensees electing to be treated in the future as an ESMR licensee as suggested in its Ex Parte Comment to avoid the competitive bidding provisions of Section 309 of the Communications Act.²³

3. Conclusion.

In its Ex Parte Comment filed on March 2, 2004, Preferred sought not only to point out the critical flaws in the Consensus Parties' Proposal, but also to recommend Improvements based upon its development of an accurate and comprehensive 800 MHz license database and total 800 MHz band relocation costs analysis. As pointed out in considerable detail, the Consensus Parties' Proposal is based upon spectrum holdings and relocation cost assumptions that fail to withstand scrutiny. Moreover, such Proposal's movement methodology is based upon a discriminatory intent that necessarily produces an impermissible result upon constitutional and statutory grounds. Preferred's Improvements set forth in its Ex Parte Comment sought not to "defeat" rebanding or the Consensus Parties' Proposal but rather to propose modifications that would render such proposal legally, practically and mathematically sound and acceptable to the vast majority, if not all of the Non-Nextel 800 MHz EA and Site licensees. Preferred would submit that if the Commission is seeking to craft a rebanding proposal that is in Chairman Powell words is "defensible and ironclad" it will take additional time to revise the present WTB draft Report and Order to incorporate most, if not all, of Preferred's Improvements. Given the importance of the issues in this proceeding, Preferred believes that the FCC should get this right the first time and not adopt a legally questionable approach likely not to withstand judicial scrutiny.

¹⁸ Preferred would repeat its request on behalf of all General Category and Lower 80 EA licensees for an extension of their respective construction deadlines on a day-for-day basis from the release by the FCC of the Notice of Proposed Rulemaking on March 15, 2002 until it releases a Report and Order. See Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, p. 42, n. 96.

¹⁹ Preferred would note that its contention with respect to the allocation of 1.9 GHz band spectrum in its Ex Parte Comment should have surprised neither Nextel nor the Commission. Preferred initially raised this issue in its Comment filed on September 23, 2002, almost eighteen (18) months ago. See Preferred Communication Systems, Inc., Comment, September 23, 2002, pp. 19, 21.

²¹ For a detailed analysis of the increase in Nextel's spectrum capacity and cost efficiency of its network, please review Thomas J. Lee, CFA, *Nextel Communications: Reach Out and Push (to talk to) Someone*, J.P. Morgan Securities, Inc. Company Report, August 14, 2001. See *Nextel Expands Successful Broadband Trial to Include Paying Customers and Larger Coverage Area*, Nextel Press Release, April 14, 2004 and www.nextelbroadband.com.

²² See, e.g., *Fresno Mobile Radio, Inc. v. FCC*, 165 F. 3d 965 (D.C. Cir. 1999)(Commission must mandate comparable requirements for providers of substantially similar services unless it can articulate what in the reviewing court's view is a "reasonable" explanation for disparate treatment); and *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

²³ Preferred Communication Systems, Inc., Ex Parte Comment, March 2, 2004, pp. 48-49 and n. 110.

Sincerely,

/s/Charles M. Austin
Charles M. Austin

Attachments

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
John A. Rogovin, Chief Counsel
Edmond J. Thomas, Chief Engineer, Office of Engineering and Technology
Jennifer A. Manner, Senior Counsel to Commissioner Abernathy
R. Paul Margie, Legal Advisor to Commissioner Copps
Samuel L. Feder, Legal Advisor to Commissioner Martin
Barry Ohlson, Senior Legal Advisor to Commissioner Adelstein
John B. Muleta, Chief, Wireless Telecommunications Bureau
Aaron N. Goldberger, Legal Counsel, Wireless Telecommunications Bureau
Michael J. Wilhelm, Deputy Chief, Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau