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The Commissioners
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

In re: *Ex Parte* Presentation of Small Business In Telecommunications (SBT)
WT Docket No. 02-55

To: The Commission

In response to the *Ex Parte* Presentation submitted by the Cellular Telecommunications & Internet Association ("CTIA") dated April 29, 2004 ("the Presentation"), the following response is respectfully provided by SBT, by and through counsel, regarding the Presentation and the Commission's consideration of same.

SBT agrees with the Presentation in that the Commission's focus in this proceeding should be on resolving interference to Public Safety systems and that the Commission should move forward to take those actions necessary to provide immediate relief to Public Safety entities which systems have suffered interference. However, SBT respectfully submits that the interference suffered is not reserved to Public Safety entities and is, in fact, suffered by all analog operators employing 800 MHz systems, including SBT's members and others.

SBT is on record as opposing Nextel's rebanding proposal for a variety of reasons, including without limitation, that the proposal (i) provides disparate treatment of 800 MHz analog operators; (ii) does not provide any statutory authority for adoption of its key elements; (iii) does not provide for payment of all costs of any rebanding for either Public Safety or Private operators' systems which would be affected; (iv) does not articulate what effect rebanding would have on Nextel Partners, Inc. and what, if any, contribution that entity might be obligated to make to effect the proposal; and (v) does not articulate why any such proposal might be necessary given the agency's authority granted under 47 U.S.C. § 301, and its existing ability to order immediate, remedial action to cause all interfering operators to cease all transmissions of electromagnetic energy that is not confined to authorized bands appearing on the licenses of each interfering entity.

The above stated, SBT is also troubled by CTIA's Presentation. The Presentation does not reach the material issues outlined above, excepting that the Presentation does attempt to provide a larger fund for the purpose of financing any rebanding. Insofar as the Presentation provides for greater funding certainty for Public Safety and other affected analog operators, SBT supports all such efforts. However, SBT respectfully notes that any funding proposal should be required to identify what, if any, statutory authority is granted the Commission for the purpose of adopting any such proposals.

The Presentation speaks to the Commission's adopting rules which recognize the existence and authority of a trustee of a fund in which Nextel would deposit $3 billion. Although the sum is more reflective of the comments received in this rule making, the creation of the trust and the authority granted the trustee is still problematic. SBT can find no, and CTIA has provided no, statutory authority granted the Commission by Congress which would allow for the agency's recognition, use or grant of authority to any such fund or its officers. Nor does CTIA provide any legal basis for demanding that Nextel place the money into such trust in the first instance. This final issue remains one which has troubled this rule making from the first instance.[1]

Although Nextel has offered funding in its proposal, it cannot and has not cited with authority any means by which the agency might adopt rules based on its proposed, private contractual relationship under which any such pledge might be honored. Similarly, CTIA has not expressed the rules or statute under which the Commission might order the creation of the fund referenced in the Presentation. Although the Commission may be able to order Nextel and other interfering operators to bear the cost of redesigning their systems to avoid and correct incidents of harmful interference, and to pay for all damages arising out of interference by applying the agency's authority under Section 208 of the Act, there does not exist any statutory authority for the Commission to recognize or rely upon either an independent or a non-independent trustee of a fund, not created by Congress. This is particularly true if the trustee would improperly usurp or be assigned (*de facto* or otherwise) the agency's exclusive authority in licensing, enforcement, or spectrum management. Indeed, both the Nextel proposal and the Presentation mistakenly contemplate the agency's recognition of such authority in a trustee.

SBT further notes that the Presentation, although stating that the initial funding be made upfront, does not comment on the treatment of the fund. If affected Public Safety, Critical Infrastructure, and Private operators are made to bear the cost of rebanding prior to being able to obtain reimbursement from the fund, the affected operators would, in effect, be financing the rebanding for some undefined period. This methodology was employed in 800 MHz relocation pursuant to Section 90.699 of the Commission's rules with disastrous results. When presented with the threat of having to bear such costs, incumbent licensees most often chose, instead, to take insufficient payment from Nextel rather than bear the risk of having to finance the effort. As the Commission may note, the comments received in this rule making demonstrate that such a burden on Public Safety entities is nearly intolerable. SBT respectfully notes that the effect on small business entities would be similarly burdensome.

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[1] 47 U.S.C. § 309 provides no support for Commission action which relies on private purchases of spectrum or payments to other than the U.S. Treasury to secure licensing.

Regarding the Presentation's suggestion that spectrum at 2.1 Ghz be employed in lieu of the 1.9 Ghz spectrum proposed by Nextel, SBT respectfully notes that were the Commission to accept the Presentation's spectrum suggestion, the "Consensus Plan" must be legally considered as withdrawn or waived from among the comments received. As the Commission must recall, the "Consensus Plan" specifically stated that adoption of any rules which included a material change from the dictates of that plan could not be considered accomplished in recognition of any statement made within those comments.[2] Thus, use of the 2.1 Ghz spectrum would render the Consensus Plan a legal nullity and would also similarly affect all comments received which were filed in support of such plan.

Finally, SBT cannot help but note that if the Commission is searching for "A Policy . . . [To] Provide Increased Incentives for Rapid Resolution Of Public Safety Interference Problems,"[3] the Commission will discover that it possesses all authority necessary to effect immediately such policy via enforcement of its existing rules adopted under its statutory authority granted by Congress in accord with Section 301 of the Act. If, as is a necessary condition precedent to employing its authority, the Commission judicially noted that the operation of interfering stations is contrary to the authority granted the interfering operators and, thus, subject to sanction, the Commission would inure to itself all authority it requires to cause interfering operators to take whatever steps the Commission deemed reasonable and prudent to provide a remedy to adversely affected Public Safety systems. What is required, therefore, is the political will to declare that the interfering operations are, in fact, without authority.

SBT respectfully lofts a simple question, but one which is important in meeting head on the agency's duty, **"If a single, 5-channel, SMR station operated by a private system licensee was causing harmful interference to a public safety station, what action would the agency take?"** The Commission's records demonstrate clearly that the station operator would be directed to correct immediately the interference or discontinue all transmissions from the offending facility. What, then, should be the difference between the duties imposed upon the 5-channel operator and the cellular operators treated in this proceeding? The law and equal protection state that there should be no disparate treatment. Yet, the record in this proceeding unfortunately suggests otherwise.

SBT supports equal protection (and duties) among users and operators of radio systems, regardless of size, funding mechanisms, and lobbying resources. SBT does not believe that an entity's ability or willingness to employ $850 million or even $3 billion is relevant to the issue of whether the payments of money in exchange for different spectrum is a reasonable approach to the Commission's duty to demand, first, fidelity to its rules and the underlying statutes, and to apply, second, spectrum allocation efforts to create potential long-term solutions. Something extremely vital is potentially getting lost in the blizzard of comments received in this docket – whether an interfering operator(s) can eschew the dictates of law, to avoid and resolve harmful interference caused by unauthorized transmission, by filing a petition for rule making. That is

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[2] Similarly, any demand upon Nextel in material excess of the offered $850 million in funding employing the specific funding mechanism created under its proposal would also create a nullification of supporting comments.

[3] Presentation at 4.

what, unfortunately, has happened by this proceeding. Yet, there exists no process or procedure under the Act or codified under the agency's rules which suggests this is an appropriate response from persons causing harmful interference.

SBT is sympathetic with the agency's complex and large responsibility in this proceeding. At this juncture, it appears that whatever path the Commission takes will be subject to judicial scrutiny (perhaps repeatedly) which will delay any positive outcome that the Commission intends in rendering a "final" decision. With full knowledge that this proceeding and the appeals it will likely generate will take additional years to resolve, does it make sense for the Commission to delay further orders which direct interfering operators to cease and avoid the creation of harmful interference during the interim, until this matter is resolved with legal finality?

The Commission's hesitation to enforce its existing rules against interfering operators can no longer be explained by the existence of this proceeding. Indeed, this proceeding stands as full justification for the Commission's acting immediately to provide greater, tangible, timely protection for Public Safety and other operators who have suffered and are suffering interference without recourse during the pendency of this proceeding. While Nextel and CTIA offer cake, Public Safety systems throughout the United States are joining with other operators in crying for bread to sustain their beleaguered operations. It is imperative that the Commission recognize these adversely affected persons ongoing denial of rights, to quietly enjoy their legitimate operations without harmful interference, while the agency contemplates the broader issues of a more permanent solution. It is also imperative that the Commission recognize that these adversely affected operators should not be made to bear the responsibility of providing or financing a remedy to a situation that is not of their making and for which they stand as victims. And, in conclusion, it is also imperative that the agency act within its statutory authority, avoiding *ultra vires* solutions which appear politically attractive, but are ultimately subject to summary reversal by a reviewing court.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By_____

Robert H. Schwaninger, Jr., Its Counsel