May 14, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

Nextel Communications, Inc. ("Nextel") hereby responds to three *ex parte* letters recently filed in this proceeding by the Cellular Telecommunications & Internet Association ("CTIA").[1]

CTIA, Verizon, Cingular, and other cellular carriers have for two years opposed the public-safety supported Consensus Plan, offering numerous contradictory proposals – none of them offering any advantage toward eliminating CMRS – public safety interference at 800 MHz. In its latest filings, however, CTIA and its members have finally embraced, at least implicitly, several key principles underlying the Consensus Plan. CTIA's acceptance of these key principles should encourage the Commission to move quickly to adopt the Consensus Plan.

First, CTIA finally accepts the fact that the Commission's response to the 800 MHz interference problem must include realigning the 800 MHz band, as proposed in the Consensus Plan, to create two separate channel blocks: one for typically high-site public safety and private wireless licensees, and the other for low-site, cellular-type operators. Second, CTIA now agrees that the Commission should assign compensatory replacement spectrum to Nextel "to accommodate Nextel's spectrum and financial contributions to rebanding."[2] Third, CTIA's recent filings recognize that the Commission has the legal authority under the Communications Act of 1934, as amended, to assign Nextel replacement spectrum as part of a comprehensive interference solution in which Nextel contributes both spectrum and funding to make the solution possible, and that a spectrum auction is not required to do so.

Notwithstanding CTIA's embrace of these key Consensus Plan principles, however, its recent filings continue to propose unworkable alternatives to the Consensus Plan. Specifically, CTIA's April 29 Letter proposes the following: (1) require Nextel to deposit at least $3 billion into a trust fund for public safety and critical infrastructure licensees; (2) use an independent

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1 Letter from Steve Largent, CTIA, to Chairman Powell (Apr. 29, 2004) ("CTIA April 29, 2004 Letter"); Letter from Diane Cornell, CTIA, to Marlene Dortch, FCC (May 7, 2004) ("CTIA May 7, 2004 Letter"); Letter from Diane Cornell, CTIA, to Marlene Dortch, FCC (May 13, 2004) ("CTIA May 13, 2004 Letter"). (Unless otherwise indicated, all comments and *ex parte* presentations referenced herein were filed in WT Docket No. 02-55.)

2 CTIA April 29, 2004 Letter at 3.

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trustee to manage the money and payments; (3) grant Nextel replacement spectrum at 2.1 GHz rather than 1.9 GHz;[3] and (4) release the replacement spectrum to Nextel on a piecemeal, market-by-market basis. CTIA claims that this last provision is necessary to provide the right incentives for Nextel "to reband quickly and nationally,"[4] and that its proposal provides "a framework for more effectively protecting Public Safety that addresses many of the Public Safety concerns in the record."[5] It further baldly asserts, "Nextel also benefits from this proposal."[6]

CTIA's assertions are startling in their hubris, cynicism, and conceit. After steadfastly opposing the Consensus Plan and an expeditious resolution of the CMRS – public safety interference problem for more than two years – even though its members contribute to the interference[7] – CTIA cannot seriously believe that it speaks for either the public safety community or for Nextel. As the leading public safety organizations – the Association of Public-Safety Communications Officials-International, the International Association of Chiefs of Police, the International Association of Fire Chiefs, and the National Sheriffs' Association – recently stated, Nextel's competitors "continue to toss out 'new' issues each time the Commission reportedly is close to final action. These are matters that could have been raised much earlier in

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[3] CTIA's filings are contradictory. CTIA's April 29, 2004 Letter indicates that the 2.1 GHz spectrum is suitable replacement spectrum for Nextel because it is *less valuable* than the 1.9 GHz spectrum, and therefore closer in value to what CTIA claims Nextel would contribute under the Consensus Plan. In contrast, in its May 7 filing, CTIA claims that its proposed 2.1 GHz replacement spectrum is *highly comparable* to the 1.9 GHz spectrum and should be entirely acceptable to Nextel. CTIA May 7, 2004 Letter at 8. Of course, CTIA fails to explain why, given the newfound comparability of these bands, Nextel should not then receive the 1.9 GHz band as replacement spectrum. CTIA's inconsistent analysis notwithstanding, Nextel has already made clear that the 2.1 GHz band is not comparable, and it unambiguously rejected this alternative in a May 11, 2004 letter to Chairman Powell, as summarized *infra*. Nextel has subsequently become aware of additional 2.1 GHz deficiencies, as discussed further herein.

[4] CTIA April 29, 2004 Letter at 1.

[5] CTIA April 29, 2004 Letter at 2.

[6] *Id.*

[7] Despite CTIA's denials in its May 13 letter, the contribution of cellular carriers to CMRS – public safety interference has been well documented in the record of this proceeding. *See, e.g.,* Comments of Nextel Communications, Inc. and Nextel Partners Inc., at 6-8 (Feb. 10, 2003). The role of cellular operators in such interference incidents has been confirmed in Anne Arundel County, Maryland; Denver, Colorado; Orange County, California; and numerous other locations around the country.

this proceeding and thus appear to be little more than calculated efforts to postpone and divert a decision."[8]

The fact is that Nextel has worked closely with the public safety and private wireless communities since mid-2002 to develop a comprehensive CMRS – public safety interference solution that maximizes every affected licensee's ability to use its licensed spectrum fully and effectively in the public interest – whether as competitors, as private operators, or to support public safety activities. This effort produced the Consensus Plan. The Consensus Parties then continued to work together during this proceeding in response to suggestions, criticisms, and concerns.

As a result, the Consensus Plan addresses all of the key concerns of incumbent public safety licensees, including providing sufficient funding to complete 800 MHz realignment, financial safeguards to make sure that funding is available regardless of Nextel's future financial position, and providing for an independent retuning administrator to pay the retuning costs of 800 MHz incumbents *as they are incurred* directly to the incumbent licensee or its designee. Despite opponents' assertions to the contrary, under the Consensus Plan, public safety and private wireless 800 MHz incumbents *would not have to spend their own limited funds and then apply for reimbursement.*

A. 2.1 GHz Does Not Provide Comparable Value to Nextel

As previously documented in the record, Nextel would contribute billions of dollars worth of assets towards 800 MHz realignment, including funding public safety and private wireless relocation costs and providing additional spectrum to public safety services.[9] Nextel, however, cannot make such a substantial contribution unless it receives sufficient compensatory spectrum in return. Any other result would be inconsistent with the fiduciary duty Nextel owes its shareholders, as even CTIA recognizes.[10]

Unlike the 1.9 GHz spectrum, CTIA's proposal to assign Nextel replacement spectrum in the 2.1 GHz band will *not* make Nextel whole for its contributions to 800 MHz realignment. In an April 22, 2004 letter to the Commission, Nextel detailed the serious technical and operational

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[8] Letter from Vincent Stile, APCO, Wayne Gay, National Sheriffs' Assn., Joseph Polisar, Int'l Assn. of Chiefs of Police, and Ernest Mitchell, Int'l Assn. of Fire Chiefs, to Chairman Powell, WT Docket No. 02-55, at 1-2 (Apr. 22, 2004) ("Public Safety April 22, 2004 Letter").

[9] *See* 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 Dortch, FCC (Nov. 20, 2003) ("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 Dortch, FCC (Mar. 19, 2004) ("Nextel March 19, 2004 Letter").

[10] CTIA May 7, 2004 Letter at 6 (expressing "doubt [that] any company would propose" a realignment plan "that would cost its own shareholders value").

problems associated with using the 2.1 GHz band rather than the 1.9 GHz band as replacement spectrum for Nextel.[11]

Further, on May 11, 2004, in an *ex parte* letter to Chairman Powell, Nextel CEO and President Timothy Donahue reviewed the many deficiencies of CTIA's proposal to substitute 2.1 GHz replacement spectrum for the 1.9 GHz spectrum in the Consensus Plan. Mr. Donahue rejected 2.1 GHz because of the potential for interference among adjacent 2.1 GHz licensees, the "one-off" channel pairing separation (duplexer gap) at 2.1 GHz that requires developing all new base station infrastructure and handset units, the denial of scale economies with existing cellular, PCS, or enhanced SMR infrastructure or handsets, the inferior propagation characteristics at 2.1 GHz requiring additional network capital costs, and the unknown challenges and requirements of relocating an entire group of incumbent 2.1 GHz microwave licensees about which the record contains virtually no information. He concluded, therefore, that "2.1 GHz is untenable for Nextel's shareholders" because it does not provide comparable value in return for Nextel's significant contributions to band realignment.[12]

There is yet another pitfall to CTIA's proposal relating to the relocation of 2.1 GHz microwave incumbents, one which will be far greater than could have been anticipated. Under CTIA's proposal, Nextel would be awarded a 5 MHz downlink block within the 2165 – 2180 MHz range (2165–2170 MHz, 2170–2175 MHz, or 2175–2180 MHz) to be paired with the 5 MHz 2020–2025 MHz uplink channel block. The entire 2165–2180 MHz range is currently licensed to fixed microwave users. Nextel would, of course, have to clear incumbent microwave licensees from the 5 MHz downlink before it could initiate CMRS service, requiring cooperation from those licensees.

Nextel engaged an independent microwave research and coordination company to analyze the Commission's 2.1 GHz microwave licensing database. *This research revealed that over 70 percent of the incumbent licensees at 2165–2180 MHz are the cellular carriers and Nextel's competitors; i.e., Verizon Wireless, Cingular/AT&T Wireless ("AWE"), Alltel, Sprint, and US Cellular.* Verizon and Cingular/AWE alone hold licenses for approximately 40 percent of the microwave links, and this percentage holds true for each of the three potential 2.1 GHz replacement downlink blocks: 2165–2170 MHz, 2170–2175 MHz and 2175–2180 MHz.

So, even though CTIA now implicitly recognizes that Nextel should receive replacement spectrum for its financial and spectral contributions to solving 800 MHz interference, it urges the Commission to relegate Nextel to a demonstrably inferior 2.1 GHz band – spectrum that CTIA itself has acknowledged is less valuable,[13] and that Verizon has *on the record rejected as*

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[11] Letter from Robert Foosaner, Nextel, to Marlene Dortch, FCC (Apr. 22, 2004) ("Nextel April 22, 2004 Letter").

[12] Letter from Timothy M. Donahue, CEO and President, Nextel, to Chairman Powell, at 3 (May 11, 2004).

[13] CTIA April 29, 2004 Letter at 3.

unsuited to advanced CMRS services.[14] Now it turns out that Verizon, Cingular/AWE, and other cellular industry opponents control over 70 percent of the 2.1 GHz downlink spectrum *giving Nextel's competitors the opportunity to directly affect the cost of and time it takes to clear this spectrum.*[15] Surely, the Commission would not knowingly mandate an outcome with such obvious anticompetitive and collusive possibilities.

It is beyond comprehension that CTIA and Verizon (the holder of over 20 percent of incumbent microwave licenses at 2.1 GHz) failed to inform the Commission of these facts. The Commission is dependent on the candor and veracity of its licensees in all proceedings, as well as the associations that represent them. Pertinent factual omissions should not and must not be tolerated, particularly in public-safety related proceedings.

CTIA's recent filings reveal yet again the transparency of its true purposes in this proceeding and the misleading advocacy of Verizon, CTIA, and the other cellular industry opponents of the Consensus Plan. CTIA's latest proposal does not provide Nextel a fair exchange for the extraordinary contributions it has offered to solve the Commission's 800 MHz CMRS – public safety interference problem – and it would give Nextel's competitors control over its access to and ability to use this spectrum. Given this additional information, the Commission must reject CTIA's 2.1 GHz replacement spectrum proposal.

B. <u>The Consensus Plan Includes an Independent Fund Administrator</u>

CTIA proposes that an independently administered "Public Safety Trust Fund" be established to protect public safety's interests. The Consensus Plan already proposes establishing a "Relocation Fund" to finance 800 MHz incumbent retuning costs.[16] Under the Consensus Plan, an *independent* Fund Administrator would manage this fund, and Nextel has made clear that it has no objection to the Commission having an approval or consent role in the selection of this administrator.[17] Moreover, Nextel's funding commitment will be secured by an irrevocable stand-by letter of credit.[18] As Nextel has explained, this arrangement would be immune to a Nextel declaration of bankruptcy, and should give the Commission and incumbent

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14 *See* Comments of Verizon Wireless, WT Docket No. 00-258, at 8 (Apr. 14, 2003).

15 Significantly, the 2.1 GHz microwave links licensed to Verizon, Cingular, and the rest of CTIA's cellular members are concentrated in the largest U.S. markets, where Nextel by commercial necessity would first seek to deploy new network capabilities. In fact, Verizon, Cingular/AT&T Wireless, Alltel, U.S. Cellular, and Sprint have 2.1 GHz microwave facilities in 29 of the nation's top 30 markets.

16 Supplemental Comments of Nextel Communications (Nov. 3, 2003) ("Nextel Funding Supplement").

17 Nextel Funding Supplement at 2 n.6.

18 *Id.* at 3.

public safety and private wireless licensees complete confidence that the funding necessary to complete 800 MHz realignment under the Consensus Plan will be available.[19]

CTIA's funding and band realignment proposals come very late in this proceeding, long after the Consensus Parties submitted a comprehensive plan addressing these issues. CTIA's proposals add nothing constructive to the Consensus Plan, and in fact would only impose unnecessary burdens on Nextel.

C. CTIA's Band Realignment Proposals Are Unnecessary and Disruptive

In its filings, CTIA not only proposes that Nextel receive inferior replacement spectrum at 2.1 GHz, it urges that Nextel be assigned this spectrum only on a piecemeal basis over the course of 800 MHz rebanding. Specifically, under CTIA's "market-by-market" approach, Nextel would receive a portion of its replacement spectrum in a given market upon the certified completion of the rebanding in that market, and would receive the rest of its replacement frequencies in all markets once its realignment and funding obligations were completed nationally.[20] CTIA claims that an immediate, nationwide assignment of replacement spectrum to Nextel "disadvantages Public Safety because it does not provide the necessary incentives for Nextel to undertake rebanding expeditiously."[21]

As discussed above, CTIA should not presume to speak for the public safety community, especially since the leading public safety organizations have already spoken in the form of the Consensus Plan.[22] The Consensus Plan contains detailed safeguards that render CTIA's proposal wholly unnecessary. In particular, the expeditious pace of 800 MHz realignment is ensured by the Consensus Plan's detailed timetable and mandatory deadlines for licensee relocations and other steps necessary to resolve CMRS – public safety interference.[23] The Consensus Plan's expeditious realignment process will be secured by the Commission's authority to condition Nextel's replacement spectrum licenses consistent with the Consensus Plan. Nextel does not oppose, and is committed to meeting, all reasonable licensing conditions that the Commission adopts to implement the Consensus Plan.

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19 *Id.*

20 CTIA April 29, 2004 Letter at 4.

21 *Id.*

22 It is ironic, if not hypocritical, for CTIA to claim it knows what will advantage or disadvantage public safety, when it has spent so much time and effort opposing the public safety-supported Consensus Plan. Nextel, in contrast, has consistently and in good faith worked with the public safety community on the important issues raised in this proceeding. It is the cellular industry, not Nextel that has been working to public safety's disadvantage.

23 *See, e.g.,* Reply Comments of the Industrial Telecommunications Association, Inc., *et al.* (the "Consensus Parties") (Aug. 7, 2002) ("Consensus Plan"); Supplemental Comments of the Consensus Parties (Dec. 24, 2002).

In addition to being unnecessary, CTIA's proposal would impose unacceptable burdens on Nextel and disrupt service to its customers. Nextel must gain immediate, nationwide access to the replacement spectrum so it can begin taking the numerous steps necessary to make this spectrum useable and ensure that the realignment process does not unduly disrupt service to its customers. Nextel must invest in the development of new network infrastructure and handsets, since currently there is no terrestrial wireless equipment that can operate in the replacement spectrum. Nextel must also initiate network planning, contractual commitments and site acquisition to utilize the replacement spectrum. Nextel will also need to clear incumbent licensees currently operating in the replacement spectrum, including relocating broadcast auxiliary service ("BAS") licensees from the 1990-2025 MHz band.[24]

Before Nextel undertakes these substantial investments, however, it is essential that it have the certainty provided by an immediate, nationwide assignment of replacement spectrum as proposed in the Consensus Plan. Under CTIA's proposal, however, Nextel would receive replacement spectrum in unpredictable dribs and drabs, yet be required to make immediate payments into a "Public Safety Trust Fund" and immediately begin surrendering spectrum and relocating its current operations in the 800 MHz band. Under the CTIA plan, Nextel would face large financial and operational burdens from Day One, yet have to wait years before it receives replacement spectrum to compensate for these burdens. The obvious purpose is to delay competitive service offerings to consumers.

CTIA's "dribs and drabs" plan thus works in tandem with its 2.1 GHz replacement spectrum proposal to hamstring Nextel as a competitor to Verizon and Cingular. Couched in a sudden concern for public safety, CTIA's proposal would delay Nextel's ability to enter the market with new services. The schedule and priority of markets for 800 MHz realignment should be made with only one goal in mind: *bringing interference relief to the largest number of public safety first responders as fast as possible.* CTIA's proposal has nothing to do with this public interest goal. Its proposal is wholly unnecessary given the detailed, careful step-by-step process that the public safety community embedded in the Consensus Plan and would cause unneeded and avoidable complexity and disruption for all parties.

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[24] Nextel has recently filed a joint BAS relocation proposal with the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV"). Under this joint proposal, Nextel would relocate BAS licensees from the entire 1990-2025 MHz band, not just the 1990-1995 MHz band Nextel would receive under the Consensus Plan. Nextel would pay the entire cost of BAS relocation, estimated to exceed $500 million, provided the Commission adopts the Consensus Plan and gives Nextel full credit for funding these BAS relocation costs. Joint Proposed BAS Relocation Plan, filed by MSTV, NAB, and Nextel in WT Docket No. 02-55, ET Docket Nos. 95-18 & 00-258, IB Docket No. 01-185 (May 3, 2004).

D. CTIA $3 Billion Trust Fund Plan Has No Basis in Fact

CTIA's other funding proposals are similarly superfluous. Although CTIA claims that the cost of 800 MHz band realignment could be as much as $3 billion, this estimate is based on an incomplete and erroneous assessment previously submitted by Motorola regarding the number of public safety radios that will need replacement as opposed to retuning.[25] As Nextel has previously explained, Motorola's assessment substantially overstates the number of radios that will need to be replaced, and any cost estimate based on this figure is fundamentally flawed.[26]

As discussed above, the Consensus Plan contains iron-clad provisions for securing Nextel's funding of 800 MHz realignment. The record in this proceeding reflects the Commission's ability to condition its decision herein to assure that Nextel provides the necessary funding to complete 800 MHz realignment. The parties who have worked together for almost three years on this matter have presented their views to the Commission, and Nextel believes the Commission will act in a manner that satisfies any legitimate concerns of 800 MHz incumbents.

E. Conclusion

The Commission should reject the various proposals contained in CTIA's recent filings. The assignment to Nextel of replacement spectrum in the 2.1 GHz band would not sufficiently compensate Nextel for its substantial contributions, which are essential to achieving the Commission's goals in this proceeding. CTIA's other proposed measures, including the piecemeal assignment of replacement spectrum and excessive funding obligations, would impose wholly unnecessary burdens on Nextel.

CTIA's proposal is far from a fair exchange. Under CTIA's plan, Nextel pays a lot more and gets a lot less. CTIA's proposal is not about public safety, or achieving "a balance that treats all interested parties fairly," as CTIA claims.[27] It is about the cynical, concerted efforts by the largest cellular carriers to use this proceeding to undermine Nextel's competitiveness and protect their market shares. The Commission must reject these efforts and adopt the Consensus Plan, including assigning Nextel replacement spectrum at 1910-1915/1990-1995 MHz.

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[25] CTIA April 29, 2004 Letter at 2 n. 2.

[26] *See* Letter from Lawrence Krevor, Nextel, to Marlene Dortch, FCC, at 2-5 (Feb. 2, 2004); Letter from Lawrence Krevor, Nextel, to Michael Wilhelm, FCC (Feb. 20, 2004); Letter from Lawrence Krevor, Nextel, to Marlene Dortch, FCC, at 3-5 (Mar. 19, 2004).

[27] CTIA April 29, 2004 Letter at 6.

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
Robert S. Foosaner
Senior Vice President and
Chief Regulatory Officer

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
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