

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications)	WT Docket No 02-55
in the 800 MHz Band)	
Consolidating the 900 MHz)	
Industrial/Land Transportation and)	
Business Pool Channels)	

Marlene H. Dortch, Secretary
Federal Communications Commission

Attention: The Commission

SUPPLEMENTAL COMMENTS

I, Dennis C. Brown, hereby file my Supplemental Comments in the above captioned proceeding. In support of my position, I show the following.

My initial comments are among the earliest to be found in the record of the instant proceeding. Since then, I have refrained from belaboring the Commission with my views, but two and one-half years have passed. A two and one-half year effort to negotiate a solution to a problem more appropriately governed by the Commission's Rules has not borne fruit. Public Safety users are no more free of interference than they were when this proceeding began. If anything, Nextel Communications, Inc. (Nextel) has warned the Commission that interference is increasing. The Commission should discard the idea that the problem of cellularized wireless interference to Public Safety can or should be solved by negotiation. The interference problem can be solved with insignificant risk of litigation or other delay by the Commission's simply and strictly enforcing its existing, codified rules, rules which have been in place since before the first

Specialized Mobile Radio System was authorized.

Priorities

The Commission has heard from every major actor in this drama in times almost beyond number.¹ In 25 years of the practice of law before the Commission, I cannot recall a proceeding which has been beset and belayed by so much lobbying effort, both inside and outside the Commission. It would appear, however, that during the period of time that this matter has been pending, the Commission may have suffered a net loss of information and a net loss of vision of its priorities and its mission.

What's important in this proceeding?

1. Stopping harmful interference from cellularized wireless carriers to Public Safety radio systems promptly.² The only thing which the Commission really must do in this matter is to stop the existing interference to Public Safety and take effective steps to prevent new interference from arising.

¹ As of this writing, Nextel has filed at least 122 notices of ex parte contacts. Many of those notices indicate that presentations were made to numerous Commission staff members on the same day. Verizon Wireless has filed at least 29 notices of ex parte contacts. Many other participants have filed notices of ex parte contacts.

² I recognize that I may be wrong in this statement. That two and one-half years have passed since the Commission launched this proceeding may suggest that protecting Public Safety users from harmful interference has not been the highest priority in this proceeding. Review of the comments filed in this proceeding and review of news reports may suggest that efforts to snatch more spectrum and to negotiate a sale price on spectrum has diverted the eye from the objective of assuring reliable Public Safety radio communications to protect the safety of the public's life and property.

What's not important in this proceeding?

1. Whether any more spectrum is allocated for Public Safety in the 800 MHz band.
2. Whether Nextel benefits or suffers in any way or is compensated in any way for the steps which it must take to stop its interference to Public Safety.

It is important that this drama end with cellularized wireless carrier interference to Public Safety stopped and the potential for further interference from cellularized wireless carriers terminated. What happens to the players in the drama other than the suffering Public Safety licensees is far less important.

Obstructive Fallacies

The propagation of three great fallacies appears to have obstructed a prompt resolution of this matter. The first fallacy is that the Commission was somehow at fault in establishing the General Category channel allocation (the first 150 channels) and the interleaved allocation of "new" 800 MHz band channels or that the frequency allocation has somehow "become outmoded". There is nothing, whatsoever, wrong with the frequency allocation. The frequency allocation has not caused the interference. The frequency allocation resides quietly in the Code of Federal Regulations. Use of the frequencies in a manner which conflicts with the assumptions which underlay the Commission's frequency allocation is the direct cause.

The second fallacy is that Nextel should be compensated by additional spectrum for any

change in spectrum use or inventory which may be necessary for Nextel to solve an interference problem which Nextel created. The Commission should recognize that Nextel is no more entitled to compensation for solving an interference problem which it has created than is any other interferor in any Radio Service in any frequency band.

The third widely propagated fallacy is that “enforcement wouldn’t work”. A report published on May 28, 2004 by “Mobile Radio Technology” magazine stated that an unnamed “FCC source” had said that, to that date, no public safety entity had filed a formal interference complaint with the Commission. Well, don’t knock it if you haven’t tried it. If no public safety entity has filed a complaint with the Commission concerning interference from a cellularized wireless carrier, then there is no factual basis for anyone to believe that enforcement of the Commission’s Rules cannot solve the interference problem.

It may be true that enforcement in a specific instance is backward looking. However, the Commission’s authority and willingness to impose substantial monetary forfeitures and to modify licenses in the public interest can cause a licensee to look a long way forward to prevent future interference.

The Landscape Has Changed

The Commission should take into account substantial changes which have occurred in the wireless business since this proceeding began, changes that make easier and which should determine the Commission’s action. When this proceeding began, Nextel was the sole

nationwide wireless carrier offering mobile telephone service and dispatch (“Push to Talk”™) service in the same handset. Now, two other nationwide carriers (Verizon Wireless and Sprint PCS) and one regional carrier (Alltel) offer competing telephone and dispatch service in the same handset. When this proceeding began, every mobile telephone user was a captive of his carrier if he desired to retain his mobile telephone number. Now, a wireless user can change carriers and port his phone number to the new carrier. These two changes mean that a Nextel user is no longer a captive of Nextel. The new competitive choices now available to consumers facilitate the Commission’s ability to enforce its rules without harm to the public interest.

Some day, Public Safety may actually decide to accept and use the gift which Congress and the Commission gave it at 700 MHz. Public Safety agencies are two and one-half years closer to being able to utilize fully its 700 MHz spectrum than when this proceeding began. The simple passage of time has significantly reduced the need of Public Safety for any additional use of the 800 MHz band.

Take A First Step Now

The Commission is not obligated to solve all aspects of a problem to be empowered to solve part of the problem. See, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986), citing Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955). Nextel may not be the sole cause of the problem, but Nextel has admitted that it is causing interference to Public Safety users. Nextel can have no reasonable complaint if the Commission begins by solving the problem which Nextel has admitted to creating. With interference from Nextel cleared, the

Commission can then take steps to clear any remaining interference which may be caused by other wireless carriers.

It must be recognized that Nextel is a relatively minor provider of a no longer unique wireless service. According to a report in the “Wall Street Journal” on May 6, 2004, Nextel’s Specialized Mobile Radio System provides service to only 10.4 percent of United States subscribers to wireless service.³ Because Nextel’s service is concentrated in the urbanized areas, most, if not all, of Nextel subscribers have multiple competitive choices, including at least one provider of competing mobile telephone/Push to Talk service. Were Nextel suddenly to vanish, only a small share of the wireless using public would suffer the disruption of choosing service from a different carrier.

Nextel has reported that its monthly rate of churn in the first quarter of 2004 was 1.6 percent.⁴ Although Nextel’s churn rate has been higher during some quarters since January 2002, conservatively using the current 1.6 percent figure and recognizing that Nextel’s

³ The report stated that Verizon Wireless serves 37 million subscribers, Cingular Wireless 24 million, AT&T Wireless 22 million, Sprint PCS 16 million, T-Mobile 13 million, and Nextel 13 million.

⁴ In its Form 10-Q report filed with the Securities and Exchange Commission on May 10, 2004, Nextel defined “churn” as “an indicator of customer retention and represents the monthly percentage of the customer base that disconnects from service. The churn rate consists of both involuntary churn and voluntary churn. Involuntary churn occurs when we have taken action to disconnect the handset from service, usually due to lack of payment. Voluntary churn occurs when a customer elects to disconnect service. Customer churn is calculated by dividing the number of handsets disconnected from commercial service during the period by the average number of handsets in commercial service during the period.”

subscriber base has grown during the past 29 months, one can calculate that approximately half of Nextel's users are new to Nextel's service since this proceeding began. (1.6 percent times 29 months equals a total churn of approximately 46 percent.) All of those new users were placed on notice by the Commission's Notice of Proposed Rule Making that Nextel was causing harmful interference to Public Safety users and that the Commission intended to take steps to solve the problem. All new users should be deemed to have accepted the risk of subscribing to Nextel's service and should have no cause for complaint against the Commission even if it were necessary to remove Nextel's service from all of them to protect the public interest and public safety.

Just Enforce the Rules

The Commission's unfortunate willingness to attempt to negotiate the means by which wireless carriers will stop interfering with Public Safety users, rather than directly enforcing its rules, has led to news reports which describe what Nextel has said that it will accept. If the Commission merely enforces its rules, Nextel will have no choice but to accept such enforcement. Neither will any other participant in the proceeding have any grounds for appeal.

The Commission should find that Nextel has violated Rule Sections 90.173(b) and 90.403(e) and should give Nextel thirty days, a reasonable period of time, within which to provide evidence that it has ceased all interference with Public Safety communications to the satisfaction of the parties which have complained to Nextel (and to the Commission, if any). Section 316(a) of the Communications Act of 1934, as amended, authorizes the Commission to modify a station license if the action will promote the public interest, convenience, and necessity. The Commission has the authority to delete frequencies from a station license to prevent harmful interference, *see*, Industrial Telecommunications Association, Inc., 17 FCC Rcd 21141 (WTB 2002). Where a licensee has other frequencies which it can use, the Commission is not obligated to replace a deleted frequency, *id.* Section 90.173(b) of the Commission's Rules provides authority for the Commission to limit or deny use of a frequency to resolve a case of harmful interference. If Nextel is unwilling or unable to cease interfering with other licensees without enforcement action, the Commission should modify Nextel's licenses or impose restrictions in a manner which will ensure that Nextel ceases causing harmful interference and which will ensure that no new interference occurs.⁵

Ample precedent exists to demonstrate that the Commission has the necessary authority to modify a license to delete a frequency to relieve interference, *See*, Terry L. Pfeiffer,

⁵ As a matter of policy, the Commission should not have rules which it is not willing or able to enforce. If the Commission is unwilling to enforce Rule Sections 90.173(b) and 90.403(e) in the instant proceeding, then at the conclusion of the proceeding, it should level the playing field and reduce a regulatory burden on all carriers by striking those sections from its Rules. All licensees will then be able, in a fair and even handed manner, to continue interfering for years until the Commission has negotiated for terms which acceptable to the interfering licensees.

Memorandum Opinion and Order, (WTB) (DA 04-1102 April 26, 2004); California Metro Mobile Communications, Inc., Memorandum Opinion and Order, 17 FCC Rcd 22974 (2002); Fresno Mobile Radio, Inc., Order of Modification, 16 FCC Rcd 19360 (WTB PSPWD 2001); Horizon Order of Modification, 17 FCC Rcd 599 (WTB PSPWD 2002); Town Taxi, Order of Modification, 16 FCC Rcd 14,820 (2001); Wayne E. Noll, Order of Modification, 17 FCC Rcd 165 (WTB PSPWD 2002); Excel Logistics, Order of Modification, 16 FCC Rcd 17,629 (WTB PSPWD 2001); Order to Show Cause to Michiana Metronet, Inc. for Point-to-Point Station WLN896 at Fort Wayne, Indiana and Point-to-Point Station WLK941 at Columbia City, Indiana, Memorandum Opinion and Order, 8 FCC Rcd 5108 (CCB 1993). Most recently, the Commission has proposed to modify a license to relieve only a perceived potential for interference to Nextel, Thomas K. Kurian, Memorandum Opinion and Order, _____ FCC Rcd. _____ (FCC 04-115 Released May 28, 2004). If the cellularized wireless carriers are unwilling to design and operate their systems in a manner which avoids harmful interference to other licensees, the Commission should exercise its full authority and move at once to modify their licenses to remove interfering frequencies.

The principle of Occam's Razor states that the simplest solution to a problem is usually the best. Nothing could be simpler or less subject to appeal than the Commission's holding that the Commission's existing Rules require Nextel to stop its harmful interference to Public Safety users and other licensees operating above 800 MHz and take reasonable precautions to prevent a resumption of interference.

Conclusion

The Commission should stop trying to negotiate a solution to the interference which Public Safety users are suffering. The Commission should terminate the above captioned proceeding by giving Nextel a brief period of time to stop causing harmful interference and if Nextel fails, the Commission should modify Nextel's licenses as necessary to stop the interference.

Respectfully submitted,

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Dated: June 1, 2004