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Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: **Ex parte presentation: WT Docket No. 02-55**

Dear Ms. Dortch:

Verizon Wireless, by its attorneys, respectfully submits this ex parte response to the latest proposal from Nextel Communications Inc. (“Nextel”) in the above-referenced proceeding. On June 4, 2004, Nextel disclosed a new 800 MHz proposal in a cryptic two-page transmittal and one-page attachment.¹ Nextel withdraws its proposal to “surrender” 4 MHz in the 900 MHz band and, for the first time, offers 2 MHz of spectrum at 800 MHz for public safety. Nextel, however, appears to offer 2 MHz of spectrum encumbered by serious interference limitations. If so, Nextel’s new proposal seems likely to recreate the very type of Nextel/public safety interference problems that this proceeding is seeking to end.

Nextel’s new proposal is far more beneficial to Nextel than public safety. Bear, Stearns noted yesterday that if one accepts Nextel’s own numbers at face value, Nextel’s new proposal is \$762 million cheaper for Nextel than its original proposal.² Moreover, the new proposal does nothing to ensure sufficient and legally sustainable funding for solving the public safety interference. Nextel has not offered one additional cent for public safety. Its offer for public safety remains woefully inadequate at \$700 million, compared to the \$3 billion provided in the CTIA plan. Nor has Nextel done anything to address the serious flaws in the Consensus Plan’s funding mechanism, under which public safety will be forced to spend taxpayer money first, then seek reimbursement from Nextel later. What the Commission needs to solve the public safety interference problem is sufficient and

¹ Ex parte presentation of Nextel Communications, Inc., WT Dkt. No. 02-55 (filed June 4, 2004) (“Nextel June 4 Ex Parte”).

² “Nextel Steps Toward a Spectrum Compromise,” Bear Stearns Equity Research Report, June 8, 2004, Exh. 2.

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enforceable funding rather than Nextel throwing encumbered spectrum onto the table in order to claim inflated credits for its spectrum “contributions.”

In contrast, the CTIA plan meets the Commission’s objectives fully and effectively. Sufficient funding is provided. Incentives for rapid rebanding are included. An independent trustee rather than Nextel will govern the process.

As discussed below, Nextel’s new offer is not accompanied by any meaningful description of how its proposal would be accomplished or what its effects might be on the rebanding process. Instead, essential information is left to speculation and conjecture. While the details of the new offer are left opaque, several serious flaws are evident:

- **Nextel’s latest gambit continues to ignore paramount public safety funding concerns that are fully and effectively addressed in CTIA’s compromise proposal.** Specifically, the Nextel plan continues to leave the funding for rebanding at risk by capping Nextel’s financial commitment at \$850 million. In contrast, the CTIA compromise plan provides assured funding in the amount of \$3 billion to eliminate existing, and prevent future, interference to public safety operations. Nextel’s plan continues the flawed reimbursement scheme that many public safety organizations have questioned in this proceeding. The CTIA compromise plan provides for direct funding to public safety, with the funds administered by an independent trustee.
- **Nextel’s proposal raises new unanswered interference and rebanding concerns.** Nextel’s new proposal is devoid of information necessary to assess the effects on public safety and private radio licensees with respect to interference protection and costs. However, it is clear by its filing that Nextel is proposing to surrender the 816-817 MHz and 861-862 MHz bands for additional public safety use. If reallocated, this spectrum would be immediately adjacent to Nextel’s core spectrum inventory in the post-rebanding world. Nextel does not explain how public safety could use this spectrum without suffering harmful interference. Indeed, for the past three years, Nextel has told us that lives remain at risk unless public safety and Nextel systems are segregated in frequency. Now, however, Nextel informs the Commission that the 2 megahertz immediately adjacent to its core spectrum holdings “provides the essential spectrum access necessary to create the interoperable communications networks essential for public safety officials to meet their expanded Homeland Security

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responsibilities.”³ To the contrary, while offering the illusion of additional relief for public safety agencies, Nextel's latest proposal only provides impaired spectrum of limited utility.⁴

- **Nextel’s purported contributions are based upon inflated spectrum valuations and unwarranted claims for credits.** Nextel’s valuation for its interleaved 800 MHz spectrum implies a value of over \$5.7 billion for 10 MHz. At the same time, Nextel maintains that 10 MHz at 1.9 GHz is only worth \$3.335 billion. The obvious inconsistencies inherent in these valuations are impossible to reconcile.⁵ Not content with inflating its spectrum contribution values, Nextel also tries to claim a right to credits for money spent to change its own operations to end its interference to public safety. It’s like a polluter asking to be paid to stop polluting. In a similar self-serving vein, Nextel seeks credits for 1.9 GHz band clearing even though it benefits the company and would be an expected undertaking of any carrier who would have acquired the 1.9 GHz spectrum in a fair and open auction.
- **The revised Nextel plan does nothing to eliminate or to minimize the fundamental illegality of its proposed “solution.”** Nextel’s efforts to structure an outcome to pay with more spectrum and less cash does not ultimately avoid the prohibitions of the Communications Act, Anti-Deficiency Act or Miscellaneous Receipts Act. The law simply does not permit private spectrum deals whether the consideration is cash, discounted spectrum or a combination of both.

³ Nextel June 4 Ex Parte at 1.

⁴ Nextel could attempt to relocate business and industrial users into these impaired bands. If so, Nextel has not provided any analysis on the impact to its rebanding costs that such a proposal would have.

⁵ Nextel continues to ignore the fact that its surrender of 800 MHz spectrum is not a value for value proposition –the new spectrum it seeks outside the 800 MHz band can be used for broadband services unlike its existing, encumbered 800 MHz spectrum.

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Nextel's latest ploy does nothing to ensure sufficient and legally sustainable funding for protecting public safety from interference. Instead, Nextel embarks on a sleeves out of its vest approach, offering additional spectrum that is impaired while assigning inflated values to create the illusion that what's being offered is worth more than what's being received. Nextel is offering to trade its costume jewelry for the taxpayers' crown jewels. In contrast, the CTIA compromise proposal addresses and meets the core objectives of protecting both public safety and the American taxpayer.

I. NEXTEL FAILS TO ADDRESS CORE PUBLIC SAFETY FUNDING CONCERNS THAT CTIA'S PROPOSAL FULLY SATISFY

Nextel's new proposal does nothing to correct the timing and funding issues resolved by the CTIA compromise proposal. CTIA has proposed a compromise solution to the ongoing interference to public safety operations caused by Nextel's transmissions in the 800 MHz band. Specifically, CTIA suggested that, if the Commission is determined to grant Nextel spectrum outside the 800 MHz band, the Commission adopt a plan that: (1) requires Nextel to deposit a minimum of \$3 billion into a trust fund for public safety and critical infrastructure licensees; (2) employs an independent trustee to manage the funds; (3) grants Nextel the 10 MHz of spectrum at 2.1 GHz that it originally sought; and (4) requires Nextel, on a market-by-market basis, to relocate and to pay the relocation costs of public safety before it receives any spectrum.⁶

Nextel's latest proposal maintains a \$850 million cap on relocation costs reimbursement for public safety and private wireless incumbents despite the strong record evidence that these costs very likely will exceed this amount. In contrast, the CTIA plan also assures public safety entities that rebanding will be completed by requiring Nextel to finish rebanding prior to receiving replacement spectrum. In sum, CTIA's proposal is superior in all respects. As the Sheriff of Prince George's County, Maryland stated in a letter last week to Chairman Powell, "I urge the Commission to adopt the CTIA plan because doing so is in the best interests of public safety."⁷

⁶ Ex parte presentation of CTIA, WT Dkt. No. 02-55, at 2-4 (filed April 29, 2004).

⁷ Letter from Michael A. Jackson, Sheriff, Prince George's County, Maryland, to The Hon. Michael K. Powell, Chairman, FCC, WT Dkt. No. 02-55 (June 3, 2004).

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II. NEXTEL'S NEW PROPOSAL RAISES UNANSWERED INTERFERENCE AND REBANDING CONCERNS

After several years of arguing the inviolability of the "Consensus Plan," Nextel has now offered to provide an additional 2 MHz of spectrum at 800 MHz for public safety, while apparently rescinding its offer to "surrender" 4 MHz of spectrum at 900 MHz. However, no precise details have been provided by Nextel with this latest proposal so it is now unclear how the relocation process would work. For example, the "Consensus Plan" contemplated some relocation of private wireless incumbents to the 900 MHz band, which apparently is no longer available.⁸ One is left to speculate not only as to the all-important relocation process, but also as to where the "new" 2 MHz of 800 MHz spectrum will be reallocated from, since Nextel did not provide a new band plan with its vague new proposal.

Being forced to read between the lines, one must assume that the new 2 MHz of spectrum will come from the 816-817 MHz and 861-862 MHz bands. Part of this spectrum, the 861-862 MHz portion, had significant out-of-band emission limits agreed to by the Consensus Parties. Further, Nextel has implied that it will abandon the stringent out-of-band emission limitations for a full 2 MHz next to the adjacent channel licensees (now situated at 861-862 MHz) which is inconsistent with the protection previously afforded adjacent channel licensees in the "Consensus Plan."⁹

Not surprisingly, the new Nextel proposal benefits primarily Nextel. First, the additional 2 MHz of 800 MHz spectrum that Nextel proposes to "contribute" is subject to out-of-band emission limitations that it has previously committed to as part of the "Consensus Plan." Second, in proposing to "surrender" spectrum encumbered with these technical restrictions, Nextel does not extend those same protections further into its remaining band. This means that users of the new spectrum would be subject to higher levels of interference from Nextel than what was previously agreed to by the "Consensus" parties. If Nextel relocates public

⁸ Nextel also fails to account for the additional relocation costs that would be associated with this widespread change to the band plan, including the relocation of significant numbers of public safety and private wireless entities that would have been previously unaffected by rebanding.

⁹ Supplemental Comments Of The Consensus Parties, WT Dkt. No. 02-55, at Appendix F (filed Dec. 24, 2002); *see also* Nextel June 4 Ex Parte at 3.

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safety licensees *adjacent* to its operations, it is recreating exactly the same interference problems that public safety has been asking Nextel to correct for the past four years.

III. NEXTEL'S PURPORTED CONTRIBUTIONS ARE BASED UPON INFLATED SPECTRUM VALUATIONS AND UNWARRANTED CREDITS

Nextel's overstatement of its proposed contributions is equally obvious and impossible to ignore. As CTIA previously noted, "Nextel's numbers don't add up" – a point true with the old plan and equally true with the new plan. Specifically, the new plan contains the following attempts at claiming unwarranted credits for cash expended or inflating the value of spectrum contributed:

- Nextel starts by claiming a right to credits for the costs incurred in modifying its own operations to prevent its interference to public safety. This is a remarkable and unprecedented attempt to be rewarded for fixing the interference problem its actions created. The Commission and ultimately U.S. taxpayers are being asked to shoulder costs of \$550 million. This is the equivalent of the polluter asking to be compensated for its clean up costs.
- Nextel continues by claiming a right to credits for moving 1.9 GHz incumbents to make that spectrum home more valuable and more suitable for its use. This is another remarkable and unprecedented attempt to shift costs of \$527 million from Nextel (the interference causer and spectrum beneficiary) to the general public.
- Nextel seeks a "credit" for relocation costs in the 1.9 GHz band. However, a large portion of relocation costs reimbursed by Nextel (\$512 million) are targeted for Broadcast Auxiliary relocation costs. These costs are much greater than Nextel's actual required costs. Nextel has voluntarily elected to relocate the entire Broadcast Auxiliary incumbency rather than just the small portion of incumbents (Broadcast Auxiliary licensees in the 2020-2025 MHz band) that it would be required to relocate under the CTIA plan. Because Nextel apparently is seeking "credit" for all of its "costs," Nextel's choice takes funding away from public safety relocation. Nextel's modified plan does nothing to correct

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these obvious deficiencies that are elegantly corrected by the CTIA proposal.

- Nextel claims that its 800 MHz spectrum is worth \$2.878 billion for a total of 5 MHz being “contributed.” Under this logic, 10 MHz of non-contiguous Nextel spectrum in the 800 MHz band would be worth over \$5.7 billion. Of course, this is simply not true. Based on the Kane Reece valuation of Nextel’s non-contiguous spectrum, such spectrum would be worth approximately \$528 million – if you give Nextel credit for its restricted of channels above 862 MHz. Clearly, the 1.9 GHz spectrum that is contiguous and nationwide is worth substantially more (in excess of \$5 billion). Nextel, of course, seeks to reach its predetermined final outcome by inflating the value of its 800 MHz spectrum and assigning an extreme undervaluation for its desired 1.9 GHz spectrum.
- Indeed, Bear Stearns has recently compared the new Nextel proposal to its previous “Consensus Plan.”¹⁰ Bear Stearns concludes that Nextel’s new proposal is \$762 million less expensive than the previous plan and views it “as a transforming event for Nextel.”¹¹ Bear Stearns believes that approval of the new proposal would provide Nextel with “a more clear upgrade path to next generation wireless services.”¹²

Nextel also continues to ignore the plain fact that its proposal to surrender 800 MHz spectrum in exchange for credits for 1.9 GHz spectrum is not a value for value proposition in any event. Nextel’s existing 800 MHz spectrum cannot be used to deploy next generation wireless data services such as those enabled by Flarion. Rather, Flarion-based services require unencumbered, contiguous spectrum, whether at the 2.1 GHz spectrum originally sought by Nextel, or its subsequently preferred 1.9 GHz outcome. As Verizon Wireless has noted in a prior filing, Nextel’s Chief Technology Officer has made clear that the company’s desire for

¹⁰ “Nextel Steps Toward a Spectrum Compromise,” Bear Stearns Equity Research Report, June 8, 2004.

¹¹ *Id.* at 4.

¹² *Id.*

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new spectrum is to find a home for new services not possible in the current 800 MHz holdings.¹³

IV. NEXTEL'S NEW PROPOSAL DOES NOT ADDRESS OR REMEDY FATAL LEGAL FLAWS

Nothing in Nextel's latest filing alters the fact that the proposed transaction is patently illegal. As Verizon Wireless and others have shown, Nextel's fundamental goal of acquiring highly desirable spectrum at 1.9 GHz, insulated from free and fair competition for that spectrum by those who desire an opportunity to bid for it at public auction, contravenes numerous provisions of federal law.¹⁴ This latest iteration of Nextel's basic plan does not cure these legal flaws – it only adds to them.

First, as we have explained for the record, the Anti-Deficiency Act (“ADA”) and the Miscellaneous Receipts Act (“MRA”) stand as criminal bars against the proposed private sale of spectrum to Nextel.¹⁵ This body of law applies, whether Nextel pays cash money in exchange for the 1.9 GHz spectrum or simply pays off its balance due in kind, by “trading in” its current spectrum holdings. In *either* case, the Commission would be granting spectrum to Nextel at a discount (depriving the federal Treasury of a portion of the proceeds that it would otherwise receive) and

¹³ See “Nextel sees spectrum alternative unworkable” at http://biz.yahoo.com/rc/040524/telecoms_nextel_spectrum_1.html (Barry West, CTO of Nextel, states: “We’re not looking at this for our voice services, we’re looking at it for the next generation of technology – for broadband.”)

¹⁴ See, e.g., Ex parte presentation of CTIA, WT Dkt. No. 02-55 (filed Dec. 24, 2003) (attaching legal memorandum explaining why grant of spectrum to Nextel under “Consensus Plan” would be unlawful and conflict with past FCC and court decisions).

¹⁵ Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55 (filed May 27, 2004) (explaining that the ADA and MRA apply to any sale of spectrum at 2.1 GHz that deviates from the CTIA compromise and fails to capture fair value); Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55 (filed Apr. 8, 2004) (explaining ADA and MRA and demonstrating that they prohibit the Nextel “Consensus Plan”).

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reimbursing Nextel for payments made to third party beneficiaries (circumventing the fact that Congress has not authorized the expenditure of agency funds for public safety relocation). As previously demonstrated, it is those two acts that trigger the ADA, because they are functional equivalents of unauthorized and unappropriated “payments of money.”¹⁶ Even if Nextel were to trade in additional spectrum in the 800 MHz band (or anywhere else) instead of paying hard cash, that would do *nothing* to change these core legal flaws in the basic Nextel approach, and the Commission thus would still be augmenting its appropriations without Congressional approval.

For similar reasons, a private sale of 1.9 GHz spectrum in which Nextel turned in additional 800 MHz spectrum would not cure the problems under the MRA. Because the FCC would nonetheless “deduct,” 31 U.S.C. § 3302(b), the discount given to Nextel and the value of the payments made by Nextel to third parties from what would otherwise be federal proceeds, the fundamental purpose of that statute would be eviscerated by this most recent version of the Nextel “Consensus Plan” as well: Government officials would fail to deposit into the U.S. Treasury the full value of monies owed to the Government.

Nor would this new tack solve the Commission’s lack of statutory authority to engage in a private sale of spectrum, or alleviate the FCC of its responsibilities under the auction statute.¹⁷ If Nextel believes that it can sidestep these problems simply by paying its tab with in-kind goods instead of cash, it is in error. A new car sale, for example, is no less a sale for legal purposes such as taxation because an old car is traded in and credited toward the purchase price of the new one. However Nextel might offer to pay its bill for spectrum at 1.9 GHz, the essential point remains: other wireless carriers would like an opportunity to compete for that spectrum, and it should, as matter of law, be auctioned. Verizon Wireless filed a petition to auction the spectrum on March 31, 2004, and the Commission has not acted on that petition. Subsequently, CTIA, on behalf of the wireless industry, informed the Commission of its support for moving “forward to auction the 1.9

¹⁶ *Id.* at 1-2.

¹⁷ See Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55 (filed Apr. 6, 2004) (attaching white paper entitled *The Federal Communications Commission Has No Authority To Award Spectrum To Nextel Through A Private Sale*).

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GHz spectrum for the fiscal benefit of the government and to improve service offerings for consumers.”¹⁸ The law plainly forbids the Commission from circumventing the auction process in favor of setting aside the 1.9 GHz spectrum for Nextel, at the expense of Nextel’s competitors and U.S. taxpayers.

The suggestions in Nextel’s *ex parte* filing do nothing to cure the fatal legal flaws in its basic plan.¹⁹ The specific type of payment or the particular spectrum proffered by Nextel in exchange for 1.9 GHz cannot obviate the underlying legal principles here – namely, when valuable public spectrum sought by many telecommunications providers is at stake, the Commission must auction that spectrum freely and fairly, rather than preordaining in extra-statutory procedures the recipient of the spectrum,

¹⁸ *Ex parte* presentation of CTIA, WT Dkt. No. 02-55, at 5 (filed Apr. 29, 2004).

¹⁹ This eleventh-hour twist on the Consensus Plan also presents *new* administrative law concerns. Neither the Notice of Proposed Rulemaking nor the subsequent public notices in this proceeding included the band plan now proposed by Nextel, and thus never provided notice to interested parties that this alternative approach was a candidate for agency action or an opportunity meaningfully to comment on it. *See Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (holding that FCC violated notice and comment requirement of Administrative Procedure Act and admonishing that requirement “improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review” (internal quotations omitted)). In fact, twice in this proceeding the FCC has clarified the current proposal so that interested parties could comment substantively on the record. *See* Public Notice, “Wireless Telecommunications Bureau Seeks Comment on ‘Supplemental Comments of the Consensus Parties’ Filed in the 800 MHz Public Safety Interference Proceeding,” Jan. 3, 2003; Public Notice, “Wireless Telecommunications Bureau Clarifies Scope of Comments Sought in 800 MHz Public Safety Proceeding,” Sept. 17, 2002. That has not happened here. Moreover, the lack of record evidence regarding Nextel’s latest proposal, as well as the lack of detail in the proposal itself, makes it impossible for parties to adequately comment on the proposal even now, or for the Commission to make a reasoned decision based on “substantial evidence.” *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970) (holding that, under APA, agency decision must be supported by “substantial evidence” in the record).

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all to the detriment of the federal Treasury and in evasion of the agency's limited authority to obligate government funds. In fact, Nextel's suggestions only increase the legal infirmities in its approach because they would cause additional violations of the APA.

* * * * *

Nextel's new plan does nothing to eliminate the infirmities of the "Consensus Plan." Instead of directly addressing the most pressing issue – full interference resolution and funding for public safety – Nextel continues to push its illegal private sale for 1.9 GHz spectrum by simply replacing 4 MHz of 900 MHz spectrum with 2 MHz of impaired 800 MHz spectrum. Indeed, the new proposal also potentially exacerbates rebanding costs and interference resolution for incumbents. Verizon Wireless urges the Commission to adopt the CTIA compromise proposal, which would better meet the urgent needs of public safety while not bestowing a private windfall to the source of public safety interference – Nextel.

Sincerely,

/s/

R. Michael Senkowski
Helgi C. Walker
Counsel for Verizon Wireless