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June 23, 2004

VIA ELECTRONIC FILING

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

Re: *Ex Parte* Presentation; 800 MHz Public Safety Interference Proceeding; WT Docket No. 02-55

Dear Ms. Dortch:

Southern Communications Services, Inc. d/b/a Southern LINC files this in response to Nextel Communications' ("Nextel") *ex parte* filing of June 14, 2004.[1] In this latest filing, Nextel turns its customary invective on Southern LINC and astonishingly argues that the upheaval that Nextel has caused in the entire 800 MHz band is somehow being "used" by Southern LINC to "improve" its spectrum position. Nothing could be further from the truth.

Nextel strains mightily to distinguish its iDEN-based network from Southern LINC's in order to convince the Commission to adopt a regulatory framework that would permanently disadvantage Southern LINC and other 800 MHz CMRS competitors by relegating them to the non-cellular portion of the 800 MHz band. What Nextel fails to mention is that it is attempting to sweep its affiliate, Nextel Partners, into the regulatory deal that it has fashioned for itself. The distinctions that Nextel attempts to make between its network and Southern LINC's do not withstand factual scrutiny; they rest on the unlawful premise that CMRS competitors can be treated differently and for that reason could not pass the scrutiny of a reviewing court.

- **"Cellularized" Definition.** Nextel now attempts to use the definition of "cellularized" both as a restriction on operations *below* 861 MHz and as a barrier to entry into the frequency band designated for commercial operations, cleverly changing the purpose of this definition to suit its anticompetitive purposes.

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[1] *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55 (June 14, 2004) [hereinafter *Nextel June 14 Ex Parte*].

- **Antenna Height.** Nextel attempts to use the high-site/low-site distinction to restrict Southern LINC's and other CMRS entities' future business plans, even though Nextel and Nextel Partners each have a mixture of high sites and low sites in the 800 MHz band and will continue to operate these sites after rebanding.

- **Business and I/LT Frequencies.** Nextel and Nextel Partners have licensed BI/LT frequencies for SMR use thousands of times. While Nextel intends to "count" these BI/LT frequencies for purposes of obtaining contiguous spectrum in the 800 MHz band and obtaining 1.9 or 2.1 GHz spectrum, it asks the FCC to discount Southern LINC's BI/LT frequencies.

- **Interference/Payment.** Nextel could not justify this disparate regulatory treatment of similarly situated CMRS licensees based on its interference to Public Safety licensees or its payment of $850 million to the relocation fund because Nextel Partners would receive the same benefit without having caused interference or contributing to the fund.

Nextel continues to give the FCC "ultimatums" on what it will or will not do to correct interference in the 800 MHz band. As many parties have demonstrated, the Commission has complete legal authority to demand that Nextel stop interfering with public safety without the need to answer to Nextel's ultimatums.

I. NEXTEL FALSELY ACCUSES SOUTHERN LINC OF "MISUSING" THIS PROCEEDING

Southern LINC takes offense to the accusations in Nextel's inflammatory *ex parte* filing of June 14, 2004. In typical fashion, Nextel attacks the credibility of Southern LINC for allegedly taking inconsistent positions in this proceeding. While Southern LINC has adjusted specific aspects of its position over the more than two years since the release of the *NPRM*, these adjustments merely responded to the evolving nature of the proceeding, Nextel's continual revision of the Consensus Plan, and Southern LINC's understanding of the ever-changing political dynamics at the FCC engendered by Nextel's rebanding ultimatums. Southern LINC's positions emanate from a desire to cure interference and compete on a level playing field.

Nextel complains that Southern LINC proposed "further study" of the interference problem in its initial filing over two years ago.[2] While Southern LINC accepts that Nextel causes interference and disruption to Public Safety communications, Southern LINC believes that the FCC still lacks comprehensive information on the precise causes of and cures for public safety interference. APCO admitted that Project 39 failed "to develop a broad inventory of all incidences of interference across the country" when it terminated its anecdotal survey of 800

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[2] *Nextel June 14 Ex Parte* at 2.

MHz interference more than one year ago.[3] Based on APCO's statements, Nextel prematurely claims that "these issues had been thoroughly assessed, analyzed, documented, affirmed, and reaffirmed in this proceeding."[4]

Although Nextel further alleges that Southern LINC has failed to offer constructive advice on the resolution of Nextel's interference problem,[5] to the contrary Southern LINC has proposed various pro-active solutions. Southern LINC joined a number of licensees to support proposals that would make the interference-causing entity assume responsibility for rectifying the problem in a legal and effective manner. For example, Southern LINC believes that the "Balanced Approach Plan," which it has supported, proposes effective technical interference mitigation techniques.

After the FCC staff indicated that they were concentrating more on realignment of the band for resolving the interference problem, Southern LINC likewise shifted its focus from proposing practical solutions to ensuring regulatory parity for all CMRS licensees in any rebanding process.[6] Although Nextel accuses Southern LINC of changing its position during the proceeding to advance its spectrum position, Southern LINC's modifications merely reflect the extent of Nextel's demands and otherwise coincide with Nextel's gradual revelation of its strategy to disadvantage its competitors. Southern LINC's vigilance in advocating regulatory parity is

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[3] Project 39 Status Report, http://www.apcointl.org/frequency/project_39/Project39StatusReport.htm (June 14, 2003). Although APCO continued to collect interference complaints, it has identified only fourteen occurrences since April 28, 2003, all but one of which occurred in Sacramento, California. http://www.apcointl.org/frequency/project_39/combined.txt.

[4] *Nextel June 14 Ex Parte* at 2.

[5] *Id.*

[6] Section 6002 of the Omnibus Budget Reconciliation Act of 1993 directs the FCC to ensure that providers of "substantially similar common carrier services" are subject to "comparable" technical requirements. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312, 397 (1993) [hereinafter 1993 Budget Act]. The FCC interpreted this requirement to apply to *all CMRS* providers, including SMR, PCS, cellular, and paging licensees, In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 7996 ¶ 12, 8009-8035 ¶ 37-77, 8042 ¶ 94 (1994), and found that treating substantially similar CMRS providers equally advanced the goal of "ensur[ing] that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace." *Id.* at 7994 ¶4.

necessary because no signatory of the Consensus Plan adequately represents the interests of CMRS providers.[7]

In particular, Nextel would dramatically improve its spectrum position through the adoption of the Consensus Plan, receiving clear, contiguous spectrum in the cellularized band in exchange for scattered interleaved spectrum and significantly restricted 700 MHz spectrum. Nextel Partners would also receive contiguous spectrum in the cellularized band for its interleaved spectrum. Consistent with the regulatory parity requirement, Southern LINC should receive contiguous spectrum in the cellularized band in exchange for its interleaved spectrum. Because Southern LINC's position is equivalent to the treatment that Nextel and Nextel Partners would receive, any problem that Nextel has with Southern LINC's position is symptomatic of problems with the Consensus Plan generally. Thus, if Nextel believes that Southern LINC's requests are unfair to consumers and Public Safety, then it must also concede that its own requests are unfair to consumers and Public Safety. The only difference is that Nextel's requests also disadvantage its competitors.

While Nextel accuses Southern LINC of attempting to "misuse" this proceeding,[8] Southern LINC agrees with Verizon Wireless that Nextel's complaint is an appropriate characterization of its own actions.[9] Nextel has waited to respond to Southern LINC's requests for relocation to the cellular band until the last minute. Southern LINC requested inclusion in the cellular band in February 2003, when it asked the FCC to extend the cellular band below 861 MHz.[10] In early April 2004, after the FCC staff had indicated that an expansion of the cellular band would be unlikely, Southern LINC requested inclusion in the band above 861 MHz.[11] Despite Southern LINC's repeated requests for regulatory parity, and submission of several *ex parte* filings on this issue in the record, Nextel has inexplicably waited to complain until this late date.

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[7] In its *ex parte* filing of June 14, 2004, Nextel concedes that the Consensus Plan does not represent the views of all the 800 MHz licensees, noting that *no* member of the Consensus Plan even considered affording regulatory parity to CMRS providers. *Nextel June 14 Ex Parte* at 5. Nextel states that relocating all CMRS providers to the cellularized band "was not part of the balancing of interests sought by the Consensus Parties in proposing a comprehensive realignment of the 800 MHz band." *Id.*

[8] *Nextel June 14 Ex Parte* at 2-3.

[9] *Ex Parte* Presentation of Verizon Wireless, WT Docket No. 02-55, 2 n.2 (June 16, 2004).

[10] Supplemental Comments of Southern Communications Services d/b/a Southern LINC, WT Docket No. 02-55, 34-39 (Feb. 10, 2003).

[11] *E.g.*, *Ex Parte* Presentation of Southern Communications Services d/b/a Southern LINC (Apr. 6, 2004).

Nextel also manipulates various facts to overstate its position. In its *ex parte* filing of June 14, 2004, Nextel asserts that allowing Southern LINC to relocate to the cellular band would adversely affect "millions of customers" in the southeast.[12] Nextel further states that the FCC could not relocate Southern LINC to the cellular band "without dramatically impacting Nextel and its approximately 13 million customers."[13] But the *ex parte* filing also indicates that the combined systems of Nextel and Nextel Partners, which are separate licensees, serve only approximately 800,000 subscribers in Southern LINC's service area.[14]

Finally, Nextel has frequently flip-flopped on its position in this proceeding. If Nextel really intended for all parties to be held to their original positions on every single issue in this proceeding, Nextel's current position would be dramatically different. For example, Nextel would still gladly accept the purchase of 2.1 GHz spectrum instead of 1.9 GHz spectrum.[15] Nextel would also continue to argue that $500 million is sufficient to relocate all displaced licensees,[16] even though it has since acknowledged that the amount required is $850 million and other parties have indicated that the relocation would greatly exceed that amount.

Nextel stated unequivocally that no terms of the Consensus Plan could be changed or the agreement among the parties ended.[17] Yet at this late date, Nextel is unilaterally making significant changes to the Consensus Plan, including taking its 900 MHz spectrum off the table, spectrum that would benefit its private wireless and Public Safety allies.

II. NEXTEL'S LATEST ATTACK ON SOUTHERN LINC HIGHLIGHTS THE UNLAWFUL NATURE OF THE CONSENSUS PLAN

No rationale exists to support preferential treatment for Nextel and Nextel Partners under the Consensus Plan. Although Nextel strains to differentiate its system from Southern LINC's, any differences are insufficient to override the fundamental similarities. Regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners, and Southern LINC. Thus, Nextel, Nextel Partners, Southern LINC, and other CMRS entities should receive comparable regulatory treatment.

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[12] *Nextel June 14 Ex Parte* at 4.

[13] *Id.*

[14] *Id.* at 3 n.12.

[15] Nextel Communications, Inc., Promoting Public Safety Communications: Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Safety Needs 8 (Nov. 21, 2001) [hereinafter *Nextel White Paper*].

[16] *Id.* at 40.

[17] Supplemental Comments of the Consensus Parties, WT Docket No. 02-55, 4 (Dec. 24, 2002).

A. The "Cellularized System" Definition Should Not Be Used as a Barrier to Entry Into the Band Above 861 MHz

The definition of " cellularized system" is an inappropriate measure of a licensee's eligibility for the band above 861 MHz. The premise of the Consensus Plan, as well as the White Paper preceding it, was to eliminate the interleaving of "interference limited systems" and "noise limited systems."[18] While the original Consensus Plan sought to achieve this result by prohibiting "cellularized systems" *below* 861 MHz,[19] Nextel now attempts to use the definition of "cellularized system" as a barrier to entry to the portion of the band *above* 861 MHz.[20] Nextel deviates from the original purpose of the Consensus Plan, claiming that the FCC should limit relocation above 861 MHz to only those licensees that meet the definition of "cellularized system."[21] Of course, a more rational regulatory approach would be to treat such definition as *permissive, i.e.*, entities wishing to employ this architecture are permitted to do so above 861 MHz.

When Nextel initially introduced the concept of separating incompatible technologies, it focused on the distinction between "interference limited systems" and "noise limited systems."[22] Nextel claimed that "licensing different services on adjacent, interleaved, and mixed spectrum in the 800 MHz band worked so long as all licensees built systems using the same basic 'noise limited' design architecture: analog, high-site, high power configurations without frequency reuse."[23] Nextel further explained that the interference resulted from the introduction to the 800 MHz band of "interference limited systems," which are "system designs featuring multiple, low-power base stations with intensive frequency reuse and mobile hand-off from cell-to-cell throughout a geographic area to serve many times more users with the same quantity of spectrum."[24] Based on these definitions, *Nextel*, *Nextel Partners*, and Southern LINC operate "interference limited systems" that, according to Nextel, require relocation above 861 MHz.

The Consensus Plan unsurprisingly agreed that "'the predominant root cause of the interference problem is the . . . mix of cellular architecture CMRS systems with the traditional noise-limited systems typically used by public safety . . . ."[25] The Consensus Parties defined this

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[18] Reply Comments of APCO, et al., WT Docket No. 02-55, 8-11 (Aug. 7, 2002) [hereinafter *Consensus Plan*].

[19] *Id.* at 10.

[20] *Nextel June 14 Ex Parte* at 1, 1 n.1.

[21] *Id.*

[22] *Nextel White Paper* at 20-21.

[23] *Id.* at 20.

[24] *Id.* at 21.

[25] *Consensus Plan* at 8.

"cellular-like system architecture" as consisting of "'large geographic service areas segmented into many smaller areas or cells, each of which uses its own base station, to enable frequencies to be reused at relatively short distances.'"[26] The Consensus Parties also asked the FCC to prohibit such cellular-like architecture, which would include the Nextel, Nextel Partners, and Southern LINC systems, in the portion of the band below 861 MHz.

Although Nextel and the Consensus Parties seek to prohibit cellular-like architecture in the non-cellular band, they substituted an arbitrary and ambiguous definition of "cellularized system" for the fundamental distinction between "interference limited systems" and "noise limited systems."[27] The parameters of the "cellularized system" definition are so arbitrary and ambiguous that the definition has remained a subject of debate since its unveiling, even among signatories of the Plan,[28] and fails to achieve the ostensible purpose of the realignment.

In August, 2002, the original Consensus Plan attempted to quantify the operational distinction between interference limited systems and noise limited systems using the "cellularized system" definition.[29] The Consensus Plan included the following definition of "cellularized system":

> systems with all of the following characteristics would be prohibited in the non-cellularized band: (1) more than 5 overlapping, interactive sites featuring hand-off capability; (2) sites with antenna heights of less than 100 feet above ground level on HAATs of less than 500 feet; *and* (3) sites with more than 20 paired frequencies.[30]

While the Consensus Parties subsequently promised to "clarify certain key provisions of the Consensus Plan that have been mischaracterized in recent filings at the Commission, including those relating to . . . permissive cellularization by licensees operating below 816/861 MHz,"[31] they never identified the alleged mischaracterizations or clarified the definition.

In the past two weeks, however, Nextel has deviated from this definition, providing two new, and inconsistent, definitions of "cellularized." In its *ex parte* filing of June 9, 2004, Nextel stated that the Consensus Plan allows incumbents in the non-cellular block to deploy low sites,

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[26] *Id.* at 10.

[27] *Id.* It should be noted that the "cellularized definition" was not directly derived from the 700 MHz proceeding.

[28] Nextel appears not to have secured the consent of the other Consensus Parties before redefining the term "cellularized system."

[29] *Consensus Plan* at 8-11.

[30] *Id.* at 10.

[31] *Ex Parte* Presentation of Consensus Parties, WT Docket No. 02-55, 2 (Aug. 7, 2003).

"provided that the incumbent does not deploy in a market more than five such interacting sites, each below 100 feet above average terrain and each with more than 20 channels in operation at each site."[32] In its June 14, 2004, attack on Southern LINC, Nextel asserts that the Consensus Plan provides "a comprehensive definition of what is and is not the type of system that should be relocated to the 800 MHz cellular block," ingeniously transforming the concept from a restriction designed to prevent interference into a barrier to entry.[33] Nextel includes the following definition:

> The Consensus Plan proposed that 800 MHz licensees offering services that are interconnected with the public switched telephone network on a system containing the architecture described below should be located (or retuned) to the cellular channel block under the Consensus Plan. The three factors in the test are conjunctive, as follows: (1) the system contains five or more linked base stations; i.e., it offers real-time hand-off of ongoing calls from site-to-site; and (2) these linked sites have antenna heights below 100 feet above ground with HAATs of less than 500 feet; i.e., they are not classic SMR/public safety "high sites;" and (3) the operator is using 20 or more channels at each site.[34]

With its two most recent filings, Nextel states that the "five interactive sites" have to be in the same "market," which is undefined, and the licensee must be "offering services that are interconnected with the public switched telephone network." These two conditions are new additions to the definition of "cellularized" system, having not appeared in any earlier filings.

In addition to these new conditions, Nextel alters, or mischaracterizes, other portions of the "cellularized" definition. In its *ex parte* filing of June 9, for example, Nextel stated that the antenna height must be "below 100 feet above average terrain,"[35] while all other filings have required the antenna to be less than 100 feet above ground and with HAAT less than 500 feet.[36] Nextel also has been inconsistent regarding whether each site must have "20 or more" channels or "*more* than 20 channels."[37]

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[32] *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 7 n.18 (June 9, 2004).

[33] *Nextel June 14 Ex Parte* at 1.

[34] *Id.* at 1 n.1.

[35] *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 7 n.18 (June 9, 2004).

[36] *E.g., Consensus Plan* at 10.

[37] *Compare id. with Nextel June 14 Ex Parte* at 1 n.1 (emphasis added).

B. No Rational or Lawful Distinction Can Be Made Among Existing 800 MHz CMRS Licensees Based on the Number of High Sites and Low Sites in the System

The FCC should decline to distinguish between CMRS providers based on the number of high-site or low-site antennas in their systems. The Consensus Plan attempts to resolve interference to Public Safety and private wireless licensees in the 800 MHz band by realigning the spectrum and relocating incumbent licensees to provide for one block of spectrum for high-site, high-power use (the "non-cellular block") and one block of spectrum for low-site, low-power cellular use (the "cellular block").[38] From this premise, Nextel goes on to argue that Nextel and Nextel Partners are the only two companies that should be permitted to occupy the cellular ("low-site") portion of the reorganized 800 MHz band.[39] This assertion, although oft repeated, is not factually correct. Nor could the agency legally adopt a regulatory construct that effectively forecloses Nextel's (as well as Nextel Partners') competitors from operating under the same technical and operational rules.[40]

Nextel and Nextel Partners operate high sites throughout their systems. A cursory examination of the antenna heights in Southern LINC's system, Nextel Partners' system, and Nextel's system, shows that each licensee operates a combination of high and low sites. While Nextel asserts that Southern LINC should remain in the non-cellular block because it "does not exclusively rely upon what the Consensus Plan definition describes as "low-site" architecture, neither Nextel nor Nextel Partners can demonstrate that it is exclusively a low-site, low-power system.

Because the FCC affords 800 MHz licensees some flexibility regarding the reporting of their site-based antenna heights,[41] Southern LINC cannot state definitively how many of Nextel

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[38] *Consensus Plan* at 8-9. The Consensus Plan has arbitrarily selected the height of 100 feet for its definition of "low-site." *Id.* at 10.

[39] *Nextel June 14 Ex Parte* at 4-5, 6-7.

[40] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312, 397 (1993); In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 7996 ¶ 12, 8009-8035 ¶ 37-77, 8042 ¶ 94 (1994).

[41] These figures reflect only the antenna heights of Nextel and Nextel Partners site-based licenses, which is the only information available in the FCC's ULS database. To the extent that Nextel and Nextel Partners colocate, there may be some duplication in the overall number of sites.

or Nextel Partners' sites exceed the 100 foot limit for the cellular definition.[42] Based on Nextel and Nextel Partners' site-based licenses in the Universal Licensing System, however, Nextel and Nextel Partners appear to operate on numerous high-site antennas in several markets:[43]

Market	**Number of Sites with Antennas Greater than 100 Feet AGL**	
	Nextel	**Nextel Partners**
Binghamton, New York	84	193
Jackson, Mississippi	90	124
Macon, Georgia	288	82
Montgomery, Alabama	19	87
St. Louis, Missouri	305	12

Even though these numbers might not be completely representative of the actual buildout, Southern LINC's own observations confirm that Nextel and Nextel Partners operate with antennas higher than 100 feet above ground level at many locations. In some instances, Nextel or Nextel Partners' antennas are located *above* Southern LINC's antennas on the same structure.

The antenna information for Nextel Partners is particularly relevant because Southern LINC competes with Nextel Partners over a larger area than the area in which Southern LINC competes with Nextel. The presumption of the Consensus Plan that only Nextel (and, interestingly, Nextel Partners) can qualify to relocate to the cellular block is completely

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[42] Southern LINC is also unable to determine precisely how many of Nextel or Nextel Partners' sites exceed 500 feet above average terrain and, thus, would not meet the second requirement of the cellular definition.

[43] Southern LINC has adjusted the size of the radius used to calculate the number of high-site antennas to approximate the size of the respective markets. While Southern LINC used a 10-mile radius for the more geographically spread-out markets of Jackson and St. Louis, it used a 5-mile radius for Binghamton, Macon, and Montgomery.

unsupported by facts and contrary to the FCC's statutory mandate to treat CMRS competitors equally.[44]

The proportion of high-site to low-site antennas is also a poor indicator of future interference potential because of the evolving nature of commercial systems. The need to put in a low site or high site depends on a number of factors, and the ability of a competitor to select the system architecture that best meets its needs should not be frozen by regulatory fiat as Nextel here proposes.[45] System architecture of all commercial providers evolves based on customer needs. As customer load increases, the need to build more low sites will increase in order to maximize frequency reuse. Therefore, low-site architecture gives a competitor the ability to increase its capacity. As Nextel well knows, the wireless industry is not static, and system architecture must change in order to accommodate market demands. As demand increases, Southern LINC will need to increase its number of low sites just as Nextel Partners will and as Nextel already has. Therefore, the FCC cannot "freeze" one company into a certain architecture without seriously damaging that company's competitive posture.

The Consensus Plan violates statutory and constitutional protections. The disparate treatment of CMRS competitors proposed by Nextel violates the FCC's statutory and constitutional mandates. When combined with the limited amount of spectrum Nextel proposes to set aside for the "cellular band," the operation of these definitions means that no other competitor can ever qualify to enter this spectrum or operate under its flexible rules, even if it operates in a cellularized configuration. While the Consensus Plan violates the statutory mandate of regulatory parity, it also contravenes the Administrative Procedure Act and the due process clause of the Fifth Amendment by treating similarly situated licensees differently without any rational basis.[46]

C. No Lawful Distinctions Can Be Made Between Southern LINC, Nextel, and Nextel Partners Based On The Amount of BI/LT Spectrum in Their Systems

The FCC cannot distinguish between CMRS licensees according to their use of site-based or Economic Area ("EA") licenses. Nextel claims that "Southern LINC's heavy reliance on B/ILT spectrum, and not EA spectrum[,] creates an importance [*sic*] difference" between the

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[44] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312, 397 (1993); In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 7996 ¶ 12, 8009-8035 ¶ 37-77, 8042 ¶ 94 (1994).

[45] Nextel generously offers to allow its competitors to request rule waivers if they can prove that they will not cause interference to Public Safety by adding low sites. Nextel and Nextel Partners do not have to operate under this obligation, however.

[46] 5 U.S.C. § 706 (2004); Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Fifth Amendment's due process clause prohibits arbitrary discrimination by the federal government).

systems and suggests that the FCC should not count these site-based licenses the same as EA licenses.[47] Nextel fails to provide any legitimate reason for discounting these spectrum holdings, given the FCC precedent regarding Business and I/LT licenses used by SMRs, Nextel's own statements in prior proceedings, and Nextel's spectrum licensing history.[48]

The FCC has already concluded that there is no difference between SMR systems using converted former Business and I/LT frequencies and those using EA licensed frequencies. In a *Memorandum Opinion and Order* on remand from the *Fresno Mobile* decision,[49] the FCC specifically found that incumbent wide-area SMR licensees, such as Southern LINC, that use both site-based and EA licenses should not be singled out as the only CMRS providers that were not entitled to flexible construction requirements.[50] In making this finding, the FCC "conclude[d] that SMR licensees granted extended implementation authority are sufficiently similar to EA licensees that they should have similar flexibility with respect to construction requirements.[51] The FCC further stated that "the record on remand demonstrates that incumbent wide-area SMR licensees such as Southern do provide service that is similar, if not identical, to that provided by EA licensees and other CMRS providers. "[52]

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[47] *Nextel June 14 Ex Parte* at 5-6.

[48] Southern LINC finds it ironic that Nextel challenges the fairness of an 800 MHz licensee being permitted to "swap" encumbered EA spectrum licenses for "clean" channels elsewhere in the 800 MHz band, or to swap site-specific licenses for full EA licenses elsewhere at 800 MHz. Throughout this proceeding, Southern and many other parties have questioned the basic fairness of allowing Nextel and Nextel Partners to upgrade their spectrum holdings in this manner. Nextel claims in its June 14 letter that, "[n]ot all holders of EA licensees [*sic*] should have their entire systems relocated to the cellular block and that EA spectrum that is relocated must only be relocated on a channel-for-channel basis based on what is clear and usable in a given market. EA licensees must not be permitted to exploit the public safety interference situation to upgrade their spectrum position." *Id.* If its position is that only Nextel, or only Nextel and Nextel Partners, should be allowed to relocate on something other than a "channel-for-channel basis based on what is clear and usable in a given market," then Nextel must also concede that its proposal is inherently unfair to other 800 MHz licensees, is anticompetitive, and would violate statutory and regulatory requirements for regulatory parity among similarly situated licensees.

[49] Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 968-970 (D.C. Cir. 1999).

[50] In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order*, 14 FCC Rcd 21679 (1999).

[51] *Id.* at 21686 ¶ 12.

[52] *Id.*

In a subsequent *Memorandum Opinion and Order,* the FCC specifically extended this reasoning to Business and Industrial/Land Transportation channels that had been converted to commercial use and were used by incumbent wide-area SMR licensees.[53] The FCC likewise concluded that there was no rational basis to make a distinction concerning these channels when they were incorporated into a CMRS network.[54] The FCC found that "wide-area incumbent 800 MHz SMR licensees operating on BI/LT channels are sufficiently similar to wide-area incumbent 800 MHz licensees operating on SMR EA-type channels that they should have the same flexibility with respect to construction requirements."[55] The FCC went on to state that "[t]he record further demonstrates that wide-area SMR licensees such as Southern use inter-category BI/LT channels interchangeably with SMR channels, and that the BI/LT channels licensed on this basis are used to provide service that is similar, if not identical, to that provided on SMR channels by 800 MHz EA and incumbent wide-area SMR licensees."[56]

Although Nextel may have a short memory in this regard, it filed comments in the *Fresno* remand proceeding specifically supporting regulatory parity. Nextel asked the FCC to give wide area 800 MHz SMR licensees using Business and I/LT channels the same flexible construction requirements as those given to other CMRS providers because they provide similar services.[57] Nextel now argues that the reverse should be true, that in fact the FCC should make unwarranted distinctions between Nextel, Nextel Partners, and Southern LINC because Southern LINC's system incorporates Business and I/LT channels.

Nextel and Nextel Partners have licensed BI/LT Frequencies in the SMR Service in thousands of instances. While Nextel also recommends discounting site-based licenses because Southern LINC "aggressively" acquired former Business and I/LT frequencies and converted them to commercial use under the inter-category sharing rule,[58] this proposed justification is both nonsensical and overlooks Nextel's own spectrum acquisition history.

Nextel's assertions about the makeup of Southern LINC's spectrum are somewhat incredible given that Nextel and Nextel Partners have also extensively licensed 800 MHz Business and Industrial/Land Transportation channels in the trunked SMR mode to support their

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[53] In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order*, 15 FCC Rcd 17009 (2000).

[54] *Id.* at 17011 ¶ 6.

[55] *Id.*

[56] *Id.*

[57] Comments of Nextel Communications, Inc., PR Docket No. 93-144, 1-2, 5-6 (Mar. 27, 2000).

[58] *Nextel June 14 Ex Parte* at 5.

operations. In the state of Delaware, for example, Nextel and Nextel Partners have licensed at least 61 of the 100 available discrete Business and I/LT frequencies for a combined total of approximately 1,560 BI/LT frequency/sites licensed across the state.[59]

A sampling of Nextel and Nextel Partners' licensing in other markets is consistent with the circumstances in Delaware. Licensing in Florida markets at and to the south of Southern LINC's service territory (where Southern LINC did not generally compete with Nextel for BI/LT channels) are illustrative:

Market	**Number of Discrete BI/LT Channels Licensed (Out of 100 Total Available) by Nextel and Nextel Partners**[60]	**BI/LT Frequency/Sites**
Jacksonville	84	6732
Orlando	95	6476
Tampa	94	6317
Miami	75	7510
Tallahassee	27	1194

[59] Southern LINC uses the term "frequency/site" to refer to an instance in which Nextel has separately licensed a discrete frequency.

[60] Southern LINC searched the FCC ULS records to identify licensing within a 10-mile radius of the approximate center of each market. Southern LINC is unclear how Nextel calculated its channel counts in its June 14 letter.

Clearly, BI/LT spectrum licensed in the trunked SMR mode is a vital part of Nextel's operations, just as it is vital to Southern LINC's. Based on this information, Nextel appears to have gamed the BI/LT spectrum counts by focusing on Southern LINC's service area, which is the only area where Nextel does not have as much BI/LT spectrum. Nextel's argument that Southern LINC's spectrum holdings somehow justify disparate treatment for Southern is specious and the FCC should reject it.

While Nextel recommends discounting Southern LINC's Business and I/LT licenses in any rebanding process,[61] Nextel simultaneously counts its own substantial Business and I/LT holdings toward the proposed spectrum exchange.[62] These Business and I/LT licenses figure prominently in Nextel's "running average" of spectrum.

D. Nextel's Status as the Primary Source of Interference and Its Contribution to the Relocation Fund Do Not Justify Preferential Regulatory Treatment

Nextel also could not justify this disparate regulatory treatment of similarly situated CMRS licensees based on its interference to Public Safety licensees or its payment of $850 million to the relocation fund. These factors fail to explain the preferential treatment granted to Nextel Partners, which has not been identified as a significant source of interference and is not contributing to the relocation fund. Based on the extensive economic data it has filed on the record, Nextel expects to be reimbursed in spectrum value for every dollar it spends on the rebanding process, as well as any perceived loss in "value" from its compliance with explicit conditions intended to prevent future interference.[63]

Nextel Partners is apparently not a primary source of interference to Public Safety licensees. Based on the interference complaints compiled as part of APCO's Project 39, Nextel Partners is alleged to have caused only one instance of interference.[64] Because Nextel Partners has not received many interference complaints, it would not have to resolve the interference problem. Thus, the need to mitigate ongoing interference could not serve as a rationale to move Nextel Partners to contiguous spectrum in the cellular band to the exclusion of Southern LINC and other CMRS providers.

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[61] *Nextel June 14 Ex Parte* at 5-6.

[62] Comments of Nextel Communications, Inc. WT Docket No. 02-55, Appendix A (May 6, 2002); *see* Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55, Appendix I (Aug. 7, 2002).

[63] *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55 (Mar. 15, 2004).

[64] APCO Project 39, http://www.apcointl.org/frequency/project_39/combined.txt.

In addition, nothing in the record indicates that Nextel Partners will contribute to the relocation fund. While Nextel Partners has filed comments agreeing to trade interleaved spectrum for contiguous spectrum in the cellular band,[65] it never agrees to provide funding for the relocation of displaced incumbents. In a recent statement, the Chairman, President, and CEO of Nextel Partners has confirmed that "none of the $850 million in the plan will come from Nextel Partners."[66]

III. NEXTEL'S RECOMMENDATIONS REGARDING SOUTHERN LINC ARE UNLAWFUL, IMPRACTICAL, AND INCONSISTENT WITH THE INTERFERENCE MITIGATION THEORY OF THE CONSENSUS PLAN

Nextel asserts that the FCC could relegate all or a portion of Southern LINC's system to the non-cellular band without harming either Southern LINC or Nextel. Nextel argues that "[e]ither alternative keeps Southern LINC, other non-Nextel EA licensees and Nextel whole, does not punish any party or its customers, and still provides for interference protection for public safety and private wireless licensees."[67] The grandfathering or bifurcation of Southern LINC's system would commercially disadvantage Southern LINC, and neither alternative would satisfy the regulatory parity requirement. Unlike Nextel and Nextel Partners, Southern LINC would encounter substantial practical, technological, and administrative burdens. These two alternatives are also inconsistent with the Consensus Plan's ostensible goal of protecting Public Safety licensees from harmful interference going forward.

A. Grandfathering Southern LINC Would Contravene the Statutory Mandate of Regulatory Parity

Southern LINC would suffer substantial harm if the FCC were to grandfather its entire system in the non-cellular band. In particular, Southern LINC would presumably have to at least conform any expansion of its operations to the non-CMRS standards of the non-cellular band. As mentioned above, the prohibition on low-site/low-power architecture would freeze many portions of Southern LINC's system and prevent it from adjusting to meet marketplace demand. While grandfathering would preclude the expansion of Southern LINC's system, limit the enrollment of new subscribers, and decrease service quality, it would simultaneously benefit Southern LINC's competitors, such as Nextel and Nextel Partners.

Even if the FCC were to grant Southern LINC blanket waivers to operate a cellularized system in the non-cellular band, other general restrictions would hinder Southern LINC's ability to provide competitive service or expand its system. For example, the FCC would unduly

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[65] Comments of Nextel Communications, Inc. and Nextel Partners, Inc., WT Docket No. 02-55, 3 (Feb. 10, 2003).

[66] A Conversation with John Chapple, Nextel Partners, TelephonyOnline.com (May 13, 2004).

[67] *Nextel June 14 Ex Parte* at 7.

prejudice Southern LINC if it required Southern LINC to constrain its operations to technical and operational requirements designed for noise-limited systems, while Nextel and Nextel Partners would benefit from future technical and licensing flexibility in the band reserved for interference limited systems.

Without question, such "grandfathered" status would instantly devalue Southern LINC as a company by relegating its assets to "restricted" status. The grandfathering of Southern LINC's system would, thus, unquestionably, result in disparate regulatory treatment for Southern LINC in violation of the statutory mandate of regulatory parity. The FCC could not lawfully adopt rules that grant these advantages only to select CMRS competitors.

B. Bifurcation of Southern LINC Across Two Bands Would Result in Unfair Prejudice

The bifurcation of Southern LINC's system suggested by Nextel would also violate the statutory mandate of regulatory parity, while at the same time being completely impractical. If the FCC were to split Southern LINC's system between the cellular band and the non-cellular band, Southern LINC would presumably have to operate under two different sets of rules. Southern LINC could follow the flexible CMRS technical and operational rules for a portion of its system but would have to comply with more stringent rules for another portion of its system. While the imposition of two regulatory regimes on Southern LINC's CMRS operations would complicate the administration of the overall system, the application of these disparate rules would also violate the regulatory parity requirement because other licensees would not have to comply with these obligations.

Even if the FCC were to apply the same CMRS rules to Southern LINC's entire system, technological issues counsel against bifurcation. While a portion of Southern LINC's system would have access to new system designs and technology enhancements, the portion of Southern LINC's system in the non-cellularized band would not receive adequate vendor support for its equipment needs. This disparity in equipment availability would eventually render the spectrum in the non-cellularized band unusable, result in tremendous stranded investment, cause intense consumer dissatisfaction, and result in an unfair competitive advantage for CMRS providers that operate entirely within the cellularized band.

C. Cellularized Operations in the Non-Cellular Band Are Inconsistent with the Fundamental Goal of the Consensus Plan

Nextel states that grandfathering or bifurcating Southern LINC's spectrum would "provide[] for interference protection for public safety and private wireless licensees."[68] While these alternatives would harm non-Nextel CMRS providers and consumers, they would also violate the basic tenets of the Consensus Plan.

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[68] *Id.*

Although Nextel claims that Southern LINC attempts to manipulate this proceeding to improve its spectrum holdings at the expense of Public Safety,[69] Public Safety licensees would actually benefit from the relocation of Southern LINC and other 800 MHz SMR licensees to the cellular band under the interference mitigation theory proposed by the Consensus Plan. The Consensus Parties stated that one of the fundamental goals of the Plan is to separate cellular and non-cellular systems.[70] Although the Consensus Parties claim that this separation is necessary to mitigate interference to Public Safety licensees, they inexplicably propose to force Southern LINC and other commercial licensees to remain in the non-cellular band. In addition, if Southern LINC were relocated to the cellular band starting at 861 MHz and going up, there would be a substantial amount of newly available spectrum in the non-cellular band in this area.

Nextel fails to explain why granting regulatory parity to all CMRS licensees would harm Public Safety. Although Nextel has asserted that low-site/low-power systems could not operate in the non-cellular band without causing interference to Public Safety licensees,[71] it simultaneously demands that non-Nextel CMRS providers remain in this band.[72] As explained above, however, CMRS providers must inevitably migrate from high-site/high-power to low-site/low-power systems to increase their capacity and subscribership.

The assumption of the Consensus Plan is that low-site/low-power systems cause interference to Public Safety.[73] The relocation of Southern LINC and other CMRS providers to the cellular band would benefit Public Safety licensees under this theory. Nevertheless, in its *ex parte* filing of June 14, 2004, Nextel conditions its participation in rebanding on the unfair treatment of its competitors. If the FCC requires all CMRS providers to relocate to the cellular band, Nextel states that "[i]t would be impossible for [it] to support 800 MHz realignment under

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[69] *Id.* at 2.

[70] *Consensus Plan* at 8-9.

[71] Comments of Nextel Communications, Inc. and Nextel Partners, Inc., WT Docket No. 02-55, 11 (Feb. 10, 2003) ("separating cellular and non-cellularized systems into different channel blocks is an essential step to mitigate CMRS – public safety interference").

[72] *Nextel June 14 Ex Parte* at 4-5, 6-7.

[73] *Consensus Plan* at 8-9.

such circumstances."[74] Thus, Nextel's commitment to Public Safety is so steadfast that it threatens to continue interfering with Public Safety communications if the FCC were to treat Southern LINC fairly.

Very truly yours,

Christine M. Gill

Attorney for Southern LINC

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Bryan Tramont
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Sheryl Wilkerson
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[74] *Nextel June 14 Ex Parte* at 5.