

June 23, 2004

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Ms. Dortch:

On Tuesday, June 22, 2004, Diane Cornell, Vice President, Regulatory Policy, CTIA, Chris Guttman-McCabe, Assistant Vice President, Regulatory Policy and Homeland Security, CTIA, and Adam Krinsky of Wilkinson Barker Knauer, met separately with Jennifer Manner, Senior Counsel for Commissioner Kathleen Abernathy, Sam Feder, Legal Advisor on Spectrum and International Issues for Commissioner Kevin Martin, and Barry Ohlson, Senior Legal Advisor and Legal Advisor for Spectrum & International Issues for Commissioner Jonathan Adelstein. CTIA reiterated that its April 29, 2004, compromise proposal<sup>1</sup> provides significant benefits over the “Consensus Plan,” including: almost a four-factor increase in funding for Public Safety relocation; increased certainty to ensure that costs truly are covered; and meaningful incentives to ensure full, nationwide relocation in a timely manner. CTIA also addressed several issues that have been raised recently that are relevant to the proceeding. In particular:

- **The NextWave Auction Reserve Prices Confirm that Granting Nextel Spectrum at 1.9 GHz Would be a Massive Giveaway.** On June 4, NextWave announced it will hold an auction on July 8, 2004 for six 10 MHz licenses at 1.9 GHz. NextWave set reserve prices which reinforce that giving Nextel a 10 MHz nationwide license at 1.9 GHz would be a massive windfall – and would amount to a loss of billions of dollars to the U.S. Treasury.
- **Nextel’s Continued Demand for an Immediate Grant of Spectrum Outside the 800 MHz Band is Not Sound Public Policy.** An immediate grant of nationwide spectrum would undermine Nextel’s incentives to reband quickly and nationally and would necessarily divert its focus and resources from the paramount goal in this proceeding – to remedy harmful interference to Public Safety users.
- **Nextel’s Offer to “Give Up” an Additional 2 MHz Raises Uncertainty and Increases the Complexity of Rebanding.** The proposal creates new uncertainty and complexity for the rebanding process and does not even guarantee more nationwide public safety spectrum.

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<sup>1</sup> See Letter from Steve M. Largent, President and CEO, CTIA, to the Honorable Michael K. Powell, Chairman, FCC, in WT Docket No. 02-55 (filed Apr. 29, 2004).

## **I. The NextWave Auction Reserve Prices Corroborate that Grant of a Nationwide 10 MHz license at 1.9 GHz Would be a Huge Windfall for Nextel**

On June 4, 2004, NextWave filed a plan with the U.S. Bankruptcy Court, developed “in consultation with the FCC,” to hold a public auction of six 10 MHz licenses of 1.9 GHz spectrum that it retained as part of its settlement with the U.S. Government.<sup>2</sup> The six licenses are for: New York City, Denver, Portland (OR), Tulsa, Tampa, and Sarasota. The auction is scheduled for July 8, 2004.

NextWave set reserve prices for each of the licenses, which are approximately 50 percent of the high bids received in Auction No. 35. The spectrum blocks being auctioned are within the 1.9 GHz PCS block immediately adjacent to the spectrum that Nextel seeks, and thus provide a “marketplace” assessment of the value of the 1.9 GHz spectrum. The total of the reserve prices, or minimum bids, for all six licenses is \$1.084 billion – of course, actual auction prices may be much higher. The average of the reserve prices represents a per MHz pop price of \$3.66. *Extrapolating from these reserve prices and based on current nationwide pops, a nationwide 10 MHz license at 1.9 GHz would yield a price of \$10.7 billion.*

The NextWave auction reserve prices demonstrate that the remaining 1.9 GHz spectrum is in high demand and is expected to raise substantial funds through the auction process. It is ironic that NextWave is going to hold an auction to yield the highest value for 1.9 GHz spectrum, while at the same time the FCC is considering giving away the spectrum to one company and prohibiting anyone else from seeking it. It further shows that Nextel’s \$3.3 billion valuation for 10 MHz at 1.9 GHz is substantially undervalued and unjustifiable – which in turn underscores the legal vulnerability of the Nextel proposal. Nextel’s demand for 10 MHz at 1.9 GHz would result in a massive giveaway – leading to a loss of billions of dollars that would otherwise go to the Treasury. These funds are better spent on Public Safety needs, rather than being handed over to one company through grant of spectrum at 1.9 GHz.

## **II. Market-by-Market Grant of Spectrum – as Rebanding Occurs – Is The Best Means of Ensuring that Public Safety Rebanding Occurs Efficiently**

Spectrum outside the 800 MHz band is not required to complete 800 MHz rebanding – yet the Commission’s decision regarding the scope and terms of any such license grant will have a considerable impact on the intensity of the rebanding effort. Giving Nextel an upfront nationwide license would necessarily undermine its incentives to fix public safety interference as fully and as quickly as possible by diverting resources away from the paramount goal of this proceeding – resolving the public safety interference that Nextel has caused for years.

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<sup>2</sup> See Notice of Presentment of Motion, *In re Next Wave Pers. Communications Inc.*, Ch. 11 Case No.98-B-21529 (ASH) (Bankr. S.D. NY filed June 4, 2004).

In contrast, a market-by-market spectrum grant approach provides Nextel with a more appropriate incentive scheme – do the rebanding work first and then gain access to the spectrum. Once rebanding is completed in a given market, Nextel would file a certification to that effect and gain access to spectrum within that particular market. The certification process would provide accountability and allow the Commission to monitor the rebanding effort. Notably, the “Consensus Plan” proposes that rebanding occur on a market-by-market basis, which would enable a market-by-market licensing approach to easily dovetail into this process without upsetting the rebanding scheme.<sup>3</sup> Given that Nextel is not going to reband on a nationwide basis, it makes no sense to grant them spectrum upfront on a nationwide basis.

Nextel objects to a market-by-market licensing approach, claiming that the proposal is “unnecessary” and imposes “unacceptable burdens.”<sup>4</sup> Nextel goes on to describe its need to take “numerous steps necessary to make this spectrum useable” and asserts that the CTIA plan would force Nextel to “face large financial and operational burdens from Day One, yet have to wait years before it receives replacement spectrum to compensate for these burdens.”<sup>5</sup>

Nextel’s argument proves too much. First, the market-by-market approach would enable Nextel to control the speed with which it obtains its spectrum outside 800 MHz, while at the same time ensuring that Nextel resolve interference before it focuses on building out the new spectrum. As the architect of the Consensus Plan, Nextel should be willing to stand behind its rebanding approach. Second, the market-by-market approach offers Nextel a clear path – fix interference then gain access to spectrum – which provides sufficient certainty to allow it to undertake the activities it claims it would not be able to do. Third, the market-by-market approach would relieve the Commission from having to micromanage and enforce the rebanding process, because the spectrum grant would serve as the “carrot” for Nextel to address public safety interference quickly. By contrast, grant of an immediate nationwide license would send the signal that the Commission has placed a higher priority on aiding Nextel than resolving public safety interference.

Nextel suggests that the FCC should simply condition an upfront nationwide license to ensure that the rebanding occurs. However, grant of a nationwide license allowing immediate access to spectrum, conditioned on rebanding commitments, is not sound public policy. The Commission has a “special statutory obligation with respect to [public safety licensees]”<sup>6</sup> that demands Nextel’s accountability in the rebanding process.

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<sup>3</sup> See Supplemental Comments of the Consensus Parties, Appendix C at 16-19, in WT Docket No. 02-55 (filed Dec. 24, 2002).

<sup>4</sup> Letter from Robert S. Foosaner, Senior Vice President and Chief Regulatory Officer, Nextel, to Marlene H. Dortch, Secretary, FCC, at 7, in WT Docket No. 02-55 (filed May 14, 2004) (“Nextel Letter of May 14”).

<sup>5</sup> *Id.*

<sup>6</sup> *Nat’l Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984).

The critical nature of public safety communications demands that noncompliance with rebanding would trigger automatic license termination, given the Commission's automatic cancellation policies for failure to build out a license area, satisfy a satellite construction milestone, or make full and timely installment payment. Yet Commission precedent reflects the difficult nature of enforcing license conditions and taking back spectrum – let alone in a case where a nationwide license valued in the billions of dollars is at stake. Simply put, it is not realistic to think that “after the fact” sanctions would be nearly as effective as the carrot of a spectrum grant in ensuring that the rebanding process proceeds swiftly and efficiently.

Finally, this market-by-market approach should not in fact significantly delay Nextel's access to spectrum given the time that will be required in any event to finalize the service rules for this band. As a matter of administrative law, the Commission has never issued a nationwide license for broadband CMRS, and *no service rules exist for such a nationwide service*. Further, it makes no sense to grant an immediate license because the Commission has yet to propose service or technical rules for the spectrum at issue.<sup>7</sup> Elsewhere in the docket, Nextel acknowledges that service rules must be adopted before any licenses are granted.<sup>8</sup>

The public safety interference problem is an individual market situation that involves different entities, on different time frames, in different markets. In practice, rebanding will be a localized solution. Nextel's incentives should be localized as well. Grant of a nationwide license for a valuable resource that Nextel can and will put to use immediately – diverting resources from resolution of the public safety interference problem – does not serve the public interest. The Commission should craft a solution that ensures Nextel's incentives are clear: fix the public safety problem now.

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<sup>7</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, FCC 03-16, ¶ 70 (2003) (“We seek comment on potential uses of the 2020-2025 MHz and 2155-2180 MHz bands. Comments should identify specific band plans and frequency pairings and describe how such proposals will result in spectrum efficiencies.”). See also *id.* at ¶ 49 & n.135 (regarding spectrum in the 1910-1920 MHz and 1990-2000 MHz bands, “[W]e make no decision with respect to whether our Broadband PCS rules would be most appropriate for this band, and note that we would propose specific licensing and service rules in a subsequent Notice of Proposed Rulemaking.”).

<sup>8</sup> See Letter from Robert S. Foosaner, Senior Vice President and Chief Regulatory Officer, Nextel, to Marlene H. Dortch, Secretary, FCC, at 14 (April 22, 2004) (“Verizon *has recognized* that the Commission must complete pending rulemaking proceedings and take a number of regulatory steps before an auction of the 1.9 GHz spectrum could be held.” (emphasis added)).

### III. Nextel's Offer of an Additional 2 MHz Benefits Nextel More Than Public Safety

On June 9, 2004, CTIA submitted an *ex parte* filing asking several questions in response to Nextel's cryptic proposal to provide an additional 2 MHz of spectrum for public safety.<sup>9</sup> Since then, Nextel has modified the proposal but the fundamental issues remain the same: it contains many uncertainties and does not address the ultimate goal of the proceeding – to remedy interference in the 800 MHz band.

Nextel admits that the spectrum at issue, 816-817/861-862 MHz, would not be used for public safety but as spectrum for other 800 MHz users willing to relocate.<sup>10</sup> *If* other users are willing to move, *then* the “additional” spectrum would be made available for public safety. Nextel further admits that the proposal would add to the cost of rebanding. With these factors in mind, Nextel's recent gambit cannot be considered a meaningful proposal to address the concerns raised in this proceeding.<sup>11</sup>

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CTIA believes that the Commission needs to adopt a solution that is more beneficial to Public Safety, while being legally and operationally sustainable. CTIA's compromise solution does just that. We urge the Commission to adopt the CTIA plan.

Respectfully Submitted,

*Diane Cornell*

Diane Cornell  
Vice President, Regulatory Policy  
CTIA

cc: Jennifer Manner  
Sam Feder  
Barry Ohlson  
John Muleta  
Ed Thomas

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<sup>9</sup> See Letter from Brian Kidney, Chief Operating Officer, CTIA, to Marlene H. Dortch, Secretary, FCC (June 9, 2004).

<sup>10</sup> See Letter from Robert S. Foosaner, Senior Vice President and Chief Regulatory Officer, Nextel, to Marlene H. Dortch, Secretary, FCC, at 2 (June 9, 2004).

<sup>11</sup> The details of why Nextel's recent filing is of little benefit to Public Safety, but of much benefit to Nextel, are addressed by recent *ex parte* submissions in the record. See Letter from R. Michael Senkowski, counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC (June 9, 2004); Letter from R. Michael Senkowski, counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC (June 16, 2004).