allocation scheme and are so widespread that they affect all of the services within that band. The "last in fixes it" approach only makes sense in response to isolated and infrequent interference events, such as where a licensee initiates FCC-compliant operations in a given market and causes interference to an incumbent because of certain terrain anomalies, buildings, or other local conditions.

In any event, in many markets, Nextel and other CMRS providers were not even the last to arrive to the 800 MHz band. Many of the SMR systems Nextel acquired and converted to integrated iDEN® service were licensed and operating prior to the deployment of nearby 800 MHz public safety systems. Further, under the Commission's rules, Nextel and other SMR operators have long been free to adopt more spectrally efficient technology.[105] In particular, when Nextel initiated iDEN® service in 1994, many police and other public safety systems had not yet transitioned, or were in the process of transitioning, from the 150 MHz and 450 MHz bands to the 800 MHz band. Indeed, public safety systems in a number of major cities, including New York, Philadelphia, and Phoenix, are only now undertaking that transition. Thus, were the Commission to apply a "last in fixes it" approach in the 800 MHz band, it would often be public safety operators, not Nextel or other cellular licensees, who would be responsible for resolving CMRS – public safety interference.

The Commission's responsibility is to implement a practical, near-term solution to these complex interference issues. Nextel is eager to be part of this solution, and it has worked with others in the industry to develop a constructive, comprehensive plan for reaching that goal.

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105 *See SMR Flexibility Order,* 3 FCC Rcd at 1848-49.

VI. THE COMMISSION SHOULD REJECT MDS INTERESTS' PROPOSAL TO RELOCATE MDS CHANNELS 1 AND 2 TO THE 1910-1916/1990-1996 MHz BANDS

On July 11, 2002, the Wireless Communications Association International ("WCA") and several Multipoint Distribution Service ("MDS") operators proposed that the MDS allocation at 2150-2162 MHz be moved to paired spectrum bands at 1910-1916/1990-1996 MHz.[106] These parties stated that the relocation of MDS Channel 1 (2150-2156 MHz) and Channel 2 (2156-2162 MHz) is necessary to facilitate the allocation of additional spectrum to 3G advanced services. In order to avoid interference to adjacent broadband PCS systems, MDS licensees in this spectrum would accept technical rules that preclude their existing fixed wireless broadband services, but that at the same time permit lower-power broadband PCS-type (or even 3G) operations.[107]

The Commission should reject the MDS interests' suggestion. In the *NPRM*, the Commission correctly placed a high priority on addressing the pressing public safety issues raised in the instant proceeding. The Consensus Plan provides a comprehensive means for doing so, and an integral part of this plan calls for the Commission to assign

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[106] *See* "A Compromise Solution for Relocating MDS from 2150-2162 MHz," BellSouth Corporation, Nucentrix Broadband Networks, Inc., Sprint Corporation, WorldCom, Inc., and the Wireless Communications Association International, Inc., ET Docket No. 00-258, IB Docket No. 01-185, ET Docket No. 95-18 (July 11, 2002). Under this proposal, MDS Channel 1 at 2150-2156 MHz would be relocated to paired bands at 1910-1913/1990-1993 MHz, and MDS Channel 2 at 2156-2162 MHz would be relocated to paired bands at 1913-1916/1993-1996 MHz.

[107] For MDS licensees to provide such services, the Commission would first have to add a mobile allocation to the relocated MDS band. In August 2001, the Commission requested comment on the addition of a mobile allocation to the current MDS band at 2150-2162 MHz. *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*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, ¶ 41 (2001).

the 1910-1915/1990-1995 MHz bands to Nextel in exchange for spectrum Nextel would contribute to resolve CMRS – public safety interference and to help meet critical public safety spectrum needs. In addition, this spectrum is well suited to be replacement spectrum for Nextel, which would require no service rule changes to operate in these bands in a manner that does not cause interference to adjacent-channel licensees. MDS, in contrast, would require significant rule changes that would essentially change MDS Channels 1 and 2 from fixed to mobile services. While the Commission is considering such rule changes in a pending proceeding,[108] more far-reaching changes appear to be in the offing. WCA has recently stated that it "is well-along in the process of recommending comprehensive rule changes that will result in a sweeping overhaul of the technical and licensing rules for MDS."[109] Left unclear is whether such an overhauled MDS service in the 1910-1916/1990-1996 MHz bands would be a compatible neighbor to adjacent PCS and MSS operations.

Aside from these factors, the MDS industry's proposal to relocate MDS Channels 1 and 2 to the 1910-1916/1990-1996 MHz band is no longer necessary given NTIA's subsequent report on 3G spectrum.[110] NTIA recommended that only 45 MHz of spectrum in the 2.1 GHz band, rather than 60 MHz, be reallocated to 3G. In all likelihood, the Commission will place this new 3G allocation at 2110-2155 MHz.

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108 *Id.*

109 WCA Motion to Defer in WT Docket No. 02-68, at 1 (June 14, 2002).

110 *See* "An Assessment of the Viability of Accommodating Advanced Mobile Wireless (3G) Systems in the 1710-1770 MHz and 2110-2170 MHz Bands," National Telecommunications and Information Administration (July 22, 2002), *available at:* <http://www.ntia.gov>.

Significantly, this outcome will permit MDS Channel 2 to remain in the 2.1 GHz band at 2156-2162 MHz and open up a number of new relocation possibilities for MDS Channel 1.

The best and most obvious option available to the Commission is the relocation of MDS Channel 1 to the opposite side of MDS Channel 2, to the 2162-2168 MHz band. More than any other relocation alternative, this approach would maintain MDS licensees' existing spectrum posture, preserving for the industry a 12 MHz block of contiguous spectrum in the 2.1 GHz band.

VII. THE CONSENSUS PLAN OFFERS A SOLUTION FAR SUPERIOR TO 700 MHz RELOCATION OR CASE-BY-CASE MITIGATION

Other proposals presented in this proceeding fall far short of meeting the public interest goals described above. For the reasons discussed below, the Commission should reject these other proposals, and should instead move expeditiously to implement the restructuring proposed in the Consensus Plan.

A. Relocating Public Safety Systems to the 700 MHz Band is Not a Viable Solution

A variety of commenters, including CTIA, Cingular, Southern LINC, and others, express support for the proposed relocation of all 800 MHz public safety operations to the 700 MHz band.[111] As an initial matter, the Commission should consider the likely purpose of this proposal. Fearing any change to the *status quo*, or perhaps competition from Nextel, many of these parties would no doubt be pleased with prolonged Commission inaction in this proceeding. And, in fact, the 700 MHz Plan would be quite effective in achieving just such a delay. While offering the Commission superficially

appealing and seemingly comprehensive solutions to the public safety interference and spectrum shortage issues, this plan comes with serious obstacles.

Certainly, the Commission should not be comforted by these parties' uniform description of the 700 MHz Plan as the "long-term" and "long-range" solution to these problems.[112] The nation could wait decades for the implementation of this plan – if it could ever be implemented – and, in the meantime, American lives and property would be jeopardized. The Commission should ignore this diversion and pursue the *expeditious* resolution of these critical public safety communications issues. In contrast to the 700 MHz Plan's extended and likely indefinite timetable, the Consensus Plan could be fully implemented within three to four years of a Commission order.

Proponents of the 700 MHz Plan either ignore or downplay an obvious impediment to public safety use of UHF TV Channels 60-69 in the 700 MHz band: *there are over 130 broadcast television stations operating on these channels.* These incumbent television stations will preclude public safety use of this spectrum in many areas, including a large number of urban areas where public safety spectrum needs are the greatest. These channels will remain encumbered for a long time, until broadcasters' conversion to digital television ("DTV") is completed. Under the Balanced Budget Act of 1997, broadcasters may continue operating on these channels, with full protection

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[111] *See, e.g.*, Comments of CTIA at 9-10, Comments of Cingular/ALLTEL at 16-19, Comments of Southern LINC at 27-30; Reply Comments of SBT at 96.

[112] *See, e.g.*, Comments of AT&T Wireless at 10, 12; Comments of Cingular/ALLTEL at 19; Comments of CTIA at 9; Comments of Southern LINC at 27. Most of these commenters argue that the Commission should rely on case-by-case mitigation and the *Best Practices Guide* to address CMRS – public safety interference in the near term. As explained fully in section VII.C *infra*, a case-by-case approach is neither an adequate approach to resolving such interference nor a means of allocating additional spectrum to the public safety community.

against interference, until at least December 31, 2006.[113] A variety of different circumstances will require the Commission to extend this deadline, including if less than 85% of households do not have at least one television capable of receiving digital service.[114] Even if Congress acted today, clearing broadcasters from Channels 60-69 would not be effectuated faster than the 800 MHz relocations resulting from the Consensus Plan. Realignment under the Consensus Plan would be complete before moving public safety to 700 MHz could even begin in major markets.

Of course, DTV is off to a slow start and is very unlikely to meet this 85% penetration target by December 2006. As PSWN has reported, "[d]igital televisions were introduced with a high purchase price with the expectation that prices would drop as mass production of DTV progressed. The cost has not gone down as expected, and the consumer response has been slow. The [Consumer Electronics Association] predicts a 50 percent DTV product penetration in 2006 if broadcasters meet all the FCC DTV transition deadlines."[115] This predicted penetration falls far short of the statutory target of 85%, even with its generous and incorrect assumption of broadcaster compliance with the DTV transition deadlines. In fact, as of July 17, 2002, only 32% of the DTV stations authorized by the Commission were on the air, and nearly 800 broadcasters have been granted an extension of the Commission's May 1, 2002 deadline to complete construction

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113 47 U.S.C. § 309(j)(14) (codifying Section 3004 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997)).

114 *Id.*

115 PSWN, "Public Safety Radio Frequency Spectrum: Digital TV Transition Status," at 7, *available at*: <http://www.pswn.gov/library/pdf/digital_tv_transition_guide.pdf>.

of their DTV facilities.[116] Moreover, as the General Accounting Office has reported, "few consumers have a high interest in DTV."[117]

Channels 60-69 will consequently be encumbered by broadcast television stations for many years, well beyond 2006.[118] Indeed, Commission Chairman Michael Powell has recently stated that the "transition to digital television could take well over a decade,"[119] and past Commission Chairman William Kennard, pointing out that it took color TV 22 years and VCRs 16 years to reach 85% penetration, stated that we may not see that level of DTV penetration until 2025.[120] Other observers agree with these assessments.[121]

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116 *See* "DTV Stations Presently On-the-Air" and "Summary of DTV Applications Filed," available at http://www.fcc.gov/mb/video/dtvstatus.html.

117 *Many Broadcasters Will Not Meet May 2002 Digital Television Deadline,* Report to the Ranking Minority Member, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, U.S. General Accounting Office, at 14 (Apr. 2002), *available at:* <http://www.gao.gov/new.items/d02466.pdf>.

118 The DTV transition is likely to last for years beyond 2006 even if the Commission adopts a proposal to require digital reception capability in all new television receivers. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 5946, ¶¶ 103-108 (2001) (seeking comment on such a proposal). Such a requirement would likely need to be phased in over a number of years to minimize costs imposed on consumers and would not alter the 85% DTV penetration target set forth in the statute.

119 *Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31)*, 17 FCC Rcd 10098 (2002), Separate Statement of Chairman Michael K. Powell at 6 ("*Powell Statement on Auction 31*").

120 *See* Remarks by FCC Chairman William E. Kennard to the Museum of Television and Radio at 8 (Oct. 10, 2000).

121 *See Completing the Transition to Digital Television*, Congressional Budget Office, at Summary (Sept. 1999), *available at*: <http://www.cbo.gov/ftpdoc.cfm?index=1544&type=1> ("It now appears likely that the transition will extend beyond 2006 in most markets, with its ultimate end uncertain."); Testimony of Thomas W. Hazlett,

Moreover, before the Commission could relocate public safety systems to the 700 MHz band and fund that relocation with 800 MHz auction revenues, Congress would have to reverse a number of recent and significant legislative actions.[122] Congress would have to amend statutory provisions designating this spectrum for "commercial use" and requiring the Commission to assign this spectrum through competitive bidding.[123] It would also need to amend the statutory provision requiring auction revenues to be deposited in the U.S. Treasury.[124] And most importantly, the 700 MHz Plan would

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American Enterprise Institute for Public Policy Research, Before the U.S. Senate Committee on Commerce, Science, and Transportation, Hearings on the Transition to Digital Television Broadcasting, at 2 (March 1, 2001), *available at:* <http://commerce.senate.gov/hearings/0301haz.pdf> ("[N]o one seriously believes that analog broadcasting will go dark in 2006."); Statement of James L. Gattuso, Competitive Enterprise Institute, Before the U.S. Senate Committee on Commerce, Science, and Transportation, Hearings on the Transition to Digital Television Broadcasting, at 3 (March 1, 2001), *available at:* <http://commerce.senate.gov/hearings/0301gat.pdf> ("Based on current adoption rates, digital television is extremely unlikely to achieve the 85 percent goal by 2006.").

[122] Supporters of the 700 MHz Plan acknowledge that legislative action is a prerequisite to implementation of this proposal. *See* Private Wireless Coalition Comments at 10; Southern LINC Comments at 29; AT&T Wireless Comments at 11; Cingular/ALLTEL Comments at 18. None discusses this legislative process in any detail, however, and all appear to assume that Congress will eventually act in their favor. *See, e.g.*, AT&T Wireless Comments at 11 (stating only that the necessary legislation "is being pursued by AWS and other cellular operators"); Cingular/ALLTEL Comments at 18 (noting that the 700 MHz Plan calls for "[w]ork with Congress to enact legislation" to achieve various goals). As explained below, this presumption is entirely unrealistic.

[123] *See* 47 U.S.C. § 337(a)(2) (designating 36 MHz of spectrum in the upper 700 MHz band for "commercial use to be assigned by competitive bidding"), as added by Section 3004 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). The Commission has already auctioned 6 MHz of this commercial spectrum (the 700 MHz guard band licenses) to bidders who bid on these frequencies in reliance on the Commission implementing the statutory 700 MHz spectrum allocation.

[124] *See* 47 U.S.C. § 309(j)(8). In addition to amendments to the law, the Commission would need to design and conduct an auction of the 800 MHz spectrum to be abandoned by public safety entities and develop the means by which these entities would receive earmarked auction revenues to fund their relocation.

require Congress to amend the DTV transition schedule it adopted in 1997. It is simply unrealistic to expect all of these legislative changes to be enacted in time to provide an effective solution to the pressing public safety communications issues raised in this proceeding.[125]

As Chairman Powell has stated, "[p]ublic safety entities should be no more enthused about being moved to this spectrum than are the commercial providers that urge they be put there."[126] Chairman Powell has pointed out that the "only present possibility for clearing [the 700 MHz band] is by way of the band-clearing mechanism established by the Commission in the Upper 700 MHz band that might induce broadcasters to leave the spectrum."[127] This mechanism relies on commercial wireless industry compensation of incumbent broadcasters who agree to move from Channels 60-69, an approach that has not produced any early migration of these incumbents. Public safety entities do not have the necessary resources or interest to pursue such a goal.

Even putting aside the problem of broadcaster incumbency, relocating public safety systems to the 700 MHz band would impose enormous costs. Although AT&T Wireless glibly declares that this relocation would give public safety operators "an

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125 Congress' recent decision to postpone the auction of 700 MHz spectrum does not address and in no way resolves the issue of continued incumbent analog broadcast operations on Channels 60-69. *See* Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715 (2002). There is no reason to expect passage of legislation that would accelerate broadcasters' transition out that spectrum, particularly given that Congress could have decided to amend the transition schedule in its 700 MHz auction legislation, but did not do so.

126 *Powell Statement on Auction No. 31* at 6.

127 *Id.*

opportunity to upgrade" their equipment and systems,[128] this so-called "opportunity" would come with a huge price tag, leaving public safety operators with no choice but to spend unprecedented sums to acquire expensive new equipment to operate in this band. Public safety systems around the nation have invested significant resources and planning in their 800 MHz systems. If required to relocate to the 700 MHz band, this effort would be wasted. With no incentive to build additional 800 MHz systems and with 700 MHz band deployment subject to broadcast encumbrances, deployment would stall just when the need for improved public safety communications is most critical.

B. Relocating Nextel to the 700 MHz Band is Not a Viable Solution

A few commenters propose that Nextel (or in some cases all CMRS providers) be relocated out of the 800 MHz band to the 700 MHz band.[129] This plan is every bit as impractical as the proposed shift of public safety systems to the 700 MHz band, and the Commission should summarily dismiss it.

As an initial matter, relocating to the 700 MHz band would impose a substantial burden on Nextel and its 10,000,000 customers, requiring Nextel to develop from scratch 700 MHz iDEN® equipment and then replace all of its customers' handsets.[130] Even more importantly, as described above, broadcast encumbrances will prevent CMRS use of the 700 MHz band at least through the end of 2006, and delays in the DTV transition will likely preclude such operations for many years beyond that date. Before the Commission could relocate Nextel or other CMRS providers to the 700 MHz band,

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128 Comments of AT&T Wireless at 8; Comments of CTIA at 10.

129 *See, e.g.*, Comments of State of Maryland at 9; Comments of E.F. Johnson Co. at 3-4.

130 Nextel has approximately 10 million subscribers in the 800 MHz band.

therefore, Congress would have to enact a series of legislative measures similar to those required for implementation of the 700 MHz Plan. As explained above, it is simply unrealistic to expect such dramatic legislative action, and particularly unrealistic to assume that such action would be taken expeditiously.

In any event, for the reasons discussed above, it would be wrong as a legal and a policy matter and factually unrealistic to impose the entire remediation burden on Nextel by forcing it to relocate its entire network to the 700 MHz band. The Commission cannot defer solving the existing and pressing public safety policy problems in favor of some theoretical future legislation. Instead, the Commission should adopt the practical, forward-looking solution set forth in the Consensus Plan.

C. Case-by-Case Mitigation and Reliance on Negotiated Resolution Procedures are Not Sufficient Solutions

A number of commenters oppose any realignment of the 800 MHz band, arguing that such action is not necessary to alleviate CMRS – public safety interference. They argue that case-by-case mitigation, negotiated resolution procedures, application of the *Best Practices Guide*, and adoption of appropriate complementary measures will reduce CMRS – public safety interference to acceptable levels.[131]

This view is misguided. While such practices have played a useful interim role in temporarily mitigating acute CMRS – public safety interference, they cannot provide an effective, long-term solution to CMRS – public safety interference in the 800 MHz band. First, the case-by-case approach is inherently reactive, responding only after-the-fact to actual instances of interference. While this method may make sense in the case of less

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[131] *See, e.g.*, Comments of Kenwood Communications at 6-8; Comments of Verizon Wireless at 8-12; Reply Comments of SBT at 80-95.

time-critical services, it is not acceptable in the public safety context, where any given interference incident can jeopardize the lives of citizens and emergency personnel.[132] Rather than settle for case-by-case, after-the-fact palliatives, the Commission should seek a comprehensive, proactive solution that preemptively addresses interference to public safety systems.

Second, case-by-case mitigation does not remedy the fundamental cause of CMRS – public safety interference: the fact that 800 MHz public safety and CMRS systems are operating incompatible wireless systems on interleaved and mixed 800 MHz channels. Case-by-case mitigation does nothing to address this fact and leaves public safety first responders vulnerable to increased interference as CMRS and public safety systems modify and expand their services. Spectrum realignment would correct the root cause of the problem, and, for this reason, the Commission has tentatively concluded, and many commenters believe, that realignment of the 800 MHz band is an essential component of any effective, long-term solution to this interference.

The *Best Practices Guide* itself, upon which some commenters would continue to rely as the centerpiece of interference resolution, recognized the crucial role of spectrum realignment in stating that "[f]requency swaps that enable each party to fully utilize its licensed channels serve the public interest by promoting spectrum efficiency and the

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[132] The PSWAC Final Report emphasized the time-urgent nature of public safety communications. It stated that "[s]ystems must provide immediate and reliable communications when lives are at stake and time is critical," and added that, in the event public safety operations are disrupted, "assistance can be delayed and response efforts can be inefficient, which ultimately jeopardizes lives, both those of the officers and the public at large." Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission, Reed E. Hundt, Chairman, and the National Telecommunications and Information Administration, Larry Irving, Assistant Secretary

widespread availability of both public safety communications and commercial wireless services."[133] As Nextel pointed out in its comments, this view was echoed in a report on interference resolution strategies from WFI, which found that "*frequency rebanding with new contiguous allocations and adequate (2 MHz appears to be reasonable) guard band is a required system solution to the [interference] issue.*"[134] This report was sponsored by CTIA, but, not surprisingly, neither CTIA nor the cellular carriers opposing Nextel's proposal chose to address WFI's findings in their comments.

Third, extensive case-by-case mitigation would impose substantial operational constraints for both CMRS providers and public safety systems. This approach would, for example, likely prevent cellular providers from implementing the dynamic channel allocation algorithms now being deployed to enhance spectrum efficiency in response to changes in customer usage patterns. In fact, reliance on case-by-case measures would disrupt frequency reuse patterns and channel availability for all CMRS carriers, including Nextel, in some cases requiring frequency use restrictions that cannot be sustained over the long term without unacceptable losses in capacity, coverage, and service quality. Substantial case-by-case mitigation could also limit public safety systems' use of their licensed channels.

Finally, a case-by-case approach to interference mitigation ignores public safety operators' need for additional spectrum. While some commenters argue that this

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of Commerce for Communications and Information, WT Docket No. 96-86, at 4 (Sept. 11, 1996) ("*PSWAC Final Report*").

133 *Best Practices Guide* at 13.

134 *See WFI Report* at 9. WFI also recommends a number of complementary measures such as improved public safety receiver performance and system coverage characteristics.

proceeding is not the appropriate forum for addressing public safety spectrum scarcity,[135] public safety parties convincingly demonstrate in their comments that a failure to do so would be irresponsible, given the urgency of this need and the significance of this issue to the nation's Homeland Security mission. Decisive action to improve public safety communications is needed now, and the Consensus Plan offers the Commission a reliable means of achieving that goal.

For all of these reasons – the demonstrated severity of public safety interference and spectrum scarcity, the human cost of delayed action, and the evidence already showing the benefits of spectrum realignment – the Commission should also reject arguments that additional technical study should be a prerequisite to any action in this proceeding.[136] Not only is further research and analysis unnecessary, it would likely delay implementation of a solution for some time, an outcome obviously counter to the public interest at this critical time for Homeland Security.

VIII. THE COMMISSION HAS THE LEGAL AUTHORITY TO IMPLEMENT NEXTEL'S PROPOSAL AND THE CONSENSUS PLAN WITHOUT TRIGGERING EITHER ASHBACKER OR SECTION 309(j)

A small minority of commenters argues that the competitive hearing requirements of *Ashbacker Radio Corp. v. FCC* ("*Ashbacker*")[137] or the auction requirements of Section 309(j) would be implicated by the Consensus Plan's proposed assignment to Nextel of replacement spectrum in the 1910-1915/1990-1995 MHz bands. Such arguments are meritless. As Nextel has previously shown, and as it demonstrates again

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135 *See, e.g.*, Comments of United Telecom Council at 28.

136 *See* Comments of IAFC at 4-5; Comments of Dallas Area Rapid Transit Authority at 3.

137 *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

below, the Commission has legal authority under Section 316 of the Act to implement Nextel's proposal or the Consensus Plan without triggering either of these requirements.[138]

A. Pursuant to Section 316, the Commission May Assign Nextel Replacement Spectrum from Reallocated Bands

As explained in Nextel's comments, the Commission may assign Nextel replacement spectrum from reallocated bands without triggering either *Ashbacker* or Section 309(j). As the Commission has recently emphasized, the "clear and unequivocal" language[139] of Section 316 allows the Commission to modify the frequency assignments of an existing licensee, as long as the Commission concludes that such action will promote the public interest. In particular, once spectrum in a given band has been reallocated (as has been proposed for the MSS and UPCS bands), the Commission has authority under Section 316 to substitute that reallocated spectrum for channels currently assigned to licensees in another frequency band. Such a step does not trigger either *Ashbacker* or Section 309(j) because, as is well established, the Commission has full discretion to promulgate rules that limit eligibility to apply for a license, as long as such rules promote the public interest.[140] Section 309(j) is not triggered for the additional reason that it applies only to the award of "initial" spectrum licenses.[141] In this case,

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138 47 U.S.C. § 316.

139 *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band,* Report and Order, 17 FCC Rcd 2704, ¶ 22 (2002) ("*MSS Report and Order*").

140 *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 439 (D.C. Cir. 1991); *MSS Report and Order* ¶¶ 21-29.

141 47 U.S.C. § 309(j)(1).

rather than awarding Nextel an initial license to use MSS or UPCS spectrum, the Commission would be modifying Nextel's already-existing licenses under Section 316.[142]

Despite these well-established legal principles, several commenters argue that such action would trigger *Ashbacker* or Section 309(j) requirements because Nextel would receive *reallocated* spectrum. CTIA, for instance, asserts that "any spectrum reallocated for a terrestrial service in the MSS bands must be auctioned" under Section 309(j).[143] Likewise, UTStarcom asserts that precedents recognizing the Commission's right to authorize channel "swaps" or "exchanges" under section 316 are not applicable to "a new nationwide allocation of frequencies in another band," such as the UPCS band.[144]

These assertions are flawed. The fact that Nextel's replacement spectrum comes from a reallocated band would not make these licenses "initial" because, as the term "replacement spectrum" obviously implies, such spectrum would merely replace spectrum already held by Nextel under its existing licenses. There is simply no legal basis for treating this replacement process as an "initial" licensing procedure. Without any sound legal support, CTIA and UTStarcom raise objections that have no relevance to either *Ashbacker* or Section 309(j). Focusing exclusively on the terrestrial nature of the

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142 As explained in Nextel's initial comments, Nextel's proposal would allow incumbent MSS licensees to retain all spectrum currently assigned to them in the 2 GHz band and therefore would not modify their 2.1 GHz MSS licenses. Nextel Comments at 60. As a result, these MSS licensees would have no standing to challenge the 2.1 GHz proposal: "Section 316, unlike Section 309 of the Act, provides for challenges to modifications only by existing licensees or permittees whose own authorizations would be modified by the Commission's action. Congress did not require the Commission to entertain objections by potential applicants for any spectrum used in accordance with a modification." *MSS Report and Order* ¶ 25.

143 Comments of CTIA at 5.

proposed reallocation, CTIA ignores the more important issue of whether such spectrum, regardless of its service allocation, would involve the grant of an "initial" license. Likewise, UTStarcom is mistaken that the Commission's authority to assign Nextel replacement spectrum that is currently unlicensed (including spectrum in the UPCS band) derives from its authority to mandate spectrum swaps. As the Commission stated just five weeks before issuing the *NPRM*,

> We are not persuaded . . . that the holding in *Rainbow Broadcasting*[145] [recognizing the Commission's Section 316 authority] is applicable only to situations involving channel swaps. The opinion contains no language indicating that the court intended that its holding be narrowly construed. Rather, in *Rainbow Broadcasting* the court found that the Commission is afforded significant latitude when it exercises its Section 316 authority. Specifically, the court referred to the Commission's authority to utilize Section 316 to expand a licensee's authority, pointing to the legislative history of the 1983 amendment of Section 316. Further, the Commission is not required [under *Ashbacker*] to open all frequencies for competing applications, so long as it provides a reasoned explanation for not doing so.[146]

This holding allows the Commission, under Section 316, to promote the public interest by assigning reallocated replacement spectrum to Nextel in the UPCS band.[147] Moreover, a "reasoned explanation" for precluding competing applications for the UPCS band is certainly readily available to the Commission: precluding competing applications would be a crucial component of a spectrum realignment designed to alleviate CMRS –

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144 Comments of UTStarcom at 3. *See also* Comments of Southern LINC at 53 (asserting that *Ashbacker* applies because "Nextel's request for 2.1 GHz spectrum does not constitute a true spectrum exchange between licensees of occupied channels").

145 *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991).

146 *MSS Report and Order*, ¶ 25 (footnotes omitted).

147 UTStarcom is thus mistaken when it asserts that under Section 316, the Commission may not change the "technical or licensing constraints to which [a licensee] is currently subject." Comments of UTStarcom at 4.

public safety interference and allocate critically needed additional spectrum to public safety communications.

The *DEMS Relocation Order* establishes that, under Section 316, the Commission can assign reallocated spectrum in another frequency band to existing licensees if such action promotes the public interest. In that decision, the Commission held that the auction requirements of Section 309(j) were not applicable to the relocation of licensees in the Digital Electronic Message Service ("DEMS") to a newly allocated band.[148] UTStarcom asserts this decision is "inapposite" to the proposed redesignation because the Commission in the *DEMS Relocation Order* "acted under the military affairs exception to the APA to relocate licensees."[149] The military affairs exception, however, was irrelevant to the substance of the Commission's relocation decision; that provision merely permits the Commission and other agencies to bypass the normal notice-and-comment procedures when promulgating rules involving military affairs.[150] Instead, it was clearly the Commission's Section 316 authority that enabled it to relocate DEMS incumbents without triggering Section 309(j):

> Because its actions [to relocate DEMS licensees to new spectrum] were license modifications under authority of Section 316, and did not involve

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148 *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, Order, 12 FCC Rcd 4990 (1997) ("*DEMS Relocation Order*"), *recon. denied*, 13 FCC Rcd 15147 (1998) ("*DEMS Relocation Recon Order*").

149 Comments of UTStarcom at 4.

150 *See DEMS Relocation Order* ¶ 11 ("we implement changes to our rules . . . without notice and comment procedures" in order to further "the interests of national security"); *Specter v. Garrett*, 971 F.2d 936, 949 n.11 (3d Cir. 1992) (military affairs exception to the APA "gives agencies involved in military decisions discretion to determine how much public participation, if any, will be available before a final rule is issued, and what evidence will be heard (and by whom) during an agency hearing"), *vacated and remanded on other grounds*, *O'Keefe v. Specter*, 506 U.S. 969 (1992).

> the grant of initial licenses, the Commission was not authorized under Section 309(j) of the Act to use auction procedures. Those auction procedures may only be used to select from among mutually exclusive applications for initial licenses. Accordingly, petitioners' reliance on Section 309(j) is misplaced.[151]

In the instant case, Nextel and other incumbents would also be relocated pursuant to the Commission's Section 316 modification authority, thereby rendering the requirements of Section 309(j) inapplicable.

B. Neither Nextel's Proposal nor the Consensus Plan Would Result in License Modifications That Should Be Treated as Initial License Applications

Several of Nextel's competitors argue that the proposed redesignation of spectrum to Nextel would trigger Section 309(j) because Nextel would receive "enhanced" spectrum[152] or "improved contiguous nationwide spectrum rights,"[153] including "10 MHz of contiguous, nationwide spectrum."[154] They claim that the assignment of nationwide replacement spectrum to Nextel would make Nextel's spectrum holdings so much more "valuable"[155] than its present licenses that such an assignment could not properly be deemed a "modification" under Section 316. Rather, these parties argue that such an assignment would be "the equivalent of a grant of an initial license, which under Section 309(j) [must] be subject to auction procedures."[156]

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151 *DEMS Relocation Recon Order* ¶ 59 (footnotes omitted). *See also DEMS Relocation Order* ¶ 14 (stating that Commission is exercising its "authority under section 316 of the Communications Act to modify licenses").

152 Comments of U.S. Cellular at 5.

153 Comments of Cingular/Alltel at 12.

154 Comments of Southern LINC at 55.

155 *See* Comments of Southern LINC at 51-52; Comments of Supreme Radio at 2.

156 Comments of U.S. Cellular at 5.

In its *Section 309(j) Second Report and Order*, the Commission defined the rare situation when a modification should be treated as an initial application and subject to Section 309(j)'s auction procedures:

> [S]everal commenters ask that the Commission clarify that certain types of mutually exclusive applications to modify existing licenses (*e.g.*, to add radio channels to an existing system), may be so different in kind or so large in scope and scale as to warrant competitive bidding if mutual exclusivity exists. . . . Where a modification would be so major as to dwarf the licensee's currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.[157]

The license modifications resulting from the Consensus Plan do not come close to satisfying the criteria under this test. Nextel – and other incumbents – would receive approximately the same amount of spectrum, on a kHz-for-kHz basis, as they currently hold. To be sure, some parties speculate that Nextel's holdings *might* be worth more after it receives its replacement spectrum, but, as explained above and in Nextel's comments, the Commission has identified no legitimate methodology for assessing the variety of economic variables and other factors that determine the market value of particular blocks of spectrum.[158] In fact, it can be argued that Nextel's 900 MHz licenses are more valuable to it today than the proposed replacement spectrum. While Nextel is already selling handsets capable of dual band 800/900 MHz operations, it has no 800 MHz/1.9 GHz or 800 MHz/2.1 GHz dual band handsets or network infrastructure. Certainly, there is no reason to believe that the subject license modifications and

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157 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, ¶ 37 (1994) ("*Section 309(j) Second Report and Order*").

158 Nextel Comments at 54.

spectrum exchanges would so enhance Nextel's facilities as to dwarf its currently authorized facilities. There are simply no factual grounds for classifying Nextel's proposed modifications as equivalent to "initial" applications under Section 309(j).

Moreover, as indicated above, the Commission will not treat a proposed modification, no matter how significant, as an "initial" application under Section 309(j) unless it also "is mutually exclusive with other applications."[159] As explained above, the public interest benefits of the Consensus Plan permit the Commission to limit the category of licensees eligible for Nextel's replacement spectrum and preclude mutually exclusive applications for those frequencies. Accordingly, the Commission can assign this spectrum to Nextel without triggering Section 309(j)'s competitive bidding provisions.

IX. CONCLUSION

The record in this proceeding confirms the urgency of resolving CMRS – public safety interference in the 800 MHz band. While other parties subject Nextel to a variety of attacks, they fail to provide the Commission with a feasible solution to these public safety issues. Meanwhile, since filing its comments, Nextel has worked with a broad cross-section of public safety and private wireless entities to develop a compromise solution that provides a practical, near-term way to achieve the public safety goals so critical to the nation's Homeland Security mission, with minimal disruption and reduced costs for incumbent licensees. The Consensus Plan is an equitable, forward-looking

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[159] *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 As Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz*, Notice of Proposed Rule Making, 14 FCC Rcd 5206, ¶ 5 (1999)

response to these public safety issues, and the Commission should expeditiously adopt and implement this proposal.

Respectfully submitted,

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August 7, 2002