

gall" to make such a proposal.¹¹⁵ UTC stresses that it "cannot join in supporting any proposal that would force licensees who are neither causing nor experiencing interference to move."¹¹⁶

D. Broadly Imposing Technology Restrictions On 800 MHz Licensees Would Be Ineffective In Resolving Interference, Contrary To The Public Interest, And Contrary To Sound Spectrum Policy

Several commenters submitted realignment plans that would ban cellular-like SMR licensees from certain portions of the 800 MHz band, such as the interleaved B/ILT band.¹¹⁷ Other commenters advocated banning cellular-like SMR licensees from the *entire* 800 MHz band.¹¹⁸ The plans would have retroactive effect, forcing licensees that have invested heavily in building out systems to vacate them at their own expense. They are premised on the fact that Nextel, the primary source of 800 MHz interference, is a cellular-like SMR licensee.

Plans that would ban cellular-like SMR licensees from certain portions of the 800 MHz band achieve little in the way of interference mitigation. Rather, as explained above in Section III(A), signals from "cellular-like" systems in the 861-869 MHz band will continue to cause intermodulation interference and receiver overload interference to public safety entities. To cellular-like users of SMR spectrum, like Southern, such limitation on its licenses is tantamount to eviction.

¹¹⁵ Comments of Verizon Wireless at 16.

¹¹⁶ Comments of UTC at 10.

¹¹⁷ Comments of Private Wireless Coalition at 14-16; Comments of M/A-COM at 11; Comments of Pinnacle West Capital Corporation at 16. The Private Wireless Coalition and M/A-COM propose, as alternatives, either banning cellular-like SMR licensees from the 800 MHz band entirely or banning them from certain portions of the band.

¹¹⁸ Comments of Nextel at 3-6; Comments of Private Wireless Coalition at 7 n.18; Comments of Wiztronics at 3; Comments of M/A-COM at 14-16; Comments of State of Maryland at 5-14; Comments of State of Hawaii at 1-2.

Moreover, some of the plans to move cellular-like SMR licensees give no indication of where the displaced licensees would relocate.¹¹⁹ The District of Columbia flatly admits that with its plan, cellular-like SMR licensees "would be required to sacrifice some current channels."¹²⁰ Such statements glibly gloss over the fact that cellular-like SMR licensees have obtained much of their 800 MHz spectrum through auction and depend upon it for their operations. As explained in Southern's Comments, forcing them to relinquish that spectrum would be contrary to the public interest and sound spectrum policy.¹²¹ Forcing auction winners off spectrum just recently purchase is highly questionable from a legal standpoint and certainly a bad policy precedent for the Commission to establish.

Also, proposals to ban cellular-like SMR licensees from certain portions of the 800 MHz band, or to prohibit them from 800 MHz altogether, deprive licensees of the ability to upgrade to highly efficient advanced technology. The Commission should not lose sight of the fact that a cellular-like technology such as Motorola's iDEN technology is one of the most spectrally efficient platforms available. This technology provides state-of-the-art digital voice and data services to enormous numbers of users with relatively limited amounts of spectrum. The Commission has a long-standing policy of promoting spectrally efficient technology in the 800 MHz band.¹²² Commensurate with that policy, the responsible use of spectrally efficient cellular-like systems in the 800 MHz band should be encouraged, not banned.

¹¹⁹ Comments of Pinnacle West Capital Corporation at 16; Comments of District of Columbia at 7-8.

¹²⁰ Comments of District of Columbia at 7.

¹²¹ Comments of Southern LINC at 42-44.

¹²² *See, e.g.,* In the Matter of an Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Docket No. 18262, *First Report and Order and Second Notice of Inquiry*, 35 Fed. Reg. 8644, 8645 (May 21, 1970); *see also* In the Matter of Amendment of Sections 90.365 and 90.377 of the Commission's Rules to Change the Co-Channel Mileage Separation and Frequency Loading Standards for Conventional Land Mobile

The Commission should also not agree to plans which "freeze" licensees into certain artificial system configurations. Some plans suggest, for example, that certain 800 MHz blocks be designated high-site only, and that this plan be implemented in a completely arbitrary manner in which similarly situated competitors are placed in bands with different restrictions. This concept is contrary to Commission directives toward maximum spectrum flexibility.¹²³ Placing such a limitation on licensees would hinder their ability to keep pace with opportunities presented by new technologies. As noted by Skitronics, the Commission should not "restrict [SMR operators'] ability to change and grow as technology and the industry evolves."¹²⁴ Rather, change and growth can be achieved consistent with sound interference management as long as licensees are required to promptly resolve interference they cause.

E. The Commission Must Not Adopt A Plan That Lacks A Viable Funding Mechanism

To implement any of the realignment plans, the Commission would have to design mechanisms for funding the relocation of displaced public safety, B/ILT, and SMR licensees. Although this obligation has been glossed over by many of the commenters proposing

Radio Systems In the Bands 806-821 and 851-866 MHz, PR Docket No. 79-106, *Notice of Proposed Rule Making*, 71 F.C.C. 2d 1356, 1360 (1979) ("We believe that our decision here . . . is consistent with the Commission's decision in Docket 18262 to promote the use of spectrally efficient land mobile radio systems in the 800 MHz bands.").

¹²³ Although parties have characterized Southern's systems as "low-site" and Nextel's system as "high-site," both networks use a combination of low-site and high-site transmitters as needed.

¹²⁴ Comments of Skitronics at 7.

realignment, it cannot be glossed over by the Commission.¹²⁵ Notably, most public safety commenters clearly stated that they could not relocate without full coverage of their costs.¹²⁶

The Commission has a firm and longstanding policy of reimbursing the relocation costs of displaced licensees. It reaffirmed this policy in June 2000 in the *Report and Order in In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, in which it set forth rules allocating one part of the band to satellite users and another part to terrestrial users.¹²⁷ In the *Report and Order*, the Commission required incoming satellite operators to reimburse the relocation costs incurred by displaced terrestrial operators.¹²⁸ In instituting that requirement, it noted that "[t]he Commission's policy has been to place the cost of an involuntary relocation to comparable facilities on the shoulders of the new entrant. We reaffirm this as our policy."¹²⁹ That was recently upheld by the D.C. Circuit Court of Appeals in *Teledesic LLC v. FCC*, in which the Court observed that "[t]he Commission's consistent policy has been to prevent new

¹²⁵ Many entities offering realignment proposals offer no suggested funding mechanism at all. *See, e.g.*, Comments of RadioSoft at 3-4; Comments of M/A-COM at 10-14; Comments of TRW at 5-7.

¹²⁶ *See, e.g.*, Comments of APCO, National Association of Counties, National League of Cities, and National Association of Telecommunications Officers and Advisors at 22; Comments of International Association of Chiefs of Police, Major Cities Chiefs Association, National Sheriffs' Association, and Major County Sheriffs' Association at 8; Comments of International Association of Fire Chiefs and International Municipal Signal Association at 10-11; Comments of City of New York at 8; Comments of County of Maui at 9; Comments of New Jersey Transit Authority at 2; Comments of City of Fort Lauderdale at 7; Comments of State of Florida at 6; Comments of the Michigan State Police at 2; Comments of Utah Communications Agency Network at 4.

¹²⁷ In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, IB Docket No. 98-72, *Report and Order*, 15 FCC Rcd 13430, 13468-70 (2000).

¹²⁸ *Id.*

¹²⁹ *Id.* at 13468.

spectrum users from leaving displaced incumbents with a sum of money too small to allow them to resume their operations at a new location."¹³⁰

The Commission's policy as enunciated in *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band* cannot be applied literally to the current proceeding because a realignment of the 800 MHz band would not result in any new entrants to the band; rather, it would simply shuffle the ones that are already there. Nonetheless, the Commission must adhere to the underlying premise of its policy: there needs to be a mechanism for reimbursing the relocation costs of displaced licensees.

With regard to relocating public safety entities, no viable funding mechanism, in the context of band realignment, has been presented to the Commission. Nextel and certain other commenters would finance public safety licensees' expenses by foisting the bill on commercial SMR providers and/or 800 MHz cellular licensees.¹³¹ Although Nextel states that it would contribute \$500 million, it would do so only if the Commission grants it everything it asks for in its *White Paper*, including its highly questionable and legally untenable request for 10 MHz of 2.1 GHz spectrum.¹³² Even if Nextel actually made a \$500 million contribution, it would account for only one-third of the potential \$1.5 billion cost of relocating public safety licensees under its plan, as estimated by Motorola.¹³³ There was uniform sentiment among other commenters that \$500 million would be far too little to cover the cost of Nextel's plan.¹³⁴

¹³⁰ *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001).

¹³¹ Comments of Nextel Communications at 42; Comments of the District of Columbia at 11; Comments of Private Wireless Coalition at 16-17.

¹³² Comments of Nextel Communications at 42.

¹³³ Comments of Motorola at 25.

¹³⁴ *See, e.g.*, Comments of APCO, National Association of Counties, National League of Cities, and National Association of Telecommunications Officers and Advisors at 22;

As for requiring CMRS providers other than Nextel to fund the relocation costs of public safety licensees, the Commission lacks the authority to require licensees to reimburse the relocation costs of other entities unless they derive some benefit from the relocation.¹³⁵ Because the only CMRS provider that causes significant interference is Nextel, it is the only licensee that would derive some benefit from the relocation of other parties. Thus, the Commission lacks the authority to require other CMRS licensees to reimburse the relocation costs of public safety entities.

B/ILT and non-Nextel SMR licensees that would be relocated would also have to be reimbursed for their relocation. Although the reason for relocating them would be to alleviate public safety interference, the interference is being caused by Nextel, not them. Because a realignment plan may force them to move due to no fault of their own and for no benefit of their own, they would have to be reimbursed for relocating.

F. The Commission Must Not Award Nextel Contiguous Spectrum At 1.9 GHz, 2.1 GHz, Or Any Band Other Than 800 MHz

In its *White Paper*, Nextel requested that the Commission give it 10 MHz of highly valuable contiguous, nationwide 2.1 GHz spectrum "in exchange for" its scattered 700 and 900 MHz spectrum.¹³⁶ Numerous commenters strongly opposed such a gift as entirely unjustified.¹³⁷

Comments of State of Hawaii at 1; Comments of Fairfax County at 4; Comments of City of Baltimore at 4; Comments of City of Fort Lauderdale at 6.

¹³⁵ See, e.g., *National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336 (1973); Comments of Southern LINC at 40-42; *infra* Section V.

¹³⁶ In the Matter of Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, Nextel Communications, *Promoting Public Safety Communications* (filed Nov. 21, 2001) ("*Nextel White Paper*").

¹³⁷ See, e.g., Comments of U.S. Cellular at 4; Comments of Verizon Wireless at 13-15; Comments of Cingular Wireless and Alltel Communications at 11-13; Comments of AT&T Wireless Services at 20-21; Comments of Fresno Mobile Radio at 13; Comments of Skitronics at 10; Comments of Boeing Company at 27-32.

AT&T Wireless notes that "[t]his aspect of Nextel's plan does not relate in any way to the interference problems confronting public safety in the 800 MHz band or the need to use spectrum efficiently."¹³⁸ Similarly, U.S. Cellular asserts that "Nextel has presented no compelling justification for such a gratuitous enhancement of its competitive position"¹³⁹

As noted in Southern's comments, Nextel's request is an attempt to obtain highly valuable and desirable spectrum for free and prevent its competitors from applying for the spectrum themselves.¹⁴⁰ The 2.1 GHz spectrum requested by Nextel is highly coveted and would clearly result in mutually exclusive applications if the Commission made it generally available. Accordingly, it would be contrary to sound spectrum policy and the public interest to simply give the spectrum to Nextel. Moreover, as explained in detail in Southern's Comments, the policies underlying the Ashbacker Doctrine and Section 309(j) militate strongly against the Commission "giving" Nextel 2.1 GHz spectrum.¹⁴¹

G. The Need For Regulatory Parity Requires That Any Rebanding Plan Be Competitively Neutral

The Commission must maintain regulatory parity for all 800 MHz CMRS licensees. Accordingly, rebanding plans should generally apply to CMRS licensees both with regard to any interference mitigation requirements and "rights" to exchange licenses in various portions of a reconfigured 800 MHz band.¹⁴² A failure to do so would give Nextel an unfair advantage.

¹³⁸ Comments of AT&T Wireless Services at 20.

¹³⁹ Comments of U.S. Cellular at 4.

¹⁴⁰ Comments of Southern LINC at 50.

¹⁴¹ Comments of Southern LINC at 52-56.

¹⁴² For example, EA license holders should be treated equally and if forced to "exchange" their spectrum, should be given access to equivalent bands.

The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act") mandated that the Commission establish a uniform regulatory regime for all commercial mobile services.¹⁴³ Specifically, Section 6002(d)(3)(B) required the Commission to establish "regulatory parity" such that "services that provide equivalent mobile services are regulated in the same manner."¹⁴⁴ As stated by the Commission in one of the orders implementing Section 6002(d)(3)(B), the statute is designed "to ensure that economic forces - not disparate regulatory burdens - shape the development of the CMRS marketplace."¹⁴⁵

The Commission has applied the concept of regulatory parity not just among different types of CMRS services, but also among licensees within the same service. For example, with regard to SMR, the Commission held that wide-area incumbent 800 MHz licensees should be treated the same as EA 800 MHz licensees for purposes of construction deadlines.¹⁴⁶ Likewise, it also held that wide-area incumbent 800 MHz SMR licensees operating on B/ILT channels should be treated the same as wide-area incumbent 800 MHz SMR licensees operating on SMR channels for purposes of construction deadlines.¹⁴⁷

¹⁴³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993).

¹⁴⁴ H.R. Rep. No. 103-11 at 259, *reprinted in* 1993 U.S.C.C.A.N. at 586; *see also* H.R. Conf. Rep. No. 103-213 at 498 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 1187.

¹⁴⁵ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 7994 (1994).

¹⁴⁶ In the Matter of 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 on Remand*, 14 FCC Rcd 21679, 21686 (1999); *see also Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (1999) (applying § 6002(d)(3)(B) to FCC Rule differentiating between wide-area incumbent 800 MHz licensees and EA 800 MHz licensees).

¹⁴⁷ In the Matter of 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, 17011-12 (2000).

In this proceeding, an example of a situation in which the Commission would have to be careful to adhere to regulatory parity would be if it realigns the 800 MHz band and implements a rule requiring licensees to get Commission pre-approval for operating low-site systems. Some parties may suggest that such approval should only be necessary for systems located below 816/861 MHz, because that is where public safety licensees would be located. However, Nextel would likely be located exclusively *above* 816/861 MHz, and, as such, would be free of the regulatory constraints binding CMRS competitors below 816/861 MHz. That would plainly violate regulatory parity, especially given that *Nextel would continue not only to be capable of causing significant interference to public safety licensees, but would remain the most likely source of interference to public safety licensees.* Thus, Nextel should not be given preference for less regulated portions of the band, and if the Commission implements a rule requiring licensees to get Commission pre-approval for constructing low-site systems (which it should not), it must make the rule competitively neutral by requiring *all* 800 MHz CMRS licensees to undergo the same approval process.

A second example would be if the Commission realigns the 800 MHz band and also implements rules requiring licensees that cause public safety interference to mitigate that interference on a case-by-case basis. Again, some parties may suggest that such approval should only be necessary for systems located below 816/861 MHz, because that is where public safety licensees would be located. However, the need for regulatory parity (and sound interference mitigation policy) would dictate that the Commission impose interference resolution obligations on *all* 800 MHz CMRS licensees, regardless of where they are located. The need for comprehensive application of such a requirement would be particularly important given that Nextel, which would likely be located above 816/861 MHz, would continue to be capable of causing public safety interference.

H. If The Commission Adopts A Rebanding Plan, The Plan Should Include Flexibility To Accommodate Southern's System

The preceding sections make clear that because of the existing incumbency in the 800 MHz bands, any rebanding process will be extremely complex. Should the Commission nevertheless go down the rebanding path, it must be open to a more flexible band plan that would allow for different allocation schemes in different parts of the country to make this exercise workable for existing incumbents.

A number of rebanding plans call for a specific allocation of bandwidth to accommodate Nextel's low-site digital architecture, while restricting the rest of the band to high-site operations. Although Southern also has need to operate low-site transmitters, the combined spectrum holdings of Southern and Nextel would exceed the amount of spectrum that is being considered for low-site operations. One way the Commission could implement flexibility would be to provide for a national flexible-use allocation that varies in size on a region-by-region or market-by-market basis depending on need.

A flexible-use allocation would be responsive to the discrete spectrum needs of individual licensees, and to that end, would be similar to steps the Commission has taken in the past. For example, around military bases, spectrum blocks for government operations are sometimes "built into" non-government allocations.¹⁴⁸ Also, in reallocating the 1427-1432 MHz band, the Commission sought to prevent interference to medical telemetry devices by switching the type of licensees that would be given primary status for seven defined geographic areas.¹⁴⁹

¹⁴⁸ In the Matter of Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands, IB Docket No. 97-95, *Notice of Proposed Rulemaking*, 12 FCC Rcd 10130, 10140 (1997).

¹⁴⁹ In the Matter of Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, WT Docket No. 02-8, *Report and Order*, FCC 02-152, pp. 16-17 (Rel. May 24, 2002).

Specifically, the Commission elevated medical telemetry to primary status in the 1429.5-1432 MHz band in seven geographic areas and elevated regular telemetry to primary status in the 1427-1429.5 MHz band in seven geographic areas.¹⁵⁰

In this matter, if the Commission rebands the 800 MHz band, designating a flexible-use band could provide enough spectrum for Southern to continue its current operations with no losses in capacity or functionality. Given the fact that Southern provides service to over 250,000 customers, including five major utilities and 30,000 public safety users, taking reasonable steps to prevent losses in its capacity and functionality is clearly in the public interest.

I. Licensees Should Continue To Be Allowed To Convert 800 MHz B/ILT Channels To CMRS Use

Motorola states that if the Commission implements a realignment plan, it should prohibit licensees from converting 800 MHz B/ILT channels to CMRS use.¹⁵¹ Motorola claims that such a prohibition would be necessary "[t]o preserve the benefits of any rebanding effort."¹⁵² Southern strongly opposes prohibiting the conversion of 800 MHz B/ILT channels to CMRS use, as such conversions greatly facilitate spectral efficiency. The Commission has a long-standing policy of promoting spectral efficiency in the 800 MHz band,¹⁵³ and less than two years ago, it

¹⁵⁰

Id.

¹⁵¹

Comments of Motorola at 17.

¹⁵²

Comments of Motorola at 17.

¹⁵³

See, e.g., In the Matter of an Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Docket No. 18262, *First Report and Order and Second Notice of Inquiry*, 35 Fed. Reg. 8644, 8645 (May 21, 1970); *see also* In the Matter of Amendment of Sections 90.365 and 90.377 of the Commission's Rules to Change the Co-Channel Mileage Separation and Frequency Loading Standards for Conventional Land Mobile Radio Systems In the Bands 806-821 and 851-866 MHz, PR Docket No. 79-106, *Notice of Proposed Rule Making*, 71 F.C.C. 2d 1356, 1360 (1979) ("We believe that our decision here . . . is consistent with the Commission's decision in Docket 18262 to promote the use of spectrally efficient land mobile radio systems in the 800 MHz bands.").

specifically found that allowing the conversion of 800 MHz B/ILT channels to CMRS use "will enhance spectral use and efficiency" and thus began allowing the practice.¹⁵⁴ The Commission should not now roll back an initiative that strongly promotes the efficient use of spectrum, especially when that initiative is less than two years old. The seeds of this flexibility are already beginning to stem. Numerous I/LT licensees are considering upgrading their current technologies to more spectrally efficient technologies. Whether for internal use or eventual commercial use, this change is in the public interest. The flexible use allocation described above can allow this technological advance to continue, and it is thus unnecessary for the Commission to retrench.

IV. NEXTEL'S PLAN IS WIDELY OPPOSED, UNJUSTIFIABLE, INEQUITABLE, AND ECONOMICALLY UNACHIEVABLE

In its Comments, Southern voiced strong opposition to Nextel's plan for wholesale realignment of the 800 MHz band. Nextel's plan would dramatically change the 800 MHz band by requiring all current licensees except Nextel, Nextel Partners (an affiliate of Nextel),¹⁵⁵ and public safety to either accept secondary status or vacate the band without reimbursement. Such draconian band realignment would result in countless established licensees being forced from their spectrum homes, including critical infrastructure entities, local governments, and small businesses. Many of them would not be able to afford the resulting relocation costs and, thus,

¹⁵⁴ *In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22761 (2000).

¹⁵⁵ Nextel Partners operates a digital 800 MHz SMR system utilizing Motorola's iDEN technology and a low-site, low-power cellular architecture. *See* Nextel Partners' 2001 Form 10-K, pp. 6-7.

would be forced to abandon their systems. Despite all that hardship, the plan would not, as Nextel acknowledges, eliminate interference.¹⁵⁶

Not surprisingly, commenters of all types - from large telecommunications associations to commercial carriers to small private licensees - soundly denounced Nextel's plan.¹⁵⁷ Even large public safety associations whose members could be viewed as potential beneficiaries of the plan generally gave it tepid reviews, stating that they were taking it into consideration but were looking forward to reviewing additional plans that would be submitted in the comments.¹⁵⁸ Numerous individual public safety licensees were non-committal with regard to the plan and some even directly opposed it.¹⁵⁹

A. Many Non-Public Safety Commenters Are Strongly Opposed To Nextel's Plan

Nextel's plan faces united opposition in the wireless industry. Major industry associations voicing opposition include CTIA, which observes that, among other things, the plan "fails to fully remedy interference problems and it will not provide adequate long-term solutions."¹⁶⁰ PCIA, ITA, FIT, SBT, NAM and AAR all oppose Nextel's plan, as indicated by their joint submission of an alternative plan.¹⁶¹ UTC asserts that implementation of the plan

¹⁵⁶ Comments of Nextel Communications at 23-26 (filed May 6, 2002 in WT Docket No. 02-55).

¹⁵⁷ *See, e.g.*, Comments of CTIA at 4, Comments of Verizon Wireless at 2; Comments of AVR at 2.

¹⁵⁸ Comments of APCO, National Association of Counties, National League of Cities, and National Association of Telecommunications Officers and Advisors at 19-22, 24.

¹⁵⁹ *See, e.g.*, Comments of State of Maryland at 3-5; Comments of City of New York at 3; Comments of City of Baltimore at 2.

¹⁶⁰ Comments of CTIA at 4.

¹⁶¹ Comments of Private Wireless Coalition. The Private Wireless Coalition is composed of PCIA, ITA, FIT, SBT, NAM, AAR, Aeronautical Radio ("ARINC"), and MRFAC.

would be "ruinous" to critical infrastructure systems and states that "Nextel's persistent efforts to purchase utility spectrum have been unsuccessful; UTC remains convinced that Nextel now seeks to achieve by regulatory fiat what it cannot accomplish through market forces."¹⁶²

Individual critical infrastructure entities also urge rejection of Nextel's plan. Energy utilities that would be drastically affected by the plan filed comments opposing it (including Cinergy Corporation, Entergy Corporation, Delmarva Power and Light Company, SCANA Corporation, and Xcel Energy Services).¹⁶³ Carolina Power and Light Company and TXU Business Services, in a joint filing, characterize Nextel's plan as "a grab for already licensed frequencies" and contend that adoption of it would effectively revoke their licenses.¹⁶⁴

The importance of maintaining the viability of critical infrastructure entities' communications systems was recently documented in the National Telecommunications and Information Administration's report to Congress entitled "Current and Future Spectrum Use by the Energy, Water, and Railroad Industries."¹⁶⁵ Its importance is also emphasized in President Bush's bill proposing the Homeland Security Act of 2002, which, among other things, calls for developing "a comprehensive national plan for securing the key resources and critical

¹⁶² Comments of UTC at 8-9.

¹⁶³ Comments of Cinergy Corporation at 32-53; Comments of Delmarva Power and Light Company at 22-43; Comments of Entergy Corporation at 30-49; Comments of SCANA at 26-36; Comments of Xcel Energy Services at 4-6.

¹⁶⁴ Comments of Carolina Power and Light Company and TXU Business Services at 2, 8. Carolina Power and Light Company and TXU Business Services also note that giving contiguous spectrum to Nextel would confer "enormous economic benefits" upon it, and reference Nextel's 2001 10-K, in which it states that it will "continue to pursue regulatory initiatives that would provide us with rights to create and use other contiguous blocks of spectrum." *Id.* at 2, 7-8; Nextel 2001 10-K at 14.

¹⁶⁵ Marshall W. Ross and Jeng F. Mao, *Current and Future Spectrum Use by the Energy, Water, and Railroad Industries*, U.S. Department of Commerce, National Telecommunications and Information Administration (Jan. 30, 2002) (available at <http://www.ntia.doc.gov/reports.html>).

infrastructures in the United States."¹⁶⁶ Also, in a White House paper discussing the proposal, the White House noted that "terrorists are capable of causing enormous damage to our country by attacking our critical infrastructure [including energy utilities]" and that, accordingly, "the Department of Homeland Security would coordinate a national effort to secure America's critical infrastructure."¹⁶⁷

Other commenters that are opposed to Nextel's plan include both large and small commercial carriers.¹⁶⁸ Verizon Wireless states that as the Commission approaches the problem of public safety interference, "[t]he wrong course would be to embark on a disruptive and extremely costly realignment process that yields no significant benefit - particularly a process as unjustified and self-serving as Nextel's proposal to realign the 800 MHz band."¹⁶⁹ Several smaller commercial carriers that operate on 800 MHz SMR spectrum contend that Nextel's plan threatens their very existence. Island SMR, a carrier in Hawaii with approximately 5,000 subscribers, states that the cost of relocating its system under Nextel's plan could force it into bankruptcy.¹⁷⁰ A small sole proprietorship radio service in Texas estimates that relocation under Nextel's plan would cost approximately \$1.2 million, forcing it to simply surrender its licenses.¹⁷¹ Business Autophones Inc., which operates a small system in the Appalachian region

¹⁶⁶ Homeland Security Act of 2002, 107th Cong., § 201(4) (2002).

¹⁶⁷ Proposal for Department of Homeland Security at 15, available at <http://www.whitehouse.gov/deptofhomeland/toc.html>.

¹⁶⁸ *See, e.g.*, Comments of U.S. Cellular Corporation at 4-7; Comments of Cingular Wireless and Alltel Communications at 11-15.

¹⁶⁹ Comments of Verizon Wireless at 2.

¹⁷⁰ Comments of Island SMR at 2.

¹⁷¹ Comments of Bosshard Radio Service at 3.

of Virginia and West Virginia that the owner mortgaged his home to build, would be bankrupted by Nextel's proposed relocation.¹⁷²

B. The Public Safety Community Has Serious Reservations With Nextel's Plan And Some Public Safety Licensees Directly Oppose It

Nextel claims to have consulted extensively with the public safety community in developing its realignment plan.¹⁷³ Any consensus from its efforts is hardly apparent, however, from the tepid reaction - and in some cases outright opposition - its plan received in the comments filed by public safety associations and licensees.

Not one public safety association wholeheartedly embraced Nextel's proposal. The Association of Public-Safety Communications Officials-International ("APCO"), the National Association of Counties, the National League of Cities, and the National Association of Telecommunications Officers and Advisors filed joint comments stating that from the public safety community's perspective, the proposal had some good points and some bad points, *and they were looking forward to reviewing other plans.*¹⁷⁴ APCO and the other joint commenters were specifically concerned with one of the most fundamental aspects of the plan - the eviction of non-public safety licensees from the 800 MHz band.¹⁷⁵ They stated that they would welcome other plans that would do a better job of mitigating the impact on non-public safety users, indicating that they are prepared to reject Nextel's plan.¹⁷⁶

¹⁷² Comments of Business Autophones Inc. at 2.

¹⁷³ Comments of Nextel Communications at 4.

¹⁷⁴ Comments of APCO, National Association of Counties, National League of Cities, and National Association of Telecommunications Officers and Advisors at 19-22, 24.

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *Id.*

Other associations were even less enthused with Nextel's proposal. The International Association of Chiefs of Police, the Major Cities Chiefs Association, the National Sheriffs' Association, and the Major County Sheriffs' Association filed joint comments in which they made only perfunctory mention of the proposal, then set forth general principles by which they believe all plans should be judged.¹⁷⁷ The International Association of Fire Chiefs and the International Municipal Signal Association filed joint comments in which they expressly urged the Commission *to not even consider* Nextel's proposal at this time.¹⁷⁸ Rather, they requested that the Commission "conduct empirical research to determine the relative effectiveness of the solutions proposed" and adopt "a plan which will meet the objectives set by the Commission of solving the interference problem, with minimal disruption and assuring adequate spectrum for public safety communications."¹⁷⁹ Importantly, the International Association of Fire Chiefs and the International Municipal Signal Association recognized that *no* realignment proposal may be appropriate, stating that if no plan would eliminate interference or if the cost of such plans would be prohibitive, the Commission must look to alternative measures to alleviate interference.¹⁸⁰

Many individual public safety licensees were non-committal with regard to Nextel's plan. For example, the Public Safety Improvement Coalition - comprised of (1) the Cities of Cincinnati, Philadelphia, Phoenix, San Diego, Scottsdale, Tucson, and the District of Columbia; (2) the Counties of Anne Arundel (Maryland), Fauquier (Virginia), Hamilton (Ohio), Osceola

¹⁷⁷ Comments of International Association of Chiefs of Police, the Major Cities Chiefs Association, the National Sheriffs' Association, and the Major County Sheriffs' Association at 3.

¹⁷⁸ Comments of International Association of Fire Chiefs and the International Municipal Signal Association at 4.

¹⁷⁹ *Id.* at 4-5.

¹⁸⁰ *Id.* at 5 n.6.

(Florida), and San Diego (California); and (3) the Denver Greater Metro Telecommunications Consortium - filed comments stating that it did not support any particular plan.¹⁸¹ The Public Safety Improvement Coalition noted that the City of Philadelphia is concerned that Nextel's realignment plan would not eliminate interference.¹⁸² The City of New York independently filed comments in which it was also non-committal with regard to Nextel's plan, specifically noting its concern that the plan would impose substantial costs on public safety licensees.¹⁸³

Other public safety licensees voiced direct opposition to Nextel's plan. For example, the State of Maryland opposes the plan because, according to Maryland, the process of implementing it would adversely impact public safety systems.¹⁸⁴ Maryland also asserts that the proposal would unnecessarily relocate licensees that are not affected by public safety interference. TRW, the prime contractor for Ohio's Multi-Agency Radio Communications System, also opposes Nextel's plan, stating that it "would be detrimental to public safety in Ohio" and "[would] not effectively solve the problems of CMRS interference to public safety communications."¹⁸⁵ It particularly notes that implementation of the plan would adversely affect public safety interoperability in Ohio.¹⁸⁶ The County of Fairfax, Virginia is also opposed to Nextel's plan.¹⁸⁷

Additionally, the City of Baltimore is highly critical of Nextel's proposal, calling it "overly simplistic" and hinting that Nextel is using this proceeding to advance its own goals at

¹⁸¹ Comments of Public Safety Improvement Coalition at 2.

¹⁸² Comments of Public Safety Improvement Coalition at 4-5.

¹⁸³ Comments of City of New York at 3.

¹⁸⁴ Comments of State of Maryland at 3-5

¹⁸⁵ Comments of TRW at 1, 3.

¹⁸⁶ Comments of TRW at 4.

¹⁸⁷ Comments of County of Fairfax at 3.

the expense of public safety: "The convenience of commercial operators and their desire to control large blocks of interference-free spectrum to accommodate business growth must not outweigh the critical public safety needs of the nation. . . . the Commission's efforts should be directed toward having those who cause interference eliminate it."¹⁸⁸

C. Many Public Safety And Quasi-Public Safety Entities Utilize Shared And Commercial Systems That Would Be Adversely Affected By Nextel's Plan

It is important for the Commission to realize that not all public safety entities use solely their own private systems, on specifically designated public safety spectrum, for wireless communications. As indicated by the comments, many public safety entities and quasi-public safety entities (such as municipal transit services and school districts) utilize shared and commercial systems that would be adversely affected by Nextel's proposed realignment. Southern strongly supports *all* public safety organizations, and cautions the Commission not to sacrifice the interests of public safety entities that use shared or commercial systems by narrowly viewing rebanding only as it affects internal public safety systems operating on "public safety" spectrum. Adoption of Nextel's proposal, unfortunately, would do just that.

For example, Southern operates as a CMRS carrier at 800 MHz and has 3,000 public safety organizations on its system (for a total of over 30,000 users), including local, state, and federal law enforcement and emergency management agencies.¹⁸⁹ However, as detailed in its Comments, realignment of the 800 MHz band pursuant to Nextel's proposal could leave Southern with an inadequate amount of 800 MHz spectrum or even no 800 MHz spectrum at all.¹⁹⁰ Likewise, a small 800 MHz provider in Texas includes the American Red Cross and

¹⁸⁸ Comments of City of Baltimore at 2.

¹⁸⁹ Comments of Southern LINC at 5.

¹⁹⁰ Comments of Southern LINC at 2.

various security companies on its list of customers.¹⁹¹ Business Autophones Inc. states that it provides service to public safety organizations, local governments, and school districts in Appalachia, which is generally a rural, mountainous region.¹⁹² It notes that the areas in which it provides service "[have] little public safety 800 MHz infrastructure" and "do not have reliable cellular service, and in some cases, [no] service at all."¹⁹³

Notably, Southern's proposal to move 800 MHz public safety licensees to the Upper 700 MHz band would not unduly impact public safety licensees that utilize shared 800 MHz systems. Since their frequencies are closely integrated into systems also used (and in many cases, primarily used) by B/ILT licensees, they could remain on their existing frequencies.

D. The Nextel Plan Is Inequitable Because It Would Heavily Burden Licensees That Are Not Causing Significant Amounts of Interference And That Would Not Benefit From Realignment

Nextel's plan would take licensees that are causing no interference to public safety entities and (1) force them to relocate or accept secondary status; (2) force them to fund the relocation costs of public safety entities; or (3) both.¹⁹⁴ This is highly inequitable because the record indicates that Nextel causes the majority of interference to public safety licensees. Most 800 MHz licensees cause none, while a handful cause very small amounts that they claim can be remediated on a case-by-case basis.¹⁹⁵ As such, 800 MHz licensees other than Nextel would gain no benefit from relocation of either themselves or public safety licensees.

¹⁹¹ Comments of Bosshard Radio Service at 2.

¹⁹² Comments of Business Autophones Inc. at 1-2.

¹⁹³ Comments of Business Autophones Inc. at 1-2.

¹⁹⁴ Comments of Nextel Communications at 4-6.

¹⁹⁵ See Comments of AT&T at 6-7.