

As noted above in Section III(C), the comments demonstrate that the cost of relocation for non-public safety licensees, to say nothing of the system disruptions and other burdens, could be massive; Motorola found that the total cost could reach \$2.4 billion.¹⁹⁶ Also, Nextel suggests that CMRS carriers fund the relocation of public safety, a cost which could conservatively run to \$1.5 billion.¹⁹⁷ Entities such as Southern may thus be forced to pay for their own relocation *and* help finance public safety licensees' relocation. Imposing such costs and burdens on licensees that are causing either no interference or very little interference to public safety licensees, and would thus not benefit from relocation of either themselves or public safety licensees, would be profoundly inequitable.

Although Nextel's plan offers licensees the option of accepting secondary status rather than relocating, the comments made clear that most licensees find secondary status completely unacceptable.¹⁹⁸ In a footnote to its Comments, Nextel attempted to dress up its offer of secondary status by stating that, pursuant to its plan, if public safety licensees do not immediately need newly allocated spectrum in a particular area, public safety frequency coordinators could permit incumbent licensees to temporarily remain on it.¹⁹⁹ In other words, non-public safety licensees would essentially be tenants at will, subject to removal at any time by public safety entities. Nextel's attempt to persuade the Commission that "secondary status" under its plan would not be as bad as regular secondary status is disingenuous and should be rejected out of hand. Secondary status is unacceptable for most 800 MHz licensees, period.

¹⁹⁶ Comments of Motorola at 25.

¹⁹⁷ Comments of Motorola at 25. Nextel has pledged to contribute \$500 million to this effort if the Commission gives it everything it asks for in its *White Paper*. *Id.* at 42.

¹⁹⁸ *See, e.g.*, Comments of National Rural Telecommunications Cooperative at 5; Comments of Entergy Corporation at 43-44; Comments of Corn Belt Energy Corporation at 2; Comments of Bosshard Radio Service at 2.

¹⁹⁹ Comments of Nextel Communications at 5 n.11.

E. Nextel's Plan Is Economically Unachievable Because It Lacks A Viable Funding Mechanism

Nextel's plan calls for 800 MHz public safety licensees to relocate within the 800 MHz band, and for B/ILT and high-site SMR licensees to either accept secondary status or relocate to the 700 or 900 MHz bands.²⁰⁰ Thus, to implement Nextel's plan the Commission would have to design mechanisms for funding the relocation of public safety within the 800 MHz band and the relocation of B/ILT and high-site SMR licensees beyond the band.

As detailed above in Section III(E), the Commission has a firm and longstanding policy of reimbursing the relocation costs of displaced licensees.²⁰¹ However, no viable funding mechanism has been presented by Nextel.²⁰² Its proposed contribution of \$500 million is contingent on the Commission granting 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.²⁰³ Moreover, even if this contribution were actually made, it would account for only one-third of the potential \$1.5 billion cost of relocating public safety licensees, as estimated by Motorola.²⁰⁴

²⁰⁰ Although Southern's SMR system uses both high and low sites, its system is highly unique. Accordingly, it is not clear whether Nextel's plan would require Southern to relocate from the 800 MHz band. Even if the plan theoretically would permit Southern to remain at 800 MHz, the plan does not provide sufficient spectrum to accommodate both Southern and Nextel. *See* Comments of Southern LINC at 30-34.

²⁰¹ *See, e.g.*, 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 (2000); *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001).

²⁰² Furthermore, most entities offering rebanding 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.

²⁰³ Comments of Nextel Communications at 42.

²⁰⁴ Comments of Motorola at 25.

F. Nextel's Suggestion That B/ILT And High-Site SMR Licensees Occupy A Relatively Small Amount Of Spectrum In The 800 MHz Band Is Misleading

At the beginning of its Comments, Nextel sets forth several 800 MHz band occupancy statistics that it generated. According to Nextel's calculations, it is the largest occupant of the 800 MHz band, with a "running average" of 18 MHz of the 36 MHz of Land Mobile Radio spectrum in the band.²⁰⁵ Public safety licensees as a group are next, with a running average of 9.5 MHz.²⁰⁶ B/ILT and high-site SMR licensees are after that, with "approximately" 4 MHz.²⁰⁷ Nextel's goal in citing these statistics is to persuade the Commission that relocating B/ILT and high-site SMR licensees out of the 800 MHz band would not be terribly disruptive, or at least would be less disruptive than relocating public safety licensees. However, Nextel's statistics are highly misleading and should be disregarded by the Commission.

Nextel's complicated statistical analysis should not distract the Commission from the fact that under its plan, approximately 3,200 B/ILT and high-site SMR licensees would be forced to accept secondary status or vacate the spectrum band in which they have established their systems.²⁰⁸ If the comments are any indication, very few licensees will accept secondary status, so they will have to relocate. The cost of such mass eviction could reach, as Motorola suggested, a staggering \$2.4 billion.²⁰⁹ Without reimbursement, licensees could be forced to abandon their systems, companies could be forced into bankruptcy, and business owners would lose their investments. B/ILT and high-site SMR licensees utilize a great deal of spectrum, and many have

²⁰⁵ Comments of Nextel Communications at 2.

²⁰⁶ Comments of Nextel Communications at 2.

²⁰⁷ Comments of Nextel Communications at 3.

²⁰⁸ See *NPRM* at Initial Regulatory Flexibility Analysis, Section C.

²⁰⁹ Comments of Motorola at 25.

built out their systems over many years at great expense and serve critical needs in our society. That reality, not Nextel's contrived statistics, is what the Commission should focus on.

As indicated by the foregoing, viewing raw data is an overly simplistic way of determining whether an interference resolution plan would be significantly disruptive to a class of licensees, or whether relocating one class of licensees would be less disruptive than relocating another. If, however, the Commission chooses to factor in such information, Southern would note that well over twice as many B/ILT and high-site SMR entities use the 800 MHz band than do public safety entities. Specifically, 3,200 B/ILT, and high-site SMR licensees have systems at 800 MHz, compared with 1,320 public safety licensees.²¹⁰

Southern also takes issue with the design of Nextel's statistical analysis. Nextel's figures represent what it terms a "running average" of B/ILT and high-site SMR licensees' spectrum holdings in each of the 100 largest cities in the United States.²¹¹ For purposes of its calculations, it purportedly identified all non-Nextel B/ILT and high-site SMR licensees within 22.5 miles of the central point of each city.²¹² The problem with this analysis is that it focuses solely on the 100 largest cities rather than the entire country. The United States is made up of far more than large cities, and hence B/ILT and high-site SMR licensees are located in many more places. The *Rand McNally Commercial Atlas and Marketing Guide* for 1997 states that as of the 1990 Census, there were 3,047 places in the United States with a population of over 10,000 persons and 5,319 places with a population of over 5,000 persons.²¹³ It is reasonable to assume that, at least, the places with over 10,000 inhabitants have radio facilities, but Nextel's analysis

²¹⁰ *NPRM* at Initial Regulatory Flexibility Analysis, Section C.

²¹¹ Comments of Nextel Communications at Appendix A, p. 2.

²¹² Comments of Nextel Communications at Appendix A, p. 2.

²¹³ Rand McNally and Company, *Rand McNally Commercial Atlas and Marketing Guide* 136 (1997 ed.) (1997).

completely excludes any of those places that are not one of the 100 largest cities or located within a 22.5 mile radius from the central point of one of those cities.

In accordance with the foregoing, many areas containing B/ILT and high-site SMR were left out of Nextel's running average. This may have significantly skewed the analysis, especially given that Nextel's operations are primarily in large cities where it holds great amounts of 800 MHz spectrum and, consequently, the amount available to B/ILT and high-site SMR is drastically reduced. The amount of spectrum held by B/ILT and high-site SMR licensees in areas where Nextel has not consolidated much of the available spectrum may be significantly greater than the 4 MHz indicated by Nextel's analysis. Thus, a *nationwide* running average might be significantly higher than the limited area running average calculated by Nextel. Therefore, Nextel's analysis is not necessarily representative of the average amount spectrum held by B/ILT and high-site SMR licensees in the 800 MHz band and, as such, should be disregarded by the Commission.

G. Nextel's Plan Would Not Significantly Lower The Likelihood Of Nextel-Based Intermodulation Interference

Nextel asserts that by relocating the NPSPAC licensees outside the 856-871 MHz range, its plan would significantly lower the probability of Nextel-based intermodulation interference to public safety licensees.²¹⁴ However, as explained above in Section III(A), a simple review of the standard intermodulation calculations indicates that Nextel's plan would not significantly lower the likelihood of Nextel-based intermodulation interference.²¹⁵ As noted by Fresno Mobile Radio, no rebanding plan that leaves public safety entities on spectrum in proximity to CMRS licensees will eliminate harmful interference.²¹⁶

²¹⁴ Comments of Nextel Communications at 20.

²¹⁵ Comments of Motorola at 17-20.

²¹⁶ Comments of Fresno Mobile Radio at 4.

H. Nextel's Plan Is Contrary To Previous Assertions That It Would Use Its 900 MHz MTA Licenses To Resolve Public Safety Interference At 800 MHz

On January 9, 2001, Nextel, through FCI 900, a wholly-owned subsidiary, requested that the Commission grant it a three-year extension of the construction requirement for its 900 MHz Metropolitan Trading Area ("MTA") licenses.²¹⁷ Nextel asserted that it needed an extension because although the deadline was looming, there was a limited availability of 900 MHz equipment, particularly equipment suitable for a dual band 800/900 MHz network that Nextel purportedly planned to implement.²¹⁸ In pressing its case for an extension, Nextel assured the Commission that it was "committed to the nationwide buildout of its 900 MHz MTA spectrum."²¹⁹ Nextel also told the Commission that "the highest and best use of its adjacent 900 MHz SMR spectrum is as a fully integrated component of [its existing 800 MHz network]."²²⁰

As part of its initiative to convince the Commission to grant it an extension of its 900 MHz construction requirement, Nextel emphasized the value of such spectrum as an ideal solution to resolving 800 MHz public safety interference. Specifically, Nextel asserted that a "pico cell" product manufactured by Littlefeet, Inc. would enable Nextel to convert 800 MHz frequencies to 900 MHz frequencies, route the 900 MHz frequencies to strategically deployed very low-site, low-power "pico cell" stations, and then re-convert the signals to 800 MHz frequencies for reception by Nextel handsets.²²¹ With this architecture, Nextel claimed that it could decrease the power of its 800 MHz signal and thus "help mitigate interference problems

²¹⁷ In the Matter of FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, DA 01-121, *Letter from Nextel Communications to Thomas Sugrue of the Wireless Telecommunications Bureau*, dated Jan. 9, 2001.

²¹⁸ *Id.*

²¹⁹ *Id.* at 2.

²²⁰ *Id.*

²²¹ *Id.* at 5-6.

between Nextel and public safety systems . . . while still enabling Nextel to provide robust services to its customers."²²² In a follow-up letter to the Commission dated March 19, 2001, Nextel stated that it "expects to begin commercial deployment of 800/900 MHz dual band network infrastructure . . . during 2nd Quarter 2002."²²³

In a *Memorandum Opinion and Order* issued May 25, 2001, the Commission granted Nextel and other 900 MHz MTA licensees an extension of the construction deadline through December 31, 2002.²²⁴ In granting the extension, the Commission specifically cited Nextel's commitment to build out its 900 MHz licenses.²²⁵ The Commission also based its decision on its belief that an extension would "facilitate Nextel's deployment of innovative digital 900 MHz 'pico cell' technology by Littlefeet, Inc. Significantly, this new technology will mitigate near-far interference between Nextel's 800 MHz SMR system and adjacent 800 MHz public safety communications systems."²²⁶

Thus, as recently as March 2001, Nextel was actively asserting to the Commission that it planned to build out its 900 MHz MTA licenses in a manner that would alleviate public safety interference in the 800 MHz band.²²⁷ As expressly stated by Nextel, such deployment constituted the "highest and best use" of its 900 MHz MTA licenses. However, in November

²²² *Id.* at 6.

²²³ In the Matter of FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, DA 01-121, *Letter from Nextel Communications to Michael Ferrante of the Wireless Telecommunications Bureau*, dated March 19, 2001, at 1.

²²⁴ In the Matter of FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (2001).

²²⁵ *Id.* at 11077.

²²⁶ *Id.* at 11079.

²²⁷ If Nextel's intent changed subsequent to that date, it was bound by FCC Rule Section 1.65 to advise the Commission of that material change.

2001, only six months after the Commission's grant of a construction extension, Nextel filed its *White Paper* on 800 MHz public safety interference, in which it proposed to trade its 900 MHz spectrum for new spectrum at 2.1 GHz and force 800 MHz B/ILT and high-site SMR licensees to relocate to its former 900 MHz channels.

Nextel's prior assertions to the Commission are further called into question by the fact that its plan to deploy pico cells to resolve interference appears to have mysteriously evaporated. The current proceeding is about mitigating 800 MHz public safety interference, and as noted above, Nextel is the primary source of such interference. Accordingly, based on Nextel's assertions in its 900 MHz extension request, it could substantially resolve public safety interference by using its 900 MHz spectrum to implement pico cell technology. Rather than doing that, however, Nextel has proposed a tremendously complicated, expensive, and destructive band realignment plan. Of course, use of pico cell technology would not enable Nextel to: (1) consolidate its 800 MHz spectrum; (2) obtain a gift from the Commission of 10 MHz of highly valuable contiguous, nationwide spectrum at 2.1 or 1.9 GHz; (3) force out of business or severely injure its 800 MHz SMR competitors; or (4) drive current B/ILT licensees to sign-up for its service.

V. THE COMMISSION LACKS AUTHORITY TO REQUIRE LICENSEES THAT WILL NOT BENEFIT FROM THE RELOCATION OF PUBLIC SAFETY LICENSEES TO FUND THEIR RELOCATION

In the *NPRM*, the Commission asked "whether a direct benefit must accrue before the Commission may require a licensee to pay for the relocation of another licensee."²²⁸ The answer is clearly yes. This question was asked largely in connection with Nextel's plan, which would require all commercial SMR and cellular providers to "fund a substantial part" of the cost of

²²⁸ *NPRM* at ¶ 44.

relocating public safety licensees.²²⁹ Southern and other commenters strongly asserted that a direct benefit to the payor constitutes the baseline legal requirement before payment for relocation can be required, and that such benefit is not present here. Cingular Wireless and Alltel Communications assert that "[a]gencies may not recover from regulated parties costs for benefits inuring to the public generally and not 'directly to the benefit of regulated parties' unless Congress has clearly authorized agencies to do so."²³⁰ Verizon Wireless similarly observes that "there is no precedent or legal authority that could support a decision by the Commission to impose relocation costs on cellular licensees."²³¹ U.S. Cellular Corporation states that "[o]nly those licensees like Nextel . . . who plainly will benefit should be required to pay for relocation costs."²³²

The foregoing arguments are clearly correct. The United States Supreme Court has spoken directly on this point, stating that the Commission cannot impose fees and costs on licensees unless specifically authorized to do so by Congress.²³³ Even where there is a specific, expressly stated grant of authority from Congress, which does not exist here, the Commission is prohibited from imposing costs or other burdens that will not directly benefit the parties upon which they are imposed.²³⁴ In the context of regulatory and licensing fees, the Court has interpreted this authority narrowly to avoid constitutional problems. Therefore, the Court has

²²⁹ Comments of Nextel Communications at 42.

²³⁰ Comments of Cingular Wireless and Alltel Communications at 14-15 (quoting *Skinner v. Mid-America Pipeline*, 490 U.S. 212, 223 (1989)).

²³¹ Comments of Verizon Wireless at 16.

²³² Comments of U.S. Cellular Corporation at 7.

²³³ *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1949).

²³⁴ *See, e.g., National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336 (1973); *see also Skinner v. Mid-America Pipeline*, 490 U.S. 212, 224 (1989).

held that even routine administrative fees must be related to the "value to the recipient" to pass constitutional muster.²³⁵ Accordingly, the Commission's latitude to impose substantial costs upon parties that do not receive "value" is strictly circumscribed.

Under the circumstances suggested here, the Commission does not have authority to order one licensee to reimburse another licensee for relocation costs. Congress simply has not granted the Commission the authority to impose such costs and burdens on licensees. The Commission has, in the past, implemented reimbursement plans in which licensees that *choose* to displace incumbent licensees and *reap the benefits* of that displacement are required to reimburse the incumbents' relocation costs. That is a far cry, however, from ordering licensees that are forced out of their present spectrum assignments (and incur their own relocation costs) to finance the relocation of other entities who are moving to other spectrum assignments due to interference caused by third parties.²³⁶

The Commission suggests in the *NPRM* that it has the authority to permit cost sharing that would spread the cost of band clearing among licensees that benefit from the process.²³⁷ While the Commission may have authority to "permit" licensees to engage in voluntary transactions, that is far different from a regime that would *compel* payment. Reimbursement

²³⁵ See, e.g., *National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336 (1973).

²³⁶ In an analogous context, the Commission denied a party's request to have a licensee pay its attorneys' fees after they settled a contested matter. The D.C. Circuit upheld the denial, noting that "any attempt to infer [the power to force a licensee to pay another party's attorneys' fees] from general grants of authority has to be considered in light of . . . the strict limitations on the Commission's powers under the Act to require broadcast licensees to pay out money" *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975).

The Court also noted that "[i]t is one thing to approve a *voluntary* agreement . . . It is quite another for an agency to *order* a litigant to bear his adversary's expenses. Before an agency may so order, it must be granted clear statutory power by Congress." *Id.* at 1356 (emphasis added).

²³⁷ *NPRM* at 44.

policies adopted in the past to clear spectrum for new technologies do not mirror the situation presented in this proceeding. In those cases, there is a direct relationship between the license that the "paying" entity holds and frequencies that the vacating party is relinquishing. The party being asked to pay to relocate an incumbent will obtain valuable rights to cleared spectrum on which to operate a profitable business.²³⁸ Here, the licensees who would be expected to pay (presumably commercial licensees) would not be receiving new or expanded spectrum rights. Rather, as in the case of Southern, they would be forced to incur substantial costs to relocate from their current spectrum homes *and* to pay to relocate public safety entities to cure interference problems that the licensees are not necessarily responsible for causing. There is no analogy in past Commission precedent for imposing such costs on licensees. Nor can commercial licensees (with the possible exceptions of Nextel and Nextel Partners) be said to be "benefiting" from this process.

²³⁸ In *Teledesic v. FCC*, 275 F.3d 75 (D.C. Cir. 2001), the Court of Appeals affirmed the FCC's relocation/reimbursement rules for MSS under this type of factual scenario.

VI. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Southern LINC respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 7th day of August 2002, I caused a copy of the foregoing "Reply Comments Of Southern LINC" to be hand-delivered to each of the following:

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