

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Improving Public Safety)	
Communications in the 800 MHz Band)	
)	WT Docket No. 02-55
Consolidating the 900 MHz Industrial/ Land Transportation and Business Pool Channels)	
)	
Wireless Telecommunications Bureau Seeks Comment on "Consensus Plan" Filed in the 800 MHz Public Safety Interference Proceeding)	DA 02-2202

To: The Commission

FURTHER COMMENTS OF CINERGY CORPORATION

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TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	THE SO-CALLED CONSENSUS PLAN FAILS TO CONCEAL DRAMATIC DIFFERENCES IN THE OPINIONS OF 800 MHZ LICENSEES	3
A.	A Difference of Opinion Exists Among the Joint Commenters Concerning a Number of Critical Issues	4
B.	Other Commenters Oppose the So-Called Consensus Plan.....	5
III.	THE PROPOSED REALIGNMENT PLAN FAILS TO PROVIDE A PREDICTABLE AND ORDERLY RELOCATION FOR BUSINESS AND I/LT LICENSEES	6
A.	The FCC Should Retain the Responsibility for Developing a Bandplan.....	6
B.	A Relocation Plan Must Clearly Define the Rights and Responsibilities of the Licensees	8
IV.	THE SO-CALLED CONSENSUS PLAN DOES NOT ADEQUATELY PROTECT BUSINESS AND I/LT LICENSEES	9
A.	A Rebanding Plan Must Offer Comparable and Adequate Spectrum to Displaced Licensees	9
1.	The Guard Band Provides Inadequate Spectrum for Wide-Area, Critical Infrastructure Licensees.....	10
2.	The So-Called Consensus Plan Does Not Demonstrate the Availability of Replacement Spectrum.....	12
B.	The So-Called Consensus Plan Improperly Offers Double the Bandwidth at 900 MHz for Voluntarily Relocating Licensees.....	13
C.	The So-Called Consensus Plan Improperly Restricts Access to Spectrum by Eligible Entities.....	14
D.	Displaced Incumbent Licensees Must Have a Realistic Amount of Time to Relocate Their Systems	15
V.	THE SO-CALLED CONSENSUS PLAN EFFECTIVELY PRECLUDES LICENSEES FROM DEPLOYING ADVANCED SYSTEMS	16
A.	The FCC's Spectrum Policy Supports Advanced Systems.....	17

B.	The Prohibition on Cellular Architecture in the So-Called Consensus Plan Is Contrary to FCC Spectrum Policy.....	18
1.	Incumbent Licensees Lack Flexibility to Develop and Deploy Advanced Systems Because of the Absolute Prohibition.....	19
2.	A Prohibition on Cellular Systems is Unnecessary to Protect Public Safety Licensees from Harmful Interference.....	20
3.	The Proposed Waiver Process Does Not Alleviate the Absolute Prohibition on Cellular Architecture.....	21
C.	Licensees Have Not Reached a Consensus Concerning the Proposed Prohibition on Cellular Systems.....	22
VI.	THE SO-CALLED CONSENSUS PLAN DOES NOT OFFER A SUFFICIENT FUNDING MECHANISM.....	23
A.	Business and I/LT Licensees Would Not Receive Any Compensation for Their Relocation Out of the General Category Band.....	24
B.	The So-Called Consensus Plan Would Not Fully Fund the Relocation of Public Safety Licensees.....	26
1.	Nextel Improperly Caps Its Liability for Resolving the 800 MHz Interference Problem.....	26
2.	Nextel Attempts to Impose Additional Conditions on Its Contribution.....	27
3.	The So-Called Consensus Plan Does Not Provide Any Details on the Security and Maintenance of the Escrow Account for the \$500 Million.....	29
4.	The Joint Commenters Have Not Reached an Agreement on the Funding Mechanism.....	30
VII.	THE FCC MUST FORFEIT ITS ENFORCEMENT RESPONSIBILITIES UNDER THE SO-CALLED CONSENSUS PLAN	31
VIII.	THE RECORD OFFERS NO SUPPORT FOR A COSTLY AND DISRPUTIVE REBANDING.....	33
A.	The So-Called Consensus Plan Continues to Rely on Isolated, Unsubstantiated Reports of Interference as Proof of a Widespread Problem.....	33
B.	The Proposed Realignment Would Not Eliminate Interference Caused by Nextel's Operations.....	34
1.	Nextel Would Cause Interference to the NPSPAC Licensees.....	35

2.	Nextel Would Also Interfere with Public Safety Licensees in the 809-814/854-859 MHz Band	37
3.	Nextel's Technical Analysis Ignores a Type of Harmful Interference	37
C.	The FCC Could Implement a Less Costly and Disruptive Alternative to Remedy Any Interference in the 800 MHz Band	38
IX.	THE SO-CALLED CONSENSUS PLAN CONTAINS SEVERAL OTHER ILL-CONCEIVED RECOMMENDATIONS	39

EXECUTIVE SUMMARY

Cinergy Corporation, a multi-state gas and electric utility licensed in the 800 MHz band, advises the FCC not to adopt the so-called Consensus Plan because it does not offer a feasible solution to the 800 MHz interference problem. While the Joint Commenters claim to comprise a representative group of 800 MHz licensees, the Plan fails to reconcile its sponsors' differences on fundamental questions and lacks any specificity on logistical issues. The Plan also encounters opposition from a diverse group of 800 MHz licensees.

In addition to this absence of support, the so-called Consensus Plan also neglects to include several important components that are necessary to protect Public Safety and critical infrastructure industry licensees during a relocation. The Plan does not provide a predictable and orderly relocation for Business and I/LT licensees, delegating responsibility for the development of a bandplan to entities with clear conflicts of interest or other disqualifying characteristics. The Plan also fails to define the rights of licensees. Cinergy recommends that the FCC develop a bandplan and promulgate self-executing rules that clearly define the rights and responsibilities of incumbent licensees. Without these minimal safeguards to balance the negotiation process, the relocation would disrupt the operations of critical infrastructure industries, such as utilities, contrary to the public interest.

Because it does not contain such safeguards, the so-called Consensus Plan does not adequately protect Business and I/LT licensees during the relocation process. The Plan fails to offer comparable and adequate spectrum to displaced licensees. In particular, the proposed Guard Band provides inadequate spectrum for wide-area, critical infrastructure operations because it is prone to interference. This interference is inappropriate for utilities

because their communications systems are necessary to perform certain public safety services, such as providing electricity, gas, and water to the public. The Plan also improperly restricts Business and I/LT access to spectrum vacated by Nextel for at least eight to nine years, while neglecting to provide a sufficient amount of time for relocation of incumbent licensees.

The Plan also prohibits licensees from deploying advanced systems, even though the FCC's long-standing spectrum policy encourages flexible spectrum use and innovative technologies. While incumbent licensees have a demonstrated interest in developing and deploying such technologies, the prohibition is unlikely to enhance the protection of Public Safety licensees from interference. Although the prohibition on cellular systems includes a waiver provision, the required showing is overly burdensome.

The Plan lacks a sufficient funding mechanism for Public Safety licensees, while completely failing to reimburse Business and I/LT licensees for their relocation expenses. Despite the statutory, administrative, and judicial precedent supporting the full reimbursement of displaced licensees, the Plan limits Nextel's liability for resolving its 800 MHz interference problem. In addition, Nextel attempts to impose additional conditions on its contribution, such as the adoption of the entire Plan, the resolution of administrative and judicial challenges to the FCC's Report and Order within two years, and certain time limits. Because of the distinct possibility that Nextel's funding obligation could expire prior to the completion of the rebanding, the so-called Consensus Plan may worsen interference in the 800 MHz band.

Because of the inordinate amount of authority that Nextel retains over the administrative details and funding, the Plan effectively requires the FCC to forfeit its

enforcement authority. Cinergy recommends against the adoption of a rebanding plan that grants a "veto" to the primary source of the interference problem.

The FCC should also not give serious consideration to the so-called Consensus Plan because the record offers no support for a costly and disruptive rebanding. The Plan relies on isolated, unsubstantiated reports of interference as proof of a widespread problem. In addition, the proposed realignment would not eliminate interference caused by Nextel's operations. Although Nextel's technical analysis omits some relevant information, the analysis appears to indicate that NPSPAC licensees would continue to experience interference, while Public Safety licensees in the 809-814/854-859 MHz band would also suffer from interference.

Finally, the so-called Consensus Plan contains several other problematic recommendations, including the proposed grant of 1.9 GHz spectrum to Nextel and the grant of 700 MHz commercial Guard Band spectrum to Public Safety licensees.

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FURTHER COMMENTS OF CINERGY CORPORATION

Cinergy Corporation ("Cinergy"), through its undersigned counsel, submits these Further Comments in the above-captioned matter pursuant to Section 1.415 of the FCC's rules. In this proceeding, the FCC requested comment on methods by which it could alleviate harmful interference to 800 MHz Public Safety systems while limiting disruption to incumbent licensees.¹ These Further Comments respond to the Wireless Telecommunications Bureau's *Public Notice* seeking further comment on a so-called Consensus Plan filed in that docket.²

¹ In re Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels; WT Docket No. 02-55, *Notice of Proposed Rule Making*, 17 F.C.C. Rcd. 4873 (2002) [hereinafter *NPRM*]. The *NPRM* was published in the Federal Register on April 5, 2002. 67 Fed. Reg. 16351 (Apr. 5, 2002).

² Wireless Telecommunications Bureau Seeks Comment on "Consensus Plan" Filed in the 800 MHz Public Safety Interference Proceeding, *Public Notice*, DA 02-2202 (rel. Sept. 6, 2002). By *Public Notice*, released September 18, 2002, the Wireless Telecommunications Bureau expanded

I. INTRODUCTION

The FCC should decline to adopt the so-called Consensus Plan because it does not offer a feasible solution to the interference problem in the 800 MHz band. In its Comments and Reply Comments, Cinergy outlined an efficient and effective solution to the interference problem using technical measures. To implement this plan, the FCC would establish rules to promote the resolution of interference through negotiation and arbitration, with firm timelines for ensuring the prompt elimination of interference. If the FCC were to find that a realignment is unavoidable, Cinergy supported an alternative plan involving the relocation of Public Safety licensees to the 700 MHz band.

In contrast to these reasonable recommendations, the so-called Consensus Plan offers a bizarre patchwork of questionable interference-reduction techniques cobbled together from diametrically opposed interests and lacking a central focus. Because of this lack of coherence, the Plan fails to generate support even among the Joint Commenters.

Counsel for Cinergy communicated its concerns to the principal sponsors of the so-called Consensus Plan prior to the filing of the Private Wireless Coalition's Comments and again prior to the submission of the Joint Commenters' Consensus Plan. While SCANA would welcome the adoption of a plan based on a true consensus among all industry sectors using the 800 MHz band, Cinergy cannot endorse this so-called Consensus Plan for all the reasons discussed in these Comments.

the scope of its September 6th *Public Notice* to invite comment on any other rebanding plans or proposals raised in the reply comments. Wireless Telecommunications Bureau Clarifies Scope of Comments Sought in 800 MHz Public Safety Proceeding (WT Docket 02-55), *Public Notice*, DA 02-2306 (rel. Sept. 18, 2002). However, because the Bureau did not extend the deadline for filing comments in response to all reply comments, the present comments are, of necessity, limited to addressing the so-called Consensus Plan, as directed by the September 6th *Public Notice*.

As explained in greater detail below, this Plan should not be given serious consideration because it:

- fails to provide a predictable and orderly relocation process, while lacking input or involvement of individually affected licensees;
- subjects utilities and other large system users to interference by forcing them into a "Guard Band";
- precludes the deployment of advanced systems by Business, I/LT, and Public Safety licensees;
- fails to provide a funding mechanism for all displaced licensees;
- caps Nextel's liability to an amount that even the Joint Commenters concede is insufficient to cover Public Safety expenses;
- requires the FCC to forfeit its authority to enforce the rebanding; and
- lacks evidence to justify the cost and disruption of such a massive rebanding effort, such as proof that rebanding would prevent the occurrence of interference.

Until the Joint Commenters resolve these issues, the FCC should decline to adopt the so-called Consensus Plan or any other similarly structured rebanding proposal.

II. THE SO-CALLED CONSENSUS PLAN FAILS TO CONCEAL DRAMATIC DIFFERENCES IN THE OPINIONS OF 800 MHZ LICENSEES

The Joint Commenters purport to comprise a representative group of 800 MHz licensees,³ a claim that allegedly lends credibility to their so-called Consensus Plan. Upon further analysis,

³ Reply Comments of Aeronautical Radio, Inc., American Mobile Telecommunications Association, American Petroleum Institute, Association of American Railroads, Association of Public-Safety Communications Officials-International, Inc., Forest Industries Telecommunications, Industrial Telecommunications Association, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, Inc. and International Municipal Signal Association, Major Cities Chiefs Association, Major County Sheriffs' Association, National Sheriffs' Association, Nextel Communications, Inc., Personal Communications Industry Association, National Stone, Sand and Gravel Association, and Taxicab, Limousine and Paratransit Association 2 (Aug. 7, 2002) [hereinafter *Consensus Plan*].

however, the Wireless Telecommunications Bureau will discover that it fails to command widespread support. While the Joint Commenters may appear to agree on certain issues in the Plan itself, scrutiny of their concurrent and subsequent filings uncovers substantial differences of opinion on fundamental issues. In addition, the utter lack of specificity on many logistical issues indicates an absence of consensus beyond the highest level of generality. Finally, a wide range of 800 MHz licensees continue to oppose the primary tenets of the Plan.

A. A Difference of Opinion Exists Among the Joint Commenters Concerning a Number of Critical Issues

Despite their claims of consensus-building, and three months of discussions, the Joint Commenters have not resolved the most contentious issues raised in this proceeding. A comparison of the so-called Consensus Plan with the Joint Commenters' separately filed reply comments and *ex parte* submissions reveals an absence of agreement on several major issues. For example, Nextel and the American Mobile Telecommunications Association, Inc. ("AMTA") have conflicting views on the prohibition on cellular operations below 816/861 MHz,⁴ while Nextel, AMTA, and the Association of Public-Safety Communications Officials-International, Inc. ("APCO") disagree on the operation of the funding mechanism.⁵

The failure of the Joint Commenters to elaborate on several important logistical issues provides further evidence of their lack of consensus. For example, the so-called Consensus Plan

⁴ Compare Reply Comments of Nextel Communications, Inc. 5 (Aug. 7, 2002) [hereinafter *Nextel Reply Comments*] with Reply Comments of American Mobile Telecommunications Association, Inc. 8 (Aug. 7, 2002) [hereinafter *AMTA Reply Comments*].

⁵ Compare *Nextel Reply Comments* at 29-32 with *AMTA Reply Comments* at 10 and Reply Comments of Association of Public-Safety Communications Officials-International 4 (Aug. 7, 2002) [hereinafter *APCO Reply Comments*]. In addition, Nextel and the International Association of Fire Chiefs appear to disagree on the necessity of Public Safety receiver standards. Compare *Nextel Reply Comments* at 24 n.50 with Comments of International Association of Fire Chiefs 6 (May 6, 2002).

completely dodges the border issue,⁶ while also reserving funding issues and details of the Business and I/LT relocation for future determination.⁷ These differences of opinion undermine the claims of consensus by the Joint Commenters.

B. Other Commenters Oppose the So-Called Consensus Plan

The lack of consensus among the 800 MHz licensees extends beyond disagreements among the Joint Commenters. While the so-called Consensus Plan claims to speak for a representative cross-section of licensees, the Plan "has not been negotiated with all affected parties."⁸

In addition, an equally wide range of licensees also oppose the positions taken by the Joint Commenters. Several Public Safety commenters have previously expressed their opposition to the basic tenets of the so-called Consensus Plan,⁹ while no members of the utility community appear to support the Plan.¹⁰ Commercial SMR licensees as well as large CMRS providers also oppose the plan,¹¹ and at least one equipment manufacturer supports an alternative

⁶ *Consensus Plan* at 16.

⁷ *Id.* at 19 n.56, 21 n.60.

⁸ Reply Comments of Carolina Power & Light Company and TXU Business Services 3 (Aug. 7, 2002) [hereinafter *CP&L/TXU Reply Comments*].

⁹ *E.g.*, Reply Comments to the Proposed "Consensus Plan" of the County of Maui and the County of Kauai 1 (Sept. 23, 2002); Reply Comments of Office of the Chief Technology Officer, Government of the District of Columbia 7-8 (Aug. 7, 2002); Reply Comments of City of San Diego 2, 4-5 (Aug. 7, 2002) [hereinafter *City of San Diego Reply Comments*].

¹⁰ *E.g.*, Reply Comments of UTC 18 (Aug. 7, 2002) [hereinafter *UTC Reply Comments*]; *CP&L/TXU Reply Comments* at 3, Reply Comments of Pinnacle West Capital Corporation 5-6 (Aug. 7, 2002); Reply Comments of Ameren 12 (Aug. 7, 2002) [hereinafter *Ameren Reply Comments*] (noting that Business and I/LT licensees should not relocate to a "Guard Band" to protect Public Safety licensees).

¹¹ Reply Comments of Mobile Relay Associates 3-4, 5-6 (Aug. 7, 2002) [hereinafter *Mobile Relay Associates Reply Comments*]; Reply Comments of Southern LINC 24-44 (Aug. 7, 2002) [hereinafter *Southern LINC Reply Comments*]; Reply Comments of Cingular/Alltel 4 (Aug. 7, 2002); Reply Comments of Alltel Communications, Inc., Cingular Wireless, LLC, AT&T

plan.¹² Although the engineers of the so-called Consensus Plan attempted to circumvent the opposition of individual licensees by acquiring the support of trade associations, many such organizations expressly withhold their support of the Plan.¹³ In addition, AMTA signed the so-called Consensus Plan over the opposition of two of its Board Members, Southern LINC and Mobile Relay Associates.¹⁴

III. THE PROPOSED REALIGNMENT PLAN FAILS TO PROVIDE A PREDICTABLE AND ORDERLY RELOCATION FOR BUSINESS AND I/LT LICENSEES

The so-called Consensus Plan does not provide any predictability for the relocation of Business and I/LT licensees from the General Category frequencies to the Guard Band. While the so-called Consensus Plan incorporates general measures to protect Public Safety licensees during their relocation, it utterly fails to provide any protection for Business and I/LT licensees. Specifically, the Plan (1) delegates the development of a bandplan to entities with clear conflicts of interest and (2) fails to set forth the rights and responsibilities of the parties.

A. The FCC Should Retain the Responsibility for Developing a Bandplan

Unlike Public Safety licensees, displaced Business and I/LT licensees have no right to approve their relocation.¹⁵ To make matters worse, the so-called Consensus Plan proposes to permit Nextel, the Land Mobile Communications Council ("LMCC"), and the Public Safety

Wireless Services, Inc., Coupe Communications, Inc., First Cellular, Southern LINC, Nokia, Inc., United States Cellular 12-14 (Aug. 7, 2002) [hereinafter *Commercial Wireless Reply Comments*].

¹² Reply Comments of Motorola, Inc. 6-14 (Aug. 7, 2002).

¹³ E.g., Reply Comments of National Association of Manufacturers and MRFAC, Inc. 4-6 (Aug. 7, 2002) [hereinafter *NAM/MRFAC Reply Comments*]; *UTC Reply Comments* at 11-16.

¹⁴ *Southern LINC Reply Comments* 24-44; *Mobile Relay Associates Reply Comments* 3-4, 5-6.

¹⁵ *Consensus Plan* at 15.

Regional Planning Committees to develop a bandplan for Business and I/LT licensees.¹⁶ The FCC should not delegate its authority over spectrum management to any of these entities because they are wholly inappropriate to oversee such a massive rebanding.

Nextel has no business participating in the development of a bandplan because of its overwhelming conflict of interest with Business and I/LT licensees. As a commercial provider, Nextel's primary goal is to advance the interests of its shareholders by lessening its operating costs and increasing its customer base. Because Nextel has demonstrated its interest in providing commercial service to Business and I/LT licensees, and especially utilities,¹⁷ it has every reason to impose an arduous, costly, and time-consuming rebanding on these entities. Thus, Nextel has no incentive to act in the best interests of Business and I/LT licensees or in the public interest.

The LMCC also possesses a conflict of interest that disqualifies it from participating in the development of a bandplan. The LMCC is a loose confederation comprised of individual frequency coordinators, such as PCIA and ITA, which would derive significant financial revenue from the coordination of Business and I/LT licensees, and equipment manufacturers, which favors rebanding as a means of selling additional equipment. In addition, the nature of the organization should also exclude the LMCC from serving as an architect of an 800 MHz bandplan. Specifically, the LMCC is a voluntary organization that lacks a permanent staff and that delegates responsibilities to various members based on individual interest in a given matter. Significantly, the LMCC has not even participated in this proceeding, presumably because it has not been able to reach consensus on any of the issues.

¹⁶ *Id.* at 17.

¹⁷ *E.g.*, In re National Telecommunications Information Administration (NTIA) Report on Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Comments of Nextel Communications, Inc. 99 (Mar. 6, 2002) (questioning the ability of critical infrastructure

Finally, the Regional Planning Committees are also improperly equipped to handle this responsibility. The Regional Planning Committees have enough to keep them busy with the NPSPAC licensees, especially if they all must relocate under a rebanding plan. They also are not a practical choice because membership in a Regional Planning Committee is voluntary. Thus, if the FCC adopts the so-called Consensus Plan, Cinergy believes that the FCC should develop a suitable bandplan itself in order to protect incumbent Business and I/LT licensees.

B. A Relocation Plan Must Clearly Define the Rights and Responsibilities of the Licensees

In the development of a bandplan, the FCC should adopt a neutral process with self-executing measures. These self-executing measures should establish rights and responsibilities of the licensees similar to those adopted in the Emerging Technologies proceeding and the Upper 200 SMR proceeding.¹⁸ Specifically, the FCC should state that incumbent licensees have the right to (1) relocate to comparable spectrum;¹⁹ (2) receive full reimbursement for the relocation;²⁰ (3) negotiate the terms of relocation, including the right to a system-wide relocation;²¹ (4) examine the replacement facilities for a reasonable period of time in order to make adjustments, determine comparability, and ensure a seamless handoff;²² and (5) use the replacement spectrum for a trial period.²³ While this list provides a basic idea of the types of

industries to build and operate modern, complex digital networks and recommending that these entities take service from a commercial provider).

¹⁸ 47 C.F.R. §§ 101.69-101.75, 90.699 (2001). Public Safety licensees already have the right to approve their relocation plan "to ensure continuous operation, equivalent functionality, coverage, and reliability." *Consensus Plan* at 15.

¹⁹ 47 C.F.R. §§ 101.75(b), 90.699(d).

²⁰ *Id.* §§ 101.71-101.73, 90.699(b)-(c).

²¹ *Id.* §§ 101.69(a), 101.73(b), 90.699(a)-(b).

²² *Id.* § 101.75(c).

rights that the FCC should afford to incumbent licensees, Cinergy expands on several of these rights in other sections of these Further Comments.

In addition to protecting incumbents, the FCC should also adopt clearly defined rights and responsibilities for the party that will relocate the displaced licensee, *i.e.*, Nextel.²⁴ By balancing the rights and responsibilities of the respective licensees, the FCC would ensure a fair and neutral transition that offers safeguards to prevent against any service disruptions, which are particularly unacceptable for critical infrastructure industry licensees, including utilities such as Cinergy.

IV. THE SO-CALLED CONSENSUS PLAN DOES NOT ADEQUATELY PROTECT BUSINESS AND I/LT LICENSEES

The proposed in-band realignment results in the inequitable and arbitrary treatment of certain 800 MHz licensees. Specifically, the so-called Consensus Plan fails to offer comparable and adequate spectrum to displaced licensees, does not demonstrate the availability of replacement spectrum, wastes spectrum in the 900 MHz band, restricts access to spectrum by eligible entities, and fails to provide adequate time for licensees to relocate their systems. To protect these licensees, the FCC should reject the so-called Consensus Plan and adopt the same interference-reducing rules for all systems in the 800 MHz band. Alternatively, the FCC should take the action described in the following sections.

A. A Rebanding Plan Must Offer Comparable and Adequate Spectrum to Displaced Licensees

²³ *Id.* § 101.75(d).

²⁴ For example, the FCC should not permit Nextel to sell or assign its licenses in the 809-816/854-861 MHz band after the commencement of the relocation process.

The so-called Consensus Plan fails to provide comparable and adequate spectrum to displaced licensees, especially Business and I/LT licensees. Under the Plan, Business and I/LT licensees in the General Category spectrum must relocate to the 814-816/859-861 MHz Guard Band, while Public Safety licensees must relocate to the 809-814/854-859 MHz band.²⁵ Incumbent Business and I/LT licensees in the proposed Guard Band must remain in the Guard Band.²⁶ After the proposed realignment, the Guard Band would serve as a buffer zone, protecting Public Safety operations in the 809-814/854-859 MHz band from interference caused by licensees in the cellular block above 816/861 MHz.²⁷

1. The Guard Band Provides Inadequate Spectrum for Wide-Area, Critical Infrastructure Licensees

Wide-area, critical infrastructure licensees should not have to operate in the Guard Band. While Nextel concedes that licensees relocating to this spectrum would suffer an increased risk of harmful interference to their operations,²⁸ these licensees would also presumably have to comply with stricter technical standards and would lose their right to require Nextel either to avoid causing, or to resolve, interference it creates.

This Guard Band requirement is particularly damaging for licensees that operate wide-area systems in the critical infrastructure industries, such as Cinergy. Ameren states that the Guard Band is unsuitable spectrum for utility systems because these systems "protect people and

²⁵ *Consensus Plan* at 12-15.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Nextel Reply Comments*, Appendix II at 4. Public Safety licensees relocated from the General Category to the 809-814/854-859 MHz band would also have a greater risk of interference than they had on their 806-809/851-854 MHz spectrum. Thus, the so-called Consensus Plan would protect some Public Safety licensees from undocumented sources of interference by subjecting other Public Safety licensees to a greater likelihood of interference.

property in all conditions and at all times."²⁹ Wide-area systems, such as those operated by Cinergy and other utilities, are not interference-resistant and require the same reliable, interference-free communications as Public Safety licensees, making them especially vulnerable on the Guard Band. Cinergy operates a significant portion of its system on General Category frequencies, meaning that it would have to relocate to this interference-prone spectrum and suffer the concomitant disruption to its operations.

Thus, Cinergy believes that, if a widespread interference problem exists in the 800 MHz band, the FCC should not attempt to resolve that problem by subjecting other innocent licensees to harmful interference, especially when the primary source of the interference would not even fund their relocation. The FCC should instead identify and shut down the sources of the interference.

If the FCC were to adopt the so-called Consensus Plan, however, it should protect critical infrastructure licensees, such as Cinergy. Critical infrastructure industries qualify as "public safety radio services" under section 309(j)(2) of the Communications Act, as amended. Section 309(j)(2) defines "public safety radio services" as services, "*including private internal radio services used by State and local governments and non-government entities . . . that (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public.*"³⁰

The legislative history confirms that this definition of "public safety" is intended to encompass critical infrastructure industries. The Conference Report to this provision expressly states that section 309(j)(2) covers "'private internal radio services' used by *utilities*, railroads,

²⁹ *Ameren Reply Comments* at 12.

³⁰ 47 U.S.C. § 309(j)(2) (Supp. 2001) (emphasis added).

metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments.”³¹
Based on the plain language of the statute, as well as the legislative history, Congress clearly intended to include non-commercial use by utilities in its definition of "public safety radio services."³²

Because critical infrastructure industries qualify as Public Safety entities, they should have the right to relocate to the interleaved channels in the 809-814/854-859 MHz portion of the band. Specifically, if an incumbent licensee operates in the General Category frequencies, such as Cinergy, then it should have the right to relocate not to the Guard Band, but to the interleaved frequencies. Similarly, if an incumbent licensee operates in the proposed Guard Band, it should have the right to relocate to the interleaved channels. Thus, under this proposal, the critical infrastructure licensees would have the same right to protection as Public Safety licensees.

2. The So-Called Consensus Plan Does Not Demonstrate the Availability of Replacement Spectrum

The sponsors of the so-called Consensus Plan never introduce evidence into the record to prove that Nextel holds enough clear spectrum in the 809-816/854-861 MHz band to accommodate all displaced licensees.³³ The sole evidence of Nextel's holdings is its assertion

³¹ House Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997), *reprinted in* 1997 U.S.C.C.A.N. 176, 192 (emphasis added).

³² Congress recently confirmed that energy and water utilities are part of the nation's critical infrastructure and warrant special protection from disruption. In particular, the USA PATRIOT Act states "that any physical or virtual disruption in the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56 § 1016, 115 Stat. 400 (2001).

³³ Appendix B to the so-called Consensus Plan indicates that in 3 of 66 select markets studied by the Plan's sponsors, Nextel has insufficient channels in the 809-816/854-861 MHz band to accommodate the licensees that would have to relocate for the 806-809/851-854 MHz band.

that it possesses a "running average" of a certain amount of bandwidth. This running average, however, does not account for its spectrum holdings in specific areas of the country of interest to particular licensees.

In addition, this limited showing of a "running average" offers other commenters no opportunity to review and assess Nextel's allegations, even though it is supposed to serve as a basis for a costly and disruptive overhaul of the 800 MHz band.³⁴ Because the allegations of the primary interfering licensee are insufficient to form a dependable record, the FCC should require more substantial showings, and permit scrutiny by interested parties, before adopting such a plan.

B. The So-Called Consensus Plan Improperly Offers Double the Bandwidth at 900 MHz for Voluntarily Relocating Licensees

While the so-called Consensus Plan recommends that Business and I/LT licensees could voluntarily relocate to the 900 MHz band, Cinergy finds this suggestion to be irresponsible. Under this proposal, licensees voluntarily relocating to the 900 MHz band would receive double the amount of bandwidth that they relinquish in the 800 MHz band.³⁵ However, commenters assert that the 900 MHz band is rapidly nearing capacity and that it would suffer an interference problem with the relocation of numerous licensees from the 800 MHz band.³⁶

In addition, Nextel plans to vacate this 900 MHz spectrum only "as needed" to accommodate relocating Business and I/LT licensees, even though it would already have gained

Consensus Plan, Appendix B at 8. Moreover, Appendix B fails to provide data for any markets in the Canadian border area (e.g., Detroit, Seattle, and Cleveland) and omits many other top 100 urban areas. *E.g.*, 47 C.F.R. § 90.741.

³⁴ Nextel has not placed proof of these holdings in the record, although it has permitted an anonymous engineers from PCIA and ITA to confirm its holdings. *Consensus Plan* at 17-18.

³⁵ *Id.* at 18.

³⁶ Comments of Florida Power & Light Company 5 (May 6, 2002).

access to additional spectrum in the 1.9 GHz band.³⁷ The remaining Nextel sites would continue to interfere with the voluntarily relocated licensees for an undetermined period of time, making the new spectrum no better than the 800 MHz band. Because of these significant problems, sound spectrum policy would counsel the FCC to reserve the remaining capacity in the 900 MHz band for potential licensees. If the FCC were to adopt the so-called Consensus Plan as it has been presented, it should grant any relocating licensees only a necessary and justifiable amount of spectrum and require Nextel to vacate the 900 MHz band prior to receiving any replacement 1.9 GHz spectrum.

C. The So-Called Consensus Plan Improperly Restricts Access to Spectrum by Eligible Entities

A rebanding plan should not restrict Business and I/LT eligibles from obtaining spectrum vacated by Nextel. Under the so-called Consensus Plan, however, Public Safety licensees are the only eligible recipients of this Business and I/LT spectrum for five years after the relocation of all NPSPAC licensees in a given Region.³⁸ This provision would bar Business and I/LT access to vacated Nextel channels in 809-816/854-861 MHz band for at least eight or nine years, assuming that rebanding could occur within three to four years after the release of the Report and Order in this docket.

The FCC should not adopt a realignment plan that restricts access by eligible entities to valuable spectrum. Business and I/LT licensees must have the ability to expand and modify their systems in accordance with customer demand. This flexibility is particularly crucial for utility licensees and other critical infrastructure entities that use their systems to support public

³⁷ *Nextel Reply Comments* at 10 n.9.

³⁸ *Consensus Plan* at 15-16.

service.³⁹ Thus, because of the public safety services performed by utilities, the so-called Consensus Plan should expand eligibility for this reserved spectrum to critical infrastructure industries.

If the Plan does not permit critical infrastructure industries to access this reserved spectrum, then utilities would have no ability to expand their systems for five years. Utilities, such as Cinergy, need to acquire additional spectrum and expand their systems depending on future population growth and movement. Without this additional spectrum, utilities could not operate communications systems over their entire service areas, resulting in more power outages and increased repair times. In license freezes imposed with respect to overlay auctions, utilities at least have the ability to purchase a portion of the spectrum from the auction winner. Under the so-called Consensus Plan, however, utilities would have no relief because FCC and coordinators would have to reserve the spectrum for a Public Safety licensee. This reservation would remain in place even if no Public Safety licensee staked a claim. Thus, to continue providing their critical public safety services, utilities require access to the reserved spectrum.

D. Displaced Incumbent Licensees Must Have a Realistic Amount of Time to Relocate Their Systems

The so-called Consensus Plan also does not address the timeframes within which Business and I/LT licensees would be required to relocate their systems. While Nextel estimates that the total realignment could be completed in three to four years,⁴⁰ the record contains no evidence to support this optimistic estimation. In addition, by restricting the availability of funding to a certain time period, as discussed below, Nextel essentially places a time limit on the

³⁹ Reply Comments of American Electric Power 8 (Aug. 7, 2002).

⁴⁰ *Nextel Reply Comments* at 29.

relocation process that is completely out of keeping with a realistic projection of the required time to reband.

Business and I/LT licensees, as well as Public Safety licensees, require a sufficient amount of time to relocate their systems. Based on the immensity of the necessary rebanding, Nextel's estimate appears overly optimistic. Because the proposed relocations could not occur simultaneously, the time period necessary to complete the process must equal the sum of the time required to relocate each group of licensees. While single channel swaps take approximately one year, the relocation of Public Safety licensees to the 809-814/854-859 MHz band would last at least three years because of the scale of this rebanding.

After the completion of the Public Safety relocation, Business and I/LT licensees would commence their relocation to the Guard Band or the 809-814/854-859 MHz band. While some Business and I/LT licensees may relocate more quickly, critical infrastructure licensees would take years to relocate their wide-area systems. The modifications necessary to the frequency re-use plans and the handset changes for these wide-area systems usually take several years to implement and fine tune. A conservative estimate of the time required to complete this process is three years, but Carolina Power & Light estimates that the relocation of utility systems would take closer to five to seven years.⁴¹ By this point, however, six years will have elapsed in the relocation process, and Nextel's funding offer will have expired without the relocation of either the NPSPAC licensees or Nextel. Thus, the FCC should set a realistic schedule for any rebanding that might be required.

V. THE SO-CALLED CONSENSUS PLAN EFFECTIVELY PRECLUDES LICENSEES FROM DEPLOYING ADVANCED SYSTEMS

⁴¹ *CP&L/TXU Reply Comments* at 8.

The so-called Consensus Plan would prohibit the use of cellular architecture below 816/861 MHz,⁴² despite the FCC's long-standing policy of encouraging flexible spectrum use and innovative technologies. As it stated in its Reply Comments, Cinergy opposes a prohibition on cellular architecture because it would contravene FCC spectrum policy and is unnecessary to protect Public Safety licensees.⁴³ The prohibition also hinders the development and deployment of advanced systems by Public Safety and critical infrastructure licensees, contrary to the public interest, and lacks widespread support from the commenters.

A. The FCC's Spectrum Policy Supports Advanced Systems

The FCC historically encourages flexible spectrum use and the development of innovative technologies.⁴⁴ Because of the increased demand for spectrum, the FCC "has implemented various spectrum allocation and assignment policies aimed at fostering more flexible use of the radio spectrum" to enable the spectrum to "be put to its best and highest value

⁴² *Consensus Plan* at 9. This prohibition would preclude the operation of systems below 816/861 MHz with all of the following characteristics: (1) more than 5 overlapping, interactive sites featuring hand-off capability; (2) sites with antenna heights of less than 100 feet above ground level on HAATs of less than 500 feet; and (3) sites with more than 20 paired frequencies. *Id.* at 10.

⁴³ Reply Comments of Cinergy Corporation 65-66 (Aug. 7, 2002) [hereinafter *Cinergy Reply Comments*].

⁴⁴ *E.g.*, In re Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 F.C.C. Rcd. 19868 ¶ 2 (1999) (committing to "pursue . . . policies that . . . encourage the development of emerging telecommunications technologies"); *see, e.g.*, In re Petitions for Reconsideration of the Second Memorandum Opinion and Order, Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Third Memorandum Opinion and Order*, 17 F.C.C. Rcd. 13985 ¶ 2 n.7 (2002) [hereinafter *700 MHz Third Memorandum Opinion and Order*]; In re Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 F.C.C. Rcd. 24178, 24181 (2000).

use."⁴⁵ The FCC recently affirmed this spectrum management policy by creating a Spectrum Policy Task Force to "establish new ways to support innovation and the efficient, flexible use of spectrum."⁴⁶ While encouraging flexible and innovative uses of spectrum, the FCC protects Public Safety licensees by balancing the need for flexibility with adequate protections against interference.⁴⁷

B. The Prohibition on Cellular Architecture in the So-Called Consensus Plan Is Contrary to FCC Spectrum Policy

The so-called Consensus Plan departs from this well-established FCC spectrum policy by imposing a total prohibition on cellular architecture below 816/861 MHz.⁴⁸ This prohibition would prevent the introduction of innovative and efficient technologies, thus precluding the best and highest value use of the spectrum. Under the FCC precedent outlined above, any proposed

⁴⁵ Spectrum Policy Task Force Seeks Public Comment on Issues Related to Commission's Spectrum Policies, ET Docket No. 02-135, *Public Notice*, 17 F.C.C. Rcd. 10560 (2002).

⁴⁶ FCC Chairman Michael K. Powell Announces Formation of Spectrum Policy Task Force, *Press Release* (June 6, 2002). In an outline of critical elements of future spectrum policy initiatives, Chairman Powell warned that with any failure to promote innovation, "we freeze ourselves in time to the detriment of the market, the technology and our citizens." FCC Chairman Michael K. Powell Outlines Critical Elements of Future Spectrum Policy, *Press Release* (Aug. 9, 2002).

⁴⁷ *700 MHz Third Memorandum Opinion and Order*, 17 F.C.C. Rcd. 13985 ¶ 2 n.7 (quoting In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, Carriage of the Transmissions of Digital Broadcast Stations, CS Docket No. 98-120, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, *First Report and Order*, 15 F.C.C. Rcd. 476, 518-19 (2000)). The FCC noted that it could set technical limits that would provide Public Safety licensees with maximum protection from interference but that, "at some point, the incremental benefits to protection of public safety from ever higher OOB limits would be outweighed by the adverse effects on the commercial usefulness of the spectrum." *Id.* Thus, the FCC concluded that it should adopt technical restrictions that, "while achieving the primary goal of protecting public safety, also strike a reasonable balance between protecting public safety and maintaining the commercial viability of the band." *Id.* In the present proceeding, the FCC should allow the same flexibility so that advanced technologies are not unreasonably constrained.

⁴⁸ *Consensus Plan* at 9.

rebanding plan should balance the need for flexibility with protection against Public Safety interference. The so-called Consensus Plan does not strike a reasonable balance between flexibility for incumbent licensees below 816/861 MHz and Public Safety protection because it would completely bar cellular systems on spectrum held by these incumbent licensees.⁴⁹

1. Incumbent Licensees Lack Flexibility to Develop and Deploy Advanced Systems Because of the Absolute Prohibition

The proposed prohibition would prevent Public Safety, Business, and I/LT licensees from deploying advanced technologies that are necessary to upgrade their systems. By implementing cellular systems, these licensees would increase the coverage, in-building penetration, and spectral efficiency of their 800 MHz systems. Because they would operate smaller systems than Nextel, these licensees would also not experience the same difficulty managing their systems and could easily avoid interference issues.

Substantial interest already exists among Public Safety, Business, and I/LT licensees to explore the use of advanced systems.⁵⁰ For example, the City of San Diego states that it desperately needs to implement a high-speed mobile data system and that "there are site-by-site cases where public safety *must* put in place cellular-like architecture."⁵¹ UTC also states that the prohibition "would hamper unnecessarily the growth of advanced technology and discriminate against existing systems."⁵² Cinergy has also reached the point at which it must consider

⁴⁹ Although the so-called Consensus Plan appears to balance the interests of 800 MHz licensees by permitting cellular architecture above 816/861 MHz, it does not offer fully reimbursed relocation to this spectrum for interested Business and I/LT incumbents below 816/861 MHz. *Consensus Plan* at 19. n.56.

⁵⁰ *E.g.*, *UTC Reply Comments* at 15; *Reply Comments of Public Safety Improvement Coalition* 6 (Aug. 7, 2002); *Cinergy Reply Comments* at 65-66; *City of San Diego Reply Comments* at 3-4.

⁵¹ *San Diego Reply Comments* at 4.

⁵² *UTC Reply Comments* at 15.

implementing such an advanced system. Thus, Public Safety and critical infrastructure licensees have a demonstrated need for advanced cellular-like systems. The public interest mandates that these entities have access to the best available technologies in order to fulfill their public service duties.

2. A Prohibition on Cellular Systems is Unnecessary to Protect Public Safety Licensees from Harmful Interference

While incumbent licensees clearly need flexible spectrum policies to deploy their innovative advanced systems, the so-called Consensus Plan prohibits cellular architecture out of a misplaced and oversimplified belief that interference results from cellular operations. This broad prohibition is overinclusive because no documented correlation exists between cellular architecture and interference to 800 MHz licensees. The anecdotal evidence that does exist indicates that different types of cellular architecture cause different levels of interference.⁵³

While some licensees operate cellular systems in this band without a significant interference problem, others consistently interfere with neighboring licensees. For example, Southern LINC operates a cellular system in the 800 MHz band but has experienced only one unconfirmed interference complaint.⁵⁴ By contrast, evidence gathered by APCO's Project 39 frequently identifies Nextel as the source of interference.⁵⁵ Commenters also draw this distinction between the systems operated by Nextel and those operated by other cellular

⁵³ APCO Project 39, http://www.apcointl.org/frequency/project_39/downloads/combined.txt.

⁵⁴ *Id.* This interference complaint occurred with respect to a site shared with Nextel. *Id.*

⁵⁵ APCO Project 39, http://www.apcointl.org/frequency/project_39/downloads/combined.txt. Nextel claims that an independent consultant "estimates that the cellular A-band carrier is involved in approximately 35% of the CMRS sites near which CMRS-public safety interference has been identified." *Nextel Reply Comments* at 31 n.66. However, this does not necessarily mean that the cellular A-band carrier is the source, or even a contributing source, of the interference: it just means that a cellular-A band carrier is at a site near where CMRS-public safety interference has been identified.

licensees.⁵⁶ Even a Joint Commenter of the so-called Consensus Plan recognizes that not all cellular systems cause interference.⁵⁷ This disparity in documented interference occurrences between Nextel and Southern LINC suggests that the problem results from Nextel's system operations rather than from cellular architecture generally.

In addition to operating a cellular system engineered not to cause interference, Cinergy is perfectly willing to abide by the technical measures proposed by it, and other commenters, to resolve any interference that does occur to 800 MHz licensees. The combination of good engineering and technical measures should provide enough protection to Public Safety licensees to tip the balance in favor of flexible and innovative use of the spectrum.

Thus, by prohibiting cellular operations on the 806-816/851-861 MHz portion of the band, the so-called Consensus Plan unnecessarily precludes the flexible use of spectrum and innovative services by incumbent licensees in these bands. The FCC should instead continue to follow its long-standing policy on spectrum management and reject this absolute ban on cellular systems below 816/861 MHz as overinclusive.

3. The Proposed Waiver Process Does Not Alleviate the Absolute Prohibition on Cellular Architecture

⁵⁶ Skitronics observed that "Southern LINC uses equipment substantially the same . . . as that used by Nextel without creating the problems that Nextel creates." Comments of Skitronics, LLC 21 (May 6, 2002). In addition, Nextel's cellular system is reportedly more interference-prone because it (1) uses frequencies that fall within the passband of the Public Safety handset; (2) employs base stations that transmit at full strength regardless of whether the channels are in use by subscribers; and (3) neglects to use dynamic power control to reduce the average power per channel. Comments of AT&T Wireless 6 (May 6, 2002). An engineer with significant experience with Nextel systems also reported that Nextel has taken several shortcuts in its system that have increased the occurrence of interference. Comments of Danny Hampton 2 (May 6, 2002).

⁵⁷ *AMTA Reply Comments* at 8.

Although the so-called Consensus Plan permits the operation of a cellular system below 816/861 MHz with a waiver, the waiver process sets an unrealistic standard by requiring a conclusive showing of no interference.⁵⁸ Although licensees have designed and constructed sites that almost never cause interference, such as Southern LINC's system, this standard is essentially impossible to satisfy because engineering studies could not conclusively prove the absence of interference. Proving a "negative" is very difficult, but proving that something which has not been defined (*i.e.*, Public Safety interference) would be impossible. By requiring conclusive proof of no interference, the so-called Consensus Plan does not alleviate the prohibition on the operation of cellular systems below 816/861 MHz and represents industrial policy at its worst.⁵⁹

C. Licensees Have Not Reached a Consensus Concerning the Proposed Prohibition on Cellular Systems

As with several other aspects of the so-called Consensus Plan, the scope of the proposed prohibition on cellular systems remains a matter of controversy among the Joint Commenters. The prohibition would essentially prevent utilities and other licensees from deploying advanced technologies below 816/861 MHz, a position which is consistent with its comments in the proceeding on utility spectrum needs. In that proceeding, Nextel complained that utilities should not have the ability to deploy advanced technologies but should take service from commercial providers.⁶⁰ The so-called Consensus Plan's prohibition on cellular systems would achieve

⁵⁸ *Consensus Plan* at 10 n. 41. The so-called Consensus Plan also requires licensees to make "pre-application coordination with public safety frequency coordinators and licensees in the contemplated area of operation." *Id.*

⁵⁹ If the Joint Commenters truly believe this standard is necessary to protect Public Safety licensees from interference, then Nextel should be immediately ordered to engineer and operate its system under this standard in accordance with its obligations to prevent interference under section 90.403(e) of the FCC's rules.

⁶⁰ In re National Telecommunications Information Administration (NTIA) Report on Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Comments of Nextel

Nextel's anticompetitive objective of limiting the options available to 800 MHz licensees to enhance their operations.

Conversely, AMTA's interpretation of the prohibition is much more in line with the FCC's spectrum policy of encouraging flexible spectrum use and innovative systems. In particular, AMTA believes that isolated situations of proposed cellular architecture "will demand targeted solutions which protect public safety and other incumbents from interference without unnecessarily limiting the deployment of more advanced, often more efficient, technologies."⁶¹ AMTA also believes that "these individual instances can and will be accommodated through a cooperative industry effort."⁶² These contrasting interpretations of the same prohibition on cellular systems is a prime example of the lack of agreement among sponsors of the so-called Consensus Plan and suggests that the FCC should examine the proposed ban with extreme care.⁶³

VI. THE SO-CALLED CONSENSUS PLAN DOES NOT OFFER A SUFFICIENT FUNDING MECHANISM

The comments and reply comments emphasized the necessity of funding to any proposed resolution of Nextel's 800 MHz interference problem. In light of the importance of this funding issue to the commenters, Cinergy believes that the so-called Consensus Plan is completely

Communications, Inc. 99 (Mar. 6, 2002) (questioning the ability of critical infrastructure industries to build and operate modern, complex digital networks).

⁶¹ *ATMA Reply Comments* at 8.

⁶² *Id.*

⁶³ The Plan is also unclear whether the definition of cellularized system is to be applied on a site-by-site basis, or on a system-wide basis. *Consensus Plan* at 10. For example, if a system includes some sites that have more than 20 channels, and other sites that have fewer than 20 channels but are less than 100 feet above ground, and yet other sites that have fewer than 20 channels and are less than 500 feet above average terrain, it is unclear whether this would be classified as a cellularized system because each site does not include all of the characteristics of which the Joint Commenters complain. Critical to this analysis would be a clear explanation by Nextel as to the characteristics of its sites which have been found to cause interference to Public Safety licensees.

inadequate to meet the needs of the displaced licensees. While the so-called Consensus Plan offers Public Safety licensees at least some reimbursement for their relocation expenses, it fails to provide any funding for private wireless licensees displaced by Nextel's interference problem. In addition, to the extent that Nextel agrees to assume responsibility for funding Public Safety relocation, it retains the ability to rescind its commitment in several circumstances.

A. Business and I/LT Licensees Would Not Receive Any Compensation for Their Relocation Out of the General Category Band

Business and I/LT licensees should receive full reimbursement for any necessary relocation. Commenters agree that the FCC should "fashion an equitable alternative that . . . does not place the burden of fixing the problem on innocent parties."⁶⁴ Cinergy previously identified various legal and regulatory precedents that require the full reimbursement of displaced Business and I/LT licensees.⁶⁵ These precedents essentially require the licensee causing the interference to reimburse the relocation expenses of the displaced licensee.⁶⁶

Because the anecdotal evidence in the record suggests that the source of the interference problem

⁶⁴ *NAM/MRFAC Reply Comments* 6; e.g., *Reply Comments of Boeing Company* 7 (Aug. 7, 2002).

⁶⁵ *Cinergy Reply Comments* at 56-59; e.g., *Ameren Reply Comments* at 9.

⁶⁶ E.g., In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *Memorandum Opinion and Order and Third Notice of Proposed Rulemaking and Order*, 13 F.C.C. Rcd. 23949, 23955 (1998); In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *First Report and Order and Further Notice of Proposed Rulemaking*, 12 F.C.C. Rcd. 7388, 74092 (1997); In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order and Second Further Notice of Proposed Rule Making*, 11 F.C.C. Rcd. 1463, 1510 (1995); In re Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rulemaking*, 7 F.C.C. Rcd. 6886, 6890 (1992); see also, e.g., *Strom Thurmond National Defense Authorization Act for Fiscal Year 1999*, P.L. No. 105-261, 112 Stat. 1920, 2132 § 1064 (1998). In re Redesignation of

in the 800 MHz band is Nextel, rather than Business and I/LT licensees,⁶⁷ these precedents would require Nextel to negotiate relocation terms with displaced General Category licensees.

Despite these precedents, the so-called Consensus Plan fails to address how Nextel would reimburse displaced Business and I/LT licensees.⁶⁸ The Plan states that "[w]hile the parties have no formal plan at this time, Nextel and the private wireless community are currently discussing funding issues"⁶⁹ This open-ended statement, which is tucked away in a footnote of the Plan, suggests that the parties to this so-called "consensus" have yet to agree on one of the most fundamental issues in this docket, further confirming suspicions that this "consensus" has been driven by Nextel. It is clear that Nextel expects Business, I/LT, and other SMR licensees to relocate at their own expense, especially because Nextel has not yet contacted Cinergy, nor any other private wireless user as far as Cinergy is aware, to schedule any such discussions.

In contrast, the so-called Consensus Plan does provide for the reimbursement of Public Safety licensees, although it declines to set forth any eligibility guidelines.⁷⁰ Similarly, if Nextel receives the 1.9 GHz spectrum as the result of the FCC's adoption of this Plan, Nextel agrees to reimburse UTAM for the expense of clearing the band for Unlicensed PCS operations.⁷¹ Such disparate treatment between Public Safety licensees and UTAM on the one hand, and Business

the 17.7-17.9 GHz Frequency Band, IB Docket 98-172, RM-9005, RM-9118, *Report and Order*, 15 F.C.C. Rcd. 13430 (2000). *Teledesic LLC v. FCC*, 275 F.3d 75, 84-87 (D.C. Cir. 2001).

⁶⁷ *E.g.*, *CP&L/TXU Reply Comments* at 5.

⁶⁸ SMR licensees would also not receive any reimbursement for their relocation, even though Nextel is the only SMR licensee causing documented interference to Public Safety licensees and is the only SMR licensee to receive a benefit from relocation. *Consensus Plan* at 19 n.56. Thus, the so-called Consensus Plan also contravenes judicial, statutory, and regulatory precedent when it requires SMR licensees to relocate at their own expense.

⁶⁹ *Id.*

⁷⁰ *Id.* at 21, 21 n.56.

⁷¹ *Nextel Reply Comments* at 38.

and I/LT licensees on the other, would be arbitrary and capricious if incorporated into an FCC order. Cinergy uses its spectrum for critical communications related to its public safety services, which are similar to those performed by Public Safety entities. Unlicensed PCS transmissions are, by definition, entitled to less regulatory protection than licensed services used for critical communications. Because the so-called Consensus Plan offers no reasonable basis to support these funding decisions, the FCC should reject the Plan as arbitrary and capricious in violation of the Administrative Procedure Act.

B. The So-Called Consensus Plan Would Not Fully Fund the Relocation of Public Safety Licensees

The so-called Consensus Plan also fails to provide funding sufficient to relocate Public Safety licensees. Cinergy identifies the crucial weaknesses of the funding mechanism in the event the FCC requires Nextel to fund Business and I/LT relocation under this same mechanism.

1. Nextel Improperly Caps Its Liability for Resolving the 800 MHz Interference Problem

The primary weakness of the so-called Consensus Plan is the ability of Nextel to curtail the amount of funding unilaterally. Under the Plan, Nextel limits its financial responsibility to \$500 million.⁷² Although Nextel and other Joint Commenters concede that relocation will exceed this arbitrary amount,⁷³ Nextel still retains "complete discretion as to whether to provide additional funding."⁷⁴

Because Nextel limits the amount of its liability in the so-called Consensus Plan, the FCC is in danger of adopting a plan without a sufficient source of funding. As discussed in the

⁷² *Consensus Plan* at 20.

⁷³ *E.g., Nextel Reply Comments* at 30-31; *APCO Reply Comments* at 4-5.

⁷⁴ *Consensus Plan* at 20.

comments and reply comments, the FCC has no authority to require non-Nextel Business, I/LT, and CMRS licensees to contribute to the relocation fund because they do not cause the interference and would not benefit from the relocation. While the Joint Commenters suggest that the federal government could provide funding, this position is inconsistent with their insistence that a relocation plan not depend on legislation.⁷⁵ This funding problem is inherent to any interference mitigation proposal that permits the primary offender to have a veto over its financial responsibilities.

2. Nextel Attempts to Impose Additional Conditions on Its Contribution

In addition to the limits on its contribution amount, Nextel also attempts to impose, in its own Reply Comments, several unagreed-upon conditions on its \$500 million contribution. For example, if the FCC does not adopt the entire Plan, including the legally questionable assignment to Nextel of 10 MHz of contiguous, nationwide spectrum in the 1.9 GHz band, then Nextel could withdraw its funding and continue its interference-causing operations unabated.⁷⁶ In other words, if the FCC seeks to provide any protection for licensees not favored by the Plan, it could not expect to retain the funding necessary to implement the Plan. By relenting to Nextel's demands, the Joint Commenters have placed the FCC in the untenable position of giving Nextel an absolute veto over implementation of any plan that differs in any respect from the plan Nextel is willing to fund.

Even if the FCC were to adopt every aspect of the so-called Consensus Plan, Nextel also attempts to create a loophole permitting it to rescind its funding under certain conditions. Nextel could withdraw the funding if the following events do not occur within two years of the Report

⁷⁵ *Id.* at 6 n.23, 28.

and Order adopting the Plan: (1) the resolution of all administrative and judicial appeals, which is unlikely because of the complexity of the issues in this docket, the disparate positions of the licensees, and the multiple avenues of appeal available to interested parties; (2) the appointment of an independent fund administrator acceptable to Nextel; (3) the establishment of guidelines to identify eligible Public Safety expenditures; and (4) the adoption of procedures for making and verifying claims for Public Safety reimbursement acceptable to Nextel.⁷⁷

Nextel also includes several additional loopholes to limit its financial responsibility, regardless of the status of Public Safety relocation. For example, Nextel would impose a sunset rule on the contribution, enabling it to cease payment to the fund after contributing only 20% of its promised amount.⁷⁸ Nextel also included a provision to recapture contributed funds after a certain date, which would occur within six years of the Report and Order adopting the Plan, even if some Public Safety licensees have not completed their relocation by that time.⁷⁹

These additional conditions are not part of the so-called Consensus Plan. Although Nextel entered into the Plan to avoid its duty to resolve interference caused by its system, it has continued its efforts to evade responsibility by attaching these additional conditions on its contribution out of view of the other Joint Commenters. While the Plan expressly incorporated certain portions of Nextel's Reply Comments, such as the technical analysis,⁸⁰ it did not

⁷⁶ *Nextel Reply Comments* at 31.

⁷⁷ *Id.* at 31-32.

⁷⁸ *Id.* at 32.

⁷⁹ *Id.*

⁸⁰ *Consensus Plan* at 21.

incorporate these additional conditions. At most, a footnote in the Plan indicates that Public Safety licensees and Nextel would discuss these additional conditions.⁸¹

By attempting to impose these conditions unilaterally, Nextel exposes the lack of agreement on important issues between the sponsors. Thus, if the FCC adopts the so-called Consensus Plan, it should disregard these additional conditions because they are not legitimately part of the Plan. Alternatively, if the FCC believes that other sponsors agreed to accept this highly conditional funding in the so-called Consensus Plan, the FCC should decline to adopt this Plan because the relocation could abruptly halt prior to completion. As set forth above, the time required to complete relocation vastly exceeds the three to four years envisioned by Nextel. Because Nextel's funding could terminate or run out before all relocations have occurred, it would escape liability and the rebanding would end prematurely. Such an incomplete realignment would leave the 800 MHz band in more disarray than before it started.

3. The So-Called Consensus Plan Does Not Provide Any Details on the Security and Maintenance of the Escrow Account for the \$500 Million

The so-called Consensus Plan states that Nextel will place \$450 million in an escrow account for gradual distribution to the fund created to reimburse displaced Public Safety licensees.⁸² Although Nextel would limit the escrow fund to use by Public Safety licensees, Cinergy would oppose this particular mechanism if the FCC imposes, as it should, a requirement on Nextel to assume financial responsibility for the relocation of private wireless licensees as

⁸¹ *Consensus Plan* at 21 n.60. In the footnote, the Consensus Plan refers to additional details on the funding process in the Nextel Reply Comments, but this reference appears in the context of funding issues that Public Safety licensees have not agreed upon at the time of the filing. *Id.*

⁸² *Id.* at 20.

well. In particular, Cinergy notes that neither the Plan nor Nextel provide any details on the security and maintenance of the escrow account.

These details are especially important because the telecommunications industry has recently experienced turbulent economic times, with many corporations suffering through precipitous declines in stock value and even bankruptcy. While Nextel would presumably ensure that neither it, nor its creditors, could reach the funds earmarked for Public Safety relocation, it fails to provide that assurance in the so-called Consensus Plan. Given Nextel's demonstrated ability to rescind its \$500 million commitment in a variety of ways, Cinergy would like some assurance that a vulnerable escrow fund is not simply another means for Nextel to escape its financial responsibilities.

4. The Joint Commenters Have Not Reached an Agreement on the Funding Mechanism

The funding mechanism highlights another example of the so-called Consensus Plan building only a superficial agreement between the disparate groups of Joint Commenters. The Plan includes two footnotes that demonstrate this lack of agreement among the sponsors. One footnote states that Public Safety organizations and Nextel must resolve "specific details of the funding process,"⁸³ while another footnote mentions that "Nextel and the private wireless community are currently discussing funding issues . . . with respect to relocation."⁸⁴ The inability of the sponsors to reach an agreement on any specific details after more than three months of negotiations illustrates the widely divergent views about the funding mechanism.

The Reply Comments filed separately by the Joint Commenters further reveal the lack of consensus among the sponsors. For example, AMTA states that "non-public safety incumbents

⁸³ *Id.* at 19 n.56.

should not be obligated to finance their own relocations to alleviate an interference problem not of their making" and that it "would not support this solution if the cost of financing it was expected to be shouldered by some confederation of non-cellularized, non-public safety operators" ⁸⁵ Despite the understanding of this commenter, the so-called Consensus Plan represents the full agreement between the sponsors, no party placed any conditions on its approval in the document, and the parties presented it to the FCC for adoption. Because AMTA would presumably not have signed away the rights of its constituents for reimbursement while expressly stating otherwise in its Reply Comments, the sponsors clearly have different ideas about the scope of the so-called Consensus Plan.

VII. THE FCC MUST FORFEIT ITS ENFORCEMENT RESPONSIBILITIES UNDER THE SO-CALLED CONSENSUS PLAN

A fundamental flaw in the so-called Consensus Plan is the inherent "veto" power vested in Nextel. Under the Plan, Nextel commands an extraordinary amount of power, especially considering its culpability in the interference problem. For example, Nextel would have the authority to develop the bandplan, albeit in conjunction with two other entities that lack the staff, organization, inclination, and expertise to craft an appropriate plan. ⁸⁶

The Plan would also improperly require the FCC to delegate responsibility for the administration of the rebanding to the primary source of the interference, without any means of enforcing the provisions. Because Nextel's Reply Comments present the Plan as a "take-it-or-leave-it" proposition, the FCC would lose the ability to modify any provisions to protect the

⁸⁴ *Id.* at 21 n.60.

⁸⁵ *AMTA Reply Comments* at 10. APCO also notes that "[t]hose entities whose operations cause the interference should bear the burden of paying for efforts to eliminate that interference whether on a case-by-case basis or as part of a comprehensive rebanding of 800 MHz channels." *APCO Reply Comments* at 4.

interests of an underrepresented licensee.⁸⁷ In other words, the Plan places the FCC in the untenable position of acceding to Nextel's demands or allowing Nextel to continue interfering with Public Safety licensees with apparent impunity.

In addition, the Plan limits Nextel's financial responsibility to \$500 million and has "complete discretion" about contributing additional funds, regardless of the status of the Public Safety relocation when the money inevitably runs out.⁸⁸ In its Reply Comments, Nextel also attempts to exert "veto" authority over other funding-related matters, including the appointment of the independent fund administrator and the adoption of procedures for making and verifying claims for Public Safety reimbursement.⁸⁹ If either of these is unacceptable to Nextel, it may withdraw from its rebanding obligations.⁹⁰ Nextel's Reply Comments also indicate that it would impose a sunset on its contribution, declining to offer any additional money after a date certain, and would employ a means to recapture funds already contributed to the reimbursement fund.⁹¹ Because of these conditions, the success or failure of the Plan would depend solely on Nextel's voluntary and conditional offers to reimburse Public Safety licensees and divert its operations to other spectrum.

Cinergy asserts that any resolution of this docket should result from the FCC's exercise of its lawful authority to manage and promote the use of radio spectrum in support of Public Safety. The FCC should not base its resolution of any interference problem on the demands of one licensee. Even if the FCC were to relent to Nextel's demands, the FCC would also have to

⁸⁶ *Consensus Plan* at 17.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 20.

⁸⁹ *Nextel Reply Comments* at 31-32.

⁹⁰ *Id.*

promptly deny any petitions for reconsideration, regardless of merit, if it hopes to preserve Nextel's commitment to live up to its financial responsibilities. Thus, the very nature of Nextel's "voluntary" funding commitment would vest it with unwarranted and unprecedented power to veto the FCC's statutory obligation to manage spectrum in the public interest.

VIII. THE RECORD OFFERS NO SUPPORT FOR A COSTLY AND DISRUPTIVE REBANDING

The so-called Consensus Plan recommends an elaborate scheme without establishing the need for such a costly and disruptive relocation. Based on the record in this proceeding, however, the scope and extent of the 800 MHz interference problem remains unknown and the proposed rebanding would not resolve the interference problem. In light of these problems, Cinergy believes that the FCC could implement a less costly and disruptive alternative.

A. The So-Called Consensus Plan Continues to Rely on Isolated, Unsubstantiated Reports of Interference as Proof of a Widespread Problem

The record does not provide sufficient documentation of a widespread interference problem to warrant a massive rebanding at this time. In their comments, parties repeatedly requested additional information to support the alleged existence of a widespread interference problem.⁹²

The so-called Consensus Plan disregards these numerous requests. The Plan relies on isolated, unsubstantiated reports of interference to support a massive rebanding and concludes that no disagreement exists among the commenters with respect to the existence of an

⁹¹ *Nextel Reply Comments* at 32.

⁹² *E.g.*, Comments of City of Baltimore 6 (May 6, 2002); Comments of Kenwood Communications 3 (May 6, 2002); Comments of Preferred Communications Systems 7 (May 6, 2002).

interference problem.⁹³ While commenters may agree that some interference occurs in the 800 MHz band, and even that Nextel causes this interference, the so-called Consensus Plan dodges the primary issue, *i.e.*, what is the scope and extent of the interference problem?

The record fails to answer this fundamental question. APCO's Project 39 has only compiled a list of approximately 100 anecdotal reports of interference nationwide,⁹⁴ and no parties have otherwise supplemented the record with empirical evidence of additional interference. After examining this record, the City of Baltimore renews its request for proof of a widespread problem, stating that "it is clear, indeed obvious, from the record that there are substantial questions of fact concerning the extent of the public safety problem."⁹⁵ Thus, Cinergy believes that the scope of the interference problem remains unknown and again calls for an in-depth study of the problem prior to any realignment of the 800 MHz band.

B. The Proposed Realignment Would Not Eliminate Interference Caused by Nextel's Operations

The record lacks any evidence that the proposed realignment would eliminate the 800 MHz interference problem. To the contrary, commenters believe that "receiver overload and intermodulation will continue" under the so-called Consensus Plan.⁹⁶ Although the so-called Consensus Plan relies on a technical analysis performed by Nextel to demonstrate interference reduction,⁹⁷ this analysis actually reveals why interference would continue to plague 800 MHz licensees after the proposed rebanding and even adversely affects Public Safety licensees in the new NPSPAC channels.

⁹³ *Consensus Plan* at 2.

⁹⁴ APCO Project 39, http://www.apcointl.org/frequency/project_39/downloads/combined.txt.

⁹⁵ Reply Comments of City of Baltimore 3 (Aug. 7, 2002).

⁹⁶ *Commercial Wireless Reply Comments* at 12.

1. Nextel Would Cause Interference to the NPSPAC Licensees

The proposed rebanding would not eliminate interference for the relocated NPSPAC licensees. Nextel asserts that "significant IM products from Nextel transmitters in the 861-866 MHz range will not fall below 856 MHz and will not fall above 871 MHz. Therefore, relocating the NPSPAC channel block below 856 MHz virtually eliminates Nextel-only IM products on the relocated channels."⁹⁸

Nextel fails to point out, however, that if it takes over the NPSPAC block at 821-824/866-869 MHz, it could create third order intermodulation products over a broader range of spectrum. After the realignment, Nextel could have transmitters ranging all the way from 861 MHz to 869 MHz. Under this scenario, significant third order IM products could fall as far away as 853 MHz and 877 MHz, causing interference for fully one-third of the "new" NPSPAC channels at 806-809/851-854 MHz. Thus, Nextel's technical analysis cites only favorable intermodulation reduction calculations, while omitting this potentially damaging information.

Although Nextel omits the mathematical analysis undermining its technical study, it indirectly concedes that this interference will occur.⁹⁹ The technical analysis notes that the typical Public Safety receiver provides little attenuation from 869-873 MHz.¹⁰⁰ This means that intermodulation products could be generated in a Public Safety receiver from a combination of Nextel signals as low as 861 MHz and cellular-A signals as high as 873 MHz, over a total range of 12 MHz.¹⁰¹ Accordingly, combined Nextel/cellular-A intermodulation products could fall as low as 849 MHz – fully covering the new NPSPAC band at 851-854 MHz. While Nextel claims

⁹⁷ *Consensus Plan* at 21.

⁹⁸ *Nextel Reply Comments*, Appendix II at 3.

⁹⁹ *Id.* Appendix II at 4.

¹⁰⁰ *Id.* Appendix II at 3.

that it could manage this interference through "coordination among the affected operators,"¹⁰² it has not shown much ability or willingness to manage its own channels previously and offers little reason to believe it will undertake better management of IM interference after rebanding.

Nextel appears to claim that it has managed its spectrum in accordance with the FCC's rules. In particular, Nextel asserts that the FCC had numerous opportunities since 1991 to stop Nextel from developing its digital cellular system but "did not even consider doing so."¹⁰³ It therefore argues that the FCC should not now make Nextel the scapegoat for Public Safety interference. However, the FCC reasonably relied on Nextel's representations that it would operate its system to avoid interference to Public Safety and, thus, had no reason to halt Nextel's operations.¹⁰⁴ Now that Nextel concedes that it has not abided with its representations, the FCC would be well within its rights to declare Nextel's operations to be inappropriate. Nextel cannot claim some laches-type defense when it only recently came to light that Nextel has reneged on its promise to protect Public Safety.

¹⁰¹ *Id.*

¹⁰² *Id.* Appendix II at 3.

¹⁰³ *Id.* at 47.

¹⁰⁴ For example, Nextel received an extension of time to construct its 900 MHz systems in 2001. In re FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 F.C.C. Rcd. 11072 (2001) [hereinafter *FCI 900 Memorandum Opinion and Order*]. In its waiver request, Nextel had repeatedly represented that it required the additional time to construct 800 MHz picocells, interconnected by 900 MHz, specifically "to assist in mitigating or eliminating interference between Nextel and adjacent channel 800 MHz public safety communications systems." In re FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, Waiver Request 2, 2-3, 5, 6, 9 (Jan. 9, 2001). The Wireless Telecommunications Bureau based its decision to grant the waiver in part on Nextel's representations about interference reduction. *FCI 900 Memorandum Opinion and Order*, 16 F.C.C. Rcd. 11072 ¶ 10. Despite the clear language in the waiver request, and the Bureau's subsequent decision, Nextel now asserts that the use of smaller cells "would not only raise the cost of providing commercial wireless services, it would actually increase interference to public safety operations." *Nextel Reply Comments* at 25.

2. Nextel Would Also Interfere with Public Safety Licensees in the 809-814/854-859 MHz Band

The proposed rebanding would also not eliminate interference for licensees in the 809-814/854-859 MHz band. In its Reply Comments, Nextel claims that consolidating its channels in the former NPSPAC band "would enable Nextel to manage its frequency usage more effectively to minimize IM products falling on the interleaved public safety channels at 854-859 MHz."¹⁰⁵ However, this statement does not seem to take into account that the so-called Consensus Plan would increase the prevalence of Public Safety systems *throughout* the 854-859 MHz band because Public Safety systems relocating from 851-854 MHz and 859-861 MHz will be allowed to relicense anywhere within the 854-859 MHz band, not just on "Public Safety" allocations. Also, for eight or nine years after the release of the Report and Order adopting the so-called Consensus Plan, the only additional licensing that will occur on vacated Nextel channels, which are in the Business, I/LT, and SMR pools, will be by Public Safety agencies. Thus, because the number of Public Safety licensees in the band would increase, the rebanding could actually worsen interference for Public Safety licensees overall.

3. Nextel's Technical Analysis Ignores a Type of Harmful Interference

In addition to this third order intermodulation interference, commenters questioned the interference-reducing potential of a realignment with respect to fifth order intermodulation interference. Significantly, the Nextel technical analysis summarily dismisses the potential for this type of interference, claiming that third order intermodulation "is almost always going to be the only IM issue in play."¹⁰⁶ Motorola disagrees with this assessment, however, finding that

¹⁰⁵ *Nextel Reply Comments* at 21.

¹⁰⁶ *Id.* Appendix II at 6.

fifth order intermodulation products "are the most common form of IM interference received by public safety and industrial systems in the 800 MHz band."¹⁰⁷ Nextel's complete disregard of fifth order intermodulation further undermines the value of its technical analysis.

Nevertheless, even under the most Nextel-friendly analysis, *i.e.*, the technical analysis filed by Nextel itself, the realignment proposed in the so-called Consensus Plan would only partially reduce interference for the *NPSPAC* licensees that *currently* receive interference, while actually increasing interference for licensees in the 809-816/854-861 MHz portion of the 800 MHz band.¹⁰⁸ Thus, before undertaking a costly and disruptive rebanding, the FCC should at least find a plan that would improve rather than worsen the situation.

C. The FCC Could Implement a Less Costly and Disruptive Alternative to Remedy Any Interference in the 800 MHz Band

As discussed in greater detail in the comments and reply comments, many parties believe that the FCC should resolve any 800 MHz interference through technical solutions.¹⁰⁹ Under this approach, the FCC would establish rules to promote the resolution of interference in the 800 MHz band through negotiation and arbitration, with firm timelines for ensuring the prompt elimination of interference. This alternative would provide a more efficient and effective solution to the interference problem.

Even the Joint Commenters concede that the so-called Consensus Plan would not eliminate the interference problem. They recommend the codification and revision of the *Best*

¹⁰⁷ Comments of Motorola 18 n.27 (May 6, 2002).

¹⁰⁸ *Nextel Reply Comments* Appendix A at 3. Careful reading of Nextel's engineering exhibits reveals that Nextel foresees the Plan only reducing the potential for interference at locations where NPSPAC licensees are "currently" experiencing interference. *Id.* If Nextel is aware of locations where NPSPAC licensees are currently experiencing interference, it should be working to resolve that interference.

¹⁰⁹ *E.g.*, Comments of National Rural Telecommunications Cooperative 6 (May 6, 2002).

Practices Guide to define clearly the rights and obligations of the licensees to correct interference.¹¹⁰ Because commenters agree that a technical approach is necessary to resolve interference,¹¹¹ the FCC should give this approach an opportunity to succeed before implementing a costly and disruptive rebanding, such as the so-called Consensus Plan.

IX. THE SO-CALLED CONSENSUS PLAN CONTAINS SEVERAL OTHER ILL-CONCEIVED RECOMMENDATIONS

In addition to the specific problems identified above, Cinergy notes that the so-called Consensus Plan contains a number of other problematic suggestions. For example, the Plan would require (1) the grant of 1.9 GHz spectrum to Nextel and (2) the grant of 700 MHz commercial Guard Band spectrum to Public Safety licensees.

The exchange of Nextel's 700 MHz, 800 MHz, and 900 MHz spectrum for contiguous, nationwide spectrum in the 1.9 GHz band is not necessary, creates uncertainty, and establishes bad precedent for the FCC's spectrum policy. As discussed in greater detail in the comments and reply comments, the 1.9 GHz band is not comparable in value to Nextel's spectrum in the 700 MHz, 800 MHz, and 900 MHz bands.¹¹² While Nextel defends the grant on the grounds that no reliable means exists to assign a comparable per-MHz value to different spectrum bands,¹¹³ this inability to quantify spectrum value is precisely the reason why Nextel should not casually ask the FCC to allow a licensee to exchange spectrum, some of which was purchased at auction and some of which was obtained for free, for valuable auctionable spectrum.

¹¹⁰ *Consensus Plan* at 22-23.

¹¹¹ *E.g.*, Comments of Office of the Chief Technology officer, Government of the District of Columbia 16-17 (May 6, 2002); Comments of M/A-COM, Inc. 11 (May 6, 2002).

¹¹² *E.g.*, Comments of Verizon Wireless 13-14 (May 6, 2002); Comments of Entergy Corporation and Entergy Services, Inc. 48-50 (May 6, 2002); Comments of Boeing Company 27-28 (May 6, 2002); *NAM/MRFAC Reply Comments* at 4-6.

¹¹³ *Nextel Reply Comments* at 26.

Nextel would also appear to receive the 1.9 GHz spectrum before it relinquished its 900 MHz holdings. In its Reply Comments, Nextel implies that it will vacate its 900 MHz channels only "as needed" to accommodate Business and I/LT incumbents that choose to migrate voluntarily to 900 MHz.¹¹⁴ If the FCC were to adopt the so-called Consensus Plan, it should promulgate rules ensuring that Nextel relinquishes its 700 MHz, 800 MHz, and 900 MHz spectrum before receiving any spectrum at 1.9 GHz.

In addition to the questionable spectrum exchange, the proposed grant of 700 MHz commercial Guard Band spectrum to Public Safety licensees is beyond the control of the FCC.¹¹⁵ Because Congress designated this spectrum for commercial use in section 337,¹¹⁶ the FCC lacks the ability to alter this designation without the enactment of additional legislation. This recommendation reveals another fundamental inconsistency in the so-called Consensus Plan. While the Joint Commenters argued that the relocation of Public Safety to the 700 MHz band was impossible in part due to the requirement of congressional action,¹¹⁷ it now inconsistently argues that Congress could enact legislation to implement this aspect of their Plan.¹¹⁸

The recommendation also contravenes the purpose of the 700 MHz Guard Band. The FCC adopted a Guard Band for the 700 MHz spectrum to protect Public Safety operations from commercial licensees.¹¹⁹ Accordingly, the FCC would have to reverse its finding concerning the necessity of a Guard Band before allotting this spectrum to Public Safety. As long as the so-

¹¹⁴ *Id.* at 10 n.9.

¹¹⁵ *Consensus Plan* at 26-27.

¹¹⁶ 47 U.S.C. § 337(a).

¹¹⁷ *Consensus Plan* at 6 n.23, 28.

¹¹⁸ *Id.* at 26-27.

called Consensus Plan advocate a rebanding that requires legislative and regulatory changes, Cinergy would suggest the adoption of a 700 MHz plan.

¹¹⁹ In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Second Report and Order*, 15 F.C.C. Rcd. 5299, 5303-5311 ¶ 7-24 (2000).

WHEREFORE, THE PREMISES CONSIDERED, Cinergy Corporation respectfully requests that the FCC consider these Further Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: September 23, 2002

CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 23rd day of September 2002, I caused a copy of the foregoing "Further Comments of Cinergy Corporation" to be hand-delivered to each of the following:

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