

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 "Supplemental)	
Comments of the Consensus Parties")	DA 03-19
Filed in the 800 MHz Public Safety)	
Interference Proceeding)	

To: The Commission

SUPPLEMENTAL REPLY COMMENTS
OF CINERGY CORPORATION

By: Shirley S. Fujimoto
Jeffrey L. Sheldon
Keith A. McCrickard
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

Attorneys for Cinergy Corporation

Dated: February 25, 2003

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EXECUTIVE SUMMARY

Cinergy Corporation, a multi-state gas and electric utility licensed in the 800 MHz band, notes that the record in this proceeding clearly reveals that the so-called Consensus Plan lacks support from 800 MHz *licensees*. Commenters overwhelmingly oppose the allegedly improved Consensus Plan as an infeasible solution for the interference problem and as a proposal that is rife with potentially devastating consequences for innocent licensees.

The most significant flaw in the Consensus Plan is its failure to eliminate the 800 MHz interference problem. The proposed realignment would not remedy interference immediately, actually increases interference for many incumbent licensees, lacks funding to complete the process, ignores the primary technical causes of interference, and is too complex to succeed. Despite these fatal shortcomings, the Consensus Plan would also impose substantial financial obligations, disruption, unnecessary restrictions, and regulatory uncertainty on incumbent licensees.

Instead of this ineffective and burdensome realignment, Cinergy and a vast majority of commenters recommend the use of technical and market-based solutions, such as the Model Interference Resolution Procedures proposed in Cinergy's Supplemental Comments. Technical and market-based measures are preferable to a realignment because they have worked in the past, would enable licensees to identify and resolve interference proactively, and provide immediate, localized remedies to interference.

If a realignment is absolutely necessary, the FCC should reject the Consensus Plan because of myriad legal and practical problems. For example, the Consensus Plan would relegate many incumbent licensees to a Guard Band and would impose onerous signal

strength standards on rule-compliant incumbent licensees. Commenters confirm that these requirements improperly give incumbent licensees a choice between investing substantial sums to upgrade their systems or losing their geographic coverage and interference protection by over 90% in some instances.

Commenters also deplore the proposed licensing freezes because they preclude essential system modification and expansion for almost 10 years, would indirectly harm Public Safety licensees, and are unnecessary to, and inconsistent with, the underlying purpose of the freezes. In addition, commenters continue to dispute the funding mechanism because it is premised on faulty assumptions and omits several significant costs, thus leading to a underestimation of the actual costs and portending serious repercussions resulting from an incomplete realignment.

The record also identifies several other significant legal and practical problems with other elements of the proposed realignment, including the prohibition on cellular systems below 816/861 MHz, the timing of relocation, and the creation, and delegation of authority to, the RCC.

If realignment of the 800 MHz band is necessary, it must comply with the FCC's existing statutory authority and precedent. In particular, Cinergy would recommend that if rebanding is adopted, it should conform to its Model Relocation Rules, which would achieve the same type of rebanding as the Consensus Plan with far less administrative overhead and potential for abuse.

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SUPPLEMENTAL REPLY COMMENTS
OF CINERGY CORPORATION

Cinergy Corporation ("Cinergy"), by and through its undersigned counsel, submits these Supplemental Reply Comments in the above-captioned docket. 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 Supplemental Reply Comments respond to a *Public Notice* seeking comment on the Supplemental Comments filed by the signatories to the so-called Consensus Plan 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).

² Wireless Telecommunications Bureau Seeks Comments on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, DA 03-19 (Jan. 3, 2003). On January 16, 2003, the Wireless

I. INTRODUCTION

A vast majority of commenters agree with Cinergy that the Consensus Plan constitutes a fundamentally flawed approach to the interference problem in the 800 MHz band. While the Consensus Plan does *not* command a consensus of support from 800 MHz licensees or trade associations that actually represent 800 MHz licensees, the proposed realignment would not even resolve the interference problem. The proposed realignment would fail because it does not eliminate interference expeditiously, actually increases interference to some licensees, lacks the funding to complete the realignment, neglects to address the primary technical causes of interference, and is too complex to succeed.

Cinergy believes that the Model Interference Resolution Procedures attached to its Supplemental Comments³ are a preferable alternative to the proposed realignment because they address commenters' concerns about proactive solutions as well as provide immediate, localized remedies to interference. If the FCC concludes that a realignment is absolutely necessary, it should discard the Consensus Plan because of its legal and practical problems and instead adopt Cinergy's Model Relocation Rules, which would achieve the same result under the FCC's existing statutory authority and precedent and with far less administrative overhead and potential for abuse than the realignment proposed by the Consensus Plan.

Telecommunications Bureau extended the filing deadlines for comments and reply comments by one week each. In re Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order Extending Time for Filing of Comments*, DA 03-163 (Jan. 16, 2003).

³ Supplemental Comments of Cinergy Corporation App. A (Feb. 10, 2003) [hereinafter *Cinergy Comments*].

II. THE COMMENTS ILLUSTRATE A GROWING CONSENSUS AGAINST THE PROPOSED REALIGNMENT PLAN

Commenters overwhelmingly oppose the Consensus Plan. Although Nextel now claims that the Consensus Parties have the support of 90% of the licensees in the 800 MHz band, as opposed to merely representing 90% of these licensees,⁴ the sheer number of commenters opposing the Plan indicates that their calculations are highly questionable.

The Consensus Plan has generated opposition from a diverse group of 800 MHz licensees. In particular, several Public Safety entities express their opposition to the basic tenets of the Consensus Plan, asserting that it is "premature and cannot be adopted in its current form."⁵ Critical Infrastructure Industry licensees⁶ universally denounce the Plan, while Business and

⁴ Compare Comments of Nextel Communications, Inc. and Nextel Partners Inc. i (Feb. 10, 2003) with Supplemental Comments of the Consensus Parties ii (Dec. 24, 2002).

⁵ E.g., Comments of the City of Baltimore, Maryland 1 (Feb. 10, 2003) [hereinafter *Baltimore City Comments*]; Comments of the Communications Division, Michigan Department of Information Technology Representing Michigan's Public Safety Communications System 2 (Feb. 10, 2003) [hereinafter *Michigan Public Safety Comments*]; Comments of the Public Safety Improvement Coalition 14 (Feb. 10, 2003) [hereinafter *PSIC Comments*]; Comments of the State of Florida 2 (Feb. 10, 2003) [hereinafter *State of Florida Comments*].

⁶ E.g., Comments of the United Telecom Council and Edison Electrical Institute 2 (Feb. 10, 2003) [hereinafter *UTC/EEI Comments*]; Comments of American Electric Power 2 [hereinafter *AEP Comments*]; Supplemental Comments of Entergy Corporation and Entergy Services, Inc. 3 (Feb. 10, 2003) [hereinafter *Entergy Comments*]; Comments of Ameren Corporation 2, 15-16 (Feb. 10, 2003) [hereinafter *Ameren Comments*]; Comments of The Baltimore Gas & Electric Company 1 (Feb. 10, 2003) [hereinafter *BGE Comments*]; Comments of Alliant Energy 3 (Feb. 10, 2003) [hereinafter *Alliant Comments*]; Comments of Duquesne Light Company 1 (Feb. 11, 2003); Comments of MidAmerican Energy 1 (Feb. 10, 2003) [hereinafter *MidAmerican Energy Comments*]; Comments of Gainesville Regional Utilities 3 (Feb. 11, 2003) [hereinafter *GRU Comments*]; Supplemental Comments of Xcel Energy Services, Inc. 2 (Feb. 10, 2003) [hereinafter *Xcel Comments*]; Supplemental Comments of Consumers Energy Company 2 (Feb. 10, 2003) [hereinafter *Consumers Comments*]; Comments of Consolidated Edison Company of New York, Inc. 24 (Feb. 10, 2003) [*Consolidated Edison Comments*]; Comments of Carolina Power & Light Company and TXU Business Services 1 n.1, 10 (Feb. 10, 2003) (filing also on behalf of Progress Energy, Florida Power Company, and North Carolina Natural Gas) [hereinafter *CP&L/TXU Comments*].

I/LT licensees,⁷ commercial SMR licensees,⁸ and CMRS providers⁹ also oppose the Plan. In addition, an influential equipment provider,¹⁰ two 700 MHz Guard Band Managers,¹¹ several 900 MHz licensees,¹² and a 1.9 GHz entity¹³ disagree with Plan.

The Consensus Parties and their supporters also harbor reservations about the proposed realignment. Although the Consensus Parties present their realignment proposal as a unified front, cracks continue to appear in their resolve. In its Further Comments, Cinergy documented several issues on which certain Consensus Parties tried to condition their support of the Plan.¹⁴ The Supplemental Comment stage of this proceeding is no different as AMTA acknowledges that it has completely forsaken its SMR members and essentially asks the FCC to replace it as

⁷ *E.g.*, Comments of The Boeing Company ii (Feb. 10, 2003) [hereinafter *Boeing Comments*]; Comments of the National Association of Manufacturers and MFRAC, Inc. i (Feb. 10, 2003) [hereinafter *NAM Comments*]; Comments of Small Business in Telecommunications iii (Jan. 10, 2003) [hereinafter *SBT Comments*].

⁸ *E.g.*, Comments of Mobile Relay Associates 2 (Feb. 10, 2003) [hereinafter *Mobile Relay Comments*]; Comments of Preferred Communication System, Inc. 1 (Feb. 10, 2003) [hereinafter *Preferred Communication Comments*]; Comments of Palomar Communications, Inc. 2, 9 (Feb. 10, 2003) [hereinafter *Palomar Communications Comments*]; Comments of Peak Relay, Inc. 5 (Feb. 10, 2003) [hereinafter *Peak Relay Comments*].

⁹ *E.g.*, Comments of Cellular Telecommunications & Internet Association 4, 6 (Feb. 10, 2003) [hereinafter *CTIA Comments*]; Comments of Verizon Wireless 2 (Feb. 10, 2003) [hereinafter *Verizon Wireless Comments*]; Comments of ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint Corporation, Southern LINC, and United States Cellular Corporation 1 (Feb. 10, 2003) [*CMRS Joint Commenters*].

¹⁰ Comments of Motorola, Inc. 23 (Feb. 10, 2003) [hereinafter *Motorola Comments*].

¹¹ *E.g.*, Comments of Harbor Wireless, L.L.C. 13 (Feb. 10, 2003); Comments of Access Spectrum, LLC 3-4 (Feb. 10, 2003) [hereinafter *Access Spectrum Comments*].

¹² *E.g.*, Comments of Electrocom, Inc. 12 (Feb. 10, 2003) [hereinafter *Electrocom Comments*]; Comments of the 900 MHz Industrial User Group 1 (Feb. 10, 2003) (consisting of the National Rural Electric Cooperative Association, Pro Tec Mobile Communications, Inc., Shell Oil Products USA, Inc., America West Airlines, Inc., and Star Crystal Communications, Inc.).

¹³ Comments of UTAM, Inc. 2 (Feb. 10, 2003) [hereinafter *UTAM Comments*].

¹⁴ Further Comments of Cinergy Corporation 4-5, 22-23, 30-31 (Sept. 23, 2002).

their advocate in this proceeding.¹⁵ In addition, Small Business in Telecommunications, National Association of Manufacturers, and MRFAC, Inc. all dropped out of the "consensus" after initially pledging their support.¹⁶ Palomar Communications, an advocate of the Consensus Plan as of September 2002, is the most recent defection from the "consensus" and filed a scathing set of comments opposing the Plan as "incomplete, inconsistent and contradictory."¹⁷

Finally, the trade associations do not represent their constituents in the 800 MHz band. When calculating support for their proposed realignment, the Consensus Parties inflate the numbers by assuming trade associations represent the licenses held by their individual members. For example, the Industrial Telecommunications Association ("ITA") has several members with 800 MHz licenses, such as American Electric Power and other utilities. Although ITA purportedly represented AEP in the negotiations, ITA never solicited AEP's views.¹⁸ In addition, the American Mobile Telecommunications Association is a signatory to the Plan, even though at least three of its members, including two members of its board of directors, vigorously oppose the Plan.¹⁹ Even Public Safety entities question whether licensees are "actually members of the

¹⁵ Comments of the American Mobile Telecommunications Association, Inc. 2 (Feb. 10, 2003) ("The Plan is not perfect, and its imperfections will be borne most heavily by AMTA's SMR members. Some could lose customers as a result of the disruption. Since payment of retuning costs alone will not reimburse them if they lose customers, the FCC should consider how such licensees can indeed be made whole.").

¹⁶ Further Comments of Small Business in Telecommunications 3 (Sept. 23, 2002) ; Reply Comments of National Association of Manufacturers and MRFAC, Inc. 4-5 (Aug. 7, 2002).

¹⁷ Compare Comments of Aeronautical Radio, Inc., JPI Electronic Communications, Inc., *et al.* (Sept. 23, 2002) with *Palomar Communications Comments* at 2.

¹⁸ *AEP Comments* at 2-3. In contrast, UTC ascertained its members' interests in regular conference calls and permitted their views to dictate its position on the Consensus Plan. *Id.*

¹⁹ Comments of Southern LINC 3 (Feb. 10, 2003); *Mobile Relay Comments* at 1; *Preferred Communication Comments* at 1.

[Consensus] Parties' organizations and . . . actually support the organization's positions."²⁰ Thus, as Cinergy emphasized in its Supplemental Comments, the Consensus Plan may represent the interests of the trade associations but does not represent the views of licensees themselves.

III. THE PROPOSED REALIGNMENT WOULD NOT RESOLVE THE INTERFERENCE PROBLEM

The FCC should examine other measures to resolve the 800 MHz interference problem because the proposed realignment is destined to fail. While the SRGPE Joint Commenters claim that the "failure . . . to adopt this proposal puts the parties back to where they started,"²¹ the adoption of the Consensus Plan would accomplish the same result, except with higher costs, disruption of vital communications, reduced in competition, and greater delay.

In particular, the Consensus Plan would not succeed because it: (1) would not eliminate interference expeditiously; (2) would actually increase interference in the short term; (3) would result in an incomplete realignment because of the absence of a sufficient funding mechanism; (4) ignores the technical problems that cause the interference; and (5) is too complex to succeed.

A. The Proposed Realignment Would Not Eliminate Interference Expeditiously

The Consensus Plan would not eliminate the interference problem until the application of technical measures at some point after the completion of the proposed realignment. While Baltimore City and Access Spectrum correctly note that the record does not "contain sufficient evidence to suggest that the scope of the interference problem . . . is nationwide or otherwise

²⁰ *E.g., Michigan Public Safety Comments* at 2-3.

²¹ Comments of Smartlink, Pete's Communications, *et al.* 5 (Feb. 10, 2003) [hereinafter *SRGPE Joint Commenters*].

warrants as radical and disruptive a solution" as realignment,²² most commenters now focus on the failure of the Consensus Plan to remedy interference expeditiously.

Most commenters seek a solution to the interference problem that would enable Public Safety licensees to avoid harmful interference immediately. For example, several commenters ask the FCC "to consider enactment of 'immediate temporary shutdown of site' provisions" that require the interfering licensee to cease operations at a particular site until the resolution of the interference problem through technical measures.²³ Other commenters ask why the FCC could not simply apply technical measures first, or as an interim mechanism, especially because the inadequate funding mechanism risks an incomplete realignment.²⁴ "This immediate action would resolve the urgent needs of [licensees] while allowing sufficient time and research to determine the most efficient and cost effective long term solution for realignment of the 800 MHz band in the future."²⁵

²² *Access Spectrum Comments* at 6; see *Baltimore City Comments* at 1. Several commenters also argue that the Consensus Parties concede that the proposed realignment would not remedy the interference problem. Michigan Public Safety, CMRS Joint Commenters, and other commenters believe that the "continued use of interference mitigation techniques after the completion of its proposed multi-year realignment plan demonstrates why its plan is not the best solution." *CMRS Joint Commenters* at 14; see, e.g., *Michigan Public Safety Comments* at 6; *Access Spectrum Comments* at 8. AEP and Alliant also note that the Consensus Parties' willingness to grandfather Southern LINC's operations proves that, "with proper engineering, the iDEN technology can be made to peacefully co-exist with high-site technology." *AEP Comments* at 17; see *Alliant Comments* at 1.

²³ *Michigan Public Safety Comments* at 7; Supplemental Comments of Small Business in Telecommunications 9-10 (Feb. 10, 2003) [hereinafter *SBT Supplemental Comments*].

²⁴ Comments of the City and County of San Diego 7 (Feb. 10, 2003) [hereinafter *City and County of San Diego Comments*]; Comments of the City of Philadelphia 9-10 (Feb. 10, 2003) [hereinafter *City of Philadelphia Comments*]; *Michigan Public Safety Comments* at 3; *UTC/EEI Comments* at 14; *CP&L/TXU Comments* at 10 ("given the constant drum beat of Rebanding Coalition about how urgent the problems are – so urgent they say that there isn't time to consider technical resolution other than through rebanding – it is sadly ironic how willing they appear to be put the implementation of real interference safeguards off so far into the distant future").

²⁵ *GRU Comments* at 3.

In addition, commenters warn that the Plan "could result in protracted litigation . . . [that] would create uncertainty in the 800 MHz band and would substantially delay any permanent interference solution that the Commission adopts" for several years.²⁶ Despite these pleas for immediate resolution, the current iteration of the Consensus Plan would not provide immediate measures to prevent interference during the realignment, effectively granting Nextel a four-year license to interfere with Public Safety operations.²⁷

B. The Consensus Plan Would Actually Increase Interference

The proposed realignment would also fail to resolve the 800 MHz interference problem because incumbent licensees would suffer additional interference from the contemplated relocations. In particular, the Consensus Plan increases interference in the short term by moving more of Nextel's operations into the interleaved spectrum.²⁸ In addition, NRECA and Electrocom assert that the replication of Nextel's system in the 900 MHz band during the three-year relocation period would increase the likelihood of interference in that band.²⁹ Finally, not even Public Safety licensees are immune from the increase in interference because "[p]lacing public safety users directly adjacent to high-powered Channel 69 TV operations raises the likelihood that interference will be more problematic."³⁰

²⁶ Comments of Blooston, Mordkofsky, Dickens, Duffy, and Prendergast 9 (Feb. 10, 2003) [hereinafter *Blooston Comments*]; Comments of Public Safety Wireless Network 8 [hereinafter *PSWN Comments*].

²⁷ *SBT Comments* at 17; *CP&L/TXU Comments* at 10; *UTC/EEI Comments* at 14.

²⁸ *NAM Comments* at 10.

²⁹ Comments of the National Rural Electric Cooperative Association 9 (Feb. 10, 2003) [hereinafter *NRECA Comments*]; see *Electrocom Comments* at 6.

³⁰ *Motorola Comments* at 15-16.

C. The Absence of Adequate and Guaranteed Funding Would Leave the Realignment Incomplete

The Consensus Plan fails to provide a guaranteed source of funding sufficient to complete the realignment. As discussed in greater detail in Section V, the relocation fund suffers from several legal and practical deficiencies. If, for whatever reason, the funding becomes unavailable, the only contingency plan offered by the Consensus Parties is for the realignment to cease and for licensees to remain in the spectrum they currently occupy. As with musical chairs, if the funding runs out, parties stay where they are – whether or not every licensee has a viable spectrum home.

Commenters have great anxiety about the possibility that the realignment would cease prematurely.³¹ The foremost concern is the lack of interoperability among Public Safety systems. While UTC/EEI assert that an incomplete relocation would leave the band "in worse shape than before,"³² Public Safety licensees in Texas worry that "the relocation process might be halted after only some of Texas's NPSPAC regions have relocated" and prevent crucial interoperability across all regions.³³ As Cinergy observed in its Supplemental Comments, the premature cessation of the realignment could also leave Nextel co-channel with NPSPAC licensees in some regions. Even if the new interference standards applied in the event of an incomplete realignment, which they do not,³⁴ incumbent licensees would not qualify for interference protection if they do not increase their signal strength level, a task which is often

³¹ *City and County of San Diego Comments* at 7; *Verizon Wireless Comments* at 11; *NAM Comments* at 5 n.9; *Ameren Comments* at 5-7; *Blooston Comments* at 6; *Michigan Public Safety Comments* at 3; *UTC/EEI Comments* at 8; *PSWN Comments* at 6; *SBT Supplemental Comments* at 2.

³² *UTC/EEI Comments* at 8; *see, e.g., PSIC Comments* at 2.

³³ Joint Comments of the Six Texas NPSPAC Regional Review Committee Chairman and the Texas Department of Public Safety 1-3 (Feb. 10, 2003).

technically infeasible and prohibitively expensive, as discussed below in Section V.A. Even if the relocation fund were sufficient to complete the proposed realignment, it does not provide compensation for the subsequent technical measures necessary to resolve the interference problem.³⁵

D. The Technical Sources of Interference Remain Unremedied

Commenters also state that the proposed realignment would not succeed because it fails to address the fundamental technical problems that cause interference in the 800 MHz band. In particular, commenters emphasize that no realignment would succeed unless it also replaced Public Safety radios.³⁶ Verizon Wireless asserts that the intermodulation interference plaguing Public Safety licensees is receiver-generated, which could only be "eliminated by improving the IM rejection characteristics of the receiver or by incorporating improved front-end filtering."³⁷ In addition, the proposed realignment would not correct receiver overload.³⁸ Because the replacement of these receivers is necessary to resolve either of these sources of interference, and the Consensus Plan would replace only 1% of all Public Safety radios, Alltel deduces that "99% [of the Public Safety receivers] will be subject to interference."³⁹ Thus, these licensees believe that interference will continue even after the proposed realignment.

³⁴ Supplemental Comments of the Consensus Parties App. F-1 (Dec. 24, 2002).

³⁵ *CMRS Joint Commenters* at 17.

³⁶ *Verizon Wireless Comments* at 4-7; *CMRS Joint Commenters* at 3-4.

³⁷ *Verizon Wireless Comments* at 8; *see CMRS Joint Commenters* at 3.

³⁸ *Verizon Wireless Comments* at 4-6; *CMRS Joint Commenters* at 3-4.

³⁹ *CMRS Joint Commenters* at 4.

E. The Complexity of the Plan Alone Precludes Its Successful Implementation

Commenters complain that the Consensus Plan is so "extraordinarily complicated and contains so many moving parts that it will be virtually impossible to implement."⁴⁰ The Consensus Parties envision that licensees, the FCC, manufacturers, and other third parties will cooperate harmoniously in the submission of information, frequency coordination, preparation and approval of frequency plans, negotiation and arbitration, and multiple relocations without any incidents. CTIA calculates that the Consensus Plan "involves 26 different deadlines, spread over 42 months, involving over 2500 licenses,"⁴¹ and the Plan "assumes every step [will] proceed[] without delay."⁴² Although NRECA believes that "it is theoretically possible that all the necessary steps could be completed as contemplated in the Consensus Plan, more than likely some snag will be encountered along the way."⁴³ In other words, the Consensus Plan is so convoluted that it is more likely that a hurricane could blow through an airplane hanger and assemble a 747 out of spare parts than the proposed realignment would succeed. Despite the numerous opportunities for failure built into the Consensus Plan, the Consensus Parties fail to provide for any sort of contingency plan.⁴⁴

⁴⁰ *CTIA Comments* at 5.

⁴¹ *Id.*

⁴² *NRECA Comments* at 4.

⁴³ *Id.*; *UTC/EEI Comments* at 8 ("With a quite-possible breakdown in the myriad details of this proposal, the band would be left in worse shape than before: licensees unable to move or grow, a detailed re-banding halted mid-stream, and harmful interference as bad or worse than before.").

⁴⁴ *NRECA Comments* at 4; *State of Florida Comments* at 2; *PSWN Comments* at 6.

IV. A TECHNICAL AND MARKET-BASED APPROACH IS A SUPERIOR ALTERNATIVE TO REALIGNMENT

The failure of the proposed realignment to eliminate interference indicates that the FCC should revert to technical and market-based measures. A majority of commenters favor these solutions, and Cinergy's Model Interference Resolution Procedures provide a sound basis for future FCC rules.

A. Commenters Support the Implementation of Technical and Market-Based Measures

A wide variety of commenters support the use of technical or market-based solutions to the interference problem in the 800 MHz band. For example, technical and market-based measures derive support from Public Safety entities,⁴⁵ the CMRS industry,⁴⁶ Business and I/LT,⁴⁷ 700 MHz Guard Band Managers,⁴⁸ and Critical Infrastructure Industries.⁴⁹ In addition, the Consensus Parties recommend the application of technical measures after their Plan fails to eliminate interference problem.

Commenters also assert that technical solutions have worked in the past to resolve harmful interference. The State of Michigan and CTIA note that their "experience to date has been that any interference caused by cellular licensees can be effectively addressed by technical

⁴⁵ *Michigan Public Safety Comments* at 7; *Baltimore City Comments* at 2; *PSIC Comments* at 6.

⁴⁶ *Verizon Wireless Comments* at 15; *CMRS Joint Commenters* at 14, 16-18; Comments of the Wireless Communications Association International, Inc. 7 n.15 (Feb. 10, 2003); *CTIA Comments* at 12-13.

⁴⁷ *SBT Comments* at 8.

⁴⁸ *Access Spectrum Comments* at 8-9.

⁴⁹ Letter of Alliant Energy 2 (Feb. 10, 2003) [hereinafter *Alliant Letter*]; *Ameren Comments* at 14-15; *AEP Comments* at 17; *NRECA Comments* at 6-7; *CP&L/TXU Comments* at 9; *UTC/EEI Comments* at 3, 5, 14-16; *Consumers Comments* at 4-6; *Entergy Comments* at 30; *Xcel Comments* at 10; *Consolidated Edison Comments* at 7-8.

mitigation techniques."⁵⁰ In addition, AEP notes that the Consensus Parties' willingness to grandfather Southern LINC's operations proves that, "with proper engineering, the iDEN technology can be made to peacefully co-exist with high-site technology."⁵¹

Because most commenters agree that technical measures are the only method that will eliminate harmful interference, and because of their past successes, CTIA recommends that the FCC use these measures prior to adopting a complex and untested realignment proposal.⁵² The technical measures would provide licensees and the FCC with immediate results, allowing additional time to study whether further action is necessary. AEP agrees with this approach, suggesting that the FCC postpone any definitive action on a costly and disruptive rebanding until the Spectrum Policy Task Force completes its assigned duties.⁵³

Several commenters specifically support the application of technical measures only to Nextel's interference-causing system. In particular, PSIC and SBT ask whether "the \$850 million pledged by Nextel would not be better spent . . . to provide remedial efforts to avoid and correct interference problems."⁵⁴ A former supporter of the Consensus Plan, Palomar Communications, also believes that technical modifications to Nextel's system would solve the interference problem, stating that "Nextel could improve [its] own handset receiver design to match the sensitivity of radios made by the industry-at-large, it in turn could reduce [its] base

⁵⁰ *CTIA Comments* at 13; *see Michigan Public Safety Comments* at 7.

⁵¹ *AEP Comments* at 17.

⁵² *CTIA Comments* at 13 ("Using mitigation *first* will allow for the most timely, least costly, solution to many of the incidents of interference").

⁵³ *AEP Comments* at 18 (the Commission should avoid a plan as disruptive as the Consensus Plan at least until the results of their Spectrum Policy Task Force have been transformed into concrete spectrum management policy).

⁵⁴ *SBT Comments* at 18; *see PSIC Comments* at 6.

station output signal levels . . . [and could] employ output filtering on all of its base station transmitters.⁵⁵

B. Cinergy's Model Rules Offer an Effective and Administratively Feasible Solution to the Interference Problem

The Model Interference Resolution Procedures attached to Cinergy's Supplemental Comments would eliminate interference in the 800 MHz band, while addressing the concerns voiced by commenters in this proceeding. In particular, Cinergy proposed the creation of a database of low-site digital transmitters that are prone to interference-causing operations. The use of this database would foster cooperation and compliance with the rules, permitting licensees to identify and resolve the problems efficiently without overly constrictive nationwide standards. Cinergy would also support the use of an advisory committee to pinpoint interference "hot spots" and proactively pursue resolution.

1. The Model Interference Resolution Procedures Would Constitute a Proactive Solution

Although some Public Safety organizations fear that purely technical solutions would not preempt any occurrence of interference, the Model Interference Resolution Procedures support a proactive application of the technical requirements. Under Cinergy's proposal, the licensee of low-site digital systems would be required to certify that it "has performed an engineering analysis pursuant to generally accepted industry practices, by which it has determined that its operations, either alone or in conjunction with systems of other licensees operating in close proximity, will not cause co-channel, adjacent channel, or intermodulation interference to other licensees" that may have mobiles operating within 5,000 feet of the digital transmitter site.

⁵⁵ *Palomar Communications Comments* at 8-9.

The FCC recently adopted a case-by-case solution to protect Public Safety licensees from harmful interference in the 700 MHz band, stressing that such a solution would address interference before it occurred.⁵⁶ In addition, a low-site digital licensee would have a significant financial incentive to avoid causing interference. To avoid incurring the remediation costs, potential interferors would be explicitly required to design their systems to avoid causing interference in the first place. This would foreclose Nextel's current position, which is to claim that its licenses do not require it to protect any other licensees from interference.

The rules could incorporate a provision requiring the creation of an independent advisory body to conduct further study on the issues surrounding interference.⁵⁷ This advisory body could "begin immediately identifying interference 'hot spots' around the country – areas that share usage patterns and spectral environments that make them more susceptible to interference."⁵⁸ The identification of "hot spots" would enable licensees to implement localized adjustments "before harmful interference adversely affects public safety licensees," thus negating the ill effects of an overly broad nationwide solution.⁵⁹

⁵⁶ 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. 13,985 ¶ 17 (2002).

⁵⁷ *CTIA Comments* at 12-13 (recommending a special task force); *Baltimore City Comments* at 1-2 (stating that "the scope of the interference problem has not been sufficiently investigated, and the cause has not been accurately enough determined, to justify the adoption of a remedy as drastic as band realignment"); *Boeing Comments* at 27 (suggesting the establishment of "an expert re-banding team").

⁵⁸ *Access Spectrum Comments* at 9-11.

⁵⁹ *Id.*

To select the advisory body, Cinergy supports either appointing an advisory committee to recommend a neutral, third party candidate⁶⁰ or employing a competitive bidding process to select an interference administrator.⁶¹ Both of these methods have worked successfully in the selection of administrators for telecommunications numbering issues and, unlike Nextel's proposal for a biased "Relocation Coordination Committee," would comply with all relevant statutory and constitutional requirements.

2. The Model Interference Resolution Procedures Employ Immediate, Individualized Technical Solutions

Several commenters prefer an individualized approach to technical solutions because the anecdotal evidence indicates that interference is site-specific and defies an all-encompassing solution. For example, the CMRS Joint Commenters believe that "most instances of CMRS/public safety harmful interference can be resolved by parties using the Best Practices case-by-case approach,"⁶² while Access Spectrum and CTIA urge the FCC to adopt interference resolution measures on the local level.⁶³ As discussed above, Cinergy's Model Interference

⁶⁰ The FCC created a federal advisory committee under the Federal Advisory Committee Act to recommend and oversee neutral, third party administrators of the numbering funds. *E.g.*, In re Toll Free Service Access Codes; CC Docket No. 95-155, *Fifth Report and Order*, 15 F.C.C. Rcd. 11,939, 11,949 ¶ 25 (2000) (appointing an administrator for the toll free number database system); In re Administration of the North American Numbering Plan, CC Docket No. 92-237, *Third Report and Order*, 12 F.C.C. Rcd. 23,040, 23,042, 23,071, 23,075 ¶ 1, 59, 68 (1997) (appointing the North American Numbering Plan Administrator and the Billing and Collection Agent for the NANPA); In re Telephone Number Portability, CC Docket No. 95-116, *Second Report and Order*, 12 F.C.C. Rcd. 12,281, 12,303 ¶ 33 (1997) (appointing a Local Number Portability Administrator).

⁶¹ The FCC recently selected a neutral, third party administrator for thousands-block number pooling through a competitive bidding process. information and established an evaluation process. In re Numbering Resource Optimization, CC Docket No. 99-200, *Second Report and Order*, 16 F.C.C. Rcd. 306, 322-323 ¶ 35 (2000).

⁶² *CMRS Joint Commenters* at 14, 18.

⁶³ *Access Spectrum Comments* at 8-9; *CTIA Comments* at 14.

Resolution Procedures would create a nationwide database to enable licensees to resolve interference on a local, individualized basis. In addition, Cinergy's Procedures would support the establishment of an advisory body to identify and resolve interference on a case-by-case basis.

The Model Interference Resolution Procedures also address the interference problem immediately, as requested by several Public Safety licensees.⁶⁴ While the Consensus Plan would require these licensees to wait for several years to operate without interference, the Model Procedures would apply technical measures without delay.

V. IF A REALIGNMENT IS ABSOLUTELY NECESSARY, THE FCC SHOULD ADOPT A PROPOSAL THAT REMEDIES THE PROBLEMS OF THE CONSENSUS PLAN

If the FCC concludes that rebanding is still required to resolve the interference problem, it should still discard the Consensus Plan and instead adopt Cinergy's Model Relocation Rules, which are premised on the FCC's existing authority and precedent and would not entail the significant administrative overhead and uncertainty created by the Consensus Plan.

A. The Guard Band Does Not Protect the Rights of Incumbent Licensees

In this proceeding, Cinergy has asserted that the FCC should adhere to the existing precedent concerning the resolution of interference and the relocation of incumbent licensees. This precedent requires the provision of comparable facilities and the location of any Guard Band in the interfering licensee's spectrum.

⁶⁴ *City of Philadelphia Comments* at 9-10; *City and County of San Diego Comments* at 7; *Michigan Public Safety Comments* at 6.

1. The Proposed Guard Band Deprives Incumbent Licensees of Comparable Facilities

The Consensus Plan fails to provide incumbent licensees with comparable facilities by not offering them equivalent capacity or quality of service.

The proposed Guard Band neglects to provide comparable system capacity because "the geographic coverage of the channels must be coextensive with that of the original system."⁶⁵ Incumbent licensees would not have coextensive geographic coverage after the realignment because the new signal strength standards effectively diminish their interference protection. While Cinergy's Supplemental Comments detail the dramatic reduction in service area caused by the unattainable performance standards, other incumbent licensees report similar unavoidable losses in geographic coverage.⁶⁶ While these reductions in coverage appear to average around 75% of an incumbent licensee's system across the band,⁶⁷ many licensees, including Cinergy, would lose up to and above 90% of their protected service area in the Guard Band.⁶⁸

To avoid losing their existing geographic coverage, Public Safety and private wireless licensees would have to make substantial investments in their infrastructure. Although the rules would allow incumbent licensees to comply with the new standards by increasing their power levels, many licensees, including Cinergy, operate systems that are "premised upon the existing

⁶⁵ 47 C.F.R. § 90.699(d)(2) (2001).

⁶⁶ *NAM Comments* at 10-11; *Entergy Comments* at 9-10; *Ameren Comments* at 9-10; *UTC/EEI Comments* at 12; *Palomar Communications Comments* at 9 ("The proposed interference protection threshold for the new 800 MHz Guard Band will make it utterly useless to almost all licensees unfortunate enough to be relocated there.").

⁶⁷ *UTC/EEI Comments* at 12; *Motorola Comments* at 11; *Ameren Comments* at 9; *Boeing Comments* at 13; Comments of State Wireless Network, New York State Office of Technology 13-14 (Feb. 10, 2003) [hereinafter *New York State Comments*].

⁶⁸ *Entergy Comments* at 9-10; *Cinergy Comments* at 9 n.16.

power and coverage levels of [their] stations."⁶⁹ To meet these new standards, licensees would have to construct additional sites, employ more channels or redesign portions of their networks to use simulcast operation, upgrade or relocate some sites (after obtaining the necessary local or zoning approval), and physically reprogram repeaters and thousands of radios.⁷⁰ While these investments are necessary merely to have the same geographic coverage area as before, the relocation fund would not appear to cover these expensive modifications.⁷¹ Thus, the Consensus Plan would not provide equivalent capacity.

The proposed Guard Band also neglects to provide comparable quality of service to incumbent licensees because it does not provide the "same level of interference protection on the new system as on the old system."⁷² The supporters of the Plan fail miserably in their attempts to prove that incumbent licensees would receive the same interference protection. For example, the SRGPE Joint Commenters emphasize that the Consensus Plan "significantly strengthens [interference] protections for all incumbent 800 MHz licensees" because licensees currently do not have any protection against intermodulation interference.⁷³ In addition, they claim that Nextel "will still be bound by the IM restrictions proposed in Appendix F" if the money runs out before the completion of the realignment.⁷⁴

⁶⁹ *Ameren Comments* at 9.

⁷⁰ *Motorola Comments* at 11, 13; *Ameren Comments* at 9-10; *BGE Comments* at 1; *New York State Comments* at 12; *City and County of San Diego Comments* at 7-8. For example, Motorola calculated "that a public safety licensee operating a 10 site system may need to expand its system to 33 sites to achieve a -95 dBm signal level throughout its existing coverage area." *Motorola Comments* at 11. Because the -95 dBm signal level applies outside the Guard Band, even more sites would be necessary to place a -62 dBm signal throughout an area.

⁷¹ *Motorola Comments* at 11.

⁷² 47 C.F.R. § 90.699(d)(3).

⁷³ *SRGPE Joint Commenters* at 3-4, 6.

⁷⁴ *Id.* at 16-17 n.17.

As a threshold matter, incumbent licensees already receive protection against harmful interference. The FCC defines "harmful interference" as "any emission, radiation, or induction which specifically degrades, obstructs, or interrupts the service provided by such stations."⁷⁵ In addition, section 90.173(b) of the FCC's rules states that "all applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference,"⁷⁶ while section 90.403(e) requires all licensees to "take reasonable precautions to avoid causing harmful interference."⁷⁷ These protections do not apply only to co-channel licensees and do not vanish simply because a licensee operates within the terms of its individual license.

Although the SRGPE Joint Commenters claim that the Consensus Plan strengthens protection, it actually revokes interference protection for incumbent licensees. As explained above, licensees must increase their signal strength in order to receive any interference protection at all in substantial portions of their existing service areas. Because many licensees could not raise their power levels, they would have to invest significant amounts of resources in their infrastructure to comply with these new signal strength standards. Any licensee that could not meet the new performance standards would lose the right to complain about the interference.⁷⁸ The position of the SRGPE Joint Commenters is also interesting given their earlier-expressed views to the FCC that "it is patently clear that the Commission may require Nextel (and Cellular A and Cellular B carriers) to remedy the interference."⁷⁹

⁷⁵ 47 C.F.R. § 90.7.

⁷⁶ *Id.* § 90.173(b).

⁷⁷ *Id.* § 90.403(e).

⁷⁸ Even if the licensee could meet the new signal strength levels, the proposed interference standards would only apply after the completion of the realignment. They do *not*, as alleged by the SRGPE Joint Commenters, apply if realignment is not completed. Supplemental Comments of the Consensus Parties App. F-1 (Dec. 24, 2002).

⁷⁹ Comments of SRGPE Joint Commenters 18 (May 6, 2002).

2. If a Guard Band is Necessary, It Should Be Placed in the Cellular Portion of the 800 MHz Band

If the FCC decides to implement a Guard Band, commenters agree that "it [should] come from the lower portion of the commercial band above 861 MHz."⁸⁰ While Cinergy notes that the location of a Guard Band in the spectrum of the interfering entity follows FCC precedent from the 700 MHz band, BGE logically states that "[i]t does not make sense that private radio users should lose primary use of this valuable spectrum when we are not the ones creating the interference."⁸¹ Commenters express tremendous support for the proposition that the technical restrictions set forth in the Consensus Plan should apply to the interference-causing entity rather than to innocent victims.⁸²

B. The Proposed Licensing Freezes Unnecessarily Limit the Expansion of Incumbent Licensee Systems

1. The Proposed Freezes Preclude Essential System Modification and Expansion

Commenters overwhelmingly oppose the proposed freezes in the Consensus Plan because they would effectively foreclose any expansions and upgrades of their systems.⁸³ These licensees must continuously "engineer[] changes in [their] 800 MHz radio system[s] to offer improvements in coverage and availability in order to serve [their] customers safely, effectively, and efficiently."⁸⁴

⁸⁰ *BGE Comments* at 1; *see CP&L/TXU Comments* 9.

⁸¹ *BGE Comments* at 2.

⁸² *City and County of San Diego Comments* at 7-8; *Michigan Public Safety Comments* at 6-7; *Comments of Pinnacle West Capital Corporation* 20-23 (Feb. 10, 2003); *CP&L/TXU Comments* at 9; *Peak Relay Comments* at 5.

⁸³ *Ameren Comments* at 11; *Alliant Letter* at 3; *Alliant Comments* at 4, 6; *AEP Comments* at 9-10; *NAM Comments* at 9-10; *Motorola Comments* at 5.

⁸⁴ *AEP Comments* at 10; *see, e.g., Alliant Comments* at 6.

The freedom to modify and expand Business and I/LT systems is crucial for Critical Infrastructure Industry licensees. Because of the pervading climate of terrorism, these licensees have commenced improvements to their systems, "[i]ncluding implementation of newer features, greater spectrum efficiency and coverage improvements."⁸⁵ In addition to Cinergy's delayed implementation of a new, spectrum-efficient, digital iDEN system, a freeze would likewise halt Alliant's redesign and rebuilding of its system and "leave almost half of its multi-state territory unable to be converted."⁸⁶

The prohibition of these modifications would also harm Public Safety entities, which often share Critical Infrastructure Industry systems on a shared, non-profit basis or, as with Cinergy, require the ability to intercommunicate.⁸⁷ Because Public Safety entities often lack the financial wherewithal to implement a system alone, non-profit sharing arrangements provide "access to an advance, highly-reliable system with excellent coverage for a fraction of the cost of building their own system."⁸⁸ The adoption of the proposed freezes would foreclose these efforts, contrary to the public interest. If the FCC wants to "promote safety of life and property,"⁸⁹ it must protect Critical Infrastructure Industry licensees as well as Public Safety licensees.⁹⁰

In addition to Cinergy, several other commenters notice the unreasonably long duration of the proposed freezes. "Combining the estimated three to four year implementation time

⁸⁵ *Motorola Comments* at 5; *CP&L/TXU Comments* at 6; *Ameren Comments* at 11; *Alliant Letter* at 3.

⁸⁶ *Alliant Comments* at 3, 6.

⁸⁷ *AEP Comments* at 7-8 (detailing the extent of AEP's shared network).

⁸⁸ *Id.*

⁸⁹ 47 U.S.C. § 151 (1991).

period for the Coalition Plan, and the five-year public safety set-aside, it could be eight, nine or more years after a Report and Order before a B/ILT licensee had the opportunity to expand its facilities."⁹¹ This unreasonable and unnecessary prohibition would cripple Business and I/LT systems, particularly, Critical Infrastructure Industry systems, that require continuous modification and expansion. Because of the debilitating nature of these freezes, the FCC should refuse to adopt this component of the Consensus Plan.

If the FCC does decide to freeze applications to prevent speculation, it should follow Motorola, AEP, or NAM's advice and provide some relief to incumbent licensees. Because the regulation of speculators would not necessitate the application of freezes to existing licensees, the FCC should "allow existing licensees to continue upgrading their systems, including upgrades that include coverage expansion."⁹² Alternatively, the FCC should adopt a waiver process for Public Safety entities to request spectrum as a last resort⁹³ or should postpone the effective date of the freeze, "provid[ing] Business and I/LT licensees an opportunity to file applications while the Commission considers the inevitable petitions for reconsideration and possible appeals."⁹⁴

⁹⁰ The proposed freeze is particularly devastating to Business and I/LT licensees because, unlike Public Safety licensees, they have no new spectrum for expansion. *NAM Comments* at 8 n.15.

⁹¹ *NAM Comments* at 7-8; *see, e.g., CP&L/TXU Comments* at 3 n.5; *Motorola Comments* at 5; *Ameren Comments* at 11 (predicting a seven-year prohibition on system expansion).

⁹² *Motorola Comments* at 6.

⁹³ *AEP Comments* at 11-12. Section 337 of the Communications Act also provides a mechanism for Public Safety licensees to access underutilized spectrum. 47 U.S.C. § 337 (Supp. 2001).

⁹⁴ *NAM Comments* at 8.

2. The Proposed Freezes Are Unnecessary and Contrary to the Underlying Goals of the Consensus Plan

Many commenters agree with Cinergy that a freeze is unnecessary and contrary to the stated purpose of the Consensus Plan. Specifically, "the proposed freeze would serve little or no purpose" because (1) little white space remains on channels 121-400 to which the Public Safety licensees will relocate; (2) speculators would have no interest in these channels because they are insufficient to support new systems; (3) to the extent that this spectrum entices speculators, they would have already occupied it during the year since the initiation of this proceeding; (4) Public Safety licensees will have ample time to contemplate their spectrum needs as the band plan takes effect; and (5) Public Safety licensees would relocate to spectrum vacated by Nextel or to white space in the Public Safety Pool, not to Business and I/LT white space.⁹⁵

C. The Funding Mechanism Fails to Guarantee a Complete Realignment

A vast majority of commenters object to the funding mechanism proposed in the Consensus Plan. They concur with Cinergy that the relocation fund should not cap Nextel's liability, would not cover the necessary relocation expenses, raises questions concerning the types of costs covered, and fails to offer sufficient guarantees about the adequacy or availability of the money. As discussed above in Section III.C, the probable insufficiency of the fund is particularly disconcerting because an incomplete realignment would strand licensees in interference-prone spectrum and would prevent crucial interoperability among Public Safety licensees.

The most pressing concern is that the Consensus Plan would result in premature depletion of the relocation fund. Commenters generally agree that Nextel should not be allowed to limit its

⁹⁵ *Motorola Comments* at 5-6, 6 n.15; *NRECA Comments* at 14; *Ameren Comments* at 11; *CP&L/TXU Comments* at 3 n.5.

liability, either through a cap on the relocation fund or through the use of corporate entities.⁹⁶ A wide variety of commenters believe, as does Cinergy, that Nextel seriously underestimates the relocation costs and bases the calculations on faulty assumptions.⁹⁷ The fundamental problem with the estimate is that the calculations were performed only on small systems. The airlines are a perfect example of the type of small, isolated system that served as the basis for the sample. While they may have licenses for several frequencies, the airlines restrict use to baggage handlers and maintenance workers (as opposed to airborne personnel) and employ these frequencies in a confined 2-3 square mile area surrounding the airport.⁹⁸ Because of these characteristics, airline systems are easy to retune in accordance with the Consensus Plan.

In contrast, many 800 MHz Public Safety and Critical Infrastructure Industry licensees operate substantially larger and more complex systems. The State of Michigan states that "the largest system [Nextel] visited was a 13 site countywide system," which is a completely inappropriate sample to provide a "realistic estimate[] of the cost or complexity involved in modifying [its] 181-site system."⁹⁹ As explained in its earlier filings, Cinergy operates an interconnected land mobile radio system that spans 25,000 square miles in three different states

⁹⁶ *E.g., State of Florida Comments* at 2; *PSWN Comments* at 5; *City of Philadelphia Comments* at 1-2; *SBT Supplemental Comments* at 7; *AEP Comments* at 9; *Ameren Comments* at 6; *CP&L/TXU Comments* at 5-6 n.16; *CMRS Joint Commenters* at 13; *NRECA Comments* at 15.

⁹⁷ *E.g., Mobile Relay Comments* at 13-14 (stating that actual cost is five times as much as the estimate); *Comments of the City of New York* 5 (Feb. 10, 2003); *Comments of the National League of Cities, National Association of Telecommunications Officers and Advisors, and United States Conference of Mayors* 4 (Feb. 10, 2003) [hereinafter *National League of Cities Comments*]; *Verizon Wireless Comments* at 10; *Preferred Communication Comments* at 8-9; *Michigan Public Safety Comments* at 3-4; *SBT Supplemental Comments* at 3; *City and County of San Diego Comments* at 13; *Blooston Comments* at 5-6.

⁹⁸ *Comments of Aeronautical Radio, Inc., United Airlines, and Northwest Airlines* 1 (Feb. 10, 2003).

⁹⁹ *Michigan Public Safety Comments* at 3; *see City of Philadelphia Comments* at 2 ("The estimate is suspect . . . because it is based on a sample of only 16 public safety systems").

and would encounter significant technical and logistical issues in any realignment. Similarly, Alliant projects that the relocation of its multi-state system alone would exhaust more than \$60 million of the \$150 million in the fund.¹⁰⁰

In addition to the flawed assumptions underlying the sample, the Consensus Parties also underestimate the need to replace Public Safety radios. While the Plan would cover 1% of all Public Safety radios, commenters believe that up to 40% of radios would require replacement in order to resolve the intermodulation interference.¹⁰¹ For every 1% increase in radio replacement, however, the estimate would increase by \$78 million,¹⁰² a prohibitive amount considering the \$700 million cap on Public Safety relocation costs.

Commenters also dispute the types of costs omitted from the Consensus Plan. For example, commenters note that the relocation fund does not take into account the following costs: (1) additional sites, channels, and equipment upgrades necessitated by the new signal strength standards;¹⁰³ (2) redundant systems required to provide a seamless transition, especially for Public Safety systems;¹⁰⁴ (3) Business and I/LT relocation costs for the transition out of the interference-prone Guard Band;¹⁰⁵ (4) labor force costs, including overtime;¹⁰⁶ (5) increased

¹⁰⁰ *Alliant Comments* at 4.

¹⁰¹ *Preferred Communication Comments* at 9. While many commenters believe that uncertainty exists regarding the actual number of Public Safety receivers that require replacement, they agree that Nextel's estimate is too low. *PSWN Comments* at 5; *PSIC Comments* at 3; *City of Philadelphia Comments* at 1, 3; *NAM Comments* at 5; *CMRS Joint Commenters* at 11; *Mobile Relay Comments* at 13-14 (contesting the estimate for Business and I/LT radio replacement).

¹⁰² *Preferred Communication Comments* at 9; see, e.g., *Verizon Wireless* at 10, 11.

¹⁰³ *PSIC Comments* at 4; *City of Philadelphia Comments* at 2; *PSWN Comments* at 5-6; *Ameren Comments* at 5, 9-10; *Boeing Comments* at 24.

¹⁰⁴ *PSWN Comments* at 7; *SBT Supplemental Comments* at 3 n.3.

¹⁰⁵ *NAM Comments* at 6.

¹⁰⁶ *City of Philadelphia Comments* at 2.

operating costs (for at least 5 years);¹⁰⁷ (6) interference mitigation measures after the completion of the realignment;¹⁰⁸ (7) equipment manufacturer development costs;¹⁰⁹ (8) 1.9 GHz relocation costs;¹¹⁰ and (9) mitigation of 900 MHz interference caused by Nextel's dual band operations.¹¹¹ The vast extent of these unfunded costs undermine the assertion by the SRGPE Joint Commenters that "all 800 MHz licensees moving to different frequencies will have their relocation work fully funded."¹¹²

D. A Realignment Should Not Prohibit Cellular Systems Below 816/861 MHz

In its Supplemental Comments, Cinergy stated that the proposed ban on advanced technologies below 816/861 MHz contravenes long-standing FCC policy, frustrates the deployment of advanced systems by Public Safety and Critical Infrastructure Industry licensees, and is unnecessary to protect Public Safety licensees.¹¹³ Commenters confirm that this prohibition is contrary to the public interest.

While several commenters had already announced their intentions to implement advanced systems,¹¹⁴ many more commenters declare that they have or will deploy such systems in their

¹⁰⁷ *NAM Comments* at 6.

¹⁰⁸ *CMRS Joint Commenters* at 16.

¹⁰⁹ *Motorola Comments* at 22-23.

¹¹⁰ *UTAM Comments* at 3-4.

¹¹¹ *Electrocom Comments* at 10.

¹¹² *SRGPE Joint Commenters* at 4.

¹¹³ *Cinergy Comments* at 36-38.

¹¹⁴ *E.g.*, *UTC Reply Comments* at 15; Reply Comments of Public Safety Improvement Coalition 6 (Aug. 7, 2002); Reply Comments of Cinergy Corporation 65-66 (Aug. 7, 2002); Reply Comments of the City of San Diego 3-4 (Aug. 7, 2002).

Supplemental Comments.¹¹⁵ For example, Baltimore City "uses several transmitters and essentially falls somewhere in between the single transmitter and cellularized configurations. It would be against the public interest if the Plan left Baltimore City unable to improve coverage of critical areas of its jurisdiction by installing fill-in base stations."¹¹⁶ Critical Infrastructure Industry licensees, such as Cinergy, Alliant, BGE, and MidAmerican Energy, would also like to upgrade to advanced systems.¹¹⁷ UTC/EEI reports that "several utilities [are] now implementing large digital wireless systems, each at a cost of tens of millions of dollars."¹¹⁸ The regulatory uncertainty in the 800 MHz band jeopardizes the spectrum efficiency of these existing and proposed systems.¹¹⁹

The proposed prohibition on advanced systems would not increase the protection of Public Safety licensees. While many Public Safety licensees have or will deploy advanced systems, others will benefit by sharing with Critical Infrastructure Industry systems.¹²⁰ In addition, the Consensus Parties clearly have no legitimate concern with low-site systems because they exempt Southern LINC, which operates the large non-Nextel system in the country and does not cause any interference. Thus, because an absolute prohibition on these systems is not necessary, and would actually harm Public Safety communications, the FCC should not adopt a

¹¹⁵ *City of Baltimore Comments* at 7; *BGE Comments* at 2; *MidAmerican Energy Comments* at 1; *Alliant Comments* at 6.

¹¹⁶ *Baltimore City Comments* at 7.

¹¹⁷ *Alliant Comments* at 6; *BGE Comments* at 2; *MidAmerican Energy Comments* at 1.

¹¹⁸ *UTC/EEI Comments* at 6.

¹¹⁹ *Id.*; see *Baltimore City Comments* at 7; *BGE Comments* at 2. In addition, several commenters allege that the prohibition on cellular architecture below 816/861 MHz is merely an anti-competitive attempt by Nextel. *E.g.*, *Mobile Relay Comments* at 10. While SMR licensees claim that the prohibition forecloses the emergence of any additional CMRS competitors from the 800 MHz band, the prohibition could also prevent any expansion or upgrades to B/ILT systems, thus forcing them to take service from a commercial provider, *i.e.*, Nextel.

realignment plan that "penalize[s] licensees that are moving in the direction of spectrum efficiency."¹²¹

E. The Timing of the Relocation Creates Legal and Practical Barriers to the Proposed Realignment

In its Supplemental Comments, Cinergy concentrates on the role of the timing rules to undermine the right of incumbent licensees to negotiate and arbitrate a relocation to comparable facilities. While the interaction of the timing rules with the negotiation and arbitration rules vitiates licensees' rights, several commenters attack the timing rules for fundamental legal problems as well as their unrealistic time frames.

1. The Time Frames Present Legal Problems to the Adoption of the Consensus Plan

The automatic cancellation provision in the proposed timing rules would violate section 303(m) of the Communications Act. This provision requires the FCC to provide licensees with notice and an opportunity to be heard prior to the suspension of a license.¹²² Despite this basic statutory and constitutional right to due process, the proposed timing rules would force incumbent licensees to relocate involuntarily or face cancellation of their licenses. Baltimore City and SBT conclude that this summary action "is wholly unacceptable and flies in the face of Section 303(m)."¹²³

In addition to the due process issues arising from the propose license cancellation rule, the proposed rules also implicate due process concerns because of the rushed nature of the relocation. SBT notes that the 60-day time limit on the FCC's review of the applications

¹²⁰ *UTC/EEI Comments* at 6; *AEP Comments* at 7-8.

¹²¹ *UTC/EEI Comments* at 6.

¹²² 47 U.S.C. § 303(m) (1991).

forecloses any opportunity for "reasoned decision making by the agency following thoughtful consideration of the pleadings."¹²⁴

2. The Consensus Plan Establishes Unrealistic Time Frames

The short time frames for relocation would prevent wide area and interrelated systems from relocating safely and efficiently. While the abbreviated relocation schedule may accommodate small systems operated by the signatories to the Consensus Plan,¹²⁵ they are insufficient for licensees that operate wide area systems or large Public Safety systems. While the Plan expects that licensees will complete their relocations within a matter of months, the City of Philadelphia and others predict that the process will take closer to years.¹²⁶ The State of Florida also believes that the relocation time frames do not account for practical problems, such as whether another statewide channel would be available for mutual aid, work force issues, managerial and engineering support, or availability of new equipment.¹²⁷

In addition to the unrealistic burdens on licensees, the Consensus Plan also imposes impractical time frames on the FCC and on manufacturers. As mentioned above, the Consensus Plan requires the FCC to review and approve applications within a 60-day time span, potentially contributing to a rushed and incomplete analysis.¹²⁸ Manufacturers also anticipate that they could not meet their deadlines for developing new equipment because "given the aggressive

¹²³ *Baltimore City Comments* at 6; *SBT Comments* at 28.

¹²⁴ *SBT Comments* at 27.

¹²⁵ *Alliant Comments* at 4.

¹²⁶ *E.g.*, *City of Philadelphia Comments* at 8; *Michigan Public Safety Comments* at 7.

¹²⁷ *State of Florida Comments* at 6.

¹²⁸ *SBT Comments* at 27. FCC analysis, and public scrutiny, is particularly important because the proposed realignment requires a lot of up-front coordination in a short period of time. *Alliant Comments* at 4.

schedule set forth in the Supplemental Comments, . . . it will be difficult for some manufacturers to complete the development in the 24 months called for in the schedule."¹²⁹

Despite the practical problems with this rushed time frame, the Consensus Plan neglects to provide for any sort of contingency plan. The failure of any single party to meet an individual deadline precisely as scheduled would disrupt the entire realignment. NRECA suggests that "while it is theoretically possible that all the necessary steps could be completed as contemplated in the Consensus Plan, more than likely some snag will be encountered along the way," especially given the convoluted nature of this proposed realignment.¹³⁰ This inevitable snag would doom the realignment without any contingency plan to mitigate the disastrous effects.

F. Commenters Agree that the RCC Is an Unlawful Entity

The Relocation Coordination Committee ("RCC") is patently unlawful as a violation of the Government Corporation Control Act, the Communications Act of 1934, as amended, the Federal Advisory Committee Act, and the Due Process Clause of the Fifth Amendment. While commenters did not identify these particular statutory and constitutional impediments by name, their arguments support Cinergy's legal analysis and extend it to the arbitration panels and planning committees appointed by the RCC.¹³¹

1. The FCC Lacks the Statutory Authority to Create the RCC

The FCC would violate the Government Corporation Control Act and the Communications Act if it created, or delegated authority to, the RCC without a specific statutory

¹²⁹ *Motorola Comments* at 23.

¹³⁰ *NRECA Comments* at 4; *State of Florida Comments* at 2; *PSWN Comments* at 6; *SBT Comments* at 3.

¹³¹ *E.g., Boeing Comments* at 25-26; Reply Comments of Small Business in Telecommunications 11 (Feb. 19, 2003).

mandate.¹³² Several commenters express concern over the absence of any legal basis for the Consensus Plan. SBT argues that the duties of the RCC "place the agency outside the dictates of its statutory authority for use of frequency coordinating services" and that the inclusion of Nextel is clearly without authority.¹³³ The Public Safety Wireless Network "recommends that the Commission . . . examine its statutory authority to undertake this plan."¹³⁴ Thus, commenters have not discovered any statutory provision specifically authorizing the creation of the RCC, as required under the Government Corporation Control Act and the Communications Act.

2. The RCC Would Fail to Comply with the Federal Advisory Committee Act

Commenters agree that the RCC would violate the FACA because it (1) lacks a fairly balanced membership, (2) fails to avoid inappropriate influence from special interest groups, and (3) does not include a member of the FCC.¹³⁵ They also assert that the RCC should not possess policymaking authority.

While the FACA requires the FCC to appoint a "fairly balanced membership" to the RCC, commenters also demand "equal and fair representation of the various interests (including private licensees) on the RCC, its oversight board, and any implementation committees."¹³⁶ All types of commenters complain about the "fixed" selection process, including Public Safety,¹³⁷

¹³² *Cinergy Comments* at 16-24.

¹³³ *SBT Comments* at 11-12, 23 n.14.

¹³⁴ *PSWN Comments* at 8; see *CTIA Comments* 6; *City of Baltimore Comments* at 6 (questioning whether the FCC has "the authority to require binding arbitration").

¹³⁵ *Cinergy Comments* at 25-29.

¹³⁶ *Boeing Comments* at 25-26; *PSIC Comments* at 7 (wondering why the FCC would not "call for nominations from the public, just as it does for certain advisory committee memberships").

¹³⁷ *PSIC Comments* at 7; *City of Philadelphia Comments* at 7.

Business and I/LT,¹³⁸ SMR,¹³⁹ and Critical Infrastructure Industries.¹⁴⁰ Thus, despite the universal belief in a balanced membership, Consensus Parties would dominate the RCC.

The proposed members of the RCC also have a substantial financial interest in the relocation process that makes them susceptible to inappropriate influence. In particular, commenters believe that "many of the trade associations and other entities that make up the Council have their own legitimate commercial interests in the reassignment."¹⁴¹ Mobile Relay Associates notes that this inappropriate influence also affects the arbitration panels because "[t]he only way for any SMR licensee to win the arbitration is if the panel decides to completely reject Nextel's position, even though Nextel pays its bills and holds major sway in the RCC for which the arbitrators work."¹⁴² Because of the direct financial benefit that four members of the LMCC will receive from the frequency coordination fees resulting from their participation on the RCC, the RCC would fall prey to special interests and, thus, would not satisfy this requirement of the FACA.

Commenters assert that an FCC representative should serve on the RCC and any other realignment committee. "To maintain objectivity and fairness in the process, it is essential to have independent committees with balanced representation and significant Commission input and involvement in every step of the process."¹⁴³ Because of the fundamental importance of

¹³⁸ *Boeing Comments* at 26.

¹³⁹ *Mobile Relay Comments* 16.

¹⁴⁰ *UTC/EEI Comments* at 9 n.16; *Alliant Comments* at 3; *AEP Comments* at 13; *CP&L/TXU Comments* at 3; *NRECA Comments* at 12-13.

¹⁴¹ *City of Philadelphia Comments* at 6; see, e.g., *Michigan Public Safety Comments* at 4; *State of Florida Comments* at 5.

¹⁴² *Mobile Relay Comments* at 16; see *Preferred Communication Comments* at 14.

¹⁴³ *Boeing Comments* at 26.

FCC participation, Boeing "is concerned regarding . . . the lack of significant Commission involvement and oversight" with respect to the RCC.¹⁴⁴

3. The Composition of the RCC Would Violate Due Process

The RCC could not serve as an impartial decisionmaker in accordance with the Fifth Amendment because the members have "direct personal, substantial, pecuniary interests" in the outcome of the realignment. Commenters express particular concern over the coordination fees collected by the RCC members, which "calls into question the neutrality of such coordinator entities."¹⁴⁵ The State of Michigan agrees that "many of the Consensus Parties provide frequency co-ordination services and will benefit financially from enactment of the Plan . . . [and] would be receiving funding provided by Nextel."¹⁴⁶ After noting that Nextel pays the bills for the RCC, Mobile Relay Associates scoffs, "[t]o think that MRA or any other existing SMR licensee could hope to have a fair hearing under such circumstances is laughable."¹⁴⁷

Because of the significant financial interest that Nextel has in the realignment process, commenters also argue that the RCC and its constituent panels are rigged to vote for certain parties, clearly indicating that the RCC suffers from at least an "appearance of partiality."¹⁴⁸ PSIC warns that the RCC would not "gain ultimate trust and acceptance" from the public because it serves a few private parties, *i.e.*, APCO, ITA, and Nextel.¹⁴⁹ The City of Philadelphia

¹⁴⁴ *Id.* at 25-26.

¹⁴⁵ *CP&L/TXU Comments* at 8 n.18.

¹⁴⁶ *Michigan Public Safety Comments* at 4; *see State of Florida Comments* at 5; *City of Philadelphia Comments* at 6; *Preferred Communication Comments* at 14 (arbitration panels).

¹⁴⁷ *Mobile Relay Comments* at 16; *Preferred Communication Comments* at 14.

¹⁴⁸ *E.g.*, *SBT Comments* at 23-24; *Alliant Comments* at 3; *UTC/EEI Comments* at 9 n.16; *Boeing Comments* at 26; *Baltimore City Comments* at 6.

¹⁴⁹ *PSIC Comments* at 9.

concurr, stating that "[p]roper representation on [arbitration] panels is essential to add legitimacy to the relocation process."¹⁵⁰

VI. CONCLUSION

Commenters overwhelmingly oppose the Consensus Plan because of the potentially devastating effect on 800 MHz licensees. Despite the alleged improvements to the Consensus Plan, commenters recognize that the proposed realignment would not resolve the interference problem because it fails to mitigate interference immediately, actually increases interference in several instances, lacks funding to complete the realignment, neglects to address the primary technical causes of interference, and is too complex to succeed. Cinergy agrees with these commenters and sees no reason for the FCC to adopt a proposal that imposes substantial financial and other burdens on rule-compliant licensees without any corresponding reduction in interference.

Instead of this burdensome and ineffective realignment, Cinergy and a wide variety of commenters recommend the use of technical and market-based solutions, such as the Model Interference Resolution Procedures set forth in Cinergy's Supplemental Comments. These Procedures are preferable to a realignment because they identify and resolve interference proactively and provide immediate, localized remedies to interference. If a realignment is unavoidable, however, the FCC should reject the Consensus Plan because of its legal and practical problems and adopt Cinergy's Model Relocation Rules, which would achieve the same result under the FCC's existing statutory authority and precedent and with far less administrative overhead and potential for abuse than the realignment proposed by the Consensus Plan.

¹⁵⁰ *City of Philadelphia Comments* at 6-7.

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

Respectfully submitted,

CINERGY CORPORATION

By: /s/ Shirley S. Fujimoto
Shirley S. Fujimoto
Jeffrey L. Sheldon
Keith A. McCrickard
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

Attorneys for Cinergy Corporation

Dated: February 25, 2003

CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 25th day of February 2003, I caused a copy of the foregoing "Supplemental Reply Comments of Cinergy Corporation" to be hand-delivered to each of the following:

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Emily Willeford
Commissioner Kevin J. Martin's Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Bryan Tramont
Chairman Michael K. Powell's Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Paul Margie
Commissioner Michael J. Copps' Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Barry Ohlson
Commissioner Jonathan S. Adelstein's
Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Marsha J. MacBride
Chairman Michael K. Powell's Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Samuel Feder
Commissioner Kevin J. Martin's Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jennifer Manner
Commissioner Kathleen Q. Abernathy's
Office
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

John B. Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen O'Brien-Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Catherine W. Seidel
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Furth
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Shellie Blakeney
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

D'wana R. Terry
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Thomas P. Stanley
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael Wilhelm
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Karen Franklin
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Julius P. Knapp
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ed Thomas, Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Bruce A. Franca
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alan Scrim
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

BY: /s/ Christine Biso
Christine Biso