

**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)

SUPPLEMENTAL RESPONSE OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Nextel Communications, Inc. (“Nextel”) hereby responds to the *ex parte* filing submitted by Verizon Wireless (“Verizon”) in this proceeding on February 26, 2004. In its letter, Verizon asks the Commission to adopt an 800 MHz-only band realignment rather than implement the Consensus Plan. In an attached legal memorandum, Verizon claims that the Commission can require Nextel to cover the retuning costs incurred by public safety and private wireless licensees. The Commission should not be distracted by Verizon’s self-serving arguments. Its proposal would not provide a feasible means of achieving the Commission’s goals in this proceeding: remedying interference to public safety systems in the 800 MHz band; minimizing disruption to existing licensees; and providing additional spectrum for public safety communications. Verizon’s anti-competitive proposal merely represents its latest effort to improve its bottom line at the expense of public safety communications.

As an initial matter, Verizon’s 800 MHz in-band realignment “proposal” is vague and incomplete, leaving too many important details to guesswork. It mentions that prior filings from other parties have discussed 800 MHz-only realignment, but those plans are significantly different from Verizon’s proposal and none offers a viable way to fund 800 MHz-only realignment. Verizon’s empty recommendation contrasts starkly with the Consensus Plan, which is the product of more than eighteen months of hard work and careful balancing among a broad cross-section of 800 MHz stakeholders.

Verizon’s filing also suffers from a flawed legal analysis. Having identified no other viable funding source, Verizon claims that the Commission could force Nextel to cover all incumbent relocation costs, citing the Commission’s Personal Communications Service (“PCS”) and 800 MHz Specialized Mobile Radio (“SMR”) overlay decisions. It is obvious that Verizon’s

anti-competitive self-interest is driving this argument – as this precedent is easily distinguishable from the current 800 MHz situation. In these cases, the Commission gave *new* licensees the right, at their own discretion and expense, to relocate affected site-licensed incumbents within their licensed geographic areas. In contrast, Verizon’s proposal would require incumbent licensees to move to alternative channels to effectuate a *Commission-mandated* 800 MHz spectrum band realignment made necessary by an out-of-date Commission-adopted band plan; in this process, Nextel itself would be displaced and relocated to alternative spectrum.

Verizon conveniently ignores this crucial distinction. Verizon seemed well aware of this difference in May 2002, however, when it argued that relocation funding obligations for commercial mobile radio service (“CMRS”) providers at 800 MHz could not be justified on the basis of decisions “requir[ing] applicants for a new service, as a condition to being licensed in the new service, to agree to pay the costs to clear the band.” Indeed, Verizon had it right then – the Commission cannot force Nextel or other commercial licensees to pay for retuning private wireless and public safety incumbents in a realignment of the 800 MHz Land Mobile Radio band, whether wholly in-band or otherwise. As a result, Verizon’s 800 MHz-only realignment proposal is unfunded and cannot be implemented.

In contrast, as the Commission is well aware, the Consensus Plan solves the funding problem by incorporating Nextel’s commitment to provide up to \$850 million for incumbent retuning, conditioned on Commission adoption of the Consensus Plan. Nextel has described in previous filings the mechanisms the Commission can use to enforce this commitment. The Consensus Plan is consequently the only proposal in this proceeding to provide a practical means of funding band realignment, which, as even Verizon now seems to acknowledge, is a

prerequisite for remedying the interference problem and improving public safety communications in the 800 MHz band.

Indeed, just to give some reasonable shape to Verizon's empty proposal, the Commission would likely have to include various implementation details from the Consensus Plan itself (a fact that underscores the Consensus Plan's superiority). But because Verizon's plan does not involve spectrum outside the 800 MHz band, such in-band realignment simply will not work. Critically, in-band only realignment will not eliminate public safety interference, and the measures that might at least reduce such interference could severely disrupt the operations of public safety and other existing 800 MHz licensees. Implementing rebanding without disrupting life-safety communications services is a bedrock principle of the Consensus Plan; Verizon's plan guarantees disruption of public safety communications.

Nor does Verizon's proposal appear to generate additional near-term 800 MHz spectrum for public safety communications. Additionally, in-band realignment would reduce Nextel's usable 800 MHz spectrum by up to 25 percent, greatly undermining its service to its customers and the Commission's statutory mandate to promote regulatory parity among CMRS providers. In short, Verizon's 800 MHz-only in-band realignment will not achieve the Commission's fundamental public interest goals; it will, however, place Nextel at a competitive disadvantage.

Verizon's flawed legal support and deficient proposal are in keeping with the cellular industry's non-constructive pattern of advocacy. Rather than take a constructive approach to the issues facing public safety communications, the industry has offered a hodge-podge of ever-changing, counterproductive, and self-contradictory responses. Verizon's February *ex parte* filing is just its latest delaying tactic. The Commission should reject its in-band realignment proposal and expeditiously adopt the legally sound and fully-funded Consensus Plan.

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SUPPLEMENTAL RESPONSE OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”) hereby responds to the *ex parte* letter and legal memorandum filed by Verizon Wireless (“Verizon”) in this proceeding on February 26, 2004.¹ The Federal Communications Commission (“Commission”) should not be distracted by Verizon’s filing, which represents that company’s latest effort to further its corporate interests at the expense of public safety communications. Verizon’s 800 MHz in-band only realignment “proposal” is not a viable legal, technical, or policy option for achieving the Commission’s goals in this proceeding. The Commission should remain focused on its public interest obligations and expeditiously adopt the Consensus Plan.

I. Introduction and Overview

In its February 26 *Ex Parte*, Verizon states that the Commission should adopt an 800 MHz-only band realignment rather than implement the Consensus Plan. In its attached *Ex Parte*

¹ Letter from John T. Scott, III, Verizon Wireless, to Marlene H. Dortch, FCC (Feb. 26, 2004) (“*Verizon Ex Parte*”) and attached memorandum entitled “The Federal Communications Commission Lawfully May Order Nextel to Pay the Costs of Relocating Incumbent 800 MHz Licensees” (Feb. 27, 2004) (“*Verizon Ex Parte Memorandum*”). (Unless otherwise indicated, all comments and *ex parte* submissions referenced herein were filed in WT Docket No. 02-55.)

Memorandum, Verizon argues that the Commission can require Nextel to cover the retuning costs incurred by public safety and private wireless licensees in this 800 MHz-only realignment.

Incomplete and ineffective proposal. Verizon's 800 MHz in-band realignment "proposal" is so vague and incomplete that it does not warrant consideration by the Commission. First, Verizon fails to provide any significant retuning detail; it provides only two 800 MHz spectrum charts that show the current segmentation of the band and how the band would be segmented post-realignment, providing no detail whatsoever about how the band would be realigned and the technical rules that would govern the realigned band. Second, while it alludes to prior filings that discussed 800 MHz-only realignment, those plans differ in significant ways from Verizon's proposal and none offers a viable way to fund 800 MHz-only realignment.² Verizon's proposal stands in stark contrast to the comprehensive Consensus Plan – the product of more than 18 months of hard work and careful balancing among a broad cross-section of directly affected 800 MHz stakeholders. Verizon's proposal falls far short of the Consensus Plan in offering an integrated, comprehensive realignment plan and retuning incumbent licensees accordingly.

Third, even if the Commission were to assume enough implementation details to give some reasonable shape to Verizon's suggestions, an in-band only realignment proposal will not

² Verizon omits, of course, the extensive discussion in the record of the inadequacy of the previously filed in-band realignment alternatives and the obvious fact that, as a result, none are being seriously considered. *See, e.g.*, Comments of Association of Public-Safety Communications Officials-International, Inc., National Association of Counties, National League of Cities, and National Association of Telecommunications Officers and Advisors at 23-24 (May 6, 2002) (opposing 800 MHz-only rebanding plan submitted by the National Association of Manufacturers ("NAM") and MRFAC, Inc. ("NAM Plan")); Comments of Nextel at 26-27 (May 6, 2002) (opposing NAM Plan); Comments of the State of Maryland at 2-3 (May 6, 2002) (opposing NAM Plan); Comments of the Industrial Telecommunications Association, *et al.* ("Consensus Parties") at 3-4 (Sept. 23, 2002) (opposing 800 MHz-only realignment proposed by Motorola ("Motorola Plan")); Comments of Aeronautical Radio, Inc., *et al.* ("SRGPE Joint Commenters") at 4-5 (Sept. 23, 2002) (opposing Motorola Plan).

achieve the Commission's fundamental public interest objectives in this proceeding.³ In-band only realignment will not eliminate public safety interference; it would, however, cause substantial disruption to public safety and other incumbent 800 MHz licensees. Nor does Verizon's proposal appear to generate additional near-term 800 MHz spectrum for public safety communications.

Flawed and inconsistent legal analysis. The legal analysis in Verizon's *Ex Parte Memorandum* is also incorrect. Verizon claims that "[s]hould the Commission decide to relocate public-safety users from their current home in the 800 MHz band, and to license Nextel to use that spectrum in their place, it would be well within its rights to order that Nextel bear the former's relocation costs."⁴ Verizon mistakenly sees 800 MHz rebanding only in terms of *Nextel* being awarded spectrum and public safety licensees being *displaced* from their spectrum. These characterizations distort both the Consensus Plan and the Commission's objectives of eliminating interference with minimal incumbent service disruptions and providing additional 800 MHz channels for public safety communications. In support of its position, Verizon cites three cases in which the Commission imposed incumbent relocation payment obligations on entities applying for entirely new initial authorizations in spectrum bands where the Commission was implementing new allocations or licensing schemes: (i) the Commission's order requiring new Ka-band satellite licensees to pay for the relocation of fixed terrestrial licensees (and the D.C. Circuit's decision upholding that order),⁵ (ii) the Commission's decision requiring new

³ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rulemaking, 17 FCC Rcd 4873, ¶ 2 (2002) ("NPRM").

⁴ *Verizon Ex Parte Memorandum* at 6.

⁵ *Teledesic v. FCC*, 275 F.3d 75 (D.C. Cir. 2001); *Redesignation of the 17.7-19.7 GHz Frequency Band*, Report and Order, 15 FCC Rcd 13430 (2000).

Personal Communications Services (“PCS”) licensees to compensate displaced fixed microwave users at 1.9 GHz,⁶ and (iii) the Commission’s orders requiring new 800 MHz geographic area-overlay Specialized Mobile Radio (“SMR”) licensees to bear the relocation costs of affected site-licensed incumbents.⁷

The precedent Verizon cites is easily distinguishable from the mandatory 800 MHz spectrum realignment at issue herein. In each of the cases Verizon cites, the entities subject to the payment obligation were gaining entirely *new* authorizations in spectrum bands where the Commission was implementing new allocations or licensing schemes. This would not be the case with an 800 MHz-only in-band realignment in which Nextel itself would be displaced and moved to new frequencies pursuant to the Commission’s Section 316 license modification authority.⁸ Here, the Commission is considering a mandatory band realignment to correct an outdated spectrum band plan that is itself giving rise to interference. Under in-band realignment, or even under the Consensus Plan, Nextel would not be “displacing” public safety licensees under an entirely new or initial authorization from the Commission; rather, Nextel itself would be displaced and relocated to alternative spectrum with such frequencies merely replacing spectrum already licensed to Nextel under its existing authorizations. Both geographic-area licensed incumbents and site-licensed incumbents (including Nextel) will have to retune in accordance with the proposed realignment of the 800 MHz land mobile spectrum into discrete,

⁶ *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992).

⁷ *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, 11 FCC Rcd 1463 (1995); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd 19079 (1997).

⁸ 47 U.S.C. § 316.

exclusive channel blocks for high-site and low-site system architectures. Whether in band or otherwise, this type of Commission-prescribed spectrum reassignment and associated license modification is completely different from a licensee choosing to apply for an initial geographic area license with knowledge that it will be encumbered by site-licensed incumbents, unless it pays the cost of retuning or relocating those incumbents to comparable spectrum.

In the relocation decisions involving PCS and 800 MHz SMR licensees, the Commission gave those initial geographic area licensees the right, at their own discretion and expense, to relocate affected site-licensed incumbents within their geographic areas. In those instances, applicants for the new geographic area licenses had the opportunity to consider the incumbents' rights in determining whether to apply for and how much to pay for overlay geographic licenses. The funding issue in the instant proceeding is entirely different, involving incumbent licensees being required by the Commission to move to alternative channels to effectuate a *Commission-mandated* 800 MHz spectrum band realignment necessary to alleviate public safety interference resulting from previous Commission spectrum management decisions that have become technically unsound. Verizon ignores this crucial distinction.

Verizon was fully cognizant of this distinction earlier in this proceeding when it asserted that the Commission could not require it and other cellular providers to pay a portion of the retuning expenses of incumbent 800 MHz licensees. Asserting, "there is no precedent or legal authority that could support" such an obligation, Verizon stated that the Commission had previously dealt with relocation costs in two ways:

In some circumstances, [the Commission] has left the cost of relocation to the licensees who are moving to new spectrum bands. In other cases, it has required applicants for a *new service*, as a condition to being licensed in the *new service*, to agree to pay the costs to clear the band, reasoning that this relocation cost can be factored into the applicant's decision to acquire the

license. Neither approach would authorize the imposition of public safety's relocation costs on cellular licensees.⁹

Thus, under Verizon's initial legal analysis, its 800 MHz-only realignment proposal is not funded and therefore impossible to implement, and Verizon's previous legal arguments flatly contradict its new position.¹⁰ Verizon had it right the first time in May 2002 – the Commission cannot require 800 MHz CMRS licensees to pay for retuning private wireless and public safety incumbents in an 800 MHz spectrum band realignment – whether wholly within band or otherwise.¹¹ As Verizon unequivocally stated then, “[t]here is no precedent or legal authority that could support” imposing incumbent retuning costs on CMRS licensees.¹²

Non-constructive pattern of advocacy. Verizon's empty proposal and deficient legal support are in keeping with the cellular industry's non-constructive pattern of advocacy in this proceeding. Rather than take a constructive approach to the issues facing public safety communications, the industry has offered a hodge-podge of ever-changing, counterproductive, and self-contradictory responses. In addition to its newly-advocated 800 MHz-only realignment, Verizon and the other cellular carriers have variously argued: (i) that cellular carriers do not significantly contribute to 800 MHz interference, notwithstanding definitive evidence to the

⁹ Comments of Verizon Wireless at 16-17 (emphasis added; footnotes omitted) (“Verizon May 6 Comments”). In fact, Verizon's comments were directed at the suggestion that Nextel and 800 MHz cellular licensees – all of whom contribute to the interference problem – should jointly fund 800 MHz incumbent retuning costs, regardless of whether part of an in-band only realignment or including replacement spectrum outside 800 MHz.

¹⁰ As the Commission is well aware, the Consensus Plan solves the funding problem by incorporating Nextel's commitment to provide up to \$850 million for incumbent retuning, conditioned on Commission adoption of the Consensus Plan. Nextel has described in previous filings the mechanisms the Commission can use to enforce this commitment. *See, e.g.*, Supplemental Comments of Nextel Communications, Inc. (Nov. 3, 2003). Clearly, the Commission can condition a license modification or grant on the licensee's compliance with its voluntary agreement to fund the retuning expense of other licensees.

¹¹ Nextel, along with Verizon, is a CMRS licensee.

¹² Verizon May 6 Comments at 16.

contrary;¹³ (ii) that 800 MHz licensees should continue using Best Practices, either in their current form or under the so-called “Balanced Approach,” despite the fact that such techniques were never intended to be a permanent solution and have already proven insufficient to alleviate public safety interference;¹⁴ (iii) that public safety licensees should improve the robustness of their own systems, despite the fact that such changes would impose enormous new costs on budget-strapped public safety agencies and state and local governments;¹⁵ (iv) that all 800 MHz public safety systems should be relocated to the 700 MHz band, despite the fact that this would require replacing all public safety infrastructure in the country without any funding therefor, and despite the fact that 700 MHz remains heavily encumbered by broadcast television operations;¹⁶ and (v) that the Commission should adopt some combination of all of these policies.¹⁷ Verizon’s *Ex Parte* and attached legal memorandum are just its latest delaying tactic. Its contentious, counterproductive efforts in this proceeding are directly contrary to a recent admonition from its landline parent company: “*Don’t put the future on hold with more litigation.*”¹⁸ The Commission should reject Verizon’s proposal and expeditiously adopt the legally sound and fully-funded Consensus Plan.

¹³ Verizon May 6 Comments at 6-7. *See also* Comments of Cingular Wireless LLC and ALLTEL Communications, Inc. at 2-4 (May 6, 2002) (“Cingular/ALLTEL”); Comments of United States Cellular Corp. at 3 (May 6, 2002).

¹⁴ Verizon May 6 Comments at 2. *See also* 800 MHz User Coalition proposal, attached to Letter from Diane Cornell, Cellular Telecommunications & Internet Association (“CTIA”) to Marlene H. Dortch, FCC (June 11, 2003) and Letter from Jill Lyon, United Telecom Council (“UTC”) to Marlene Dortch, FCC (May 29, 2003).

¹⁵ Verizon May 6 Comments at 9-10.

¹⁶ Comments of Verizon Wireless at 16-18 (Sept. 23, 2002) (“Verizon Sept. 23 Comments”). *See also* Comments of CTIA at 9-10, Cingular/ALLTEL at 16-19, and Southern LINC at 27-30 (May 6, 2002).

¹⁷ *See* Verizon Sept. 23 Comments. *See also* Comments of CTIA at 11-15 (Feb. 10, 2003).

¹⁸ “A New Dawn for Broadband Communications in America,” Verizon Communications (as appearing in Roll Call at 32 (Mar. 30, 2004) (emphasis added)).

II. 800 MHz-only Realignment is Not a Viable CMRS – Public Safety Interference Solution from a Technical, Legal, or Policy Perspective

A. 800 MHz-only realignment will not remedy CMRS – public safety interference

The overriding goal of this proceeding is to eliminate the CMRS – public safety interference that threatens the safety of first responders and the public they serve. Achieving this outcome requires a comprehensive approach that proactively addresses the fundamental causes of such interference, particularly interference due to intermodulation (“IM”) and out-of-band emissions (“OOBE”).

Verizon’s proposal is far from comprehensive. For example, it proposes no post-realignment technical constraints on cellular systems immediately adjacent to 816/861 MHz, the demarcation line between the proposed cellular and non-cellular (public safety/private wireless) channel blocks. Without such restrictions, public safety and private wireless licensees in the 806-816/851-861 MHz channel block would experience OOBE and IM interference from adjacent low-site cellular operations. Licensees operating in the 814-816/859-861 MHz channels immediately adjacent to the cellular band would be particularly affected.

In contrast, Appendix F of the Consensus Plan includes technical measures that are key to preventing post-realignment interference. First, cellularized carriers above 816/861 MHz (both Nextel and cellular A block licensees) will be required to install filters at their base stations where necessary to prevent OOBE interference to public safety and private wireless systems. Second, Appendix F will impose certain operational restrictions on low-site deployment of the 816-818/861-863 MHz channels that are directly adjacent to the high-site channel block and are today licensed predominately to Nextel. These restrictions and filtering will protect public safety and private wireless licensees – particularly those in the 814-816/859-861 MHz channel block – from post-realignment, CMRS – public safety interference.

Moreover, Appendix F provides for the first time a clear and comprehensive definition of the interference rights and responsibilities of all 800 MHz licensees. Appendix F provides the standards necessary to make objective determinations regarding the cause or causes of any post-realignment CMRS – public safety interference, and assigns responsibility for mitigating such interference on the basis of those findings.

Of course, Verizon could respond to this critique by saying that Appendix F should apply under its proposal as well.¹⁹ Verizon might also say that its plan requires Nextel to surrender 2.5 MHz of its current 800 MHz spectrum, for example, to create the necessary “green space” to implement realignment, or to contribute to public safety use, or perhaps because Verizon knows full well that 800 MHz-only realignment is impractical unless some incumbent(s) surrender sufficient spectrum to make it possible. Such detail, however, would expose Verizon’s true objective in this proceeding: to manipulate the Commission’s interference resolution efforts to achieve a competitive advantage over Nextel, as discussed further below.

Unlike Verizon’s proposal, the Consensus Plan includes numerous interrelated provisions that, in combination, would completely resolve CMRS – public safety interference while providing additional 800 MHz spectrum for public safety communications and minimizing disruption of incumbents.²⁰ The Consensus Plan acknowledges that 800 MHz-only realignment will not eliminate public safety interference unless existing 800 MHz incumbents – public safety licensees, private wireless operators, or Nextel – relinquish some of their existing channel

¹⁹ Alternatively, Verizon may intend to propose rules requiring public safety and other non-cellular operators below 816/861 MHz to upgrade their systems so that they are more resistant to cellular base station interference, as cellular commenters have previously suggested in this proceeding. *See, e.g.*, Verizon May 6 Comments at 9-10. This would, of course, require public safety systems to increase on-street signal strength by constructing additional base stations, which would impose large, unfunded costs on public safety agencies.

²⁰ *See, e.g.*, Reply Comments of the Consensus Parties (Feb. 25, 2003).

assignments and accept the operating restrictions necessary to eliminate interference. Accordingly, the Consensus Plan requires Nextel to contribute 2.5 MHz to better separate incompatible systems and imposes the channel use restrictions set forth in Appendix F on Nextel as part of the overall realignment solution that assigns Nextel replacement spectrum at 1.9 GHz. The Consensus Plan thus provides a comprehensive remedy to 800 MHz interference.

The Verizon proposal, in contrast, would exacerbate the interference problem. As explained in Section II.D., below, Verizon's proposal would effectively reduce Nextel's 800 MHz spectrum by 25%. This would not only greatly hamper Nextel's ability to serve its customers – and contradict the Commission's statutory mandate to promote regulatory parity – it would impose such severe spectrum restraints on Nextel that it would not have the flexibility to operate its 800 MHz network in a manner that minimizes interference to public safety systems. Verizon's proposal thus would only make the interference problem worse.

Interestingly, two other opponents of the Consensus Plan – Cingular and AT&T Wireless – have recently underscored this point in recognizing that giving CMRS carriers the flexibility to use different frequencies is a critical component of remedying interference to public safety systems at 800 MHz. In their applications seeking consent to transfer control of AT&T Wireless' licenses to Cingular, these two parties state that “[b]y granting the subject applications, the Commission will alleviate spectrum constraints faced by Cingular in many areas. This will positively affect public safety because the additional frequencies will allow Cingular ‘to react in a more flexible manner if its operation did affect public safety licensees.’”²¹ Verizon's proposal

²¹ FCC Form 603, File No. 0001656065, Exhibit 1 at 24 (filed March 18, 2004) (quoting *Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc.; For Consent to Assignment of Licenses*, Memorandum Opinion and Order, 16 FCC Rcd 21105, 21112 (WTB 2001)).

flies in the face of this statement because it would *reduce* Nextel's spectrum and therefore its flexibility to prevent interference to public safety systems.

B. 800 MHz-only realignment would disrupt the operations of incumbent 800 MHz licensees

An 800 MHz-only realignment would fail to meet the Commission's second key public interest objective in this proceeding: minimizing disruption to incumbent licensees. Without a lawful, identifiable funding source, 800 MHz-only realignment is impractical, since public safety licensees cannot self-fund relocation from their already-strained public sector budgets. Funding delays and interruptions would cause severe disruption to public safety communications services.

Moreover, Verizon's proposal ignores the critical requirement that individual incumbents must retune to the new band plan without experiencing potentially life-threatening service disruption. Unlike the Consensus Plan, which was developed with the extensive participation of experienced public safety engineers, system managers and operators, Verizon's proposal does not address any of the particulars of retuning an individual public safety system, much less coordinating retuning among all of the systems in a region, particularly where adjacent systems have mutual assistance or channel interoperability agreements. Verizon does not even acknowledge the possibility that some incumbent systems may require temporary construction and operation of a duplicate system to retune without disrupting safety-of-life communications. In such cases, two parallel systems will be in operation at the same time, one on the licensee's original channels and one on the licensee's post-realignment channels.

Verizon's in-band only realignment proposal assumes that realignment is just a simple "flash cut" on a channel-for-channel basis and leaves no open spectrum or "green space" for these kinds of essential accommodations for retuning public safety communications networks. An effective and successful retuning plan must provide "green space" to operate temporary

systems or for interim retuning where necessary. It must also provide sufficient spectrum “green space” for accommodating coordination among individual systems in a regional network to assure continuity and mutual assistance obligations. These considerations require channel use flexibility that is not possible under Verizon’s in-band-only proposal.

Avoiding public safety and private wireless disruption during the realignment transition process is a bedrock principle of the Consensus Plan. This paramount principle was considered in developing all aspects of the Consensus Plan, including data collection requirements, implementation time frames, and cost estimates. Under the Consensus Plan, Nextel will leverage the inherent frequency agility of its network at 800 MHz and 900 MHz, along with its replacement spectrum at 1.9 GHz, to make the spectrum concessions necessary at 800 MHz to enable seamless retuning of non-Nextel incumbents. Nextel itself will absorb much of the disruption of the retuning process – in particular by having to retune its own 800 MHz operations at least twice – in conjunction with its assignment to 1.9 GHz replacement spectrum not adjacent to, interleaved with or otherwise impacting public safety communications systems.

Making additional 800 MHz channels available for public safety communications is another bedrock principle of the Consensus Plan and would achieve one of the Commission’s primary goals in this proceeding.²² Indeed, the voluminous record developed herein clearly demonstrates the urgency of public safety’s need for additional capacity to facilitate interoperability and to carry out increased Homeland Security responsibilities. The Consensus Plan will meet this need; Verizon’s ill-defined 800 MHz-only realignment proposal is silent on this matter.

²² *NPRM* ¶2. Post-realignment, the Consensus Plan frees up on average 2.5 MHz of spectrum between 809/854 MHz and 814/859 MHz for public safety communications systems. This would increase public safety’s allocation in the 800 MHz band by 25 percent.

Verizon's proposal will not only disrupt public safety and private wireless incumbent services, it would unlawfully, unfairly, and punitively disrupt Nextel's 800 MHz operations. As discussed above, Verizon's in-band only realignment proposal will not work unless it mirrors the Consensus Plan in terms of Nextel (or other incumbents) surrendering 2.5 MHz for "green space" retuning flexibility and ultimately public safety communications use, and imposes Appendix F type restrictions on low-site operations adjacent to the high-site channel block. Subjecting Nextel to these use restrictions is equivalent in operational impact to surrendering an additional 2 MHz. Thus, combined with the 2.5 MHz contribution discussed above, Nextel would face the loss or limited use of 4.5 MHz – about 25 percent of its total 800 MHz spectrum position.

The Consensus Plan accommodates these spectrum concessions by providing Nextel with replacement channels at 1.9 GHz; Verizon's proposal does not. Stated simply, Verizon's 800 MHz in-band only realignment proposal *would deny Nextel a level playing field in the CMRS marketplace*. Verizon's proposal amounts to an unprecedented and unjustifiable license revocation, and it could not survive judicial review for any number of reasons, including that it is (i) arbitrary and capricious, (ii) inconsistent with the Commission's statutory obligation to promote regulatory parity, and (iii) in violation of the constitutional prohibition on government takings without just compensation. The litigation risk of Verizon's ineffective and transparently anti-competitive in-band realignment proposal should by itself lead the Commission to eliminate it from consideration.

C. Verizon's Proposal would not produce the valuable public interest benefits of the Consensus Plan

Nextel and the Consensus Parties have described in this proceeding how the Consensus Plan will provide enormous benefits for the public safety community and society as a whole.²³ Verizon continues to ignore the Consensus Plan's demonstrated public interest benefits, described in detail in a November 20, 2003 study by the Sun Fire Group entitled "The Consensus Plan: Promoting the Public Interest – A Valuation Study."²⁴ The Sun Fire Group Study demonstrated that by improving public safety communications, the Consensus Plan will save lives, the true value of which cannot be measured in monetary terms. The Sun Fire Group Study estimated that if improved public safety communications reduce the societal losses from crime and fire by a mere one-tenth of one percent, the nation will save *over \$1 billion every year*. Verizon would sacrifice the best interests of public safety personnel in its single-minded focus on gaining competitive advantage over Nextel.

D. Increased contiguous spectrum at 800 MHz would not benefit Nextel or justify a requirement that Nextel cover the cost of incumbent retuning

Verizon attempts to buttress its defective legal argument by suggesting that Nextel will unfairly benefit from 800 MHz realignment, and that because of this "windfall," "Nextel should be obligated to pay for all realignment expenses, to ensure that public safety licensees incur no cost from implementation of the plan."²⁵ As Nextel has explained elsewhere in this proceeding,

²³ Comments of Nextel Communications, Inc. at 3-12 (Sept. 23, 2002); Reply Comments of Nextel Communications, Inc. and Nextel Partners, Inc., at 2-7 (Feb. 25, 2003); *Ex Parte* Submission of the Consensus Parties, at 6-8 (Aug. 7, 2003) ("Consensus Parties' Aug. 7 *Ex Parte*").

²⁴ Dr. Kostas Liopiros, Sun Fire Group LLC, "The Consensus Plan: Promoting the Public Interest – A Valuation Study," attached to Letter from Lawrence R. Krevor, Nextel, to Marlene H. Dortch, FCC (Nov. 20, 2003) ("Sun Fire Group Study").

²⁵ *Verizon Ex Parte* at 3-4.

however, *Verizon's "windfall" spectrum valuation claims are blatantly flawed;*²⁶ Verizon's 800 MHz-only realignment plan would only further disadvantage Nextel by depriving it of a minimum of 2.5 MHz of spectrum *and limited use of another 2 MHz – 25% of its 800 MHz spectrum – without assigning Nextel any replacement spectrum.* It defies credibility to believe that Nextel could suffer such spectrum losses and derive *any* benefit, much less receive some sort of "windfall" spectrum valuation.

Furthermore, Verizon's assertion that replacing 8.5 MHz of Nextel's current non-contiguous spectrum at 800 MHz with 6 MHz of contiguous spectrum would create a windfall is equally without merit. Contrary to Verizon's claims, Nextel's capacity and operational losses from a net spectrum reduction of 2.5 MHz at 800 MHz will not be offset by having *fewer* channels in a contiguous block. Despite more than two years of comment and analysis in this proceeding, Verizon apparently still does not understand that Nextel's iDEN® technology was developed from the ground up and optimized over a decade to provide competitive cellular communications services over non-contiguous spectrum. Nextel's near-nationwide iDEN® network today uses both contiguous and non-contiguous 800 MHz and 900 MHz channels to serve over 12 million subscribers who subscribe longer and pay more per month than the customers of any other cellular carrier in the United States. Nextel would receive little direct value, if any, from replacing 8.5 MHz of non-contiguous spectrum with 6 MHz of contiguous spectrum.

²⁶ See, e.g., "What Windfall? A Review of the Valuation Components of the Consensus Plan," attached to Letter from Regina M. Keeney, Counsel for Nextel, to Marlene H. Dortch, FCC (Mar. 19, 2004).

Nextel recently submitted a report by Dr. Gregory Rosston that supports this conclusion.²⁷ Dr. Rosston explains that the incremental value to Nextel of replacing non-contiguous 800 MHz spectrum with contiguous 800 MHz spectrum is likely very low because Nextel has made substantial investments in iDEN® technology that enable it to offer highly competitive wireless communications, including the nation's preeminent "push-to-talk" service, over a combination of contiguous and non-contiguous spectrum. Replacing its network infrastructure at over 16,000 cell sites and replacing over 12 million customer handsets in order to use a technology requiring contiguous spectrum would impose significant economic costs on Nextel, including technology costs, opportunity costs, and transition costs – making it very unlikely for Nextel to replace its current 800 MHz technology. In other words, the increased spectrum efficiency that a contiguous spectrum technology may in theory offer is offset by the costs of replacing Nextel's existing, highly efficient spectrum technology.

Even if, however, Nextel experienced some indirect benefit from an 800 MHz-only realignment, that benefit alone would not justify imposing relocation payment obligations on Nextel. While the Commission frequently takes action that increases the value of a licensee's spectrum holdings, such action in and of itself does not provide a basis for the Commission to seek payment from those beneficiaries. Verizon cites no precedent to the contrary.²⁸ In fact, Verizon's argument on this point is blatantly hypocritical, given that Verizon, its predecessors,

²⁷ Gregory L. Rosston, "Economic Analysis of the Kane Reece Spectrum Valuation," attached to Letter from Lawrence R. Krevor, Nextel, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (Mar. 18, 2004).

²⁸ From an economic point of view, consolidating Nextel's 800 MHz channels into a contiguous block represents at most an option that Nextel could exercise to transition to a contiguous spectrum technology at some future date. This option would have little value, however, given the obstacles described above.

and other cellular providers have over the years obtained numerous FCC rule modifications that significantly enhanced the value of their spectrum.

For example, the Commission has amended its rules to give cellular licensees greater flexibility in the types of technologies they may use and in the types of services they can provide to customers.²⁹ These rule changes have created new business opportunities and efficiencies that have significantly benefited these operators. Chief among these is the 1995 rule change that eliminated the Commission's long-standing prohibition on cellular carriers offering two-way dispatch service; *i.e.*, the increasingly popular "walkie-talkie" service that Nextel has brought into the commercial wireless mainstream.³⁰ Recent walkie-talkie product introductions by Verizon and other carriers were made possible by that Commission decision. The cellular carriers never objected to or characterized their own increased opportunities as "windfalls"; to the contrary, the cellular carriers aggressively sought these opportunities, and at no point did they volunteer to compensate the Commission or any other party for such benefits.

E. Imposing relocation payment obligations on Nextel would violate the Commission's CMRS regulatory parity mandate

Imposing public safety and private wireless incumbent relocation costs on Nextel as part of Verizon's 800 MHz-only realignment proposal would violate the Commission's statutory

²⁹ See, *e.g.*, *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, Report and Order, 17 FCC Rcd 18401, ¶¶5-33 (2002) ("*Analog Sunset Order*") (eliminating, after a five-year transition period, the requirement that cellular carriers continue to provide analog service); Reply Comments of Nextel at 26-27 (Aug. 7, 2002) ("*Nextel Aug. 7 Reply Comments*") (describing FCC decisions allowing cellular carriers to deploy new technologies and services, including digital service and paging, and allowing cellular and other CMRS providers to offer fixed wireless services on a co-primary basis with commercial mobile services).

³⁰ See *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, Report and Order, 10 FCC Rcd 6280 (1995).

mandate to ensure regulatory parity among CMRS providers. This is another legal bar to Verizon's realignment funding proposal. Regulatory parity is a fundamental requirement established by Congress in the Omnibus Budget Reconciliation Act of 1993 ("1993 Act").³¹ The 1993 Act created the CMRS regulatory classification and explicitly directed the Commission to modify its technical, operational, and licensing rules for common carrier and private mobile radio services "to establish regulatory symmetry among similar mobile services."³² In enacting this legislation, Congress' intent was "to create a level regulatory playing field for CMRS."³³ As the Commission has described, the "broad goal of this [legislation] is to ensure that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace."³⁴

Verizon's proposal is particularly offensive to regulatory parity given the fact that cellular A and B block licensees will benefit significantly from 800 MHz rebanding.³⁵ Cellular licensees' operations currently contribute to approximately 25% of CMRS – public safety

³¹ Pub. L. No. 103-66, Title VI, § 6002(b)(2), (c) & (d), 107 Stat. 312 (1993), codified at 47 U.S.C. § 332(c) and accompanying note.

³² *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, ¶ 1 (1994) ("1994 Third Report and Order").

³³ *1994 Third Report and Order* ¶ 11. *See also* H.R. Rep. No. 103-111 (1993) (1993 Act "directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar. In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services."); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 967 (D.C. Cir. 1999) ("As to certain services that had been considered private under the prior definition but now would be classified as commercial, the Commission was required to promulgate 'technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar [commercial] services.'").

³⁴ *1994 Third Report and Order* ¶ 4.

³⁵ While Verizon says that public safety interference in the 800 MHz band is "being caused by Nextel" (*Verizon Ex Parte* at 2), the significant role of cellular carriers in CMRS – public safety interference has been confirmed by third-party experts. The cellular contribution to this interference has been documented, for instance, in Anne Arundel County, Maryland, Phoenix, Arizona, and Denver, Colorado. *See* Consensus Parties' Aug. 7 *Ex Parte* at 17 n.34.

interference. Under Verizon's proposed realignment of the 800 MHz band, cellular licensees would enjoy greater operational flexibility and be relieved of the burdens of addressing CMRS – public interest interference on an ongoing, *ad hoc* basis – all without having to retune their systems or provide any relocation funding for other incumbents.

In particular, cellular A block carriers would benefit by being able to deploy, for the first time, digital broadband CMRS operations in the lower portion of their frequency bands. These cellular carriers have typically located their legacy analog systems in the lower part of their band, *i.e.*, directly adjacent to the current NPSPAC block at 821-824/866-869 MHz. Under the 2002 *Analog Sunset Order*, these analog cellular systems may be phased out by early 2008.³⁶ Cellular A block carriers are eager to convert these systems to digital modulation, and are likely to utilize CDMA or other wideband digital technologies. Without 800 MHz realignment, however, this cellular A broadband deployment would exponentially increase interference on the adjacent NPSPAC public safety channels. Accordingly, 800 MHz realignment – whether in-band or as proposed in the Consensus Plan – would not only give both the cellular A and B carriers a virtual free ride on eliminating public safety interference, but cellular A band licensees would also gain a spectrum valuation and deployment windfall.

Certainly, there is nothing about the conditions in the 800 MHz band that justifies singling out Nextel for blame and ignoring the statutory mandate for CMRS regulatory parity. CMRS – public safety interference is a complex problem resulting from numerous actions and developments over the last several decades, including the Commission's 800 MHz band plan decisions, public safety radio operators' choice of system architecture, the adoption of new,

³⁶ See *Analog Sunset Order* ¶¶ 5-33; 47 C.F.R. § 22.901(b).

Commission-approved technologies by SMR and cellular providers,³⁷ and the unanticipated growth in CMRS and public safety traffic.³⁸ CMRS operators whose base station signals interfere with public safety communications are typically operating in full compliance with their licenses; Nextel, in particular, has operated and continues to operate in full compliance with the terms and conditions of its licenses and the Commission's regulatory structure.³⁹

III. Conclusion

Unlike Verizon, the public safety community recognizes the Consensus Plan's enormous public interest benefits. Rather than pursue a fatally flawed 800 MHz-only rebanding, the

³⁷ In its letter, Verizon points to statements by Nextel's predecessor Fleet Call, Inc. in its 1990 waiver request regarding the need for full and continuing protection of public safety licensees. *Verizon Ex Parte* at 4 n.3 (citing *Application of Fleet Call, Inc. for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules* at 33-34 (Apr. 5, 1990)). Verizon's lame attempt to misuse these statements fourteen years later is completely off the mark. *Nextel has fully protected public safety licensees in the 800 MHz band from the types of interference that were understood to be possible in 1990 (and to which Fleet Call's 1990 statement was directed)*. Nextel has designed its operations to provide sufficient co-channel and adjacent-channel mileage separations to avoid causing either type of interference to 800 MHz public safety systems.

The CMRS – public safety interference that has emerged in the last several years is not co-channel or adjacent channel interference, but stems from IM and OOB triggered by the mixing of high-site and low-site system architecture on interleaved spectrum. *It is categorically different from what was contemplated in 1990 in the Fleet Call waiver proceeding*. This recent interference is the product of the dramatic growth of CMRS and public safety systems in the late 1990s, a development that the Commission itself has recognized was unanticipated. Thus, the Commission has already concluded that this interference is the product of the outdated, interleaved band plan at 800 MHz (*NPRM* ¶¶15, 20). Verizon's effort to single out a specific party for blame highlights its desire to manipulate the regulatory process for competitive gain and belies its claimed interest in improving public safety communications. In any case, the regulatory parity principles of the 1993 Act require comparable regulatory obligations for all CMRS licensees.

³⁸ See Nextel Aug. 7 Reply Comments at 38-45.

³⁹ Nextel has at all times complied with the Commission's general operating requirements in sections 90.173 and 90.403, having taken all reasonable steps to avoid interference to public safety and other licensees. 47 C.F.R. §§ 90.173, 90.403. Nextel has also complied with all other technical and operational requirements in Part 90, Subpart S, that are applicable to its digital SMR system.

leading public safety organizations have endorsed the Consensus Plan, and played a critical role in the Plan's development in cooperation with private wireless organizations and Nextel. Hundreds of other public safety agencies and officials have also expressed their support for the Consensus Plan. In contrast to Consensus Plan opponents, these parties have worked diligently toward a proactive solution to 800 MHz interference that will serve the public interest. The Commission should reject Verizon's latest attempt at delay and expeditiously adopt the plan that has received overwhelming support in the public safety community.

Respectfully submitted,

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