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April 2, 2004

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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation, WT Docket No. 02-55

Dear Ms. Dortch:

On April 1, 2004, John T. Scott, Donald C. Brittingham, and Paul Marsh of Verizon Wireless, and I of this firm, met with Commissioner Jonathan S. Adelstein, as well as Barry Ohlson and Anne Perkins of Commissioner Adelstein's staff, to discuss the above-referenced docket.

During the meeting, we discussed the Commission's legal authority to order the payment of relocation costs. We also discussed the Commission's lack of authority to award licenses outside of the competitive bidding process established by Section 309(j) of the Communications Act. Copies of the attached documents were distributed at the meeting.

Also, on April 2, 2004, Helgi C. Walker of this firm and I had a telephone conversation with Anne Perkins of Commissioner Adelstein's staff. We discussed the Commission's authority to grant bidding credits when conducting auctions.

In conformance with the Commission's ex parte rules, this document is being filed electronically in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Sincerely,

/s/

R. Michael Senkowski

cc (by email): Commissioner Jonathan S. Adelstein
Barry Ohlson
Anne Perkins

**THE FEDERAL COMMUNICATIONS COMMISSION
HAS NO AUTHORITY TO AWARD SPECTRUM TO NEXTEL
THROUGH A PRIVATE SALE**

April 1, 2004

Prepared by

Wiley Rein & Fielding LLP

for Verizon Wireless

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EXECUTIVE SUMMARY

The Federal Communications Commission (“Commission” or “FCC”) is considering proposals to remedy interference problems in the 800 MHz band resulting from Nextel’s introduction of cellular infrastructure into spectrum designed for high-site and high-power public-safety facilities. Several proposed solutions would involve selling spectrum to Nextel in the unrelated 1.9 GHz band, in exchange for the company’s agreement to fund the costs of solving the 800 MHz interference problem it has created. Verizon Wireless (“Verizon”) agrees that the Commission must act expeditiously to protect critical public-safety communications. But it must do so by adopting a solution that comports with the demands of the Communications Act. This memorandum demonstrates that the FCC has no legal authority to grant Nextel spectrum in the 1.9 GHz band through a predetermined, private sale. Rather, Section 309(j) of the Communications Act obliges the Commission to award this spectrum by conducting an auction in which all qualified prospective buyers are free to participate.

1. *The Act Provides Only Four Ways – Forfeitures, Application Fees, Regulatory Fees, and Auctions – By Which The Commission Can Collect Monies From Applicants Or Licensees, None Of Which Applies To A Sale Of Spectrum To Nextel.*

Congress has been very clear about the limited circumstances in which the FCC may collect monies from applicants or licensees. Specifically, the Communications Act limits such authority to four instances: (a) forfeitures or fines; (b) application fees; (c) regulatory fees; and (d) competitive bidding for licenses. Nothing in the Act permits the Commission to receive monies from a sale of spectrum to an individual company. Because the FCC is a creature of limited powers, Section 309(j)’s comprehensive scheme for awarding licenses therefore effectively *denies* the Commission the power to accept monies through private sales.

Nothing in Section 4(i) of the Communications Act – which allows the Commission to adopt measures that are “*not inconsistent*” with other provisions in the Act – provides any warrant for violating the congressional determination reflected in Section 309(j) that the public interest demands mandatory auctions. In the 1996 *Mobile Communications* case, the D.C. Circuit held that Section 4(i) allowed the Commission to require payment for the award of spectrum that otherwise would have been given for free, because doing so was “not inconsistent” with the rest of the Act. But that use of Section 4(i) took place when the FCC’s auction power was *permissive*; Section 309(j) then provided that “the Commission *shall have the authority*” to conduct auctions. Since the Act was amended in 1997, the Commission has had an *obligation* to assign licenses via auctions; Section 309(j) now provides that “the Commission *shall grant*” spectrum through auctions. Privately selling spectrum to Nextel today thus would be flatly inconsistent with the Act.

2. *A Private Sale Of Spectrum To Nextel Would Violate The Act’s Requirement That Initial Licenses For Which There Are Mutually Exclusive Applications Must Be Awarded Only Through Competitive-Bidding Procedures.*

The Commission may not bypass Section 309(j)’s standard competitive-bidding process to sell spectrum to Nextel. The Act’s auction requirement is mandatory for “initial licenses” for

which there are mutually exclusive applications. Under *both* D.C. Circuit precedent *and* Commission rules, any grant of a 1.9 GHz license to Nextel would constitute an auction-triggering “initial license” within the meaning of Section 309(j), and not a mere “minor modification” under Section 316. Moreover, Verizon has stated its intention to bid for the 1.9 GHz spectrum in question, and formally has petitioned the Commission to move forward with competitive bidding and service rules in that band. By the Act’s express terms, the FCC therefore is compelled to use competitive-bidding procedures here.

3. *The Congressional Purposes Underlying Section 309(j) – Enhancing Federal Revenues, Encouraging Innovation, And Accurately Valuing Spectrum – Indicate The Impropriety Of A Private Sale To Nextel.*

The purposes that led Congress to enact Section 309(j)’s auction authority over a decade ago remain fully applicable here. Auctions ensure that spectrum licensing redounds to the benefit of the general public (through increased revenues to the federal Treasury) – and, conversely, they prevent the enrichment of individual licensees at the expense of public coffers. Auctions harness beneficial market forces to encourage technological innovation. And auctions are the most accurate way of accomplishing the notoriously difficult task of assigning value to spectrum blocks. A private sale of spectrum to Nextel would frustrate these congressional purposes.

4. *A Private Sale Of Spectrum To Nextel Is Not Permitted Under Provisions Of Section 309(J)(6)(E) That Encourage The Commission To Avoid Mutually Exclusivity Through “Engineering Solutions, Negotiation, Threshold Qualifications, Service Regulations And Other Means.”*

This Commission should not long detain itself with the suggestion that Section 309(j)(6)(E) might permit a private sale of spectrum to Nextel outside of the customary auction procedures. The tools enumerated there are designed to facilitate spectrum-sharing arrangements, and to ensure that the Commission meets the needs of *all* interested parties. Section 309(j)(6)(E) was meant to quell the fears expressed by some companies when the auction statute was being drafted in 1993, that the new competitive-bidding procedures would enable the FCC to abandon the then-ongoing MSS (or “Big LEO”) negotiated-rulemaking proceeding and order an auction among the competing applicants. Congress added Paragraph (6)(E) to instruct the Commission that its new auction powers did not replace traditional spectrum-management solutions – e.g., spectrum sharing – when those measures could accommodate all of the parties’ conflicting needs. Nothing in Section 309(j)(6)(E) authorizes the Commission to single out a preferred company to receive specific spectrum at a privately determined price.

* * *

The legal bottom line is clear. The Commission has no authority to sell spectrum privately to Nextel or anyone else. The sole means of licensing spectrum in exchange for the payment of monies is the standard Section 309(j) competitive-bidding procedure. To do otherwise would be a direct and unquestionable violation of the Communications Act.

BACKGROUND

For several years, the Commission has been considering how to alleviate harmful interference to critical public-safety communications in the 800 MHz band.¹ A number of public-safety users are experiencing interference due to the operations of Nextel, a mobile radio licensee, in adjacent blocks of spectrum.² This interference has caused difficulties that range in severity from “signal quality problems on particular frequencies” and “system access difficulties,” to “prolonged response times” and “loss of coverage.”³

Everyone agrees on the bedrock necessity of protecting public-safety licensees from the harmful interference Nextel is causing. The parties differ, however, on how to accomplish this shared goal. As Verizon and others have shown, the so-called “Consensus Plan” – under which Nextel would surrender low-value spectrum in the 700, 800, and 900 MHz bands, in exchange for high-value blocks of contiguous, unencumbered spectrum at 800 MHz and 1.9 GHz – would confer an enormous \$7.2 billion windfall on Nextel.⁴ Verizon, like many parties in the two years this docket has been open, has endorsed an alternative plan under which incumbent users would be moved from their current homes in the 800 MHz band, with Nextel, the source of interference, shouldering their relocation costs.⁵ Nextel would not receive spectrum at 1.9 GHz under this plan. But the enhanced value of its 800 MHz holdings – due to the substitution of contiguous spectrum for interleaved spectrum – would more than offset the relocation costs the company would pay.⁶ This alternative would accomplish the same result as the “Consensus Plan,” but would do so through a different funding mechanism – i.e., Nextel would deduct the relocation costs from the increased value of its 800 MHz holdings, rather than from the even more valuable 1.9 GHz spectrum it seeks.

According to press accounts, the Commission now is considering a draft proposal that would involve awarding Nextel up to 10 MHz of spectrum in the 1.9 GHz band through a private

¹ See *Improving Public Safety Communications in the 800 MHz Band, Notice of Proposed Rulemaking*, 17 FCC Rcd 4873 (2002) (“800 MHz NPRM”).

² See *id.* at 4879-80.

³ *Id.* at 4881.

⁴ See *Ex parte presentation of Verizon Wireless*, WT Docket No. 02-55, at 1 (Oct. 27, 2003) (“Kane Reece Appraisal”).

⁵ See *Ex parte presentation of Verizon Wireless*, WT Docket No. 02-55, at 2-4 (Feb. 26, 2004) (“In-Band Realignment Proposal”).

⁶ *Id.* at 5. The Commission should not credit Nextel’s argument that, because its iDEN technology is “optimiz[ed] for efficient non-contiguous spectrum deployment,” consolidating its 800 MHz holdings would not enhance their value. *Ex Parte presentation of Nextel Communications, Inc.*, WT Docket No. 02-55, attachment at 4 (Mar. 5, 2004). In a free market system, an object’s value is determined by its *potential* uses, not the uses to which it actually is put. A lot on Fifth Avenue in Manhattan is worth a King’s ransom even if it houses a ramshackle shed, because the land could be developed into an exclusive hotel, boutique, or apartment building. In the same way, a block of contiguous and nationwide spectrum at 800 MHz carries a high market value even if Nextel chooses not to exploit its ability to support advanced wireless technologies.

sale.⁷ The specific details of the plan necessarily remain opaque at this stage. But it appears that the FCC envisions a private sale of spectrum to Nextel for some yet-undetermined price, calculated using a yet-undetermined valuation methodology. Nextel would not be required to compete with other potential licensees in an auction, but would pay a portion of the displaced 800 MHz users' relocations costs. The FCC would grant Nextel a payment credit; the final price tag for the 1.9 GHz block would be reduced by the amount paid in relocation costs.

ARGUMENT

While Verizon shares the Commission's commitment to improving the reliability of critical public-safety communications, it believes that the current FCC plan, as described by the media, is unlawful. The Commission lacks the statutory authority to accept any payments from Nextel through a private sale of spectrum. In addition, a private spectrum sale would violate the competitive-bidding requirement of Section 309(j) of the Communications Act.⁸ The underlying purposes of Section 309(j) are fully applicable here. And the FCC has no authority to thwart Congress's purposes by arbitrarily manipulating the license-application process. The Commission undoubtedly must protect public-safety operations, but just as certainly it must do so by adopting a legally sound plan, such as the one supported by Verizon.

I. THE COMMISSION HAS NO LEGAL AUTHORITY TO CONDUCT A PRIVATE SALE OF 1.9 GHZ SPECTRUM TO NEXTEL.

A. Private Spectrum Sales Are Not Among The Four Methods By Which Congress Has Authorized The Commission To Collect Monies From Regulated Entities.

Congress has authorized the Commission to receive money from regulated entities only in specific, narrow circumstances – circumstances that simply do not include the private sale of spectrum to a predetermined party. For example, Congress has conferred on the FCC the power to accept payments in forfeiture proceedings.⁹ Likewise, the Commission has been given the authority to receive payments when assessing application fees,¹⁰ and when assessing regulatory fees.¹¹ And, of course, Congress has authorized the Commission to accept payments from

⁷ See *FCC Eyes Draft Giving Nextel 1.9 GHz, but at Higher Pricetag*, COMMUNICATIONS DAILY, Mar. 11, 2004 (“*Communications Daily*”); Legg Mason, *Logjam Breaks on FCC Consideration of Nextel Spectrum Swap*, Mar. 10, 2004 (“*Legg Mason*”); Bear Stearns, *Spectrum Swap Reported in Nextel's Favor*, Mar. 9, 2004 (“*Bear Stearns*”).

⁸ Section 309(j)(1) of the Communications Act, 47 U.S.C. § 309(j)(1), provides as follows:

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

⁹ 47 U.S.C. §§ 503, 504.

¹⁰ *Id.* § 158.

¹¹ *Id.* § 159.

private parties when conducting auctions.¹² But the FCC has not been delegated any authority to accept payments from private parties in any other type of proceeding, such as through a private spectrum sale. The only statutory mechanism for selling spectrum is Section 309(j). Any receipt of payment from Nextel outside of this carefully crafted statutory scheme therefore would be *ultra vires*.

The FCC, like all administrative agencies, is a creature of limited powers. As the Supreme Court and D.C. Circuit repeatedly have made plain, it can act only when, and only to the extent, Congress authorizes it to do so: “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”¹³ Accordingly, Congress’s failure expressly to deny the Commission the power to accept payments through private spectrum sales does not create an ambiguity that triggers *Chevron*¹⁴ deference. Rather, Section 309(j)’s comprehensive scheme for exchanging spectrum for payments is an affirmative *denial* of that claimed power to the agency:

To suggest . . . that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is written in “thou shalt not” terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.¹⁵

¹² *Id.* § 309(j)(8).

¹³ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); accord *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (stressing that “[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature”), *cert. denied*, 514 U.S. 1032 (1995); see also, e.g., *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (rejecting “as entirely untenable under well-established case law” the proposition “that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency”); *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (explaining that “the agency’s interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue”); *American Bus Ass’n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) (“Agencies have no inherent powers. They instead are creatures of statute, and may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act.”); *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150 (D.C. Cir. 1996) (rejecting EPA’s argument “that, since section 6945(c) is silent as to its application to Indian tribes, the statute is ‘ambiguous’”); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (“We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power.”).

¹⁴ Under the well-worn *Chevron* principle, a court reviewing an agency’s interpretation of a statute must “[f]irst, always” inquire “whether Congress has directly spoken to the precise question at issue.” An affirmative answer “is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). It is only if a statute is “ambiguous with respect to the specific issue” that a reviewing court will defer to “a reasonable interpretation made by the administrator of an agency.” *Id.* at 843, 844.

¹⁵ *Ry. Labor Executives’ Ass’n*, 29 F.3d at 671; see also *American Bus Ass’n*, 231 F.3d at 8 (Sentelle, J., concurring) (“Congress’s failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been

The Communication Act “is not ambiguous on whether it grants [the Commission] the power to [accept payments through a private sale of spectrum.] The statute simply does not grant it that power.”¹⁶

The legislative history of Section 309(j) confirms that that statute’s comprehensive scheme for assigning licenses forecloses the possibility of the FCC receiving payments through any other means. In 1996, both houses of Congress agreed to a conference report faulting the FCC for failing to exercise its auction power more frequently. Congress explained that it had assumed that “services would be auctioned where the Federal Communications Commission has not yet conducted auctions for such services.”¹⁷ It then expressed its sense that “the Commission should act expeditiously and without further delay to conduct auctions of licenses in a manner that maximizes revenue, increases efficiency, and enhances competition.”¹⁸

As the D.C. Circuit has recognized, the proposition that the enumeration of certain powers implicitly denies the existence of others is particularly forceful when the statute’s structure or legislative history indicate “that a normal draftsman when he expressed ‘the one thing’ would have likely considered the alternatives that are arguably precluded.”¹⁹ Here, given Congress’s explicit disapproval of the FCC’s persistence in awarding spectrum through methods that did not produce the same federal revenue, efficiency, and competition as auctions, there can be no doubt that Congress in making Section 309(j)’s auction authority mandatory intended to foreclose all other options.

B. Section 4(i) Provides No Authority To Conduct Private Spectrum Sales.

Nothing in Section 4(i) of the Communications Act – which allows the Commission to adopt measures that are “*not inconsistent*” with other provisions in the Act²⁰ – provides any warrant for accepting payment from Nextel through a private spectrum sale. To be sure, the D.C. Circuit in *Mobile Communications Corp. of Am. v. FCC*²¹ held that the FCC under Section 4(i) could sell spectrum to Mtel (a holder of a pioneer preference) outside the competitive-bidding procedures, because such a sale was “not inconsistent” with the then-current version of Section 309(j).²² But at the time, Section 309(j)’s auction power was *permissive*; the Commission was

granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency.”).

¹⁶ *American Bus Ass’n*, 231 F.3d at 9 (Sentelle, J., concurring).

¹⁷ H.R. REP. NO. 104-612, § 421(4) (1996).

¹⁸ *Id.* § 421(5).

¹⁹ *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 778, 782 (D.C. Cir. 1998).

²⁰ 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions.” (emphasis added)).

²¹ 77 F.3d 1399 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

²² *See id.* at 1404-07.

authorized, but not required, to award certain commercial licenses through competitive bidding.²³ Since the 1997 amendments to Section 309(j), however, the Commission’s auction authority has been *mandatory*; the FCC now has an affirmative duty to auction commercial licenses to the highest bidder.²⁴ In short, the FCC no longer can invoke Section 4(i) as a basis for conducting private spectrum sales, since such sales are now flatly inconsistent with Section 309(j)’s explicit command that the FCC must award spectrum through a system of competitive bidding.²⁵

As the *Mobile Communications* court explained, the “amendment of the Communications Act necessarily alters any analysis of what is in the ‘public interest,’ which is not an issue of abstract political economy but of fulfilling the congressional view of the public interest.”²⁶ Prior to Congress’s 1997 decision to make Section 309(j)’s auction authority mandatory, the FCC lawfully could weigh the advantages and disadvantages of auctions when calculating which course would best advance the public interest. But Congress’s decision to require auctions has abolished the agency’s discretion. Congress *itself* has made the determination – binding on courts and on this Commission – that mandatory auctions best serve the public interest.²⁷ The FCC has no authority to thwart this congressional calculation by advancing its own contrary conception of the public interest.

²³ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 388 (emphasis added):

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then *the Commission shall have the authority*, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

²⁴ See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258 (emphasis added):

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), *the Commission shall grant* the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

See also H.R. REP. NO. 105-149, at 557 (1997) (confirming that the 1997 amendments “require[e] all radio-based licenses for which mutually exclusive applications are filed with the FCC to be assigned by means of competitive bidding”); *id.* at 567 (“The subsection requires the FCC to employ a system of competitive bidding if presented with mutually exclusive applications for the use of spectrum.”).

²⁵ See *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 818 n.18 (Fed. Cir. 2002) (emphasizing that “the sole question” in *Mobile Communications* “was whether statutory limitations denied authority” to sell spectrum, and implicitly acknowledging that no such limitations existed in the 1993 version of 309(j)).

²⁶ *Mobile Communications*, 77 F.3d at 1406.

²⁷ See H.R. REP. NO. 105-149, at 556-57 (expressing Congress’s intent “to broaden and to extend the Federal Communications Commission’s (FCC’s) authority to assign licenses for radio-based services by means of competitive bidding”).

Congress's conclusion that the public interest favors auctions emerges even more clearly in light of the 1997 auction bill's legislative history. As explained above, one year before making Section 309(j)'s auction authority mandatory, both houses of Congress expressly disapproved of the FCC's persistence in awarding spectrum without auctions, and directed the Commission "to conduct auctions of licenses in a manner that maximizes revenue, increases efficiency, and enhances competition."²⁸ Congress's dissatisfaction with the sporadic use of competitive bidding culminated in the 1997 Balanced Budget Act, which affirmatively required the FCC to award spectrum through auctions, and which thus amounts to a specific congressional finding that mandatory auctions are in the public interest.

Moreover, the public-interest considerations that the *Mobile Communications* court cited as counseling in favor of a private sale, suggest the necessity of an auction here. In that case, the Commission faced the choice of awarding Mtel a free license (on the theory that the new auction regime should not disrupt its pre-existing entitlement to a pioneer preference), or requiring payment for the license.²⁹ The Commission opted for the latter. It concluded, and the D.C. Circuit agreed, that it would be inequitable to grant a windfall to Mtel when its competitors would be required to pay the full market price, as determined through auctions, for their licenses.³⁰

Here, by contrast, the choice is not between giving Nextel a free license and a paid license. The choice is between giving Nextel a paid (albeit below market value³¹) license and allowing it to compete in an auction, with the winner paying full market price for the license. A private sale in this case thus would not prevent unjust enrichment. To the contrary, privately selling Nextel a license at a lower-than-market rate while other providers through auctions were required to pay the fair market value for their licenses, would produce precisely the windfall that

²⁸ H.R. REP. NO. 104-612, § 421(5) (1996); see *supra* notes 17 to 18 and accompanying text.

²⁹ See *Application of Nationwide Wireless Network Corp., Memorandum Opinion and Order*, 9 FCC Rcd 3635, 3641 (1994) ("*Mtel Order*").

³⁰ See *id.* at 3639 ("[W]e are concerned that the award of a free license to Mtel would create an unfair competitive advantage for Mtel at the expense of licensees who may pay significant sums for their licenses."); see also *Mobile Communications*, 77 F.3d at 1406 (citing the "unjust enrichment of Mtel from the receipt of a free license while, under the new auction regime, others would be required to pay").

³¹ Basic economic theory teaches that any private sale that Nextel would agree to necessarily would involve a below-market-value price. As a rational actor that seeks to maximize benefits and minimize costs, Nextel would have no reason to agree to purchase spectrum at a price higher than the rate it calculates it could obtain through an auction – i.e., the spectrum's estimated fair market value. Independent industry analysts agree that a private sale of 1.9 GHz spectrum would confer a windfall on Nextel. See *Legg Mason, supra* note 7, at 2 (stating that Nextel stands to receive a "\$1.5 billion to \$3.2 billion net gain"); see also Moody's Investor Servs., *Moody's Assigns B2 Rating to Nextel Communications \$500 Million 5.95% Senior Notes Due 2014*, Mar. 24, 2004 ("*Moody's*") (stressing that the award of 1.9 GHz spectrum to Nextel "would bring tremendous long term benefits to the company" by allowing it "to more efficiently utilize its spectrum and also to invest in next generation technologies"); *Bear Stearns, supra* note 7, at exhibit 3 (describing the award of 1.9 GHz spectrum as "a transforming event for Nextel"); *Morningstar Analyst Report*, Feb. 25, 2004, at 2 ("*Morningstar*") (predicting that by "gain[ing] a chunk of valuable spectrum in the 1.9-GHz band," Nextel would "lower its capital spending, reduce caller interference, and [become] a more attractive acquisition target").

the Commission and D.C. Circuit in *Mobile Communications* found contrary to the public interest. In addition, Nextel would gain its license without facing competition from other providers, who would be denied even the chance to pursue spectrum at 1.9 GHz, thus conferring on Nextel the further benefit of regulatory certainty.

Finally, the unique circumstances that were present in *Mobile Communications* are not duplicated here. The *Mobile Communications* transaction took place at a time of great regulatory upheaval. The Commission was phasing out its old pioneer preferences rules and transitioning to a new scheme of awarding spectrum by auction. The licensee in that case found itself caught, due to the happenstance of bad timing, between these two regimes – the FCC awarded Mtel a pioneer preference in 1993, but before the license was issued Congress eliminated the Commission’s power to grant pioneer preferences.³² The FCC therefore adopted a unique solution designed to address the complications caused by these highly unusual circumstances. Here, by contrast, the FCC is not transitioning from one licensing regime to another; the mandatory auction procedures have been on the books for years. In addition, the Commission in *Mobile Communications* faced the difficult task of balancing its new legal authority to award spectrum through auctions, against Mtel’s significant reliance interests and the interests of other, paying licensees in fair competition.³³ In this case, Nextel can point to no such reliance interests that would be disrupted if the FCC simply adhered to Section 309(j)’s auction requirement. And a private sale would give Nextel an “unfair competitive advantage”³⁴ over other licensees.

II. SECTION 309(J) REQUIRES THE FCC TO AWARD SPECTRUM IN THE 1.9 GHZ BAND BY HOLDING A COMPETITIVE AUCTION.

Section 309(j) of the Communications Act requires the FCC to grant any license here through the standard auction procedures. That provision obliges the Commission to award spectrum through a system of competitive bidding whenever there are “mutually exclusive applications” for “any initial license.” Both elements are present here. Competing mobile radio providers are seeking mutually exclusive access to the 1.9 GHz band, as Verizon has filed a petition to auction the 1.9 GHz spectrum that Nextel seeks.³⁵ Indeed, Verizon for some time has been “*ready, willing and able to participate in an immediate auction of the 1.9 GHz spectrum.*”³⁶ A private sale of 1.9 GHz spectrum likewise would amount to the award of an “initial license” under the clear and consistent standards articulated by *both* the D.C. Circuit *and* this Commission. Conversely, such a sale would not be a mere “modification” that could be

³² See *Mobile Communications*, 77 F.3d at 1402-03.

³³ See *id.*

³⁴ *Mtel Order*, 9 FCC Rcd at 3640.

³⁵ See *Petition of Verizon Wireless for Expedited Action to License 1.9 GHz Spectrum for Personal Communications Services Through Competitive Bidding* (Mar. 31, 2004).

³⁶ *In-Band Realignment Proposal*, *supra* note 5, at 1.

accomplished under Section 316.³⁷ Any departure from Section 309(j)'s auction requirement in this case therefore is unlikely to survive judicial review.³⁸

A. A Private Sale of 1.9 GHz Spectrum Would Amount To An “Initial License” Under D.C. Circuit Precedent.

Any private sale of spectrum to Nextel plainly would constitute the award of an “initial license” under controlling D.C. Circuit precedent. In *Fresno Mobile Radio, Inc. v. FCC*,³⁹ the court approved the FCC’s decision to treat as “initial” any license that “is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee.”⁴⁰ The *Fresno* court therefore held that the Commission properly used an auction to award new specialized mobile radio licenses in the 800 MHz band after it decided to abandon its old licensing scheme for a new one. Because the new licensing scheme differed significantly from its predecessor – i.e., because the new “Economic Area” licenses covered “blocks of spectrum and substantial geographic areas” whereas the old licenses were “for small groups of channels and individual transmitters” – the new scheme rendered the second set of licenses “initial” ones for purposes of Section 309(j).⁴¹

Just as in *Fresno*, a 1.9 GHz license would be “the first awarded” for that block of channels.⁴² Indeed, the FCC has not yet licensed *any* user to provide mobile radio service in that band. The opening of the 1.9 GHz band also would constitute an entirely “new licensing scheme”⁴³ for at least three reasons. First, the Commission would have to promulgate new rules for the provision of mobile radio service in that band. No such rules currently exist. Second, Nextel’s new license would enable it to operate nationwide in a band of contiguous spectrum. By contrast, its existing 800 MHz licenses were awarded initially on a site-by-site basis (later on a geographic basis) and entitle it to use only narrow, interleaved channels of spectrum.⁴⁴ Third,

³⁷ See *Ex parte presentation of Cellular Telecommunications & Internet Association*, WT Docket No. 02-55, at 8-13 (Dec. 4, 2003).

³⁸ For the same reasons given above, *see supra* Part I.B, nothing in Section 4(i) authorizes the Commission to award licenses in a way that is inconsistent with Section 309(j)'s comprehensive spectrum-allocation scheme.

³⁹ 165 F.3d 965 (D.C. Cir. 1999).

⁴⁰ *Id.* at 970.

⁴¹ *Id.* at 970-71; *see also Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000) (applying *Fresno* and upholding the FCC’s decision, after adopting a new geographic licensing scheme, to require that incumbent paging users, who had received their licenses under a site-specific licensing scheme, bid at auction when they sought to exchange their old site-specific licenses for new geographic ones).

⁴² *Fresno*, 165 F.3d at 970.

⁴³ *Id.*

⁴⁴ Nextel itself has conceded that its existing 800 MHz licenses are less advantageous than the licenses it seeks. *See Reply Comments of Nextel Communications, Inc.*, WT Docket No. 98-205, at 4 (Feb. 10, 1999) (“The Commission already recognized that this fragmented SMR spectrum is ‘not currently equivalent to cellular or broadband PCS

as a consequence, independent market analysts confirm that Nextel's new legal right to operate at 1.9 GHz would enable it for the first time to offer third generation Advanced Wireless Services and high-speed broadband.⁴⁵ By contrast, the 800 MHz spectrum it would relinquish supports only low-bandwidth data-transmission technologies. One analyst has gone so far as to dub the proposed private sale "a transforming event for Nextel."⁴⁶ Clearly, then, Nextel would be operating under a vastly "different" – and, not coincidentally, vastly more advantageous – "set of rights and obligations" and technical capabilities.⁴⁷ Because a private spectrum sale would entail the award of an "initial license" under D.C. Circuit precedent, a reviewing court can be expected to take a dim view of any predetermined private sale here.

B. A Private Sale of 1.9 GHz Spectrum Would Amount To An "Initial License" Under FCC Regulations.

Similarly, a private spectrum sale involving Nextel would constitute an "initial license" under the Commission's *own* rules. A licensee's request "to add a frequency or frequency block for which the applicant is not currently authorized" is deemed a "major modification."⁴⁸ And the FCC long has regarded a "major modification" as the equivalent of an "initial license" that by law must be awarded by auction.⁴⁹ The Commission requires auctions for major modification

spectrum.' Because the channels are encumbered, non-contiguous and assigned on a site-by-site basis, an SMR licensee faces more obstacles than its competitors in configuring a wide area system." (footnotes omitted)).

⁴⁵ See *Moody's*, *supra* note 31 (predicting that "the aggregation of [Nextel's] spectrum holdings into two contiguous blocks" at 800 MHz and 1.9 GHz "would permit the company to more efficiently utilize its spectrum and also to invest in next generation technologies"); *Communications Daily*, *supra* note 7, at 8 (stating that Nextel would use the new 1.9 GHz spectrum to offer "customers high-speed, IP-based broadband access"); *Legg Mason*, *supra* note 7, at 3 (explaining that "the new spectrum would give the company more operational flexibility not only to formulate a data strategy but also to more effectively manage its voice service and improve quality over time"); *Bear Stearns*, *supra* note 7, at exhibit 3 (predicting that "Nextel would use this [new spectrum] to eventually build a CDMA 3G network for voice and data" or "for a high-speed broadband strategy, which it is testing today in Virginia using leased 1900 MHz spectrum"); *cf. Morningstar*, *supra* note 31, at 2 (predicting that by "gain[ing] a more contiguous swath of the 800-MHz band," Nextel would "lower its capital spending, reduce caller interference, and [become] a more attractive acquisition target")

⁴⁶ *Bear Stearns*, *supra* note 7, at exhibit 3.

⁴⁷ *Fresno*, 165 F.3d at 970.

⁴⁸ 47 C.F.R. § 1.929(a)(6).

⁴⁹ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15,920, 15,925-28 (1998) ("First Report and Order"); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3137 (1996) (concluding that incumbent Part 90 paging licensees could not make the major modification of expanding beyond their interference contours unless they participated in an auction); *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2655-56 (1995) (concluding that incumbent 900 MHz specialized mobile radio licensees could not make the major modification of expanding beyond their protected contour unless they participated in an auction); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development*

applications because such changes are “analogous to applications for construction permits for new stations,” and because of “the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner.”⁵⁰

Beyond cavil, licensing Nextel to operate in the 1.9 GHz band would involve an “initial license” – and not a “minor modification” of Nextel’s existing license – within the meaning of these FCC regulations. Nextel here seeks to “add a frequency or frequency block” in which it is not “currently authorized” to operate⁵¹; indeed, *no* mobile radio user is “currently authorized” to conduct operations in the 1.9 GHz band. Under the FCC’s own rules, the proposed private sale of spectrum to Nextel therefore must be regarded as a request for a “major modification” that is equivalent to an “initial license.” Section 309(j), as consistently interpreted and applied by this Commission, therefore mandates that this spectrum cannot be given away to a predetermined recipient but rather must be auctioned.

In addition to transgressing Section 309(j)’s auction requirement, any latter-day departure from this well-established administrative precedent would constitute arbitrary and capricious decisionmaking in violation of the Administrative Procedure Act (“APA”).⁵² An agency cannot, consistent with the APA, abandon its principles when they become inconvenient.⁵³ Reviewing courts are unlikely to allow the Commission to reverse course simply because it now recognizes that its longstanding interpretation of “initial license” poses an obstacle to its favored outcome here.

III. THE CONGRESSIONAL PURPOSES UNDERLYING SECTION 309(J)’S AUCTION REQUIREMENT ARE FULLY APPLICABLE HERE.

The purposes that led Congress to require competitive bidding confirm that Section 309(j) prohibits the award of spectrum to Nextel through a private sale. This Commission long has acknowledged “Congress’ expressed preference . . . for competitive bidding as a method of

of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463, 1513-15 (1995) (concluding that incumbent 800 MHz specialized mobile radio licensees could not make the major modification of shifting from site-specific licenses to wide-area licenses unless they participated in an auction).

⁵⁰ *First Report and Order*, 13 FCC Rcd at 15,925, 15,926.

⁵¹ 47 C.F.R. § 1.929(a)(6).

⁵² *See* 5 U.S.C. § 706(2)(A).

⁵³ *See, e.g., Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (holding that an agency’s failure to come to grips with its own precedents constitutes “an inexcusable departure from the essential requirement of reasoned decision making”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1970) (holding that an agency engages in arbitrary and capricious action whenever it “casually ignore[s]” its own “prior policies and standards”), *cert. denied*, 403 U.S. 923 (1971).

selecting from among competing applicants.”⁵⁴ The FCC has no authority to adopt a solution in the 800 MHz matter that would thwart this clearly expressed intent of Congress.

First, auctions guarantee that the American people benefit from the assignment of spectrum, in the form of increased revenues to the federal Treasury. The text of the Communications Act itself recognizes that competitive bidding allows “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use.”⁵⁵ The House Report accompanying the 1993 auction legislation likewise stressed that “a carefully designed system to obtain competitive bids from competing qualified applicants can . . . produce revenues to compensate the public for the use of the public airwaves.”⁵⁶ And as several Senators remarked when introducing the original version of the auction legislation, auctions “allow the Government to receive significant revenues from the use of this public asset.”⁵⁷ Auctions thus prevent private parties from receiving unwarranted windfalls when the government licenses them to use necessarily scarce spectrum.⁵⁸ The need to ensure that licensing decisions do not enrich individual licensees at the expense of the public treasury takes on an added urgency in an era of federal budget deficits. A predetermined private sale to Nextel is unlikely to produce the same revenues as an auction in which Nextel’s competitors are free to offer potentially higher bids for the 1.9 GHz spectrum.

Second, auctions assign spectrum “to those who value it most highly.”⁵⁹ Because “the party able to use the license most efficiently will be able to bid the most,” a system of competitive bidding ensures that “the license will end up in the hands of the firm best able to develop its potential.”⁶⁰ By thus “promot[ing] efficient and intensive use of the electromagnetic spectrum,”⁶¹ auctions allow the market to determine which technologies or applicants are most likely to be successful, thereby facilitating innovation. A private sale to Nextel here – in which the 1.9 GHz spectrum is awarded, not to the party able to use it most efficiently, but rather to a

⁵⁴ *First Report and Order*, 13 FCC Rcd at 15,927-28.

⁵⁵ See 47 U.S.C. § 309(j)(3)(C).

⁵⁶ H.R. REP. NO. 103-111, at 253 (1993).

⁵⁷ 139 Cong. Rec. S1437-38 (daily ed. Feb. 4, 1993) (statement of Sen. Inouye); *see id.* at S1442 (statement of Sen. Stevens) (emphasizing that “competitive bidding will . . . fairly compensate Federal taxpayers for use of a scarce public resource”).

⁵⁸ See 47 U.S.C. § 309(j)(3)(C) (requiring the Commission, in structuring auctions, to promote “avoidance of unjust enrichment through the methods employed to award uses of [the public spectrum] resource”); *see also* H.R. REP. NO. 103-111, at 253 (emphasizing that auctions can “prevent unjust enrichment”).

⁵⁹ *First Report and Order*, 13 FCC Rcd at 15,928 (internal quotation marks omitted).

⁶⁰ *Mobile Communications*, 77 F.3d at 1405.

⁶¹ H.R. REP. NO. 103-111, at 253; *see also First Report and Order*, 13 FCC Rcd at 15,936 (explaining that auctions “encourag[e] the efficient use of the frequency”).

single licensee arbitrarily singled out for preferential treatment – would disrupt these beneficial market forces.

Third, the operation of the free market is a more accurate method of determining the value of spectrum than any other form of assessment, whether governmental or from private analysts.⁶² Verizon stands by its studies, but the very fact that the parties have differing estimates of the 1.9 GHz band's value only confirms the wisdom of allowing the market, through a system of competitive bidding, to set the price at which spectrum will be sold. Kane Reece Associates estimates that 10 MHz of spectrum in the 1.9 GHz band is worth \$5.278 billion. Legg Mason, an independent analyst, gives that spectrum a \$4.502 billion price tag.⁶³ For its part, Nextel implausibly estimates that the spectrum is worth \$3.335 billion.⁶⁴ Again, Verizon continues to believe that Nextel's desired block of 1.9 GHz spectrum is worth nearly \$5.3 billion. But, to the extent that the Commission finds itself daunted by the task of reconciling these dueling estimates, the best solution is to allow market forces, through a competitive auction, to run their course.

This is not to suggest that Congress's goals of public reimbursement, harnessing market incentives to encourage innovation, and valuing spectrum accurately require, or even permit, the FCC to resort to auctions in all cases. Congress has not given the Commission any authority to order competitive bidding where the statutory predicates are not met – i.e., where there are no mutually exclusive applications, or where the licenses sought are not initial ones. But where, as here, a party seeks permission to operate in frequency blocks where it never before has been licensed, the animating purposes of Section 309(j) speak at full volume.

IV. THE COMMISSION HAS NO AUTHORITY TO CIRCUMVENT SECTION 309(J)'S AUCTION REQUIREMENT BY MANIPULATING THE ADMINISTRATIVE LICENSING PROCESS.

The FCC cannot lawfully evade Section 309(j) by manipulating the administrative licensing process. That is, it may not circumvent Congress's clear directive to grant licenses through a system of competitive bidding by the simple expedient of refusing to open an auction filing window in the first place – especially where, as here, interested parties such as Verizon stand ready, willing, and able to compete with Nextel's bid for the 1.9 GHz spectrum. Such a move would run afoul of the well-worn principle of administrative law that an agency may not

⁶² See H.R. REP. NO. 105-149, at 559 (1997) (acknowledging that “[t]he process of predicting the outcome of spectrum auctions is an imprecise one”).

⁶³ See *Legg Mason, supra* note 7, at 2. Legg Mason's baseline estimate of the 1.9 GHz spectrum's value is \$1.60/Mhz/POP. Given an estimated United States population of 281.4 million, Legg Mason's formula – \$1.60 x 10 x 281,400,000 – yields a sum of \$4,502,400,000.

⁶⁴ See *Ex parte presentation of Nextel Communications*, WT Docket No. 02-55, attachment at 3 (Mar. 5, 2004). As CTIA has demonstrated, Nextel's estimate simply is not credible. See *Ex parte presentation of Cellular Telecomms. & Internet Ass'n*, WT Docket No. 02-55, at 1 (Mar. 17, 2004) (faulting Nextel's valuation methodology for “aggressive[ly] deflating” the value “of its desired new spectrum”).

seek to accomplish indirectly that which it cannot achieve directly.⁶⁵ In addition, such action would undermine the very purposes that motivated Congress to enact Section 309(j)'s auction requirement in the first place – ensuring that the public reaps the financial benefits of spectrum grants, encouraging innovation, and awarding licenses based on neutral principles, rather than inherently subjective criteria that may favor one competitor over another.

Nor may the FCC cite as a basis for conducting a private spectrum sale, its responsibility under Section 309(j)(6)(E) to use engineering solutions and similar measures to avoid mutual exclusivity. It has been suggested that, because “the Commission, when the public interest so dictates, may employ ‘engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity,’” the FCC could avoid mutual exclusivity here by awarding a 1.9 GHz license to Nextel without giving Verizon or others an opportunity to pursue licenses of their own.⁶⁶ This provides no authority for a private sale of spectrum to Nextel.

Section 309(j)(6)(E) merely admonishes the Commission to avoid mutual exclusivity among potential applicants by finding a way to accommodate *all* such applicants’ needs. The provision was meant, as its legislative history reveals, to promote the sharing of spectrum via technical solutions. Like all of Section 309(j), Paragraph (6)(E) originated in the House version of the 1993 Omnibus Budget Reconciliation Act. At the time, several companies were opposed to auctions, fearing that the new competitive-bidding process would disrupt the then-ongoing MSS (or “Big LEO”) negotiated rulemaking proceeding. These companies were concerned that Section 309(j) improperly would open the door to the FCC abandoning the MSS proceeding and ordering an auction among the competing Big LEO applicants. Paragraph (6)(E) was designed to quell these fears, and instruct the FCC that the new auction authority was not intended to replace traditional spectrum-management solutions – e.g., spectrum sharing – when those measures could accommodate all of the parties’ conflicting needs. The accompanying House Report described the provision as follows:

In connection with application and licensing proceedings, the Commission should, in the public interest, continue to use engineering solutions, negotiation, threshold qualifications, service rules, and other means in order to avoid mutual exclusivity. The . . . Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so. *The ongoing MSS (or “Big LEO”) proceeding is a case in point.* The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum

⁶⁵ See, e.g., *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960) (“[O]nce want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted . . .”); *Time Warner Entm’t Corp., L.P. v. FCC*, 56 F.3d 151, 201 (D.C. Cir. 1995) (emphasizing that the FCC could not “accomplish indirectly what [federal law] directly proscribes”), *cert. denied*, 516 U.S. 1112 (1996); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (holding that the agency could not achieve indirectly through conditioning power of Federal Power Act what it is otherwise prohibited from achieving directly).

⁶⁶ Letter from Michael K. Powell, Chairman, Federal Communications Commission, to Congressman Vito J. Fossella, at 2 (Mar. 15, 2004).

sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate.⁶⁷

The entire discussion surrounding what would become Section 309(j)(6)(E) revolved around the FCC's obligation, consistent with the public interest, to accommodate *all* parties seeking access to a particular block of spectrum. There was no suggestion that the public interest would be served by awarding spectrum to a single, favored entity, while failing to give others the opportunity to have their applications or interests considered. Section 309(j)(6)(E) was meant to promote the sharing of spectrum in a way that would promote the interests of all users. No one has suggested here that Nextel and other commercial mobile radio service providers such as Verizon could share the 1.9 GHz spectrum. The Commission cannot use this provision to elevate the interests of Nextel over all others.

CONCLUSION

Verizon agrees with the Commission that it is essential to protect public-safety licensees from the harmful interference they are experiencing due to the operations of Nextel in adjacent blocks of spectrum. But Verizon believes that any solution that involves a private sale of 1.9 GHz spectrum would run afoul of the competitive-bidding requirement of Section 309(j) of the Communications Act. The FCC has no authority under the Communications Act to accept payments from Nextel through a private spectrum sale. Such a sale would amount to the award of an "initial license" – not a mere "minor modification" – under governing D.C. Circuit caselaw and this Commission's own regulations, and therefore must proceed via auction. The purposes that led Congress to enact Section 309(j) are fully applicable here. And the Commission has no power effectively to nullify the mandate of the auction statute by manipulating its authority over the application process to foreclose all competition for the spectrum. On appeal, a reviewing court therefore is likely to regard any decision to grant Nextel spectrum in the 1.9 GHz band through a predetermined private sale, as violating Section 309(j)'s competitive-bidding requirement.

⁶⁷ H.R. REP. NO. 103-111, at 258-59 (1993) (emphasis added).

**THE FEDERAL COMMUNICATIONS COMMISSION
LAWFULLY MAY ORDER NEXTEL TO PAY THE COSTS OF
RELOCATING INCUMBENT 800 MHz LICENSEES**

February 27, 2004

Prepared by

Wiley Rein & Fielding LLP

for Verizon Wireless

I.
EXECUTIVE SUMMARY

Now pending before the Federal Communications Commission (“Commission” or “FCC”) are a number of proposals to remedy the interference to public-safety operations in the 800 MHz band caused by Nextel’s use of neighboring spectrum. This memorandum argues that the FCC has ample legal authority under the Communications Act to require that Nextel pay the costs of relocating incumbent 800 MHz licensees, as part of a comprehensive new spectrum band plan that ameliorates future interference and affords Nextel an improved home for its operations.

In particular, the FCC may require Nextel to bear the costs of relocating incumbent public-safety licensees, since Nextel would displace them from their spectrum and occupy it for its own use. The Commission has ordered similar measures a number of times in the past, and this policy has been sustained by the D.C. Circuit. The FCC’s authority to order Nextel to pay these relocation costs is enhanced by the agency’s special statutory duties to protect the needs of public-safety licensees. Finally, the Commission lawfully may require that Nextel assume the relocation costs of business and industrial users, since they would be moved as a direct result of Nextel’s relocation of the public-safety licensees.

II.
BACKGROUND

For several years, the Commission has been considering ways to alleviate harmful interference caused to critical public-safety communications in the 800 MHz band.¹ Public-safety licensees include police and fire agencies, medical rescue teams, and other first-responders charged with protecting citizens’ lives and property.² It goes without saying that these sorts of

¹ See *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 7169 (2002).

² See *id.* ¶ 11.

operations demand “a high degree of system reliability.”³ Regrettably, public-safety users are experiencing interference due to the operations of Nextel, a mobile-telephone licensee, in adjacent blocks of spectrum.⁴ As a result, public-safety users have experienced difficulties ranging from “loss of coverage” and “signal quality problems on particular frequencies,” to “system access difficulties” and “prolonged response times.”⁵

The Commission has solicited comment from the public on how best to remedy the interference caused by Nextel’s operations. One possible solution would involve the relocation of certain public-safety licensees, which currently operate between 821 and 824 MHz (and in paired channels between 866 and 869 MHz), to a block of channels lower in the 800 MHz band. The spectrum vacated by these licensees would be licensed to Nextel for mobile-telephone services. Also, a number of business and industrial users would be relocated from their current home in a block of interleaved channels between 809.75 and 816 MHz (and in paired channels between 854.75 and 861 MHz), to elsewhere in the 800 MHz band. These users’ spectrum would be taken over by the public-safety licensees displaced by Nextel. In other words, Nextel’s displacement of the public-safety users would set off a chain reaction, as a direct result of which the public-safety users would displace the business and industrial licensees. (See Attachment A.)

Implementing these steps would both ameliorate the interference problems Nextel currently is causing to public-safety users in the 800 MHz band, and free up a valuable, contiguous block of spectrum for Nextel’s use. Indeed, this realignment would confer on Nextel an enormous windfall – which Kane Reece estimates to be worth nearly \$2.3 billion – by

³ *Id.*

⁴ *See id.* ¶ 10.

⁵ *Id.* ¶ 14.

replacing its current pockmarked allocation with a large block of contiguous, nationwide spectrum in the 800 MHz band.

This rebanding scenario would include a requirement that Nextel pay the relocation costs of the public-safety licensees who find themselves evicted and reassigned to different spectrum in the 800 MHz band. Nextel also would pay to reassign the business and industrial users who must move to make room for the public-safety licensees displaced by Nextel. Relocation costs can include FCC filing fees, the costs of retrofitting existing equipment to operate at the new frequencies, and the costs of constructing entirely new facilities.

In the so-called “Consensus Plan,” Nextel characterizes its obligation to fund necessary relocation costs as voluntary and contingent. The contingency, according to Nextel, is the Commission’s approval of unrelated spectrum transactions that would give Nextel 10 MHz of spectrum at 1.9 GHz, in addition to a block of contiguous spectrum in the 800 MHz band. As detailed below, the Commission does not need Nextel’s consent or concurrence to take the steps necessary to protect public-safety licensees, nor does it need to reach out of the 800 MHz band to resolve interference with public-safety operations.

III. **ARGUMENT**

The D.C. Circuit has squarely held that the Commission has the legal authority to require entities that displace incumbent licensees, and that use the vacated spectrum for their own purposes, to bear the displaced users’ relocation costs. For instance, in *Teledesic LLC v. FCC*,⁶ the Commission required satellite providers who displaced fixed terrestrial licensees in the 18 GHz band, to pay the latter’s costs of relocation. The court upheld the obligation, explaining that

⁶ 275 F.3d 75 (D.C. Cir. 2001).

when providers “displac[e] existing users” in a given band of spectrum, they can be “forced to pay those existing users to relocate to comparable facilities.”⁷

The policy approved in *Teledesic* is hardly an innovation. Rather, the Commission routinely has required that incumbent licensees’ relocation costs must be borne by users who displace them and occupy their spectrum. In addition to the order at issue in *Teledesic*,⁸ the Commission in 1992 required PCS users to pay to relocate displaced fixed microwave users.⁹ In 1995, the Commission ordered certain SMR licensees to bear the costs of relocating displaced incumbent SMR licensees.¹⁰ And two years later in that same proceeding, the Commission reaffirmed the obligation to pay relocation costs.¹¹ The D.C. Circuit just as regularly has given effect to orders containing these types of requirements.¹²

Precisely the same situation is presented in the 800 MHz matter. The Commission now is considering proposals that would move public-safety licensees from the spectrum between 821 and 824 MHz (and between 866 and 869 MHz), and that would award that spectrum to Nextel. Because Nextel, like the satellite providers in *Teledesic*, would step into the spectrum vacated by

⁷ *Id.* at 86.

⁸ See *Redesignation of the 17.7-19.7 GHz Frequency Band, Report and Order*, 15 FCC Rcd 13,430 (2000).

⁹ See *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).

¹⁰ See *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).

¹¹ See *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 19,079 (1997).

¹² See, e.g., *Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001); *Ass’n of Pub.-Safety Communications Officials – Int’l, Inc. v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996).

the incumbent public-safety users, the Commission lawfully can require it “to pay those existing licensees to relocate to comparable facilities.”¹³

The Commission’s authority to require Nextel to shoulder relocation costs is enhanced by its “special statutory obligation with respect to [public-safety licensees].”¹⁴ Section 151 of the Communication Act mandates that the FCC allocate spectrum in a way that promotes the “safety of life and property”¹⁵ – a directive that has been construed to “require the FCC to give the[] needs [of public-safety users] priority over those of commercial broadcasters.”¹⁶ The special status of public-safety licensees is reinforced by other provisions in the Communications Act. For instance, Section 337 requires the Commission to allow public-safety users access to any unassigned channels.¹⁷ No comparable entitlement exists for other types of licensees.

The Communications Act’s legislative history likewise unambiguously reveals Congress’s intent to extend special treatment to public-safety operations. According to a 1981 Senate Committee Report, “radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury.”¹⁸ The House of Representatives sounded a similar theme several years later: “The Committee believes, as it has stated on prior occasions, that public

¹³ *Teledesic*, 275 F.3d at 86. The enormous financial windfall Nextel stands to receive from rebanding within the 800 MHz band – estimated to be worth nearly \$3.2 billion – confirms the propriety of requiring it to shoulder relocation costs. Nextel can certainly not be heard to complain if, in exchange for nationwide contiguous spectrum worth \$3.2 billion, it is made to pay relocation costs in the amount of \$850 million.

¹⁴ *Nat’l Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984).

¹⁵ 47 U.S.C. § 151 (2000).

¹⁶ *Nat’l Ass’n of Broadcasters*, 740 F.2d at 1213.

¹⁷ *See* 47 U.S.C. § 337(c) (2000).

¹⁸ S. REP. NO. 97-194, at 14 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2250.

safety consideration should be a top priority when frequency allocation decisions are made.”¹⁹

The Commission therefore has a heightened responsibility to ensure that any rebanding plan makes whole the public-safety users that would be displaced by Nextel.

For similar reasons, the Commission has the authority to order that Nextel pay the costs of relocating the business and industrial users from their current home in the interleaved spectrum to elsewhere in the 800 MHz band. These licensees would be displaced by public-safety users, because the public-safety users would be displaced by Nextel. In other words, Nextel would be ultimately responsible for the eviction of the business and industrial licensees, albeit one step removed. The FCC therefore may order Nextel to bear the costs of the private users’ relocation. Even though Nextel itself may not come to occupy their spectrum, their relocation is a direct and necessary consequence of clearing spectrum for Nextel’s use and is designed to ameliorate future interference from Nextel’s operations.

IV. **CONCLUSION**

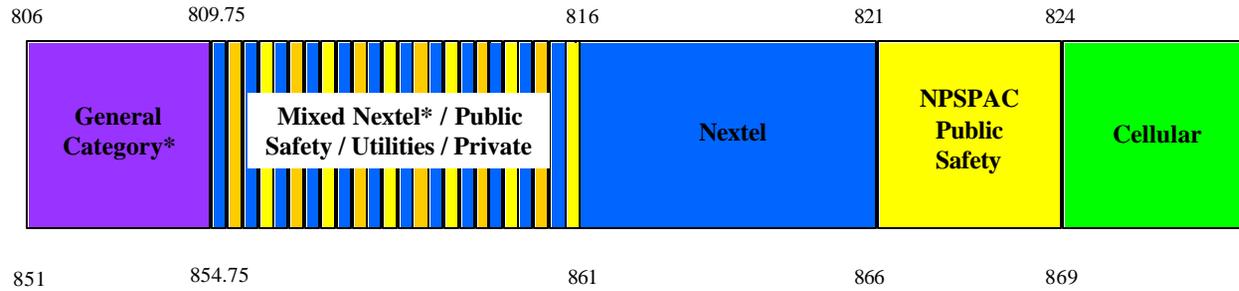
Should the Commission decide to relocate public-safety users from their current home in the 800 MHz band, and to license Nextel to use that spectrum in their place, it would be well within its rights to order that Nextel bear the former’s relocation costs. Whenever licensees “displac[e] existing users,” they cannot complain if they are asked to “pay those existing users to relocate to comparable facilities.”²⁰ Moreover, the Commission bears a special statutory duty to protect the interests of public safety licensees, as the courts have recognized. Nextel also can be made to pay the causally related “second step” relocation costs of the business and industrial users who would be moved as a direct result of Nextel’s relocation the public-safety licensees.

¹⁹ H.R. REP. NO. 98-356, at 27 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2219, 2237.

²⁰ *Teledesic*, 275 F.3d at 86.

Attachment A

The 800 MHz Band Before Realignment



* Nextel has an average of approximately 4.5 MHz in the General Category and approximately 4 MHz in the interleaved Lower 800 MHz band, but does not have all the channels or all the geography licensed throughout the U.S.

The 800 MHz Band After Realignment

