



Wiley Rein & Fielding LLP

1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7049

Virginia Office  
7925 JONES BRANCH DRIVE  
SUITE 6200  
McLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wrf.com

April 7, 2004

R. Michael Senkowski  
202.719.7249  
msenkowski@wrf.com

**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 7, 2004, John T. Scott and Steven Zipperstein of Verizon Wireless, and I of this firm, met with General Counsel John A. Rogovin, Linda I. Kinney and Austin C. Schlick of the General Counsel's office, and Brian Tramont and Sheryl J. Wilkerson of Chairman Michael K. Powell's office, 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.

Attached please find a white paper entitled "The Federal Communications Commission Lawfully May Order Nextel To Pay The Costs Of Relocating Incumbent 800 MHz Licensees." This is an updated version of the white paper of the same name filed in this docket on February 27, 2004.

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): General Counsel John A. Rogovin  
Linda I. Kinney  
Austin C. Schlick  
Brian Tramont  
Sheryl J. Wilkerson

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

**April 7, 2004**

**Prepared by**

**Wiley Rein & Fielding LLP**

**for Verizon Wireless**

## Table of Contents

	<b>Page</b>
Executive Summary .....	1
Background.....	2
Argument .....	4
I. The Commission Lawfully Can Order Nextel To Pay Relocation Costs Because It Would Displace Incumbent Licensees And Occupy Their Spectrum For Its Own Use.....	4
II. The Commission Lawfully Can Order Nextel To Pay To Relocate Incumbent Users Under Its Longstanding “Last In Fixes It” Policy For Part 90 Licensees.....	7
Conclusion .....	9

## 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, an amended version of the white paper filed in this docket on February 27, 2004, 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. And 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.

The Commission’s authority to require Nextel to pay relocation costs is further confirmed by the rules and precedents governing 800 MHz licensees. Specifically, for many decades, the Commission has enforced a “last in fixes it” policy that requires a subsequent entrant into a band to remedy interference that it caused to incumbent operations. Here, Nextel’s deployment of cellular infrastructure at 800 MHz is the root cause of the public-safety interference problems that would be remedied by band realignment. Under the policy codified in Part 90 of the FCC’s rules, Nextel clearly had the responsibility to avoid causing interference in the first instance, and to resolve interference when it does arise, including by paying incumbents’ relocation costs.

## **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.<sup>1</sup> Public-safety licensees include police and fire agencies, medical rescue teams, and other first-responders charged with protecting citizens' lives and property.<sup>2</sup> It goes without saying that these sorts of operations demand "a high degree of system reliability."<sup>3</sup> Regrettably, public-safety users are experiencing interference due to the operations of Nextel, a mobile-telephone licensee, in adjacent blocks of spectrum.<sup>4</sup> 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."<sup>5</sup>

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 channels between 806 and 816 MHz (and in paired channels between 851 and 861 MHz), to elsewhere in the 800 MHz band. These users' spectrum would be taken over by

---

<sup>1</sup> See *Improving Public Safety Communications in the 800 MHz Band, Notice of Proposed Rulemaking*, 17 FCC Rcd 4873 (2002).

<sup>2</sup> See *id.* at 4879.

<sup>3</sup> *Id.*

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* at 4881.

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 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.

## ARGUMENT

### I.

#### THE COMMISSION LAWFULLY CAN ORDER NEXTEL TO PAY RELOCATION COSTS BECAUSE IT WOULD DISPLACE INCUMBENT LICENSEES AND OCCUPY THEIR SPECTRUM FOR ITS OWN USE.

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*,<sup>6</sup> 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 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."<sup>7</sup>

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*,<sup>8</sup> the Commission in 1992 required PCS users to pay to relocate displaced fixed microwave users.<sup>9</sup> In 1995, the Commission ordered certain SMR licensees to bear the costs of relocating displaced incumbent SMR licensees.<sup>10</sup> And two years later in that same proceeding, the Commission

---

<sup>6</sup> 275 F.3d 75 (D.C. Cir. 2001).

<sup>7</sup> *Id.* at 86.

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

<sup>9</sup> 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).

<sup>10</sup> 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).

reaffirmed the obligation to pay relocation costs.<sup>11</sup> The D.C. Circuit just as regularly has given effect to orders containing these types of requirements.<sup>12</sup>

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

The Commission’s authority to require Nextel to shoulder relocation costs is enhanced by its “special statutory obligation with respect to [public-safety licensees].”<sup>14</sup> Section 151 of the Communications Act mandates that the FCC allocate spectrum in a way that promotes the “safety of life and property”<sup>15</sup> – a directive that has been construed to “require the FCC to give the[] needs [of public-safety users] priority over those of commercial broadcasters.”<sup>16</sup> The special status of public-safety licensees is reinforced by other provisions in the Communications

---

<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> *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 \$2.3 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 billions, it is made to pay relocation costs in the amount of \$850 million.

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

<sup>15</sup> 47 U.S.C. § 151.

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

Act. For instance, Section 337 requires the Commission to allow public-safety users access to any unassigned channels.<sup>17</sup> 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."<sup>18</sup> The House of Representatives sounded a similar theme several years later: "The Committee believes, as it has stated on prior occasions, that public safety consideration should be a top priority when frequency allocation decisions are made."<sup>19</sup> 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 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.

---

<sup>17</sup> See 47 U.S.C. § 337(c).

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

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

**II.**  
**THE COMMISSION LAWFULLY CAN ORDER NEXTEL TO PAY TO RELOCATE**  
**INCUMBENT USERS UNDER ITS LONGSTANDING “LAST IN FIXES IT” POLICY**  
**FOR PART 90 LICENSEES.**

Well established Commission precedent and policy require Nextel to remedy the interference its cellular-type operations are causing to incumbent 800 MHz operations, including public-safety communications. When resolving interference complaints between licensed Part 90 wireless users, the Commission routinely has applied its longstanding “newcomer” or “last in fixes it” policy. “The Commission’s policy with respect to objectionable interference to existing licensees caused by a “newcomer” dates back to our [1947] decision in *Midnight Sun Broadcasting Co.*, where we held the ‘newcomer’ to be responsible for resolving the interference problem to another broadcaster.”<sup>20</sup> Over the past twenty years, the Commission has codified its “last in fixes it” policy for a number of services where interference problems have occurred between licensees, including 800 MHz operations under Part 90 of the rules.<sup>21</sup>

Significantly, Nextel’s obligation to remedy interference – including the payment of incumbents’ relocation costs – exists regardless of whether Nextel is operating within the terms of its 800 MHz licenses. Under the “last in fixes it” policy, “the ‘newcomer’ is responsible, financially and otherwise, for taking whatever steps are necessary to eliminate the objectionable interference.”<sup>22</sup> Moreover, the Commission has made clear that the “last in” licensee must bear

---

<sup>20</sup> *Broadcast Corp. of Georgia (WVEU-TV)*, 96 FCC 2d 901, 906 (1984) (“*WVEU III*”) (citation omitted).

<sup>21</sup> See, e.g., 47 C.F.R. § 22.371 (governing interference from cellular licensees to AM broadcasters); 47 C.F.R. § 73.687(e)(4) (governing interference from Channel 14 and 69 TV broadcasters to PLMRS licensees in the 450-470 MHz and 806-821 MHz bands).

<sup>22</sup> *Sudbrink Broadcasting of Georgia, Inc.*, 65 FCC 2d 691, 692 (1977); see also *WVEU III*, 96 FCC 2d at 908; *Athens Broadcasting Co.*, 68 FCC 2d 920, 920-21 (1978); *Midnight Sun Broadcasting Co.*, 11 FCC 1119 (1947).

all of the costs associated with remedying the interference resulting from its operations,<sup>23</sup> even if the costs of remedying the interference are substantial and “greatly in excess of that which [the licensee] anticipated.”<sup>24</sup> These obligations exist, even if, as Nextel claims here,<sup>25</sup> the “last in” licensee is operating within its authorized parameters.<sup>26</sup>

Part 90 rules explicitly require Nextel to avoid causing interference in the first instance, and to resolve instances of harmful interference when they do arise.<sup>27</sup> Specifically, Nextel must comply with out-of-band emission limits that require attenuation of Nextel’s signals that crossover into the adjacent public safety bands.<sup>28</sup> Compliance with the specified out-of-band limits, however, does not absolve Nextel of its obligation to eliminate harmful interference. It is

---

<sup>23</sup> *Broadcast Corp. of Georgia (WVEU(TV))*, 92 FCC 2d 910, 912 (1982) (“*WVEU II*”) (“Although the land mobile radio licensees are expected to cooperate with [the interfering party] by offering suggestions to resolve the problem and by implementing a solution to it reasonable in both cost and configuration . . . , there is no doubt that the financial responsibility for eliminating the objectionable interference falls upon the ‘newcomer.’”).

<sup>24</sup> *Id.*; see also *Jack Straw Memorial Foundation*, 37 FCC 2d 544, 546-47 (1972).

<sup>25</sup> See *Reply Comments of Nextel Comm., Inc.*, WT Docket No. 02-55, at 40 (Aug. 7, 2002).

<sup>26</sup> See *Application of WKLX, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 225, 226 (1991) (stating that WKLX would be obligated to rectify interference even though “the transmitted signals fully comply with all of our emission standards and requirements”); *WVEU III*, 96 FCC 2d 901 at 902, 910 (requiring the newcomer licensee, WVEU, to “reimburse [affected] land mobile radio licensees for their expenses in modifying their facilities to new frequencies” even though WVEU was operating at only “6% of full power” permitted under its license). Clearly, when a licensee is causing harmful interference to another licensee, if such modifications do not cure the interference, the station can be shut down.

<sup>27</sup> 47 C.F.R. § 90.403(e). Part 90 licensees must first try to resolve instances of harmful interference among themselves, but if they are unsuccessful, the FCC can require the licensee causing the problem to eliminate the interference by imposing stringent operating conditions. 47 C.F.R. § 90.173(b) ([T]he Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned. Further, . . . the use of any frequency may be restricted as to specified geographical areas, maximum power, or such other operating conditions, contained in this part or in the station authorization”); see also *Amendment of Part 90 of the Commission’s Rules and Regulations to Eliminate Certain Restrictions on Non-Voice Operations in the Private Land Mobile Radio Services, Report and Order*, PR Docket No. 82-470, 53 RR 2d 33, 37 (1983) (“*PLMRS Data Transmission Order*”).

<sup>28</sup> Indeed, Nextel claims that “nearly 50%” of all reported CMRS-public safety interference incidents result from OOB even though Nextel is operating within the Commission’s prescribed OOB limits. *Ex parte presentation of Nextel Communications, Inc.*, WT Docket No. 02-55, at 13-14 (May 16, 2003).

fully within the Commission’s authority to impose more stringent attenuation requirements to cure harmful interference.<sup>29</sup>

By introducing its incompatible cellular operations into a band configured for high-site and high-power public-safety facilities, Nextel bears the burden – and must assume the responsibility – of correcting the interference that it is causing to other 800 MHz operations, including the payment of all relocation costs necessitated by rebanding. Indeed, when Nextel’s corporate predecessor first proposed to introduce cellular infrastructure into the 800 MHz band, it pledged that its new systems would cause “lower adjacent channel interference than existing SMR service,” and indicated that “[p]ublic safety systems should be accorded full and continuing protection” should any interference arise.<sup>30</sup> Moreover, Nextel strongly asserted that its cellular infrastructure system would “not impact existing and future adjacent channel licensees.”<sup>31</sup> Now that its operations have caused adjacent channel interference, contrary to its earlier representations, the Commission may order Nextel – the spectrum newcomer and admitted interference causer – to pay to relocate incumbent users that are being harmed by Nextel’s operations.

### **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

---

<sup>29</sup> See 47 C.F.R. § 90.691(b) (“When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.”).

<sup>30</sup> *Petition for Waiver of Fleet Call, Inc.*, FCC File No. LMK-90036, at A-12 ¶ 31, A-12 ¶¶ 33-34 (Apr. 15, 1990).

<sup>31</sup> *Comments of Fleet Call, Inc., on the Petition for Waiver*, FCC File No. LMK-90036, at I (June 7, 1990).

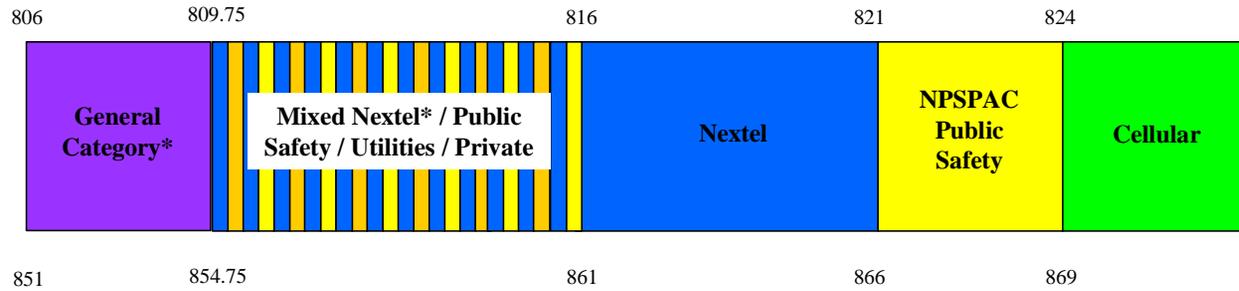
relocate to comparable facilities.”<sup>32</sup> Moreover, the Commission bears a special statutory duty to protect the interests of public safety licensees, as the courts have recognized. Nextel also can be made to pay the causally related “second step” relocation costs of the business and industrial users who would be moved as a direct result of Nextel’s relocation the public-safety licensees. Finally, the FCC routinely has applied its “last in fixes it” policy to require the newcomer to pay to relocate incumbent operations when necessary to remedy interference. There is no basis in the Commission’s precedent for Nextel to condition its obligation to remedy the interference it is causing upon its receipt of 1.9 GHz spectrum. Nextel’s obligations to prevent and remedy interference are not conditional. They are mandatory.

---

<sup>32</sup> *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

