



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

May 27, 2004

Helgi C. Walker  
202.719.7349  
hwalker@wrf.com

**Via Electronic Filing**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: **WT Docket No. 02-55**

Dear Ms. Dortch:

This letter responds to the April 29, 2004, *ex parte* submission of the Cellular Telecommunications & Internet Association (“CTIA”)<sup>1</sup> and the *ex parte* letter of Nextel Communications, Inc. of May 11, 2004.<sup>2</sup> In its filing, CTIA proposed a compromise solution to the ongoing interference to public safety operations caused by Nextel’s transmissions in the 800 MHz band. Specifically, CTIA suggested that, if the Commission is determined to grant Nextel spectrum outside the 800 MHz band, the Commission adopt a plan that: (1) requires Nextel to deposit a minimum of \$3 billion into a trust fund for public safety and critical infrastructure licensees; (2) employs an independent trustee to manage the funds; (3) grants Nextel the 10 MHz of spectrum at 2.1 GHz that it originally sought; and (4) requires Nextel, on a market-by-market basis, to relocate and to pay the relocation costs of public safety before it receives any spectrum.<sup>3</sup> In response to the CTIA compromise, Nextel threatens to oppose an FCC Order adopting the CTIA plan.<sup>4</sup>

In the interest of advancing the cause of public safety and reaching a true, broad-based consensus on this matter, Verizon Wireless (“Verizon”) concurs with the CTIA compromise proposal. The CTIA compromise provides to public safety the benefits of adequate funding and structural incentives to accomplish rebanding

<sup>1</sup> Letter from Steve Largent, President & CEO, CTIA, to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (Apr. 29, 2004) (“CTIA Letter”).

<sup>2</sup> Letter from Timothy M. Donahue, CEO & President, Nextel Communications, to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (May 11, 2004) (“Nextel Letter”).

<sup>3</sup> See CTIA Letter at 2-4.

<sup>4</sup> See Nextel Letter at 3. Nextel has also since filed a letter attacking, in inflammatory terms, the CTIA compromise. See Letter From Robert S. Foosaner, Senior Vice President & Chief Regulatory Officer, Nextel Communications, to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (May 14, 2004). Those objections ring hollow, given that Nextel itself originally proposed that the Commission give it spectrum at 2.1 GHz.

Ms. Marlene H. Dortch

May 27, 2004

Page 2

quickly and nationally, which the Nextel plan does not. Although the CTIA compromise plan is not Verizon's preferred solution, Verizon recognizes the public interest in timely achieving an acceptable, if not from its standpoint ideal, industry-wide solution to the very real public safety problems that Nextel has caused for years.

Verizon supports the CTIA compromise. Verizon must, however, reiterate its opposition to any other plan that involves spectrum outside the 800 MHz band and fails to capture the fair value of that spectrum. Verizon restates for the record its concerns about the legality of such an approach.

As the Commission knows, there is a continuing demand for new spectrum, including at 2.1 GHz, to meet the wireless industry's growing needs to serve its customers. Verizon has a particularly strong interest in obtaining new spectrum, due to its business plans and circumstances unique to it. The FCC should make that spectrum available to the industry and allow companies to compete for it, just as they are fiercely competing in the marketplace every day. The governmentally-created competitive advantage to Nextel from receiving valuable spectrum – particularly a nationwide license that the Commission has refused to allow other wireless companies to bid for, thus insulating Nextel from competition – is enormous. It would cause significant and irreparable harm to Verizon, a direct competitor of Nextel's, in the market for wireless services and particular geographic and product submarkets, and to competition in the wireless industry in general.

Accordingly, if the Commission is unable to arrive at a solution in this proceeding that ensures full funding for public safety and captures the fair value of any 2.1 GHz spectrum given to Nextel, the Commission should auction that spectrum. Verizon has authorized me to confirm that it would be ready, willing, and able to participate in such an auction within the terms and conditions of the Commission's auction rules and 47 U.S.C. § 309(j), just as it would be willing to participate in auction of spectrum at 1.9 GHz.<sup>5</sup> Indeed, Verizon Wireless has previously expressed its interest in obtaining spectrum in this band for 3G services in the Advanced Wireless

---

<sup>5</sup> See Letter from Margaret P. Feldman, Vice President, Bus. Dev., Verizon Wireless to John B. Muleta, Chief, Wireless Telecomms. Bureau, FCC, WT Docket 02-55, at 1 (Feb. 26, 2004) (“*Verizon Wireless is ready, willing and able to participate in an immediate auction of the 1.9 GHz spectrum.*” (emphasis in original)).

Ms. Marlene H. Dortch

May 27, 2004

Page 3

Services (“AWS”) proceeding.<sup>6</sup> Although Verizon’s ultimate valuation of specific bands of spectrum at auction is difficult to predict and would depend on then-prevailing market factors, Verizon has authorized me to state for the record that it would open the bidding on 2.1 GHz at a substantial level, though at a somewhat lower amount than for 1.9 GHz,<sup>7</sup> given Verizon’s unique reasons for valuing 1.9 GHz more highly.

If any grant of spectrum at 2.1 GHz were at less than fair value, thereby conferring a windfall upon Nextel, such agency action not only would harm competitors, but also would deprive the federal Treasury of the full value of that spectrum. Many in Congress have expressed their concern about the budgetary effects of a private sale to Nextel.<sup>8</sup> As CTIA has noted, even Nextel’s own calculations prove the existence of a windfall for Nextel.<sup>9</sup> The fact that Nextel itself, presumably a profit-maximizing rational actor, originally proposed a “voluntary” transaction involving

---

<sup>6</sup> See Comments of Verizon Wireless, WT Docket 00-258 (Apr. 14, 2003) (“AWS Comments”). Nextel has seized upon these comments to wrongly assert that Verizon has indicated that the 2.1 GHz band is not suitable for CMRS. See Letter from Regina M. Keeney, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (May 24, 2004). In fact, Verizon stressed the “vital[] importan[ce]” of reallocating the 2.1 GHz band for AWS and urged the Commission to make such a reallocation. AWS Comments, at 2; see also *id.* (stating that “Verizon Wireless applauds the Commission’s decision to reallocate a substantial portion of the 2 GHz band”). Verizon did observe that there was “no *optimal* pairing arrangement available for the 2020-2025 MHz band,” *id.* at 8 (emphasis added), the lower portion of the 2.1 GHz band originally requested by Nextel in the instant interference proceeding. But that statement was made in the context of a Verizon proposal to use the 2155-2180 MHz band in conjunction with spectrum already allocated for AWS (1710-1755/2110-2155 MHz) as part of an *asymmetrical* band plan. The Commission never adopted any such plan. The reallocation of 2155-2180 MHz remains pending, and a portion of that spectrum would be available for pairing with 2020-2025 MHz, as Nextel itself originally proposed. This spectrum clearly would be well suited for CMRS.

<sup>7</sup> Cf. Letter from Margaret P. Feldman, Vice President, Bus. Dev., Verizon Wireless to John B. Muleta, Chief, Wireless Telecomms. Bureau, FCC, WT Docket 02-55, at 1 (Apr. 8, 2004) (“*We are prepared to submit an initial, opening round bid of \$5.0 billion.*” (emphasis in original)).

<sup>8</sup> See, e.g., Letter from Sen. Charles Schumer to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (May 6, 2004); Letter from Rep. Ed Wynn to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (May 5, 2004); Letter from Rep. Jim Nussle, Chairman, House Committee on the Budget, to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (March 3, 2004); Letter from Rep. Vito Fossella, et al. to Michael K. Powell, Chairman, FCC, WT Docket 02-55 (Feb. 26, 2004).

<sup>9</sup> See Letter from Diane Cornell, Vice President, Regulatory Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55, at 5-6 (May 7, 2004).

Ms. Marlene H. Dortch

May 27, 2004

Page 4

2.1 GHz spectrum is confirmation that Nextel believes it to be substantially as valuable to Nextel as 1.9 GHz.

Any grant of spectrum to Nextel in the 2.1 GHz band that were to deviate from the CTIA compromise, and fail to capture the fair value of that spectrum, would raise the same legal problems that, as we have amply demonstrated in the record, exist with respect to a grant of 1.9 GHz.

First, any such grant of spectrum to Nextel would violate the auction requirement of Section 309(j) of the Communications Act. Verizon, CTIA, and others have demonstrated why the grant of a license to Nextel for spectrum outside the 800 MHz band cannot qualify as a spectrum swap or license modification, and would violate the Commission's own precedent.<sup>10</sup> Second, as Verizon has explained, any such grant of spectrum would violate the Anti-Deficiency Act ("ADA") and the Miscellaneous Receipts Act ("MRA").<sup>11</sup>

Finally, there is no rational way for the Commission to grant any spectrum until actual rebanding costs are known. Granting spectrum before rebanding is completed and the full costs can be determined would be inherently arbitrary and unlawful, since there is no way for the Commission to "pay" Nextel in spectrum until it knows how much rebanding has in fact cost. Indeed, granting Nextel valuable spectrum on day one with only a future contingency of *possible* payments to public safety, and without taking into account the basic time value of money, is inherently arbitrary and capricious: a contingent liability of unknown duration and amount is in no way equivalent to the grant of a valuable resource that can be used immediately to generate new services and revenues. We have noted that a grant of spectrum at 1.9 GHz would be arbitrary and capricious for additional reasons, and those reasons pertain to 2.1 GHz as well.<sup>12</sup>

---

<sup>10</sup> See, e.g., Letter from R. Michael Senkowski, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 6, 2004) (attaching white paper entitled *The Federal Communications Commission Has No Authority To Award Spectrum To Nextel Through A Private Sale*); Letter from Diane Cornell, Vice President, Regulatory Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Dec. 24, 2003) (attaching legal memorandum explaining why grant of spectrum to Nextel would be unlawful and conflict with past FCC and court decisions).

<sup>11</sup> See Letter from Helgi C. Walker, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 8, 2004).

<sup>12</sup> See Letter from Helgi C. Walker, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (May 24, 2004).

Ms. Marlene H. Dortch

May 27, 2004

Page 5

These are not, in the main, new arguments. When the Commission first sought input on a grant of the same 2.1 GHz spectrum to Nextel, Verizon, CTIA and other parties opposed it, pointing out the many legal and policy reasons why a grant would be unlawful.<sup>13</sup> While Verizon supports the CTIA compromise plan for the good of public safety and all interested parties, we are obliged to reiterate these arguments for the record.

Sincerely yours,

/s/

Helgi C. Walker

---

<sup>13</sup> Comments of CTIA, WT Docket 02-55, at 5 (May 6, 2002) (“CTIA is particularly concerned by Nextel’s proposal that it should be assigned 10 MHz in the 2.1 GHz mobile satellite service (‘MSS’) band in exchange for making additional spectrum available for Public Safety in the 800 MHz band.”); Comments of Verizon Wireless, WT Docket 02-55, at 14 (May 6, 2002) (“Nextel’s proposal to ‘trade’ encumbered, non-contiguous spectrum for an equal amount of exclusive-use, contiguous spectrum (including 6 MHz of spectrum adjacent to its 800 MHz licenses and 10 MHz in the MSS band) would thus yield a substantial and totally unjustified windfall to Nextel.”).