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June 30, 2004

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**VIA ELECTRONIC FILING**

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

Re: **Ex parte presentation: WT Docket No. 02-55**

Dear Ms. Dortch:

Verizon Wireless, by its attorneys, respectfully submits this response to the latest filing from Nextel Communications Inc. (“Nextel”) in the above-referenced docket. On June 21, 2004, Nextel filed a chart summarizing Nextel’s purported spectrum and financial support of its “Consensus Plan.”<sup>1</sup> The Nextel submission is the latest chapter in an ever evolving exercise in financial reverse engineering – guess the lowest number the Commission might accept for 1.9 GHz spectrum, construct a catalog of “contributions” that are assigned values in an arbitrary and unsubstantiated fashion, and ensure that these “estimates” add up to a net loss rather than a net gain. This type of legerdemain is the very reason that Congress did not give the Commission authority to sell spectrum outside of prescribed competitive bidding procedures. The illusion of a rational valuation process is quickly dispelled when the facts of this case are examined. As discussed below, the Nextel numbers do not add up:

- *Nextel continues to grossly exaggerate its contributions by inflating the value of its spectrum holdings.*
- *Nextel seeks credit for expenditures that are its own necessary costs of doing business and avoiding interference.*
- *Nextel’s request to be paid by the Commission for its own rebanding costs is patently illegal.*

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<sup>1</sup> Ex parte presentation of Nextel Communications Inc., WT Dkt. No. 02-55, at 2 (filed June 21, 2004).

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The real bottom line is that Nextel ends up with a \$244 million windfall, even without considering the value of the 1.9 GHz spectrum.<sup>2</sup> This reality contrasts with Nextel's inflated values for its spectrum contributions and claimed credits for its own rebanding costs. In constructing its numbers, Nextel seeks immediate credits for all its "contributions" and "expenditures" even though none of these are immediate "costs." It also claims costs for its own rebanding that exceed its total commitment to Public Safety rebanding. When you take into account the 1.9 GHz spectrum that Nextel seeks in return, the windfall to Nextel exceeds \$5 billion. Accordingly, as shown in the attachment hereto, the Nextel numbers are simply not credible.

#### **Nextel Exaggerates Its "Spectral Contributions"**

Nextel blithely engages in a pattern of grossly overstating the value of its own spectral contributions. Its estimate of the 800 MHz spectrum value being offered is inflated by roughly \$4 billion more than reasonable estimates. Its "valuations" also ignore the benefit from receiving clear, contiguous, nationwide 800 MHz spectrum in place of its current interleaved spectrum which is encumbered and non-national in scope – an improvement in its holdings that actually produces a net benefit to Nextel rather than a net cost.<sup>3</sup> Furthermore, while Nextel apparently expects an

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<sup>2</sup> See Attachment A.

<sup>3</sup> See Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55, Attachment, Table 7 (filed Oct. 27, 2003) (attaching "Determination of Fair Market Value of the Certain Portions of FCC Licensed Wireless Spectrum Proposed For Realignment by Nextel Communications, Inc. Under FCC Docket No. 02-55 As of December 31, 2002") ("Kane Reece Report"). Nextel considers the 10.5 MHz of spectrum it proposes to return and the 6 MHz of spectrum it proposes to receive and states that it is losing a net of 4.5 MHz of 800 MHz spectrum. However, Nextel fails to consider that 8.5 MHz of the spectrum it proposes to return is non-contiguous and worth substantially less than the 6 MHz of contiguous spectrum it proposes to receive. Experts have appraised the 8.5 MHz of contiguous spectrum at \$898M, while the 6 MHz of contiguous spectrum has been appraised at more than \$3B. As described more fully in Attachment A, when the true valuations of the spectrum components that are involved in Nextel's proposed spectrum "swap" are considered, it is clear that Nextel is actually receiving more than a \$1B *windfall*.

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immediate grant of a license for the 1.9 GHz spectrum, it will only “surrender” its 700 and 800 MHz spectrum over a period of time, defined by the Consensus Plan as better than three and a half years. Nextel’s valuation of its “credits” does not take the time factor of its spectral “contributions” into account.

In contrast, Nextel continues to understate the value of the 1.9 GHz spectrum that it seeks by maintaining that 10 MHz of spectrum at 1.9 GHz is only worth \$3.5 billion. The 1.9 GHz spectrum is easily worth a minimum of \$5 billion, demonstrated by Kane Reece’s valuation submitted in the record and Verizon Wireless’s offer to open the bidding for this spectrum at more than \$5 billion. In fact, the 1.9 GHz spectrum is potentially worth much more, as reflected in the recent NextWave auction reserve prices.<sup>4</sup>

**Nextel Seeks Credit For Expenditures That Are Its Own Necessary Costs Of Doing Business And Avoiding Interference**

Nextel also seeks credits for a number of necessary costs of doing business and avoiding interference as required by Commission rules. Specifically, Nextel seeks credits for retuning its own 800 MHz systems (\$400 million); additional filters for its base stations (\$407 million) (a credit increase of \$257 million from Nextel’s previous estimate as a result of its additional 2 MHz proposal); and limitations on its use of 862-863 MHz (\$288 million). Nextel also wants credits for clearing the 1.9 GHz band for its own benefit, including payments for relocating Broadcast

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<sup>4</sup> Ex parte presentation of CTIA, WT Docket No. 02-55, at 2 (filed June 23, 2004). Last November, Verizon Wireless submitted a study by Kane Reece showing that the 1.9 GHz spectrum was worth over \$5 billion or \$1.82 per MHz-pop. Nextel scoffed at that valuation and claimed that the spectrum is worth only \$3.5 billion. However, six months later, the Commission and NextWave agreed that NextWave would auction six of NextWave’s retained licenses, for which the reserve prices far exceed on a per-MHz-pop basis the Kane Reece appraisal of 1.9 GHz spectrum. For the Commission to now accept a far lower valuation at Nextel’s prodding would be wholly arbitrary and patently unlawful, even assuming that the FCC has any authority whatsoever to engage in spectrum valuations, which it does not.

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Auxiliary Service licensees that go well beyond what is necessary for its own use (\$512 million versus \$73 million).<sup>5</sup>

Nextel has never produced any documentation of these costs but simply asserts them as fact without providing any basis for their evaluation. Moreover, as is the case for its spectrum “contributions,” Nextel will not immediately retune its 800 MHz spectrum, add filters to its base stations, nor limit its use of the 862-863 MHz band. Nextel again fails to consider the staged approach of its “costs” when calculating its “credits.” Even though Nextel has not committed to providing \$850 million upfront for relocation payments for Public Safety and private wireless relocation, it also expects this “credit” to be immediate.

In effect, Nextel is asking for not only a free ride in curing the 800 MHz interference problem of its own making, but, actually, a windfall to boot. Its zeal to inflate the value of its contributions does not carry over to its financial commitment to retune Public Safety and private radio licensees. In fact, Nextel wants credits for cleaning up its own operations that exceed its commitment to fund Public Safety rebanding.

**Nextel’s Request To Be Paid By The Commission For Its Own Rebanding Costs Is Patently Illegal**

For over half a century, the Commission has consistently held that licensees bear the cost of correcting interference they cause to others. Nextel entered the 800 MHz band with full knowledge that its incompatible operations might result in interference. Indeed, in deploying its iDEN technology, Nextel expressly pledged that public safety systems should be “accorded full and continuing protection” where interference arises.<sup>6</sup>

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<sup>5</sup> Nextel has voluntarily reached an agreement with Broadcast Auxiliary licensees to relocate all 35 MHz of licensed Broadcast Auxiliary spectrum rather than simply the 5 MHz of spectrum it would occupy. As such, Nextel should only receive “credit” for 14.3% (or 1/7) of the costs associated with Broadcast Auxiliary relocation (\$73 million vs. \$512 million).

<sup>6</sup> *Petition for Waiver of Fleet Call, Inc.*, FCC File No. LMK-90036 at A-12 ¶¶ 31, 33-34 (Apr. 15, 1990).

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Now, in curing its interference to Public Safety, Nextel asks this Commission to pay for its costs in the form of credits for 1.9 GHz spectrum. This Nextel demand must be rejected. The Commission precedents and rules establish that the party causing interference – even if operating consistent with the terms of its license – is obligated to bear the costs of correcting the problem. This obligation is triggered irrespective of whether the interference is “illegal” or “legal” under the license in question. Moreover, Nextel’s efforts to avoid financial responsibility fly in the face of its representations to the Commission in seeking the original authority to deploy its incompatible services in the 800 MHz band.

Nextel has no legal basis for demanding “credits” in excess of \$800 million – a bounty more than \$100 million greater than the sum it offers public safety licensees – to offset its own relocation costs and other expenses. As Verizon Wireless has demonstrated, both FCC and D.C. Circuit case law confirm that spectrum newcomers that cause interference to incumbent licensees, or that displace incumbent users from their spectrum, routinely are ordered to bear the incumbents’ relocation costs.<sup>7</sup> If interferers and displacers can be made to pay the costs of relocating incumbents, *a fortiori* they can be made to bear the costs of relocating themselves.

Indeed, a long line of FCC precedent confirms that licensees that cause interference or displace incumbent users must shoulder their own relocation costs and the other expenses associated with resolving the problems they cause.<sup>8</sup> The Commission

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<sup>7</sup> See Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55 (filed Apr. 7, 2004) (attaching white paper entitled “The Federal Communications Commission Lawfully May Order Nextel To Pay The Costs Of Relocating Incumbent 800 MHz Licensees”) (“*White Paper*”).

<sup>8</sup> See, e.g., *Redev. of Spectrum to Encourage Innovation in the Use of New Telecomms. Tech., First Report & Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886, 6890 (1992) (requiring spectrum newcomer to “guarantee payment of *all* relocation expenses” (emphasis added)); *Application of Sudbrink Broad. of Ga., Inc., Second Report & Order and Second Memorandum Opinion & Order*, 65 FCC 2d 691, 692 (1977) (“It is clear that the ‘newcomer’ is responsible, financially and otherwise, for taking *whatever* steps may be necessary to eliminate objectionable interference.” (emphasis added)).

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cannot discard this policy now, without running afoul of the Administrative Procedure Act's ("APA") prohibition on arbitrary and capricious agency action.

Nor is it legally relevant that Nextel may be operating within the terms of its licenses while causing interference. As Verizon Wireless has demonstrated, under FCC precedent, the obligation to cure interference exists even if the interfering licensee is operating within its authorized parameters, as Nextel claims to be here.<sup>9</sup> Again, the Commission cannot, consistent with the APA, abandon this policy now.

\* \* \* \*

In sum, Nextel grossly exaggerates its spectral and financial contributions to the Consensus Plan by inflating the value of its surrendered spectrum holdings and seeking credits for expenditures that should be viewed as necessary costs of doing business and avoiding interference. Nextel overstates its proposed contributions to the Consensus Plan by more than \$5 billion.<sup>10</sup> The end result is that its proffered numbers not only offend common sense, but are contrary to Commission and court precedent.

Sincerely,

/s/

R. Michael Senkowski  
Counsel for Verizon Wireless

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<sup>9</sup> See *White Paper* at 7-8 & n.26.

<sup>10</sup> See Attachment A at 3.

## Nextel's "Spectral and Financial Support" of the Consensus Plan – Attachment A

<b>Retuning 800 MHz to Eliminate Interference</b>	<u>Nextel Valuation</u>	<u>Proper Valuation</u>
Retuning Public Safety and Private Wireless <i>Record indicates \$850M is woefully insufficient</i>	\$850M	\$850M
Retuning Nextel (Nextel's retuning costs) <sup>1</sup>	\$400M	\$0M <sup>1</sup>
Additional filters @ Nextel's base stations <sup>1</sup>	\$407M	\$0M <sup>1</sup>
Limited use of 862-863 MHz <sup>1</sup>	\$288M	\$0M <sup>1</sup>
<b>Spectrum Returned to the Commission</b>		
4.5 MHz @ 800 MHz <sup>2</sup> <i>Based on Kane Reece estimates of 4.5 MHz of non-contiguous, encumbered spectrum</i>	\$2,590M	\$475M <sup>2</sup>
4 MHz @ 700 MHz <sup>3</sup>	\$350M	\$31M <sup>3</sup>
<b>Clearing the 1.9 GHz Spectrum</b>		
Pro rata UTAM reimbursement	\$15M	\$15M
Relocating BAS licensees <i>Nextel should only be credited for relocating BAS from the 5 MHz of spectrum it seeks to occupy</i>	\$512M	\$73M
<b>Total</b>	<b>\$5,412M</b>	<b>\$1,444M</b>

<sup>1</sup> Nextel, as are all Commission licensees, is responsible for protecting adjacent channel licensees and should receive no "credit" for these protection requirements.

<sup>2</sup> Nextel considers trading in non-contiguous spectrum for contiguous spectrum as an even trade. If the value of contiguous spectrum gained under the Nextel proposal is properly valued, the windfall to Nextel would be even greater.

<sup>3</sup> Based on Kane Reece valuations, Nextel's 700 MHz spectrum is worth only \$31M. However, this spectrum should not be part of the Commission's 800 MHz Decision.

## Nextel's "Spectral and Financial Support" of the Consensus Plan – Attachment A

Nextel in evaluating its spectral contributions, fails to value the contiguous spectrum it gains under its proposal:

	<u>Nextel Valuation</u>	<u>Proper Valuation<sup>1</sup></u>
<b>Spectrum Returned to the Commission</b>		
8.5 MHz of non-contiguous @ 800 MHz	\$4,892M	\$898M
2 MHz of contiguous @ 800 MHz	\$1,151M	\$1,056M
4 MHz @ 700 MHz	\$350M	\$31M
<b>Less 800 MHz Spectrum Received by Nextel</b>		
6 MHz of contiguous @ 800 MHz	-\$3,453M	-\$3,167M
<b>Total Spectrum "Contributions"</b>	<b>\$2,940M</b>	<b>-\$1,182M</b>

<sup>1</sup> Based on Kane Reece estimates, which concludes that non-contiguous, encumbered 800 MHz spectrum is worth substantially less than contiguous, unencumbered spectrum. Nextel argues that it simply has turned in 4.5 MHz of 800 MHz of spectrum, without consideration for the value gained by receiving contiguous spectrum in return. When properly evaluated, the windfall for Nextel is \$1.182 billion.

**Nextel’s “Spectral and Financial Support” of the Consensus Plan – Attachment A**

	<u>Nextel Valuation</u>	<u>Proper Valuation</u>
Spectrum “Contributions”	\$2,940M	- \$1,182M
Retuning 800 MHz Band	\$1,945M	\$850M
Clearing 1.9 GHz Spectrum	\$527M	\$88M
<b>Total of Nextel “Contributions”</b>	<b>\$5,412M</b>	<b>- \$244M</b>

Nextel receives a \$244 million windfall before the 1.9 GHz spectrum is considered.