

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Improving Public Safety Communications	)	WT Docket No. 02-55
In the 800 MHz Band	)	
	)	
Consolidating the 800 and 900 MHz	)	ET Docket No. 00-258
Industrial/Land Transportation and Business	)	
Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's	)	RM-9498
Rules to Allocate Spectrum below 3 GHz	)	
for Mobile and Fixed Services to Support	)	
the Introduction of New Advanced	)	
Wireless Services, Including Third	)	
Generation Wireless Systems	)	
	)	
Petition for Rule Making of the Wireless	)	RM-10024
Information Networks Forum Concerning	)	
the Unlicensed Personal Communications	)	
Service	)	
	)	
Petition for Rule Making of UT Starcom,	)	ET Docket No. 95-18
Inc. Concerning the Unlicensed Personal	)	
Communications Service	)	
	)	
Amendment of Section 2.106 of the	)	
Commission's Rules to Allocate Spectrum	)	
at 2 GHz for use by the Mobile Satellite	)	
Service	)	

**PETITION FOR RECONSIDERATION OF  
REPORT AND ORDER, FIFTH REPORT AND ORDER, FOURTH  
MEMORANDUM OPINION AND ORDER, AND ORDER**

Richard W. Duncan d/b/a Anderson Communications (“Duncan”), by its attorneys and in accordance with Section 1.429 of the Commission’s rules, hereby seeks reconsideration of the *REPORT AND ORDER, FIFTH REPORT AND ORDER, FOURTH MEMORANDUM OPINION AND ORDER, AND ORDER*, in the above-captioned

proceeding released on August 6, 2004 (“*Rebanding Order*”). In support thereof the following is respectfully shown:

**I. Standing**

1. Duncan is the licensee of SMR station WPXQ626 in Charlotte, North Carolina. That station is a licensed 800 MHz SMR system with a CMRS regulatory status. The *Rebanding Order* directly affects the frequencies assigned to Duncan by that license and, as set forth below, the impact of the resulting rule changes would be adverse to Duncan. Accordingly, Duncan has been adversely impacted by the *Rebanding Order* and therefore has standing to seek reconsideration of the *Rebanding Order*.<sup>1</sup>

2. In addition to the foregoing, there have been significant developments which have been made public only during the past few weeks. Specifically, Sprint and Nextel have announced a planned merger. It is abundantly clear that the proposed merger was never considered in developing the *Rebanding Order*. While only sketchy details of the merger have been made public as of this date, as detailed below the proposed merger would have a dramatic impact on the ability of the purpose behind the proposed rebanding being met. Accordingly, reconsideration of the Order is appropriate in light of this new development that represents a fundamental change in the licensee, the proposed use of the 1900 MHz spectrum and whether the need for rebanding would continue if the proposed merger is granted. In any event, this merger represents a fundamental shift in the underlying assumptions and analysis which led to the holding in the *Rebanding Order* and, as such mandates reconsideration.

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<sup>1</sup> Inasmuch as Duncan did not participate in this proceeding prior to this date, this Petition for Reconsideration is required as a prerequisite to seeking judicial review. See § 1.429(b)(j) of the Commission’s Rules.

## **II. The Commission Must Reconsider the Disparate Treatment it is Affording Existing Licensees.**

3. The grant of the Duncan license on May 21, 2003, culminated a licensing process that spanned more than 7 years<sup>2</sup> and included litigation before the United States Court of Appeals for the D.C. Circuit.<sup>3</sup> Duncan spent years in litigation and invested significant resources to obtain these spectral rights relying upon the authorized uses for that spectrum under the Commission's rules and regulations. Awarded on a site-specific basis, this license covers one of the largest population centers in the State of North Carolina; one of the most significant portions and some of the heretofore highest valued spectrum in the Economic Area ("EA"). The EA license in this market did *not* include the Charlotte, North Carolina area on this spectrum. The effect of the *Rebanding Order* is to dramatically reduce the value and future use of the license.

4. The premise underlying the *Rebanding Order* is that Nextel is entitled to receive "value-for-value" and not MHz-for-MHz since the FCC acknowledges that all spectrum is not fungible and that other consideration such as limited permissible uses for certain spectrum are relevant to determining whether a proposed spectrum swap is, in

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<sup>2</sup> In sharp contrast, the Nextel White Paper that culminated in the *Rebanding Order* was not even filed with the Commission until November 21, 2001 *Rebanding Order* at ¶ 61.

<sup>3</sup> The initial license application was filed on November 12, 1995 in the form of a request for a finder's preference for 5 of 10 frequencies previously licensed to Morris Communications, Inc. The Duncan finder's preference was granted December 16, 1996. Six years of litigation ensued including proceedings before the US Court of Appeals and a second round of pleadings before the FCC dealing with an issue from the court on remand.

fact, equitable.<sup>4</sup> Yet, with respect to licensees such as Duncan, that is precisely what the FCC has done; considered all MHz as fungible. In essence, the Commission effectively takes Duncan's license and offers replacement spectrum having far fewer permitted uses.<sup>5</sup> Rather than leaving Duncan in the position of having a key spectrum in a designated EA, the Commission is offering EA licensees unencumbered spectrum throughout the EA, including the area where Duncan holds the license. The practical effect is to render Duncan's facilities a non-compatible, isolated island of spectrum with little opportunity to fully develop or realize the value from the license fought for by Duncan for 7 years. The replacement spectrum is barred from ever deploying cellular technology and will have virtually no market value. As such, the *Rebanding Order* represents a taking from Duncan. Clearly, not only has the *Rebanding Order* adversely effected Duncan but has gone out of its way to treat other licensees far more favorably.

5. Aside from Nextel, the *Rebanding Order* carves out an exception for Southern Linc in ensuring that it too, receives "value-for-value." There is no explanation as to why certain large carriers are ensured comparable value while small carriers are relegated to far less valuable spectrum.

6. There is ample precedent that the Commission cannot discriminate within a class of licensee.<sup>6</sup> With respect to Nextel, the Commission ensures that it has the opportunity to voluntarily decide whether to accept the *Rebanding Order* conditions after

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<sup>4</sup> See, e.g. *Rebanding Order* at ¶¶ 32, and 278.

<sup>5</sup> Even if Duncan were to be able to stay on his current frequencies, there would be reduced permitted use associated that spectrum.

<sup>6</sup> See, e.g., *Telephone and Data Systems v. FCC*, 19 F.3d 655,657 (D.C. Cir. 1994); *Telephone and Data Systems v. FCC*, 19 F.3d 42, 49-50 (D.C. Cir. 1994); *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

having set up a procedure that ensures Nextel receives full “value-for-value”. Similarly, in the case of Southern Linc, the Commission again ensures that equal value is received. In sharp contrast, and without explanation, the Commission proceeds to treat virtually all other SMR licensees as disposable and enacts restrictions and limitations that render their licenses of little value. This action is clearly arbitrary and capricious.

**III. The Commission Must Reconsider the Rebanding Order in light of the proposed Sprint-Nextel Merger.**

7. Fundamental to the Commission decision to award Nextel 10 MHz of 1900 MHz spectrum was the belief that the Commission was allocating spectrum needed to enable Nextel to migrate its iDEN technology to a frequency band where it would eliminate the interference Nextel has caused to Public Safety operations. The Commission envisioned completion of the migration to this band within 3 years and assumed it to be essential to the ability of Nextel to cease its interfering 800 MHz operations. In making this unprecedented award of 10 MHz of spectrum to Nextel, the Commission expressly cited the advantage of promoting “...rapid and widespread introduction of services into spectrum that heretofore has lain fallow.”<sup>7</sup> The Rebanding Order never envisioned a situation where Nextel would essentially “flip” this spectrum to a nationwide PCS licensee before completing (or as it now appears not even beginning) any of the proposed relocations.

8. As of this point in time, there is absolutely nothing in the record showing how the Sprint-Nextel merger would be implemented or how the overlaying of an additional 10 MHz of nationwide spectrum on top of Sprint’s existing near nationwide

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<sup>7</sup> *Rebanding Order* at ¶ 228.

footprint might result in spectral overlap requiring divestiture in key geographic areas, just as the Commission recently required in the Cingular AT&T merger. However, what is significant here is that the need to divest portions of 1900 MHz spectrum would render the entire *Rebanding Order* proposal unavailable in such areas for use in resolving the harmful interference.<sup>8</sup> And while the Commission would surely consider proposed divestitures in the context of the proposed Merger applications, the viability of the *Rebanding Order* as a means of providing uniform spectrum on a nationwide basis for clearing the Public Safety band cannot be known until considered in the context of the fundamentally changed facts resulting from the merger of Sprint with Nextel.

9. The *Rebanding Order* specifically and unequivocally recognizes the tie-in between the ability to resolve 800 MHz interference and Nextel's "quick access" to the 1900 MHz band.<sup>9</sup> Yet, the record is void of any consideration as to how a merged Sprint-Nextel might use the spectrum and make the requisite move to the 1900 MHz band; a band which would be incompatible with not only every handset presently marketed by Nextel but also each and every handset presently marketed for Sprint. A recent report in the Wall Street Journal suggests that the proposed Sprint-Nextel merger would obviate the need for Nextel to build its own "next generation" digital network entirely. The

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<sup>8</sup> The *Rebanding Order* already dismissed suggestions that the 1900 MHz band be allocated in smaller allotments or on a non-nationwide basis. "We believe that providing Nextel uniform nationwide access to ten megahertz in the 1.9 GHz band not only helps to ensure that Nextel receives comparable value for its loss of spectrum rights and expenses it will incur, but also will promote efficient use of the 1.9 MHz band." *Rebanding Order* at ¶278.

<sup>9</sup> "Given the unique facts of this case, there is an inextricable connection between quick abatement of unacceptable 800 MHz interference and Nextel's quick access to additional spectrum. *Rebanding Order* at ¶ 222.

projected “cost savings” to Nextel from no longer needing to proceed with an independent network enhancement program was reported at \$3 billion dollars. While there have been reports in the press that the Commission was considering, *sua sponte*, some re-evaluation of the “value” being ceded by Nextel, unless that consideration also addresses the \$3 billion “value” which Nextel would now be receiving as a windfall by simply “flipping” the 1900 MHz allocation in lieu of actually using it to develop a next generation Nextel network, the *Rebanding Order* must be reconsidered in light of this dramatic change in “value” being received by Nextel.

10. Further support for the widely reported belief that Nextel would not proceed with its own network upgrade deployment abounds. Reported in an apparent effort to allay concerns of Nextel’s current “push-to-talk” users, the Wall Street Journal advised that “...the combined company plans to keep customers who want to stick with the push-to-talk service on Nextel’s technology until at least 2008, acknowledging the importance of keeping them happy.”<sup>10</sup> It lacks credulity to believe that Sprint-Nextel would build a new 1900 MHz network and provide new handsets to every Nextel customer, using Nextel’s “existing technology” in the 1900 MHz band during the 36 month transition period envisioned in the *Rebanding Order* only to then dismantle it shortly thereafter in favor of building yet another new network in the 1900 MHz band and again replacing its subscriber’s handsets. Rather, it appears as though any planned migration would be dramatically slowed to enable the existing PTT users (which presumably is nearly the entire Nextel subscriber base) to remain on the existing network

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<sup>10</sup> *The Wall Street Journal*, December 16, 2004, B1, B9. Appended hereto as Appendix A is a copy of that article.

for 3 years. What is highlighted is that the *Rebanding Order* must be fully reconsidered in light of the proposed Sprint-Nextel merger.

11. The proposed Sprint-Nextel merger represents an absolute change in virtually every underlying assumption contained in the *Rebanding Order*. The stated benefit of obviating Nextel's need to build a next generation network altogether represents one of the most fundamental of changes. Migration of the Nextel customers to the Sprint network, followed by the cancellation of the Nextel licenses that would become fallow, would result in clearing a substantial portion of the 800 MHz frequency band and might in and of itself resolve the vast majority of Public Safety interference issues without the need to perform any rebanding whatsoever; or rebanding that is vastly different than that envisioned in the current *Rebanding Order*. Indeed, the awarding of a bidding credit to Nextel in lieu of the 1900 MHz spectrum award; a proposal dismissed in the *Rebanding Order* because it was viewed as a much longer path to interference elimination<sup>11</sup> might well prove a far more expedient resolution than awaiting the trade out of all of Sprint's CDMA subscribers (in addition to Nextel's subscribers) to new handsets before Sprint-Nextel could make any use of the 1900 MHz band. Acquisition of additional broadband PCS spectrum in the currently scheduled PCS auction<sup>12</sup> would

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<sup>11</sup> *Rebanding Order* at ¶222.

<sup>12</sup> We note that Sprint is "indirectly" participating in the upcoming broadband PCS auction (auction 58) through Wirefree Partners LLC. (*See* FCC Form 175 for Wirefree Partners LLC. FCC File No. 0581631143 at Exhibit B). Through that auction, Sprint could acquire access to spectrum limited to the areas where it would need additional capacity to accommodate Nextel subscribers. Such a directed spectrum acquisition could lessen the divestiture that is sure to be required by the award of a nationwide 10 MHz overlay of new spectrum to a merged Sprint-Nextel. Bidding credits could substantially enhance its ability to acquire the spectrum at auction while still resulting in the requisite 800 MHz clearing. An added benefit of returning the *Rebanding Order's* 1900 MHz



# MARKETPLACE

THE WALL STREET JOURNAL

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THURSDAY, DECEMBER 16, 2004 B1

## Can Sprint Keep Nextel Customers Happy?

By SHAWN YOUNG  
And CHRISTOPHER RHODES

**E**RIC BEMBENEK, a police officer in New York, is one of the millions of Nextel Communications Inc. customers hooked on the company's push-to-talk feature, which lets mobile workers establish instant walkie-talkie style connections with colleagues.

"They've got me with the push-to-talk," says Officer Bembenek, who regards his Nextel phone as an extension of the classic police radio. He and co-workers in the police department's office of ceremonial affairs use the instant connections to coordinate their movements at parades, funerals and other events.

"It doesn't take time up on the police radio to say things like: 'The car is rolling down the block,'" says Officer Bembenek.

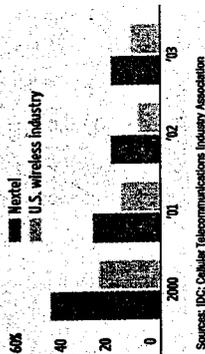
Whether Sprint Corp. can keep the allegiance of the millions of contractors, deliverymen, salesmen, technical-support workers and police officers—as well as teenagers—who rely on Nextel's walkie-talkie feature is crucial to the success of its \$35 billion merger with Nextel, announced yesterday. These workers benefit from being on the same network as their colleagues, customers and, very often, family members. If the transition goes poorly, the merged company could see major, very rapid customer defections as large groups leave

all at once. Rivals likely will try to pick off customers, as they have done with AT&T Wireless Services Inc., which was officially acquired by Cingular Wireless seven weeks ago.

Developing its own push-to-talk technology and holding on to Nextel's customers—the industry's biggest spenders—will be crucial in meeting the combined company's goal of having the most profitable customers in the industry. So far, rivals developing their own push-to-talk technology for their cellular networks have come up short.

### Growth Chart

Year-on-year percentage change in Nextel subscribers, compared with wireless subscribers as a whole.



Source: IDC; Cellular Telecommunications Industry Association

It won't be easy for Sprint to move Nextel's customers onto its more extensive and versatile network without tampering with Nextel's winning formula. That's because each company uses a different—and totally incompatible—technology to send calls. Nextel uses a unique setup called iDEN. Sprint uses a more widely favored technology known as CDMA. So far, attempts to build push-to-talk service on top of CDMA networks have failed to match Nextel's speed.

The combined company plans to keep customers who want to stick with push-to-talk on Nextel's technology until at least 2008, acknowledging the importance of keeping them happy. Officials of both companies say they will maintain and invest in Nextel's iDEN technology for the next several years, while the merged company rolls out its new network, using technology called CDMA EV-DO. The company hopes that it can develop a technology to run on its new network that can match the quality of Nextel's push-to-talk service.

For customers who want to continue using their push-to-talk service and benefit from Sprint's national network, which is more extensive than Nextel's, the new company will be pushing Motorola Inc., which provides Nextel's equipment, to build dual-mode phones that can do both.

Nextel's technology was cobbled together on

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## TECHNOLOGY JOURNAL

## Can Sprint Keep Nextel's Customers Satisfied After the Merger?

Continued From Page B1

radio frequencies used by truck dispatchers, and if it hadn't merged with Sprint, Nextel would have had to upgrade its own network, at a cost of at least \$2 billion, because its current technology can't handle advanced services like high-speed data. Some customers complain about spotty service, even in major cities.

"I could throw this thing in the river half the time. There are a ton of dead spots," says Officer Bembenek, who hopes the merger with Sprint improves his connections.

Nextel spokeswoman Audrey

Schaefer says the company monitors its networks' performance constantly. "Our systems are performing at extraordinarily high levels," she says.

Indeed, Nextel's technology has worked well enough to make it the fastest-growing national wireless company. Its customer roster grew 22% in 2003, compared with 13% for the industry as a whole, according to IDC, a technology-research company based in Framingham, Mass.

And Nextel's customers have average bills of \$69 a month, compared with \$63 at Sprint, \$52 at Verizon Wireless and \$50 at

Cingular, according to IDC. "Sprint won't want to do anything to fiddle with Nextel's magic sauce," says Keith Waryas, an analyst with IDC. "No one is going to want to damage Nextel's customer base."

The popularity of push-to-talk is a phenomenon that can be lost on the uninitiated. Just one button connects you to a list of colleagues, family or friends. And there's virtually no waiting for the call to go through once the button is pressed, which is great for people who need to have lots of quick conversations. Nextel customers can

link to other users in just three seconds, far faster than competing push-to-talk versions.

That's critical for Scott Lohmeyer, a land surveyor, and his colleagues. Mr. Lohmeyer, dressed in a bulky Carhartt coverall with a hooded sweatshirt underneath while working on a cold New York street, says he and co-workers trade directions throughout the day. "I've got more bosses than you can imagine," he says.

The immediacy of push-to-talk is more than a convenience, he adds. "If you're out in traffic and someone sees

a car coming, you get that [warning] immediately," he says, adding that a regular cellphone would never do because "you've got to stop, you've got to look for the buttons" and you've got to wait for the call to go through.

Nextel customers interviewed in recent days didn't seem worried that the merger would lead to higher prices by removing a competitor from the market.

John Hulseay, a real-estate escrow agent from San Diego, says: "I'm hoping a merger makes the Nextel service better. I'm counting on the fact that [phone] numbers are now portable to make it so that even if there are only three big companies, they still really have to compete with each other."