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

In re Applications of	)	
	)	
Nextel Communications, Inc.,	)	
Transferor	)	
	)	WT- No. 05-63
and	)	
	)	
Sprint Corporation,	)	
Transferee	)	

PETITION TO DENY

Richard W. Duncan d/b/a Anderson Communications ("Duncan"), by its attorneys and in accordance with the Commission's February 28, 2005 Pubic Notice (DA 05-502), calling for interested parties to file Petitions to Deny with respect to the above-captioned proceeding, and in accordance with Section 310(d) of the Communications Act of 1934, as amended, hereby urges that the Commission deny the proposed transfer of control of licenses in the above-captioned proceeding to the extent that they relate to 800 MHz and 1900 MHz spectrum involved in the re-banding of the 800 MHz frequency band. 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 proposed transfer includes the nationwide license which Nextel is acquiring

pursuant to the Commission's *Rebanding Order*[1] which directly affects the frequencies assigned to Duncan by the referenced license, as well as a consolidation of licenses in the Charlotte, NC market with facilities that directly compete with Duncan. Accordingly, Duncan is an interested party with standing to file this petition to deny.

2. Duncan has sought reconsideration of the *Rebanding Order*. As more fully described in that filing, the proposed Sprint-Nextel transaction, which was only made public after the *Rebanding Order* was issued, makes it abundantly clear that the basic underlying assumptions and the factual analysis which led to that order were no longer complete or accurate. Unfortunately, the filing of responsive pleadings in that Reconsideration proceeding have been delayed[2]. Accordingly, the Commission has not had the opportunity to consider the impact of the Sprint-Nextel merger on the case that restructures the 800 MHz SMR frequency band and adversely impacts small carriers such as Duncan. It is abundantly clear that the proposed merger was never considered in developing the *Rebanding Order*. As detailed below the proposed merger would have a dramatic impact on the ability of the purpose behind the proposed rebanding being met. Yet the voluminous Sprint-Nextel filing seeking Commission consent to this transaction says little about that nationwide spectral grant other than that the merged entity will meet the obligations Nextel has committed to in that proceeding. Accordingly, reconsideration of the *Rebanding Order* is appropriate in light of this new development that represents a

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[1] *REPORT AND ORDER, FIFTH REPORT AND ORDER, FOURTH MEMORANDUM OPINION AND ORDER, AND ORDER*, WT Docket No. 02-55, ET Docket No. 00-258, RM-9498, RM-10024, ET Docket No. 95-18, released on August 6, 2004 (*"Rebanding Order").*

[2] The Petition for Reconsideration was filed more than 3 months ago and Oppositions have yet to be filed in that proceeding.

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. Duncan respectfully submits that the Commission cannot make the requisite public interest finding necessary to grant the subject transfer application unless and until it has fully evaluated the impact of the proposed transaction on the *Rebanding Order*. In the alternative, the Commission should proceed to process the proposed transaction only as it relates to licenses other than the 800 MHz SMR and 1900 MHz nationwide spectrum assigned in the *Rebanding Order*.

II. The Commission Cannot Consent to the Proposed Transfer of Licenses Involved in the Rebanding Order Unless that Order is Reconsidered in Light of the Proposed Sprint-Nextel Merger.

3. 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."[3] The Rebanding

[3] *Rebanding Order* at ¶ 228.

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. In essence, the Commission is faced with a trafficking issue whereby Nextel, immediately upon receipt of the nationwide spectral allocation, seeks to "flip" that license to Sprint for substantial profit.

4. The Sprint-Nextel merger application includes a voluminous public interest statement that unashamedly admits that Nextel stands to save "multi-billions" of dollars by now avoiding the need to construct its own "advanced network facilities." (*See, e.g.* Application Public Interest Statement at pp. 5, 34, 35). In short, rather than meeting the purpose of affording Nextel spectrum with which to make its "next generation deployment" Nextel is now seeking to simply "flip" that nationwide spectral authorization for substantial private financial benefit; benefit never envisioned or even considered by the Commission in making the assignment or in valuing the transaction to determine what Nextel would be required to "pay" for the spectrum. Accordingly, while the Commission will no doubt go through the analysis of determining what spectral divestitures will be required in conjunction with the merger, that analysis alone is incomplete absent a full reconsideration of the *Rebanding Order*. The bottom line is would the Commission have made the same nationwide spectral grant under the same terms and conditions if Nextel had expressly advised the Commission that, rather than use the nationwide license to build out its own "next-generation" network, Nextel intended to "flip" that 10 MHz of spectrum to an existing nationwide PCS provider? Unless and until the answer is yes, the proposed transfer cannot be found to be in the public interest.

5. In addition to the question raised as to what precisely would be implemented in the new spectrum allocation, the Commission must also consider how the overlaying of an additional 10 MHz of nationwide spectrum on top of Sprint's existing near nationwide 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.[4] 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. Yet, the underlying basis for making an unprecedented "nationwide spectral grant" to a carrier that before lacked a nationwide footprint, becomes suspect in light of the expressly stated plans to "scrap" the Nextel buildout of an advanced next generation nationwide SMR network in favor of simply keeping the "multi-billion" dollars that the Commission was led to believe would be used for that purpose at 1900 MHz. A fundamental question is raised as to whether the 1900 MHz nationwide license will be placed to the "best use" of that nationwide spectral grant.

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[4] 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.

6. 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.[5] Yet, the application is vague of specificity with respect to how a merged Sprint-Nextel will 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 projected "cost savings" to Nextel from no longer needing to proceed with an independent network enhancement program was reported at $3 billion dollars. While the Commission did reconsider, *sua sponte*, a re-evaluation of the "value" being ceded by Nextel, that consideration did not addresses the "multi-billion dollar" "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 which is fundamental to the underlying transaction envisioned in the subject transfer application.

7. The applicants themselves most eloquently stated the appropriate level for Commission analysis of the proposed transfer transaction.

> The scope of the FCC's review is limited by Section 310(d) which requires the Commission to dispose of the transfer application 'as if the

[5] "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.

> proposed transferee…were making an application under section 308 for the permit or license in question.'[6]

The proposed Sprint-Nextel merger represents an absolute change in virtually every underlying assumption leading to 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. Accordingly, in evaluating the Sprint-Nextel transfer application, the Commission must look to whether it would make the additional 10 MHz nationwide grant to the merged entity if all of the facts currently known (such as the total abandonment of the intent for Nextel to use this spectrum for its next generation iDen network replacement opting instead to simply allow the shareholders to reap an additional "multi-billion" dollar benefit from the new allocation) were known when the *Rebanding Order* was adopted. Indeed, the Commission may also wish to examine the timing of the proposed transaction. While the transaction was announced after the *Rebanding Order* was issued, a question arises as to whether there were facts that should have been publicly disclosed in time to allow their consideration in that context of the *Rebanding Order*. For example, 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 then 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

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[6] Application Public Interest Statement at p. 19.

was viewed as a much longer path to interference elimination[7] might well have proven 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 recently concluded PCS auction[8] would have provided a far more immediate migration path for the merged Sprint-Nextel company than utilizing the new 1900 MHz band allocated to Nextel in the *Rebanding Order*. In any event, these facts are now publicly known and the *Rebanding Order* must be reconsidered in that light before any transfer can be approved regarding spectrum involved in the *Rebanding Order*.

III. Conclusion

As filed, the Commission should deny the transfer applications with respect to all spectrum (800 and 1900 MHz) that is subject to the *Rebanding Order*. In the alternative, the Commission should hold action on the proposed transfer as it affects that spectrum in abeyance pending reconsideration of the *Rebanding Order*. The Commission must clearly reconsider the entire *Rebanding Order* in the context of a fundamental change in the licensee and the potential use of the 1900 MHz spectral award and examine whether,

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[7] *Rebanding Order* at ¶222.

[8] We note that Sprint did "indirectly" participate in the broadband PCS auction (Auction 58) through Wirefree Partners LLC. (*See* FCC Form 175 for Wirefree Partners LLC. FCC File No. 0581631143 at Exhibit B).

in this entirely new context, the *Rebanding Order* would be expected to even meet its intended goals in a timely manner, if the proposed transfer is allowed.

Respectfully submitted,

RICHARD W. DUNCAN D/B/A
ANDERSON COMMUNICATIONS

By ____*/s/ Michael K. Kurtis*_____
Michael K. Kurtis
Its Attorney

March 30, 2005

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DECLARATION

I, Richard Duncan hereby affirm that I am familiar with the matters set forth in the foregoing Petition to Deny, and that except for facts of which the Commission may take official notice, I believe those facts to be true complete and correct to the best of my knowledge.

Respectfully Submitted,

/s/ Richard Duncan

Richard Duncan

March 30, 2005

CERTIFICATE OF SERVICE

I, Ruth E. Garavalia, with the law firm of Bennet & Bennet, PLLC, do hereby certify that I have this 30th day of March, 2005, had copies of the foregoing "PETITION TO DENY" sent first class United States mail, postage prepaid to the following:

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