

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

ORIGINAL

In re Applications of
Nextel Communications, Inc.,
Transferee, and Sprint Corporation,
Transferor
Applications for Transfer of Control
of Licenses and Authorizations
To: The Commission

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WT Docket No. 05-63

File No.: 0002031776

DA 05-502

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Federal Communications Commission
Office of Secretary

PETITION TO DENY OF PREFERRED COMMUNICATIONS SYSTEMS, INC.

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SUMMARY

This second major horizontal merger in the wireless sector will further concentrate large amounts of the spectrum available for mobile telephony services in the control of a relatively small number of carriers, including the Applicants. The proposed amalgamation also comes on the heels of Commission decisions providing Nextel (along with its corporate affiliate Nextel Partners and other affiliated licensees) unencumbered spectrum in the 800 MHz band suitable for mobile telephony through a relocation and rebanding process. As part of that process Nextel also emerges with 10 MHz of suitable spectrum in the 1.9 GHz Band. Indeed, Preferred believes that it was only the benefits received as a result of rebanding that transformed Nextel's spectrum holdings into assets that made a marriage with Sprint attractive and feasible from both a business and technical perspective.

Unfortunately, the results of rebanding already leave competing regional licensees like Preferred, which paid tens of millions of dollars for geographic licenses, with decidedly less spectrum rights than when the process started. In addition, both Applicants control many MHz of other radio spectrum, an admittedly finite commodity, which can be employed (and which they plan to employ) to provide mobile wireless services. Under such circumstances it does not serve the public interest, convenience, and necessity to permit the proposed merger to go forward on an unconditional basis. To the contrary, the Commission should only grant the Applications with conditions that ensure that licensees such as Preferred are not constrained in their ability to attempt to compete because of encumbered and inadequate access to suitable spectrum in their markets. Preferred proposes conditions to alleviate the inevitable constraint that would accrue from granting the Applications without them.

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Preferred Communications Systems, Inc. (“Preferred” or “Company”), by its attorneys and pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Communications Act”)² and Section 1.939 of the Commission’s Rules,³ hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to deny or, in the alternative, condition the above-referenced applications (“Applications”) of Nextel Communications, Inc. (“Nextel”) and Sprint Corporation (“Sprint”) seeking Commission approval of the transfer of control to Sprint of the FCC licenses and authorizations held both directly and indirectly by Nextel (collectively, “Applicants”).⁴

¹ The Commission’s Public Notice DA 05-502, released February 28, 2005 (“Public Notice”), at p. 2, n. 6 states that this file “has been designated as the lead application.” Therefore, Preferred is making reference to that file rather than citing all the file numbers.

² 47 U.S.C. § 309(d).

³ 47 C.F.R. § 1.939.

⁴ The Petition is timely filed pursuant to the timetable set in the Public Notice.

I. SUMMARY

This second major horizontal merger in the wireless sector will further concentrate large amounts of the spectrum available for mobile telephony services in the control of a relatively small number of carriers, including the Applicants. The proposed amalgamation also comes on the heels of Commission decisions providing Nextel (along with its corporate affiliate Nextel Partners and other affiliated licensees) unencumbered spectrum in the 800 MHz band suitable for mobile telephony through a relocation and rebanding process. As part of that process Nextel also emerges with 10 MHz of suitable spectrum in the 1.9 GHz Band. Indeed, Preferred believes that it was only the benefits received as a result of rebanding that transformed Nextel's spectrum holdings into assets that made a marriage with Sprint attractive and feasible from both a business and technical perspective.

Unfortunately, the results of rebanding already leave competing regional licensees like Preferred, which paid tens of millions of dollars for geographic licenses, with decidedly less spectrum rights than when the process started. In addition, both Applicants control many MHz of other radio spectrum, an admittedly finite commodity, which can be employed (and which they plan to employ) to provide mobile wireless services. Under such circumstances it does not serve the public interest, convenience, and necessity to permit the proposed merger to go forward on an unconditional basis. To the contrary, the Commission should only grant the Applications with conditions that ensure that licensees such as Preferred are not constrained in their ability to attempt to compete because of encumbered and inadequate access to suitable spectrum in their markets. Preferred proposes conditions to alleviate the inevitable constraint that would accrue from granting the Applications without them.

II. STATEMENT OF PREFERRED'S INTEREST

Preferred is licensed by the Commission to provide mobile telephony services using portions of the 800 MHz Specialized Mobile Radio ("SMR") band. The Company holds Economic Area ("EA") licenses awarded in Auction No. 34 that encompass a total population of approximately 29.4 million in the District of Columbia and parts of California, Oregon, Virginia, West Virginia, Maryland, Pennsylvania, Kentucky, Ohio, North Carolina, Puerto Rico and the U.S. Virgin Islands ("Preferred Markets").⁵ Preferred paid the FCC approximately \$31.7 million for its EA licenses. Since that time the Company has invested substantial additional sums in engineering and other expenses related to the development of its systems. In addition, the Company has acquired site-based 800 MHz SMR licenses located in the same and other EAs. As a result, Preferred has a substantial economic stake in the mobile telephony sector, a stake that will be directly affected by the proposed merger of the Applicants.

More importantly, in each of the Preferred Markets one or both of the Applicants holds 800 MHz and other spectrum that is suitable to provide mobile telephony services. In many of the Preferred Markets Applicants are already providing such services. Thus Preferred and the Applicants already are competing licensees, focusing on many of the same potential customers for such services. A combined Sprint-Nextel entity would no doubt be a direct, and even more formidable, competitor for Preferred.

Finally, the Company has been a continued active and substantive participant in other proceedings before the Commission addressing issues affecting competition in the provision of mobile telephony, particularly the 800 MHz SMR services. Preferred's detailed submissions in the

⁵ Based on 2003 population information. A map showing Preferred's EA licenses is attached as Exhibit 1 hereto. The Commission has found that apart from cellular and broadband PCS, the approximately 26 megahertz of spectrum in the 800 and 900 MHz bands that has been licensed for SMR can be used to provide mobile telephony services. *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses and Authorizations*, 19 FCC Rcd. 21522, 21553, ¶ 60 (2004) (hereinafter "AT&T Wireless").

Commission's 800 MHz rebanding proceeding raised a number of legitimate, meaningful concerns about the competitive impact of providing enhanced spectrum access to Nextel.⁶ Those concerns are only magnified by the prospect of further accumulation of wireless spectrum contemplated by the Applications being considered here.

In light of the foregoing, Preferred clearly is directly impacted by the Commission's consideration and action on the Applications and will suffer competitive injury without at a minimum the imposition of conditions on the merger if the Commission grants the Applications. Therefore, the Company has the requisite standing to file this Petition and thereby convey its concerns and positions to the Commission.

III. ANALYTICAL STANDARD AND FOCUS

A. Analytical Standard: The Public Interest

Under Sections 214(a) and 310(d) of the Communications Act, the burden is on the Applicants to demonstrate that the proposed merger, which would combine the third and fifth largest nationwide mobile carriers, will serve the public interest, convenience, and necessity.⁷ Application of that broad standard involves "a balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits."⁸

⁶ *In the Matter of Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969 (2004), as amended by *Erratum*, released September 10, 2004, *Erratum*, DA 04-3208, 19 FCC Rcd. 19651 and *Erratum*, DA 04-3459, released October 29, 2004, *recon. and appeal pending; Supplemental Order and Order On Reconsideration*, 19 FCC Rcd. 25120 (2004), *recon. pending* (collectively, "Rebanding Orders").

⁷ *AT&T Wireless*, at ¶ 40. Accounting for the AT&T Wireless-Cingular merger, according to the FCC the Applicants are now the 3rd and 5th largest mobile telephone operators based on number of subscribers as of year-end 2003. *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd. 20597, 20697 (2004) ("2004 Report"). According to the 2004 Report statistics, the combination of the Applicants would be the third largest mobile operator with almost 29 million subscribers. While these data are well over a year old, Preferred has no reason to believe that these rankings have changed.

⁸ *AT&T Wireless*, at ¶ 40.

The Commission's public interest evaluation is required to encompass the "broad aims of the Communications Act," which include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector development of advanced services, ensuring a diversity of license holdings and generally managing the spectrum in the public interest."⁹ The Commission has asserted its interest as serving the public interest in a broad range of the radio services that it regulates, an interest that has been repeatedly upheld by reviewing courts.¹⁰

In conducting its analysis, the Commission may consider "technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry."¹¹ The analysis also includes an assessment of the "merger's affect on future competition," which is a particularly relevant concern in this case.¹²

The Commission's public interest evaluation is not limited by traditional antitrust principles. The Commission is charged with determining whether the proposed transaction serves the broader public interest. This assessment includes determining whether combining assets may allow the merged entity to "create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways."¹³

Further, the Commission's public interest authority under the Communications Act empowers the agency to impose and enforce transaction-specific conditions that ensure that the

⁹ *Id.*, at ¶ 41.

¹⁰ *Report and Order on Broadcast Ownership Rules (Biennial Regulatory review Order)*, 18 FCC Rcd. 13620 (2003), *aff'd in pertinent part sub nom. Prometheus Radio Project v F.C.C.*, No. 03-3388, slip op (3rd Cir, June 24, 2004) (competition in local radio markets)

¹¹ *A T& T Wireless*, at ¶ 41.

¹² *Id.*

¹³ *Id.*, at ¶ 42.

public interest is served by the transaction.¹⁴ The Commission has frequently imposed such conditions in approving mergers of this magnitude. For example, it did so with respect to eighteen markets in the *AT&T Wireless* matter.

Finally, a fundamental tenant of the Commission's public interest review is that "absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest."¹⁵

In this case, the Commission also must consider a special and specific statutory mandate applicable to the mobile telephony sector, namely Section 332 of the Communications Act. Therein Congress directed the Commission with respect to the mobile telephony sector, to manage the spectrum "to encourage competition" and to ensure "regulatory parity" between all providers of commercial mobile radio services. The Commission's obligation in this regard is not solely to ensure that Nextel can compete or has regulatory parity with cellular and PCS providers. The Commission has an equal obligation to ensure that EA licensees like Preferred are similarly protected in that competition, including competition with Nextel, in order to preserve the broad range of service offerings for the public.¹⁶ As the Commission assesses the impact of the proposed merger, it must follow this express Congressional instruction.

¹⁴ *Id.*, at ¶ 43.

¹⁵ *Id.*, at ¶ 68.

¹⁶Section 6002 of the Omnibus Budget Reconciliation Act of 1993 directs the FCC to ensure that providers of "substantially similar common carrier services" are subject to comparable requirements. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 §6002(d)(3)(B), 107 Stat. 312, 397 (1993) ("*Budget Act*"). The FCC properly interpreted this requirement to apply to all CMRS providers, including SMR, PCS, cellular, and paging licensees. *See In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd. 7988, 7996, ¶12, 8009-8035, ¶¶ 37-77, 8042, ¶ 94 (1994), and found that treating substantially similar CMRS providers equally advanced the goal of "ensur[ing] that economic forces - not disparate regulatory burdens - shape the development of the CMRS marketplace." *Id.*, at 7994, ¶4

B. Analytical Focus: Products, Geographic Area, Participants

The Commission must apply the same analytical focus in assessing Sprint-Nextel that it applied in connection with the recently completed AT&T Wireless-Cingular merger.

First, the initial relevant product market is the “combined market for mobile telephony services.”¹⁷ This market includes both interconnected mobile and mobile data services, provided to both residential and enterprise subscribers.¹⁸

Second, another critical relevant product market is “the input market of spectrum that is suitable for provision of mobile services.”¹⁹ As the Commission held:

“In this sector ... spectrum suitable for use in mobile telephony is an input of finite supply. It is possible that rivals to the merged entity may be unable to add subscribers so as to function as a competitive check if there is an insufficient amount of spectrum available to them.”²⁰

As a result, the Commission’s focus is properly on “the amount of spectrum suitable for the provision of mobile telephony services that the combined entity would control in the relevant markets.”²¹ Especially worrisome are “markets in which providers are present but are constrained from repositioning and expanding output for some reason such as incomplete footprint or inadequate spectrum bandwidth.”²² As noted below, Preferred believes that a thorough analysis requires the Commission to consider the concentration of cellular, PCS, SMR and all other spectrum suitable for the provision of mobile telephony services (i.e., 2.5 GHz band as well).

¹⁷ *AT&T Wireless* at ¶¶ 74-79.

¹⁸ *Id.*, at ¶ 74.

¹⁹ *Id.*, at ¶ 81. This spectrum includes, among other bands, the SMR spectrum licensed to Preferred. *Id.*

²⁰ *Id.*, at ¶ 118. The Commission must be properly “mindful of the unique role of spectrum as a critical input in the market for wireless services” and must “carefully [analyze] the potential impact of this merger on that input.” *Id.*, at ¶ 138.

²¹ *Id.*, at ¶ 188.

²² *Id.*, at ¶ 149. Also “worrisome are markets in which the combined share of the merged entity is very high.” *Id.*

Third, as to the relevant geographic market, the proper focus is “a local one, not national.”²³ While a local market does not include individual counties, it certainly includes EAs such as those licensed to Preferred.

Fourth, the relevant participants include cellular, PCS, SMR and other licensees employing various technologies that provide the same basic voice and data functionality and are indistinguishable to the consumer.²⁴ This includes, among others, the five (5) remaining nationwide carriers, among them the Applicants, along with Preferred and similarly situated EA licensees in the 800 MHz band.²⁵

IV. ANALYTICAL CONTEXT: *Rebanding Orders* and 2.5 GHz Spectrum

In performing its review, the Commission must recognize the current context in which the proposed merger arises, particularly recent competitive and regulatory developments in the mobile telephony marketplace. The *Rebanding Orders* are, for example, a very significant regulatory development, affecting the finite spectrum input product component, which must be factored into the Commission’s review. But there are other developments that the Commission must also include.

First, last year the Commission approved the AT&T Wireless-Cingular merger which reduced the number of nationwide competitors and increased the concentration of spectrum ownership suitable for the provision of mobile telephony services. At the time the Commission noted the “challenge of examining the potential consequences of a proposed merger between two large national wireless carriers that is largely horizontal in nature.”²⁶ The challenge is no less in this

²³ *AT&T Wireless*, at ¶¶ 86, 89.

²⁴ *Id.*, at ¶ 91.

²⁵ *Id.*, at ¶ 94.

²⁶ *Id.*, at ¶ 3. At the time the Sprint/Nextel merger was announced, then Chairman Powell reportedly noted that “[w]hen we ... consolidate the market one fewer we’re going to take a very, very hard and rigorous look at that.” *Communications Daily*, Vol. 24, No. 241, December 16, 2004, at p. 8.

case. This second proposed horizontal merger, which would permit the combination of two of the fastest growing nationwide carriers, would only further heighten that concentration and market power.²⁷ In addition, there is pending at the Commission a proposed third merger of two large regional carriers – AllTel and Western Wireless.²⁸ The plain fact is that the burden of meeting the public interest standard should be heightened as the market becomes more highly concentrated.

Second, implementation of the *Rebanding Orders* will already provide Nextel (and Nextel Partners) fundamental competitive advantages over Preferred and other similarly situated 800 MHz licensees. These *Orders* directly affect the spectrum input component of the FCC's analysis.

Third, the Commission must include as part of its analysis additional spectrum that is suitable for mobile telephony services that is held by both Sprint and Nextel in many relevant markets, including a number of the Preferred Markets.

A. The Competitive Impact of the *Rebanding Orders*

Separate and apart from the proposed merger, the *Rebanding Orders* substantially enhance the suitability of 800 MHz band spectrum held by Nextel (along with Nextel Partners and other contractually affiliated entities) (collectively, the “Nextel Control Group” or “NCG”) to provide mobile telephony services. These enhancements for the NCG have come, in major part, at the expense of other EA and site-based 800 MHz SMR licensees such as Preferred.

The key competitive impacts of the *Rebanding Orders* on Preferred and other similarly situated EA SMR and site-based 800 MHz SMR licensees include:

1. The *Rebanding Orders* divide the 800 MHz SMR spectrum into two blocks - one for cellular-type services, the other for non-cellular-type services – and shrink the cellular eligible spectrum from a total of 26 MHz to no more than 16 MHz. Most if not all of the cellular

²⁷ At the time that the Commission approved the AT&T Wireless-Cingular merger, the Commission noted that Sprint and Nextel collectively had, between the fourth quarter of 1998 and the fourth quarter of 2003, gained ten percent in subscriber based market shares in the mobile telephony sector, while the shares of Verizon and Cingular had both declined by approximately six percent. *A T& T Wireless*, at ¶ 132.

²⁸ FCC Public Notice DA 05-332, released February 7, 2005.

eligible spectrum will be reserved exclusively to NCG, thus severely limiting the possibility for operators like Preferred to expand their cellular-type operations.

2. The cellular eligible spectrum "lost" in the 800 MHz SMR bands is "replaced" in part in the 1.9 GHz band, with only NCG gaining access to a nationwide license of 10 MHz in that band.
3. As a result, Nextel is allowed to increase its cellular eligible spectrum from a nationwide average of 17.9 - 18.5 MHz per EA to some 23 MHz, largely by removing the right to use cellular eligible spectrum from Preferred and similarly situated EA and site-based 800 MHz SMR licensees.
4. NCG is permitted to exchange encumbered, non-contiguous spectrum for unencumbered, contiguous spectrum. While NCG's EA and site-based 800 MHz spectrum moves to new spectrum with unencumbered status, Preferred and similarly situated EA and site-based 800 MHz SMR licensees do not.
5. NCG is permitted to exchange EA and site-specific licenses for nationwide exclusive spectrum. Preferred and similarly situated EA and site-based 800 MHz SMR licensees were offered no such option.
6. NCG retains the right to provide cellular-type service on their EA licensed spectrum, whether constructed or not. Preferred and other similarly situated EA licensees retained that right only if they had constructed a cellular type system using the 800 MHz spectrum before November 22, 2004.
7. NCG retains the right to provide cellular-type service on their site-based 800 MHz spectrum and can now do so on an EA-wide bases. The right of Preferred and other similarly situated EA and site-based 800 MHz SMR licensees to do so was conditioned on geographic and construction requirements.²⁹

Indeed, the extended uncertainty and competitive impact generated by the *Rebanding Orders* has already made it more difficult for Preferred and others to finalize system designs and attract the additional capital needed to implement those designs. In other words, rebanding has already interposed its own barriers to entry.³⁰

²⁹The *Rebanding Orders* also provided for implementation through an impartial Transition Administrator. However, the issue of that impartiality has been called into question by legitimate inquiries concerning the relationship between Nextel and a key member of the Transition Administrator team. See *Emergency Petition For Removal Of BearingPoint From Transition Administrator Team and Cessation of Transition Process Pending Announcement of Replacement Administrator*, February 7, 2005, filed by Mobile Relay Associates and Skitronics, LLC in WT Docket 02-55.

³⁰Under Section 257 of the Communications Act, the Commission has an independent obligation to seek to eliminate regulatory barriers to entry "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services..." 47 U.S.C. 257.

The cumulative competitive impact of the *Rebanding Orders* is to provide Nextel with unencumbered, contiguous 800 MHz spectrum for use to provide cellular-type services. On the other hand, competitors like Preferred, who also paid the FCC millions in value for EA 800 MHz spectrum to provide similar services, are relegated to a shrunken segment of encumbered spectrum in an effort to compete, at least on a regional basis, on an equal footing.³¹ Yet access to clean and unencumbered spectrum is an essential precondition to future competitive efforts by EA licensees like Preferred. Without such spectrum, such licensees are unable to offer the type of integrated advanced dispatch, cellular voice, text messaging and mobile Internet services that Nextel and Sprint now plan to provide. Thus, in assessing the proposed merger the Commission must consider these localized impacts of the *Rebanding Orders* and how they are amplified by the proposed merger.

B. The Suitability of Additional Spectrum Held By Applicants for Mobile Telephony Services

In analyzing the AT&T Wireless-Cingular merger the Commission dismissed the need to include additional spectrum in the 2.5 GHz band as suitable for mobile telephony services, on the grounds that "it is committed to non-mobile telephony uses currently and for the near-term future."³² Preferred respectfully submits that in analyzing the Sprint-Nextel merger, the Commission's failure to consider the Applicants' control of this spectrum is unrealistic, shortsighted and simply wrong.

First, Nextel controls considerable quantities of this spectrum as evidenced by a number of the Applications which are the subject of this proceeding. Indeed, Preferred estimates that in its Washington-Baltimore EA Nextel controls over 150 MHz of this 2.5 GHz spectrum alone.³³ Sprint

³¹ Preferred's detailed analysis of the impact of the August 2004 *Rebanding Order* is contained in its December 22, 2004 Petition for Reconsideration of the decision, which is attached as Exhibit 2 hereto.

³² *A T& T Wireless*, at ¶ 81, n. 282.

³³ Preferred attaches as Exhibit 3 an analysis of the 800 MHz, 900 MHz, 1.9 GHz and 2.5 GHz spectrum that would be controlled by a combined Sprint and Nextel in the Preferred Markets. The 2.5 GHz spectrum includes both licensed

also controls considerable quantities of this spectrum as well. In fact, Sprint's 2.5 GHz spectrum covers geographic areas that overlap with areas wherein both Applicants provide mobile telephony services. Sprint controls substantial 2.5 GHz spectrum in at least four (4) of Preferred's Markets. In seven (7) of the ten (10) Preferred Markets, the Sprint-Nextel combination would control on average 42.88% of the spectrum that Preferred believes is suitable for mobile telephony services.³⁴

Second, this spectrum is authorized for use for the mobile telephony services, which are relevant to the Commission's public interest assessment. The FCC, in a concerted effort to afford the licenses of this spectrum greater flexibility, specifically sanctioned this spectrum for use for mobile services.³⁵ Therefore, this spectrum is legally available to be converted and applied to such use.³⁶ Preferred believes that Nextel for has already been testing the use of the spectrum for these and other purposes.

Third, Nextel and Sprint actively lobbied the Commission to permit the use of this spectrum for expanded and mobile applications.³⁷ The fact that the Applicants in this case have not necessarily emphasized the utility of the spectrum for mobile telephony services does not justify or warrant its exclusion from the Commission's analysis of spectrum concentration and control.

Fourth, the Applicants have boasted that the "2.5 GHz spectrum offers the potential of supporting services that change the way people communicate comparable to the communications

and leased spectrum. Note that the chart separates out Washington and Baltimore because they are separate Basic Trading Areas in which the Applicants hold or control relevant spectrum.

³⁴Exhibit 3 also includes an analysis of the percentage of spectrum controlled by Sprint-Nextel in seven (7) of the Preferred Markets.

³⁵*Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd. 14165, 14210, ¶¶ 111-112 (2004), *modified*, 19 FCC Rcd. 22284 (2004).

³⁶The fact that there is a transition period to greater mobile use should not be a basis for excluding this spectrum. There is a transition period associated with the *Rebanding Orders*, yet clearly the Commission is not contemplating excluding that spectrum from its analysis.

³⁷ Both Sprint and Nextel were active participants in WT Docket No. 03-66 filing comments and ex parte submissions.

revolution that accompanied the introduction of cellular mobile services.”³⁸ Further they are proud that Sprint and Nextel will have access to a 2.5 GHz footprint covering nearly 85% of the population in the top 100 Basic Trading Areas in the country.³⁹ It is clear from public statements by the Applicants reported after the announcement of the merger that they feel in an “enviable spectrum position” and envision an integrated spectrum platform of voice and data across all bands that they control, including 2.5 GHz, no matter what form of mobile wireless service that spectrum is actually used for.⁴⁰ While there may be some impediments, the Applicants are confident that a “combined Sprint Nextel will be able to overcome these impediments more successfully than either company acting alone.”⁴¹ Indeed, Nextel has opposed any effort to delay access to this spectrum and urged the FCC to accelerate the transition.⁴²

Fifth, as previously noted, the Commission has a special responsibility with respect to mobile telephony to “manage the spectrum to ensure competition” and to ensure “regulatory parity” among mobile telephony competitors.⁴³ Turning a blind eye to this additional suitable spectrum controlled by both Sprint and Nextel ignores that responsibility.

For this, and the other foregoing reasons, the Commission’s public interest analysis must consider all spectrum that the Applicants will control that is capable for use in providing mobile telephony services, including the 2.5 GHz spectrum.

³⁸Joint Declaration of Todd Rowley and Robert Finch, dated February 8, 2005, Attachment E, Sprint/Nextel Application for transfer of Control (“*Rowley/Finch Declaration*”).

³⁹ *Rowley/Finch Declaration*, at p. 8

⁴⁰ Communications Daily, Vol. 24, No. 241, December 16, 2004, at p.8.

⁴¹*Rowley/Finch Declaration*, at p. 2. There is clearly equipment and software in development and use to employ this spectrum for mobile telephony purposes. See, e.g., www.ipwireless.com/news/press.

⁴²Nextel’s Consolidated Opposition To Petitions for Reconsideration, WT Docket No. 03-66, RM-10586, February 22, 2005, at p. 4.

⁴³ 47 U.S.C. § 332.

V. UNCONDITIONED GRANT OF THE APPLICATIONS IS NOT IN THE PUBLIC INTEREST

Based on all of the foregoing, Preferred respectfully submits that the Commission cannot find that an unconditioned grant of the Application will serve the public interest convenience and necessity.

Without any conditions, the potential public interest harms of the proposed merger outweigh the potential public interest benefits because the merger would, when coupled with the competitive impact of the *Rebanding Orders*, box out potential competitors like Preferred from access to spectrum reasonably necessary to compete. The merger would leave the Applicants in control of well in excess of 70 MHz of spectrum suitable for the provision of mobile telephony in six (6) out of the ten (10) Preferred Markets.⁴⁴ Indeed, considering all such spectrum available to the Applicants, in some Preferred Economic Areas, the combined entity will control well in excess of 100 MHz of spectrum in those markets.

Control over such large amounts of additional spectrum suitable for mobile telephony will only magnify the competitive advantages gained by Nextel as a result of the *Rebanding Orders*, which clearly favored Nextel to the detriment of licensees like Preferred. As the Commission stated with respect to the AT&T transaction, "especially worrisome are markets in which providers are present but are constrained from repositioning and expanding ... for some reason such as an incomplete footprint or inadequate spectrum bandwidth."⁴⁵ If granted without conditions, the proposed merger will leave Preferred and other licensees stranded precisely in that position identified by the Commission in the *AT&T Wireless* decision.

⁴⁴ In *AT&T Wireless*, the Commission used 70 MHz as the trigger for special focus on a particular market. In *AT&T Wireless* the applicants also volunteered to divest any spectrum in excess of 80 MHz of cellular or broadband PCS spectrum held in a particular market, an offer the Commission readily accepted. *AT&T Wireless*, at ¶ 199.

⁴⁵ *AT&T Wireless*, at ¶ 149.

The Commission's unconditioned grant of the Applications and the sanctioning of such a spectrum hoard by a merged Sprint and Nextel would fly in the face of the standards that it has applied to past mergers, including most recently the merger of AT&T Wireless and Cingular. The end result would be to further devalue the spectrum acquired in good faith by Preferred and similarly situated auction winners long before the *Rebanding Orders* and this proposed merger. It would send a message to such entities that the concept and requirement to manage spectrum to encourage competition is a hollow one for licensees like Preferred. Therefore, the Commission should not grant the applications without appropriate conditions.

VI. APPROPRIATE CONDITIONS

It is appropriate for the Commission to impose conditions on the transfer of control of Commission licenses to mitigate the competitive harms the transaction would likely create. In this case, the competitive harms directly relate to the amount of the spectrum that would be controlled by a combined Sprint-Nextel entity versus the ability of competitors such as Preferred to gain access to such spectrum. To redress these competitive harms, Preferred believes that any approval of the Applications must be subject to the following conditions:

1. In a particular EA market, either Nextel or Nextel Partners would, in exchange for spectrum specified below, divest itself of EA market-wide unencumbered and contiguous spectrum in the former NPSPAC Channels (821-824 MHz/866-869 MHz) and at the Upper End (Channels 551-600 or 819.7375-820.9875 MHz/864.7375-865.9875 MHz) of the Upper 200 Channels. This spectrum comprises one hundred seventy (170) Channels, or a total of 8.5 MHz spectrum. This spectrum would be reallocated as follows:
 - a. First, to non-Nextel EA licensees on an EA market-wide, unencumbered and 1:1 channel basis with respect to their respective (1) 800 MHz General Category and Lower 80 EA Authorizations, (2) presently held 800 MHz site-licensed channels and (3) site licensed channels subsequently acquired and constructed as part of a "cellular system," as that term is defined in the *Rebanding Orders* within eighteen (18) months of the FCC's final approval of the Nextel-Sprint merger.
 - b. Second, to the extent that such spectrum remains unallocated at the end of such eighteen (18) month period, the FCC would conduct an auction of such spectrum.

2. In exchange for the foregoing divestiture in a particular EA market, a non-Nextel EA or site licensee electing to receive such spectrum would:
 - a. In the case of EA licenses, exchange its EA-licensed spectrum (post-*Rebanding Orders*) in a particular EA market with Nextel or Nextel Partners for unencumbered and contiguous 800 MHz spectrum in the former NPSPAC Channels on an EA market-wide, 1:1 channel basis. If such spectrum is insufficient to accommodate a non-Nextel EA licensee, it would have the election to exchange such "excess" spectrum with Nextel or Nextel Partners either for unencumbered and contiguous channels (1) in the Upper 200 Channels on an EA market-wide and 1:1 channel basis beginning with Channel 600 and then moving downward on a contiguous channel basis or (2) the 1.9 GHz Band beginning with 1,910 MHz and then moving upward on a contiguous channel basis.
 - b. In the case of site-licensed 800 MHz spectrum presently held or subsequently acquired during the eighteen (18) month described above by a non-Nextel EA or site licensee, it would exchange such site-licensed spectrum with Nextel or Nextel Partners on an EA market-wide basis for either (1) the former NPSPAC Channels, (2) Upper 200 Channels beginning with the first channel not previously exchanged by Nextel or Nextel Partners with a participating non-Nextel EA licensee, or the (3) 1.9 GHz Band beginning with the first channel not previously exchanged by Nextel or Nextel Partners with a participating non-Nextel EA or site licensee.
3. Nextel and/or Sprint would divest itself of 10 MHz of 1.9 GHz Band Spectrum in certain EA or BTA markets to non-Nextel EA and site Licensees. Such Non-Nextel licensees would receive such spectrum in exchange for (1) foregoing reimbursement of their respective 800 MHz Band relocation costs and (2) posting an irrevocable letter of credit to pay a portion of the total 800 MHz Band and 1.9 GHz Band relocation costs. Such letter of credits would be in an amount equal on a MHz/Pops basis to the amount of Nextel's irrevocable letter of credit. At the FCC's discretion, such letter(s) of credit could serve as a substitute for one or more of the eight (8) separate letters of credit provided by Nextel on March 8, 2004 or as an addition thereto.

These are reasonable conditions to redress the competitive barriers which would be erected or solidified by unconditional grant of the Applications. Divestiture has been the conditional remedy that the Commission has previously employed to remedy concerns about particular local markets.

VII. CONCLUSION

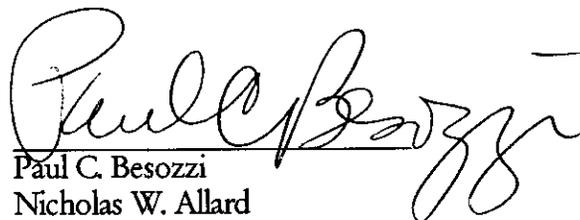
The Applicants have failed to demonstrate the grant of the captioned Applications is warranted. An unconditioned grant of the Applications would not serve the public interest and would cause harm to wireless competition as outlined herein and thereby wireless consumers in the

markets licenseed to Preferred. For the reasons stated herein the Commission should dismiss or deny the Applications or grant them only with the conditions outlined in Section VI. above.

Respectfully submitted,

PREFERRED COMMUNICATIONS SYSTEMS, INC.

By



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Dated: March 30, 2005

Exhibit 1

Preferred Communication Systems, Inc.

BEA Map

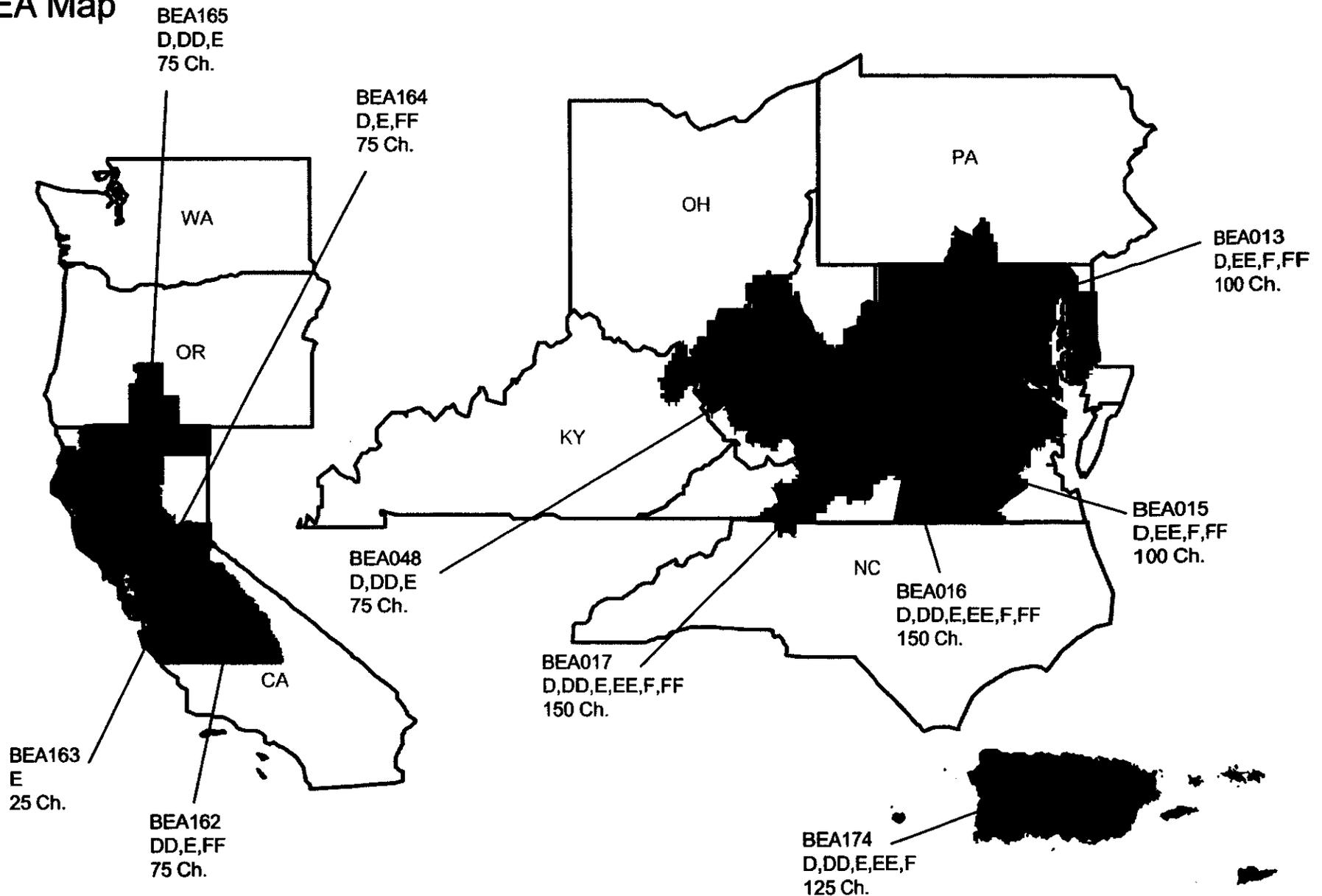


Exhibit 2



December 22, 2004

BY ELECTRONIC FILING

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

Re: WT Docket No. 02-55
Petition for Reconsideration

Dear Ms. Dortch:

Preferred Communication Systems, Inc. ("Preferred") and Silver Palm Communications, Inc. hereby submit their Petition for Reconsideration of the Commission's Report and Order in WT Docket 02-55, *Improving Public Safety Communications in the 800 MHz Band*.

Sincerely,

/s/Charles M. Austin
Charles M. Austin

/s/Kent S. Foster
Kent S. Foster

Attachments

cc:

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
John A. Rogovin, Chief Counsel
Edmond J. Thomas, Chief Engineer, Office of Engineering and Technology
Jennifer A. Manner, Senior Counsel to Commissioner Abernathy
R. Paul Margie, Legal Advisor to Commissioner Copps
Samuel L. Feder, Legal Advisor to Commissioner Martin
Barry Ohlson, Senior Legal Advisor to Commissioner Adelstein
John B. Muleta, Chief, Wireless Telecommunications Bureau
Michael J. Wilhelm, Deputy Chief, Public Safety and Critical Infrastructure Division of the
Wireless Telecommunications Bureau

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

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

PETITION FOR RECONSIDERATION

Preferred Communication Systems, Inc. ("Preferred") and Silver Palm Communications, Inc. ("Silver Palm") hereby request that the FCC reconsider its position with respect to certain issues in the *Report and Order*.

EXECUTIVE SUMMARY

- 800 MHz Band Movement
 - The *Report and Order's* impermissible discriminatory treatment of Non-Nextel EA and Cellular-Architecture System EA- and Site-Licensed Spectrum and SMR Site-Licensed Spectrum violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the Commission's statutory mandates to maintain regulatory parity and promote competition among ESMR and SMR Site licensees and between such licensees and cellular and PCS licensees.
 - The FCC should expressly recognize and affirm the spectrum rights of EA authorization holders: (1) the right to offer cellularized service throughout the geographical market area in which they hold one or more EA frequency block licenses; and (2) the right to recover "white space" upon the expiration or termination of an underlying Site-Specific license on a frequency within its EA-Licensed Spectrum. The Commission therefore should reaffirm that all General Category and Lower 80 EA licensees will be afforded the three (3)-part election set forth in paragraph 162 of the *Report and Order* concerning the movement of their respective EA authorizations.
 - The FCC should reaffirm that all Cellular-Architecture System Site licensees will be afforded the three (3)-part election set forth in paragraph 162 of the *Report and Order* concerning the movement of their respective Site licenses.
 - The FCC's discriminatory treatment of Site-Licensed Spectrum held by Nextel, Nextel Partners and the licensees who have executed purchase option or management agreements with Nextel ("Nextel Control Group" or "NCG") and Non-Nextel EA, Cellular-Architecture System and SMR Site licensees constitutes a confiscation of these licensees' spectrum right to offer cellular service on their respective Site-Licensed Spectrum without compensation and thereby violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the Commission's statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition among SMR licensees as well as between SMR, cellular and PCS licensees. The Commission therefore should modify the *Report and Order* to permit Non-Nextel EA, Cellular-Architecture System and SMR Site licensees to move their respective Site Channels into the Cellular Block on an EA market wide Clean 1:1 basis if such Channels are included in a Cellular-Architecture System as of the present construction deadline for Site Channels held by the Nextel Control Group (December 20, 2005).

- The Commission should modify the *Report and Order* to extend such three (3)-part election to a SMR Site licensee if it has obtained a firm commitment to purchase the infrastructure equipment for a Cellular-Architecture System within nine (9) months following the date the Memorandum Opinion and Order (reflecting all clarifications and modifications to the *Report and Order*) is published in the Federal Register.
- Given the considerable spectral benefits provided to the Nextel Control Group in the 800 and 900 MHz Bands and the 1.9 GHz Band and the crediting to Nextel, and presumably Nextel Partners, of their respective capital expenditures incurred to add cell sites to maintain their respective present operating systems' capacity toward Nextel's total contribution of \$4.86 billion, and the uncertainty created, and impermissible results caused, by the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 of the *Report and Order*, the Commission expressly should eliminate such approach.
- Alternatively, the FCC should modify the *Report and Order* to restrict the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 of the *Report and Order* to the unique 800 MHz licensing situation found in Southern Communications Services, Inc.'s core EA markets (Georgia, Alabama, southeastern Mississippi and northern Florida).
- The Commission should clarify that a Cellular-Architecture System licensee's Upper 200 Site Channels are entitled to remain in the Upper 200 Channels and thereby become EA-Licensed Spectrum.
- The FCC should modify the *Report and Order* to provide that if a Non-Nextel or Cellular-Architecture System licensee elects to move its EA- and qualifying Site-Licensed Spectrum to the new Cellular Block, it further may elect to move its
 - (1) General Category EA- and Site-Licensed Spectrum to the thirty (30) Channels at the top of the Upper 200 Channels (Channels 571-600), if held by Nextel or Nextel Partners, and available to be vacated, and the former NPSPAC Channels (821-824 MHz/866-869 MHz) on an EA market, Clean and 1:1 basis; if the top of the Upper 200 Channels is not held by Nextel or Nextel Partners, as is the case in the Puerto Rico EA market, the Non-Nextel EA licensee alternatively could elect to relocate up to thirty (30) of its General Category EA and/or Site Channels to the 1.9 GHz Band on an EA market, Clean and 1:1 basis.
 - (2) Lower 80 EA- and Site-Licensed Spectrum either to the top of the Upper 200 Channels and moving downward or to the 1.9 GHz Band spectrum on an EA market, Clean and 1:1 basis.

- Except for Site Channels held by EA and Cellular-Architecture System licensees, the Commission should modify the *Report and Order* to provide that all Site Channels that

- (1) presently are within the new Cellular Block, or
- (2) are moved into the new Cellular Block pursuant to the election set forth in paragraph 162 of the *Report and Order* and paragraph 163 therein and
- (3) qualify to be treated as EA-Licensed Spectrum as set forth in paragraph 163 of the *Report and Order*,

would be relocated to the Non-Cellular Block on a geographic "footprint" basis as follows:

- (1) Initially, such Site Channels will be moved to the Guard Band;
- (2) If the Guard Band is insufficient to accommodate the Site Channels required to be relocated from the Upper 200 Channels in a particular EA market, then the excess Site Channels would be relocated to the Expansion Band; and
- (3) If the Expansion Band is insufficient to accommodate the remaining Site Channels that are required to be relocated from the Upper 200 Channels in a particular EA market, then the excess Site Channels will be moved to the top of the Non-Cellular Block and move downward.

Site Channels required to be moved from the Upper 200 Channels will be relocated on a geographic "footprint" basis only.¹

- The Commission should recognize that, much like Southern Communications Services, Inc.'s core markets, the Puerto Rico EA market presents an unusual licensing situation that should be addressed separately from the remaining EA markets. Since Nextel failed to win the A and C Frequency Blocks in FCC Auction #16 in this EA market, movement of Preferred's EA- and Site-Licensed Spectrum to the Upper 200 Channels as proposed in the *Report and Order* would result in the loss of numerous Channels in violation of the Due

¹ The relocation rules with respect to Site Channels in the Upper 200 Channels also would apply to EA Authorizations not constructed as part of a Cellular-Architecture System within seven (7) years from the license issuance date. To expedite rebanding in EA markets in which Preferred Communication Systems, Inc. holds EA Authorizations, it would forego reimbursement of its relocation costs and pay the total 800 MHz and pro rata 1.9 GHz band relocation costs in exchange for the award of 10 MHz of 1.9 GHz band spectrum in those EA markets. In the Puerto Rico EA market, Preferred also would commit to pay Nextel's relocation costs involving its B Frequency Block EA Authorization and Site Channels in the Upper 200 Channels to the Interleave Channels in that EA market. Preferred would seek to complete the rebanding process in these EA markets within thirty-six (36) months, or several years before the schedule proposed in the *Report and Order* and proposed by Nextel.

Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution.

• Allocation of 1.9 GHz Band Spectrum

- The Federal Communications Commission (“FCC” or “Commission”) clearly lacks the statutory authority to allocate either a nationwide 10 MHz license in the 1.9 GHz Band or multiple 1.9 GHz Band licenses based upon the one hundred seventy-five (175) EA markets exclusively to Nextel and Nextel Partners. Such spectrum award would violate the mandatorily applicable competitive bidding provisions of Section 309 of the Communications Act and the FCC’s statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition under Sections 332(c), 309 and 257 of the Communications Act.
- Lacking the discretion to allocate the 1.9 GHz Band spectrum exclusively to Nextel and Nextel Partners, a reviewing court clearly would reverse the FCC’s determination.
- The allocation of 1.9 GHz Band spectrum exclusively to Nextel and Nextel Partners clearly would involve the issuance of an “initial” license under the standard enunciated in the *Fresno Mobile Radio* decision, the Commission’s own rules and the standard announced by the FCC in the Competitive Bidding Second Report and Order. Having already allocated the 1.9 GHz Band spectrum for commercial services, recent Commission decisions that avoid mutual exclusivity by limiting eligibility to participate in the award of spectrum are inapplicable.
- Section 309(j)(6)(E) provides no authority for a private sale of spectrum to Nextel and Nextel Partners. That Section admonishes the FCC to consider “engineering solutions, threshold qualifications, service regulations and other means” to avoid mutual exclusivity when it accommodate the needs of all of the members of a class of licensees. By separating the award of 1.9 GHz Band spectrum from the movement of 800 MHz Band General Category and Lower 80 EA- and Site-Licensed and BILT Site Channels converted to CMRS, the Report and Order renders this Section inapplicable.
- The FCC should clarify that Nextel Partners, Inc. receives an allocation of 10 MHz of 1.9 GHz band spectrum in the seventy-one (71) EA markets in which it, rather than Nextel, holds 800 MHz band spectrum.
- The Commission should clarify that it is issuing multiple 1.9 GHz band licenses to Nextel Communications, Inc. and Nextel Partners, Inc. according to the one hundred seventy-five (175) EA markets.

- The FCC should clarify that Nextel Partners, Inc. is not contributing any funds toward defraying 800 MHz band relocation costs.
- The Commission should clarify that Nextel is receiving credit for the value of 800 MHz Band spectrum to be vacated by Nextel Partners.
- The Commission should modify the *Report and Order* by explicitly recognizing that a minimum of 5.5-6.5 MHz of 1.9 GHz band spectrum is integral to any 800 MHz rebanding proposal (1) moving EA-Licensed Spectrum from the underlying Site-Licensed Spectrum held by EA licensees on a 1:1 Clean basis to the new Cellular Block and separating such Spectrum from the Site-Licensed Spectrum held by Non-EA licensees and (2) protecting fully the spectrum rights of all General Category and Lower 80 EA licensees. Unlike the Consensus Parties' Proposal, such an alternative proposal necessarily would open up participation in the allocation of such 1.9 GHz Band spectrum to all such licensees.
- Having recognized (1) the minimum of 800 MHz band spectrum that needs to be moved, and replaced by spectrum outside the Private Land Mobile Radio Band ("PLMRB")(806-824 MHz/851-869 MHz), and (2) the spectrum rights of Non-Nextel EA, Cellular-Architecture System and SMR Site licensees that need to be protected and promoted, the FCC should modify the *Report and Order* to increase the allocation of 1.9 GHz band spectrum from 10 MHz (1,910-1,915 MHz/1,990-1,995 MHz) to 12.5 MHz (1,910-1,916.25 MHz/1,990-1,996.25 MHz).
- The Commission should modify the *Report and Order* by adopting a proposal that provides that all General Category and Lower 80 EA licensees who (1) forego reimbursement of their own relocation costs, and/or (2) promise to contribute funds to defray total relocation costs and/or, (3) in certain EA markets, lose 800 MHz frequencies, would be entitled to an allocation of additional 1.9 GHz band spectrum.
- Preferred is willing to forego reimbursement of its own relocation costs estimated at \$20 million, contribute up to \$180 million to defray total 800 MHz relocation costs and 1.9 GHz band clearing costs, and give up some 800 MHz frequencies in the Puerto Rico EA market. In exchange, Preferred would receive 8 MHz of 1.9 GHz spectrum in the Puerto Rico EA market and 6 MHz of such spectrum in each of its other EA markets and certain other EA markets.
- If Nextel refuses to accept the only rebanding proposal for which the Commission has the legal authority to adopt, Preferred believes that the Commission should adopt such Improvements and fund the 800 MHz band relocation including that of Nextel from the alternative funding sources set forth in this Comment.

- Funding
 - The FCC should seek amendment of the Communications Act to grant it the authority to impose a license renewal fee of \$.15 per MHz/Pop on cellular licensees who originally obtained their respective licenses by a comparative hearing or random selection lottery procedure and/or have acquired their licenses from such licensees. Such renewal fees are estimated to raise \$2.19 billion over the next five (5) years. The amendment would allow the Commission to apply such fees toward payment of 800 MHz Band reconfiguration costs and to assist Public Safety and CII licensees to achieve interoperability in the 800 MHz and 700 MHz Bands.
 - If the Commission determines to afford a higher priority to providing additional funding for 800 MHz relocation costs than an additional 4.5 MHz of spectrum for Public Safety licensees, it should allocate such spectrum by a competitive public auction and require the auction winners to pay a portion of the total 800 MHz Band relocation costs. Preferred estimates that the winners of such auction would be willing to pay as much as several hundred million dollars to relocate SMR, BILT and Public Safety Site licensees.
- Interference Protection Standards and Administrative Issues
 - The Commission should clarify the *Report and Order* by granting all General Category and Lower 80 EA licensees a waiver of their respective five (5)-year construction deadline on a day-for-day basis from the date of the publication of the *Notice of Proposed Rulemaking* in the WT 02-55 proceeding until the publication of the Supplemental Order and Order on Reconsideration in the Federal Register.
 - The FCC should recognize that in many EA markets that Nextel or Nextel Partners lacks the necessary total channels within the Interleave Channels (Channels 151-400) to accommodate the movement of Public Safety and Non-Nextel BILT and SMR Site Channels in Channels 1-150 proposed in its *Report and Order*.
 - The Commission should recognize that in many of the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA and Cellular-Architecture System licensees, Nextel and Nextel Partners respectively lack the Clean Channels in the Upper 200 Channels to accommodate the movement of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum to the Upper 200 Channels within the new Cellular Block without requiring Nextel and/or Nextel Partners to vacate a considerable number of their Clean Channels and incur significant capital expenditures to maintain their respective systems' operating capacity.

- The FCC should recognize that in many EA markets it will prove difficult, if not impossible to provide Public Safety and Non-Nextel BILT and SMR Site licensees with Site Channels in Channels 1-150 comparable facilities as guaranteed by the *Report and Order* in the Interleave Channels (Channels 151-400) due to the unavailability of the same sites and coverage contours or "footprints." As a result, numerous such Public Safety, BILT and SMR Site licensees will lose sites, coverage areas and Channels and the cost of such relocation will be increased significantly above the \$2.5 billion figure Nextel is required by the Commission to collateralize by providing an irrevocable letter of credit.

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

In the Matter of)	
)	
Improving Public Safety Communications)	
In the 800 MHz Band)	WT Docket No. 02-55
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Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by The Mobile Satellite Service)	ET Docket No. 95-18
)	
To: The Commission)	

INTRODUCTION

On November 22, 2004, the FCC's *Report and Order* in this proceeding was published in the Federal Register. Preferred and Silver Palm hereby file this Petition for Reconsideration to the Commission's *Report and Order* within the thirty (30) day period specified in the *Report and Order* for the modification of applications or licenses.²

In addition to recommending that the FCC reconsider certain of its decisions in the *Report and Order*, Preferred and Silver Palm propose solutions with respect to the treatment of 800 MHz Band Non-Nextel EA and Cellular-Architecture System licensees' EA- and Site-Licensed Spectrum and the allocation of 1.9 GHz Band spectrum that would address the *Report and Order's* legal, practical and even mathematical infirmities,

² See 47 C.F.R. § 1.429.

the lack of adequate funding of 800 MHz Band relocation costs and 1.9 GHz Band clearing costs and the unavailability in many EA markets of the total channels and/or channels with the matching sites and coverage areas or "footprints" within the Interleave Channels to accommodate the reconfiguration of the 800 MHz Private Land Mobile Radio Band (806-824 MHz/851-869 MHz).

DISCUSSION

I. Reconfiguration of the 800 MHz Band

A. Present Licensing Scheme in the Private Land Mobile Radio Band

Under the Commission's present geographic overlay licensing system for SMR licenses in the Private Land Mobile Radio Band ("PLMRB") (806-824 MHz/851-869 MHz), a minimum of 26.5 MHz of spectrum is eligible to provide Commercial Mobile Radio Service ("CMRS") ("Cellular Eligible Service Spectrum").³ 9.5 MHz of spectrum in the PLMRB is reserved for public safety licensees.⁴ Beginning in 1997, the FCC conducted auctions of the Upper 200, General Category and Lower 80 Channels. Nextel won ninety percent (90%) or more of the licenses granted in the Upper 200 and Lower 80 auctions. However, in the General Category Channels' auction, it won only 76% of the licenses granted.

As a result, Nextel or Nextel Partners holds all of the EA-Licensed Spectrum in only fifty-eight (58) Economic Area ("EA") markets in which 151 million persons live. Nextel or Nextel partners share EA-Licensed Spectrum in one hundred seventeen (117) EA markets in which 133.5 million persons reside. In these EA markets, the EA-Licensed and Site-Licensed Spectrum therefore are held by nonaffiliated entities. In these EA markets this "dual ownership" increases the amount of present Cellular Service Eligible Spectrum from 26.5 MHz to as much as 31-32.5 MHz of such Spectrum.

B. Report and Order

The FCC sought in the *Report and Order* to mitigate, if not eliminate, interference with public safety and other systems in the PLMRB by separating high site and high power ("Non-Cellular") systems from low and multi-cell site and low power ("Cellular") systems.⁵ According to the Commission it was guided by the principle that it could

³ This figure is comprised of 7.5 MHz of spectrum in the General Category Channels (806.0125-809.7375 MHz/851.0125-854.7375 MHz), 4 MHz in the Lower 80 Channels (16 5 Channels Blocks within 809.7625-815.9875 MHz/854.7625-860.9875 MHz), 10 MHz of spectrum within the Upper 200 Channels (816.0125-821.9875 MHz/861.0125-865.9875 MHz) and 5 MHz in the Business and Industrial Land/Transportation Channels' Pool (within 809.7625-815.9875 MHz/854.7625-860.9875 MHz). In this context, "cellular service" would be defined as set forth in the Consensus Parties' Reply Comment filed on February 25, 2003, at pp. 27-28 and nn. 59-60. See also Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 1.

⁴ This figure is comprised of seventy (70) channels within 809.7625-815.9875 MHz/854.7625-860.9875 MHz and the two hundred thirty (230) NPSPAC Channels (822-824 MHz/866-868 MHz), most of which use a 12.5 kHz, rather than a 25 kHz bandwidth. These latter channels comprise 6 MHz of spectrum.

⁵ *Report and Order*, at ¶¶ 1, 22 and 142-148.

minimize unacceptable interference in this Band by “placing similar system architectures in like spectrum and isolating dissimilar architectures from one another.”⁶

By largely adopting the Consensus Parties Proposal’s movement methodology,⁷ the Commission’s *Report and Order* adopted a plan that also seeks to

- (1) separate EA-Licensed Spectrum from Site-Licensed Spectrum;⁸
- (2) separate the EA- and Site-Licensed Spectrum of Nextel Communications, Inc., (“Nextel”) Nextel Partners, Inc. (“Nextel Partners”) and licensees that have executed either a purchase option or management agreement with Nextel (“Nextel Control Group” or “NCG”) from that of the Non-Nextel

⁶ *Id.*, at ¶ 22.

⁷ *Id.*, at ¶¶ 149-151 & n. 402. In declining to adopt Preferred’s Improvements, the FCC mischaracterized Preferred’s plan as not providing public safety licensees additional PLMRB spectrum rights. Under Preferred’s Improvements public safety licensees would be afforded exclusive access to seventy (70) additional PLMRB channels (channels 121-150; channels 201-208, 221-228, 241-248 and 261-268) or twenty (20) more channels than allocated to public safety licensees by the Consensus Parties’ Proposal. Although the FCC adopted Nextel’s subsequent modification of the Consensus Parties’ Proposal to provide for a Guard Band (816-817 MHz/861-862 MHz) and Expansion Band (815-816 MHz/860-861 MHz) in the *Report and Order*, given the number of Non-Nextel Site licenses required to be moved from Channels 1-150 and Channels 401-600 if the Non-Nextel EA and Cellular-Architecture System licensees’ spectrum holdings are to be relocated to Clean Upper 200 Channels spectrum held by the NCG, such Guard and Expansion Band practically will be unavailable to public safety licensees. See Concepts To Operations, Inc., *Analysis of the Relocation of Non-Nextel SMR, BILT and Public Safety Site Licenses in Channels 1-150 and 401-600 Under the FCC’s Report and Order (“CTO Report”)* attached hereto as **Exhibit A**, and Southern Communications Services, Inc., Ex Parte Presentation, October 8, 2004. Given the unavailability of these Bands, Preferred’s Improvements provide more additional spectrum to public safety licensees than does the rebanding approach adopted by the Commission in the *Report and Order*. Given the legal, practical and mathematical infirmities of the *Report and Order* and the FCC’s failure to articulate a basis for declining to adopt Preferred’s Improvements, a reviewing court likely would find that the Commission’s determination to select the Consensus Parties’ movement methodology and resulting PLMRB plan would be found to be arbitrary and capricious and an abuse of its discretion, or otherwise not in accord with law under the Administrative Procedure Act. See 5 U.S.C. §706(2)(A), Preferred March Ex Parte, at p. 46 (section is entitled “Additional Spectrum for Public Safety and Critical Infrastructure Licensees”) and Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at pp. 15-16. See also Comparison Channel Movement Charts attached hereto as **Exhibit B**.

⁸ See Mobile Relay Associates’ and Skitronics, LLC’s Motion for Partial Stay of Decision Pending Appellate Review, November 19, 2004; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at p. 27 (“Preferred March Ex Parte”).

- EA licensees and certain Site licensees that have deployed Cellular-Architecture systems ("Cellular-Architecture System Licensees");⁹
- (3) move the Nextel Control Group's Site-Licensed Spectrum to the former NPSPAC Channels and 1.9 GHz Band spectrum on an EA market wide, Clean 1:1 basis;¹⁰ and
 - (4) exclusively reserve the former NPSPAC Channels and 1.9 GHz Band spectrum to the NCG.¹¹

Given the above, the *Report and Order* relocates Non-Nextel Control Group Site licenses in Channels 1-150 to the Interleave Channels (Channels 151-400) to be vacated by the NCG.¹² Although it is somewhat unclear, the FCC's rebanding rationale set forth above would appear to require relocation of Non-Nextel Site licenses in Channels 401-600 to channels 151-400 within the Non-Cellular Block.¹³ This conclusion is buttressed by the *Report and Order's* relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA-Licensed and qualifying Site-Licensed Spectrum to the Clean Upper 200 Channels presently held and to be vacated by the Nextel Control Group. As set forth in the *CTO Report* attached hereto as **Exhibit A** absent relocation of the Non-Nextel Site licenses the NCG holds insufficient Upper 200 Channels spectrum to accommodate the *Report and Order's* movement of Non-Nextel EA and Cellular-Architecture System licensees' spectrum holdings without applying the *pro rata* distribution approach set forth in paragraph 168 and footnote 444. As discussed below and in Appendix I at length, the *pro rata* distribution approach clearly violates both the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution¹⁴ and the Commission's statutory mandates to promote regulatory parity¹⁵ and to promote competition.¹⁶

⁹ See *Report and Order*, at ¶¶ 151, 168 & n. 444, 196, 325 & n. 743; Preferred March Ex Parte, at pp. 26-27, 29-35 and 43-44.

¹⁰ *Id.*, at ¶¶ 23, 68-74 and 198; see also Preferred March Ex Parte, at pp.

¹¹ See *Report and Order*, at ¶¶ 65-74, 151 and 198; see also Preferred March Ex Parte, at pp. 25-28 and 41-43.

¹² See *Report and Order*, at ¶¶ 23, 151 and 198.

¹³ See *id.*, at ¶¶ 1-2, 22, and 142-148.

¹⁴ For a general discussion of the constitutional limitations upon the FCC's authority to modify licenses under Section 316, see William L. Fishman, *Property Rights, Reliance and Retroactivity Under the Communications Act of 1934*, 50 Federal Communications Law Journal 2, 13-23 (1997) ("Fishman"). See also Preferred March Ex Parte, at p. 29 & n. 58.

¹⁵ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)B), 107 Stat. 312, 397 (1993), 47 U.S.C. § 332 (c). 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, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, at 1483, ¶ 23 & n. 88 ("800 MHz SMR First Report and Order"); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079 at 19087-88, ¶¶ 10, 12

In paragraph 162 of the Report and Order¹⁷, the Federal Communications Commission ("FCC" or "Commission") provided Non-Nextel EA and Cellular-Architecture System Site licensees ("Cellular System Site Licensees") an "incentive" to relocate their respective systems by providing them the flexibility of the following three options:

- (1) Relocate all of their systems in an EA market into the ESMR portion (817-824 MHz/862-869 MHz) portion of the band where they will share spectrum with Nextel, Nextel Partners and licensees which have executed a management or purchase option agreement with Nextel ("Nextel Control Group" or "NCG");
- (2) Relocate their systems as close as possible to the ESMR portion of the band but remain in the non-cellular portion of the band, i.e., in order of preference:
 - (a) the 816-817 MHz/861-862 MHz Guard Band;
 - (b) the 815-816 MHz/860-861 MHz Expansion Band; and
 - (c) channels below 815 MHz/860 MHz if necessary.

According to the FCC, these licensees will operate on a strict non-interference basis, subject to pre-coordination of any new or modified operations; or

- (3) Remain on their current channels in the non-cellular portion of the band on a strict non-interference basis, subject to pre-coordination of any new or modified operations.

In paragraph 163, the FCC expounded upon the first option it afforded Non-Nextel EA and certain Site licensees. According to the Commission, if a Non-Nextel EA or Cellular-Architecture System Site Licensees elect to relocate to the ESMR portion of the band, their EA licenses will move upon an EA market wide, Clean 1:1 basis. The FCC also recognized that these Licensees also hold Site-Licensed Spectrum. The FCC therefore also determined to provide these Licensees the option of relocating their Site-Licensed Spectrum along with their EA-Licensed Spectrum to the ESMR portion of the band. However, to transfer Site-Licensed Spectrum, a Non-Nextel EA or Cellular-Architecture System Site Licensee must:

- (a) currently hold an EA license in the relevant EA market; and

and 15 & n. 35 (800 MHz SMR Second Report and Order"); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Memorandum Opinion and Order of Reconsideration, 14 FCC Rcd 17556 at 17564, ¶ 11 & n. 30 ("800 MHz SMR Memorandum Opinion").

¹⁶ 47 U.S.C. § 309(j)(3)(B) and (4)(C) and 47 U.S.C. § 257.

¹⁷ *Report and Order*, at ¶ 162.

(b) be using the Site-Licensed Spectrum as part of a cellular-architecture system in that EA market as of the date of the publication of the *Report and Order* in the Federal Register.¹⁸

Moreover, to create a more uniform licensing scheme, the transferred Site-Licensed Spectrum would be converted to EA-Licensed Spectrum on a Clean 1:1 basis. If Non-Nextel EA or Cellular-Architecture System licensees elect to move to Guard Band or must be relocated to the Expansion Band, or to the spectrum immediately below, when necessary, subject to the conditions set forth immediately above, their Site-Licensed Spectrum also would be converted to EA-Licensed Spectrum on a Clean 1:1 basis.

In footnote 444 to paragraph 168 of the *Report and Order*, the FCC seemingly contradicts the three preceding paragraphs by placing an additional limitation upon the movement of EA- and Site-Licensed Spectrum held by Non-Nextel EA and Cellular-Architecture System Site Licensees into the ESMR portion of the band. In paragraph 164 the Commission had noted that in some EA markets insufficient spectrum in the ESMR portion of the band may be available due to multiple incumbent ESMR licensees already operating in the band. The FCC cited, but did not limit this possible problem of insufficient spectrum to, those markets in which Nextel or Nextel Partners and Southern Communications Services ("Southern") are offering service. Noting that Southern holds a large number of channels (average of 85 channels in its core markets) in the interleaved portion of the band and licenses for some General Category channels (average of 94 channels in its core markets). Although not mentioned by the Commission, Southern also holds a considerable number of Lower 80 channels (average of 26 channels in its core

¹⁸ This new two-part "Cellular Deployment Test" for Site-Licensed Spectrum impermissibly confiscates the present spectrum right held not only by Non-Nextel EA and Cellular-Architecture System licensees, but also by SMR Site licensees to offer cellular service on such Spectrum. See *Motion for Partial Stay*, at pp. 4-5. By failing to provide Non-Nextel EA, Cellular-Architecture System and SMR Site licensees reasonable notice that the retention of such spectrum right would be conditioned upon the (1) location of their respective Site-Licensed Spectrum within an EA market in which they also hold an EA authorization, and (2) the construction status of such qualifying Site-Licensed Spectrum as of the date the Report and Order was to be published in the Federal Register, the FCC confiscated such spectrum right in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. See, e.g., *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 ("[W]e look not at the reasonableness of the Commission's intended interpretation, but at the clarity with which the agency made that intent known.") See *id.*, at 1363-64. Under the *McElroy* decision and its progeny, the Commission clearly did not provide these licensees sufficient notice that it would confiscate their respective spectrum right to offer cellular service on their Site Channels. Moreover, such "Cellular Deployment Test" violates the Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the FCC's statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition. See 47 C.F.R. § 332; 47 U.S.C. § 309(j)(3)(B) and (j)(4)(C); and 47 U.S.C. § 257.

markets). Southern therefore holds an average of two hundred five (205) Interleaved, Lower 80 and General Category Channels (10.2 MHz of spectrum) in its core markets. In several of these EA markets, Southern also holds the A Frequency Block EA Authorization in the Upper 200 Channels. We have attached a Summary Spreadsheet and a Complete Spreadsheet detailing Southern's and Nextel's or Nextel Partners' spectrum holdings in these and other EA markets as **Schedule 4** hereto. As a result, the FCC concluded that there are an inadequate number in the 816-824 MHz/861-869 MHz band to replicate the channel capacity of both Southern and Nextel or Nextel Partners.

The Commission noted that in *ex parte* filings Southern and Nextel had cited a preliminary agreement in which they proposed to widen the 816-824 MHz/861-869 MHz band such that the lower edge would begin at 813.5 MHz/858.5 MHz. With the ESMR portion of the band so widened by one hundred (100) paired channels, Southern and Nextel would engage in a channel-for-channel exchange that would result in the configuration of channels shown in Appendix G to the *Report and Order*. Although the FCC noted that the Southern and Nextel agreement was not final and that the parties had not been able to agree on a final apportionment of channels in the Atlanta, Georgia EA market, on its own motion the Commission defined the ESMR portion of the band in the area shown in Appendix G as the band segment 813.5-824 MHz/858.5-869 MHz. The Expansion Band in these markets shall extend from 812.5-813.5 MHz/857.5-858.5 MHz.

In paragraph 168 the FCC provides that if Nextel and Southern fail to reach such agreement within the prescribed period, they shall submit their differences to the Transition Administrator who will attempt to facilitate a final agreement. If the disputed matters are not resolved within thirty (30) days, the Transition Administrator will submit the entire record to the Commission for *de novo* review. The FCC then continues by stating that “[p]arties are hereby put on notice that disputed matters concerning the ESMR channels in any area of the country, including the area shown in Appendix G may be resolved by the Commission making a *pro rata* distribution of ESMR channels.” Citing footnote 444, the FCC then states in that footnote: “When the ESMR spectrum is not adequate to accommodate all eligible licensees that wish to relocate in the ESMR block, and parties are unable to agree, we may apportion the ESMR block as a function of the relative spectrum rights each licensee holds in a given EA. For example, in a hypothetical market, outside the area shown in Appendix G, in which licensee “A” currently has rights to 150 channels and licensee “B” has rights to 250 channels, the 320 channels in the ESMR block would be apportioned by giving licensee “A” access to 128 channels (40%) and licensee “B” access to 192 channels (60%).”¹⁹

¹⁹ The Commission initially should note that its *pro rata* distribution example set forth in footnote 444 is in error. Licensee “A” has 37.5% of the total EA Channels and therefore should have rights to one hundred twenty (120) channels while licensee “B” has 62.5% of the total EA Channels and should receive spectrum rights to two hundred (200) channels.

A second and much greater problem is that the FCC's *pro rata* distribution approach is based on the rights to ESMR channels currently held by various parties in the 800 MHz band. Such approach ignores that under the *Report and Order* Nextel's or Nextel

Partners' relinquishment of spectrum rights to certain channels in the 800 MHz band in the one hundred eighteen (118) EA markets in which it shares EA-Licensed Spectrum with Non-Nextel EA licensees is compensated either (1) by the award of 1.9 GHz band spectrum as replacement spectrum, or (2) as partial payment for the grant of 10 MHz of spectrum in the 1.9 GHz band. Under this approach Nextel or Nextel Partners therefore effectively would receive a double spectrum "credit."

This double spectrum "credit" is illustrated by considering the Washington-Baltimore-DC-MD-VA-WVA-PA (BEA) EA in which Nextel and Preferred Communication Systems, Inc. both hold EA and Site Channels.

In this market Nextel currently holds EA Authorizations comprising three hundred thirty (330) EA channels while Preferred holds such Authorizations comprising one hundred (100) EA channels. The new Cellular Block has three hundred twenty (320) channels including those in the Guard Band. Under the *pro rata* distribution approach set forth in footnote 444, Nextel would hold 76.74% of the total EA Channels and therefore would receive two hundred forty-six (246) EA Channels and Preferred would hold 23.26% of the total EA Channels or seventy-four (74) channels. Although Nextel experiences a loss of eighty-four (84) channels, under the *Report and Order* these Channels previously have been counted as relinquished and used as a spectrum "credit" toward the Commission's award of 1.9 GHz band spectrum. In this EA market Nextel therefore would receive a double "credit" the EA Channels lost. By contrast, Preferred would receive no 1.9 GHz spectrum rights or spectrum "credit" for its twenty-six (26) lost EA Channels even though it has offered to contribute \$180 million to defray total 800 MHz Band relocation costs and 1.9 GHz band clearing costs. This offer has not been recognized in the *Report and Order*.

In the Puerto Rico EA market Nextel currently holds EA Authorizations comprising one hundred forty (140) EA Channels while Non-Nextel EA licensees hold EA Authorizations comprising two hundred sixty-five (265) EA Channels (Preferred: 125; North Sight Communications, Inc.: 120; and High Tech Communications Services, Inc.: 20). Under the *pro rata* distribution approach, apportioning these currently held rights in accordance with footnote 444 would result in Nextel holding 34.57% of the total EA Channels. As a result, Nextel would be granted one hundred eleven (111) EA Channels of the three hundred twenty (320) available channels. Under such approach the Non-Nextel EA licensees would hold 65.43% of the total EA Channels and therefore would receive two hundred nine (209) EA Channels. Nextel would experience a reduction of twenty-nine (29) channels but would receive the entire 10 MHz of the 1.9 GHz band in this EA market (a net gain of 171 EA Channels) while the Non-Nextel EA licenses would lose fifty-six (56) EA Channels and would not be entitled to receive any 1.9 GHz band spectrum as compensation.

Preferred's current EA Channels were obtained pursuant to FCC Auction #34. Preferred maintains that the reduction in EA Channels by the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 in the *Report and Order* constitutes an

1. Underlying Assumptions of *Report and Order*.

In largely adopting the Consensus Parties Proposal's movement methodology, the *Report and Order* necessarily accepted most, if not all, of that Proposal's assumptions with respect to the sufficiency of the Nextel Control Group's spectrum holdings within (a) the Interleave Channels (Channels 151-400) to accommodate the relocation of Non-Nextel SMR, BILT and Public Safety Site Channels within Channels 1-150²⁰ and if the Commission's rebanding rationale is to be applied consistently,²¹ the Non-Nextel SMR, BILT and Public Safety Site Channels within Channels 401-600.²² Under the *Report and Order*, such relocated Site licensees are required to receive "comparable facilities."²³ Such term encompasses the following:

- (1) equivalent channel capacity (defined by the FCC's rules as the same number of channels with the same bandwidth that is currently available to the end user);²⁴
- (2) equivalent signaling capability, baud rate and access time;²⁵
- (3) coextensive geographic coverage;²⁶ and
- (4) operating costs.²⁷

To test the *Report and Order*'s assumptions set forth above, Preferred retained Concepts To Operations, Inc. ("CTO"), to download the Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150 and 401-600 in every EA market and prepare a license spreadsheet reflecting these results. Preferred also requested that CTO to determine whether the Nextel Control Group held sufficient spectrum within Channels 151-400 to accommodate the *Report and Order*'s proposed relocation of such Non-Nextel Site licenses. Finally, since the Commission's rules require such relocated Site licenses to receive coextensive geographic coverage, Preferred requested that CTO compare the "footprints" of the Non-Nextel Site SMR, BILT and Public Safety licenses to be

uncompensated taking of its EA spectrum rights in violation of the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution.

²⁰ See *Report and Order*, at ¶¶ 23, 153.

²¹ See n. 9 *supra*.

²² See Non-Nextel SMR, BILT and Public Safety Site Licenses spreadsheet attached as **Schedule 1** to the *CTO Report* attached hereto as **Exhibit A**.

²³ See *Report and Order*, at ¶ 201 & n. 527.

²⁴ See *id.*, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of 800 MHz Systems in the 800 MHz Frequency Band, Second Report and Order, PR Docket No. 93-144, 12 FCC Rcd 19079, 19112-13 ¶ 92 (1997)("800 MHz SMR Second Report and Order"); see also 47 C.F.R. § 90.699(d)(2).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

relocated in the top eleven (11) EA markets as ranked by population used by the FCC to determine Nextel's 800 MHz General Category, Lower 80 and BILT spectrum holdings²⁸ to the "footprints" of the Interleave Channels (Channels 151-400) presently held and to be vacated by the NCG.²⁹

CTO initially examined whether the Nextel Control Group holds sufficient Interleave Channels to accommodate the relocation of Non-Nextel SMR, BILT and Public Safety Site licenses from both Channels 1-150 and Channels 401-600 on a total channels basis. Based upon the FCC's license database as of June 30, 2004, CTO found that in forty-nine (49) more "heavily congested" EA markets in which 174.79 million persons (2003 census figures) reside, the NCG lacks sufficient spectrum within the Lower 80 Channels to accommodate either the relocation of

- (1) Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150; and
- (2) those Site licensees and the Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 401-600.

CTO then assumed that all of the NCG's BILT Channels' site coordinates and geographic "footprints" match³⁰ and subtracted the Nextel Control Group's BILT channels from the excess Non-Nextel SMR, BILT and Public Safety licenses in the forty-nine (49) "heavily congested" EA markets. As CTO's Report indicates, even if all of the NCG's Interleave Channels' geographic "footprints" match those of the Non-Nextel SMR, BILT and Public Safety licenses within Channels 11-150 and 401-600 to be relocated under the *Report and Order's* movement methodology, in thirty-eight (38) EA markets in which 103.18 million persons reside, or approximately thirty-six percent (36%) of the U.S. population, the NCG still lacks sufficient spectrum holdings to accommodate the *Report and Order's* relocation of Non-Nextel SMR, BILT and Public Safety licenses.

CTO then examined the alternative rebanding scenario pursuant to which the Transition Administrator and the FCC do not relocate Non-Nextel SMR, BILT and Public Safety Site licenses from the Upper 200 Channels to the Interleave Channels

²⁸ See *Report and Order*, at ¶ 318 & n. 733.

²⁹ For this purpose CTO used both the actual coverage and the 22 dBu contour boundary of the Non-Nextel SMR, BILT and Public Safety licensees and the Nextel Control Group to compare "footprints." Although the Commission's rules and the *Report and Order* are somewhat unclear on this point, Preferred and CTO adopted the position that the term "coextensive geographic coverage" means virtually identical geographic and population coverage at the same site coordinates or at a site coordinate that would represent a minor modification thereof (would not increase the contour boundary).

³⁰ For this purpose CTO considered that a "match" would exist if the Non-Nextel SMR, BILT or Public Safety Site license's site coordinates were within a one quarter mile of the site coordinates of the Nextel Control Group's Interleave Channel and the relocation would constitute a minor modification under the Commission's rules.

presently held by and to be vacated by the Nextel Control Group. Given the Report and Order's exclusive reservation of the former NPSPAC Channels and the 1.9 GHz Band Spectrum respectively to the NCG and Nextel,³¹ CTO sought to determine whether the Nextel Control Group holds sufficient Clean spectrum holdings in the Upper 200 Channels to accommodate the *Report and Order's* relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum.

CTO downloaded the FCC license database as of June 30, 2004 with respect to Non-Nextel SMR, BILT and Public Safety licenses in the Upper 200 Channels and created the Nextel Control Group Clean Spectrum Holdings in Channels 410-600 spreadsheet attached hereto as **Schedule 3** to *CTO's Report*. As this **Schedule** indicates, in the majority of EA markets the NCG holds sufficient Clean Upper 200 Channels spectrum to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum. However, in forty (40) EA markets, in which 64.28 million persons, or approximately 22.46% of the total U.S. population resides, the Nextel Control Group lacks sufficient Clean Upper 200 Channels to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum.

Given these results, CTO now is examining the geographic "footprints" of each Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150 and 401-600 and those of the Nextel Control Group in the top eleven (11) EA markets by population to determine the extent of this spectrum "shortfall." Preferred will submit CTO's findings concerning whether the NCG's Interleave Channels spectrum holdings are sufficient to satisfy the Commission's rules concerning "comparable facilities" set forth above to the FCC when they become available within the next few days.

2. *Legal Infirmities of Report and Order.*

Given the practical and even mathematical infirmities of the *Report and Order*, a reviewing court necessarily will employ a heightened degree of scrutiny with respect to the FCC's rationale(s) for its discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees with respect to movement within the PLMRB. As noted above, the *Report and Order* exclusively reserves to the Nextel Control Group both the

- (1) former NPSPAC Channels (Channels 601-830 under the present PLMRB licensing scheme);³² and
- (2) 10 MHz of 1.9 GHz Band spectrum.³³

In the fifty-seven (57) EA markets in which Nextel or Nextel Partners holds all of the General Category and Lower 80 EA-Licensed Spectrum, the *Report and*

³¹ See n. 14 *supra*.

³² See *id.*

³³ See *id.*

Order's rebanding approach is both logical and relatively simple.³⁴ One hundred twenty (120) channels of the General Category EA authorizations move on an EA market wide Clean 1:1 basis to the former NPSPAC Channels.³⁵ Although the Report and Order is silent on this point, the thirty (30) excess General Category EA channels necessarily would be modified and swapped or exchanged for 1.9 GHz Band spectrum on an EA market wide, Clean 1:1 basis.³⁶ Similarly, Nextel's or Nextel Partners' Lower 80 EA and BILT Site Channels would be modified by swapping or exchanging them for 1.9 GHz Band spectrum on an EA market wide Clean and 1:1 basis.³⁷ In these EA markets Nextel and Nextel Partners experience a considerable increase in their respective Total, Clean and Cellular Service Eligible Spectrum.³⁸

In the one hundred nineteen (119) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA and Cellular-Architecture System licensees,³⁹ the Report and Order's rebanding approach becomes illogical and convoluted. Given the *Report and Order's* adoption of the Consensus Parties' movement methodology, it necessarily accepted their goal of separating the Nextel Control Group's EA- and Site-Licensed Spectrum from that of the Non-Nextel EA and Cellular-Architecture System licensees.⁴⁰ As a result, the *Report and Order* excludes the Non-Nextel EA and Cellular-Architecture System licensees from relocating to the former NPSPAC Channels⁴¹ and the 1.9 GHz Band spectrum exclusively reserved to the NCG.⁴²

As noted above, under the FCC's present PLMRB licensing scheme, a minimum of 26.5 MHz of spectrum is Cellular-Service Eligible Spectrum in all one hundred seventy-five (175) EA markets.⁴³ In the one hundred nineteen (119) EA markets in which Nextel and Nextel Partners share EA-Licensed Spectrum with Non-Nextel EA licensees, this figure increases to 31-32 MHz due to the Commission geographic overlay licensing scheme. In seeking to bifurcate the present PLMRB into two separate blocks

³⁴ These EA markets are set forth in spreadsheets attached hereto as **Exhibits C and D**.

³⁵ See *Report and Order*, at ¶¶ 151, 198 and 325 & n. 743.

³⁶ See *id.*, at ¶¶ 11, 23, 31, 35, 65-74, 198, 307, 314-16, 321 and 325 & n. 743.

³⁷ See *id.*, at ¶¶ 11, 23, 31, 35, 65-74, 151, 198, 307, 317-18, 323 and 325 & n.743.

³⁸ See the Nextel Control Group's Clean Spectrum Holdings in Channels 401-600 spreadsheet attached hereto as **Schedule 2 to CTO's Report**.

³⁹ These EA markets are set forth in spreadsheets attached hereto as **Exhibits E and F**.

⁴⁰ See Preferred March Ex Parte, at pp. 2-3, 25-29 and 41-44.

⁴¹ See AirPeak Communications, LLC Ex Parte Presentation, August 16, 2004; and AirPeak Communications, LLC Ex Parte Presentation, September 23, 2004. Preferred has learned that the Wireless Telecommunications Bureau staff recently has indicated to both AirPeak and Airtel Wireless, LLC, both Cellular-Architecture System licensees, that their respective General Category and Lower 80 EA- and Site-Licensed and BILT Site Channels spectrum holdings may be relocated to the former NPSPAC Channels.

⁴² See n. 14 *supra*.

⁴³ See n. 6 *supra*; *Report and Order*, at ¶¶ 22 and 36-39.

for Non-Cellular (22 MHz) and Cellular (14 MHz) systems⁴⁴ and precluding the Non-Nextel EA and Cellular-Architecture System licensees from the former NPSPAC Channels and the 1.9 GHz Band as replacement spectrum, the *Report and Order* necessarily is required to squeeze these licensees' spectrum holdings into the Clean Upper 200 Channels presently held and to be vacated by the NCG.

In many EA markets the Nextel Control Group holds sufficient Clean Upper 200 Channels spectrum to accommodate the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum without requiring Nextel or Nextel Partners to vacate a considerable portion of their respective Upper 200 Channels. However, as the Nextel Control Group's Clean Spectrum Holdings in Channels 401-600 spreadsheet attached hereto as **Schedule 3** to *CTO's Report* indicates in forty (40) EA markets in which 64.28 million persons reside, Nextel or Nextel Partners lack sufficient Clean Upper 200 Channels to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum without vacating a considerable portion of its Upper 200 Channels spectrum and incurring significant capital expenditures for additional cell sites to replace lost operating system capacity.⁴⁵

To minimize the loss of the Nextel Control Group's Upper 200 Channels and capital expenditures that otherwise be required to maintain operating system capacity the FCC added the language to paragraph 168 and footnote 444 extending the *pro rata* distribution approach beyond Southern's core EA markets in Georgia, Alabama, southeastern Mississippi and northern Florida set forth in the *Report and Order's* Appendix G to any dispute between a Non-Nextel or Cellular-Architecture System licensee and Nextel or Nextel Partners with respect to ESMR channels.⁴⁶ Under this approach, in the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA and Cellular-Architecture System licensees, Nextel or Nextel Partners would experience an increase or maintain its present Total Spectrum and a considerable increase in its Clean and Cellular-Service Eligible Spectrum.

⁴⁴ In the *Report and Order*, the Commission states that it is allocating 18 MHz of PLMRB spectrum to the Non-Cellular Block and 14 MHz of such spectrum to the Cellular Block. See *Report and Order*, at ¶¶ 11 and 151. Since the 4 MHz in the Guard and Expansion Bands are available to Public Safety and other Non-Cellular System licensees and that no Non-Nextel EA licensee would elect to move any of their respective EA authorizations to such Bands, Preferred believes that this spectrum properly should be considered part of the Non-Cellular Block. See Southern Communications Services, Ex Parte Presentation, October 8, 2004 (insufficient spectrum for Expansion Band to which Public Safety licensees could be relocated in the Atlanta, Georgia EA market due to numerous Non-Nextel and Non-Southern licensees in Channels 1-150; therefore requested clarification that Expansion Band restrictions not applicable to this EA market).

⁴⁵ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at pp. 4-5 & n. 17.

⁴⁶ See *Report and Order*, at ¶ 168 and n. 444.

In the Sacramento, California EA market, for example, without the application of the *pro rata* distribution approach under the *Report and Order* Nextel's Total Spectrum would increase from 21.55 to 26.0 MHz. Its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively would increase from 18.40 MHz and 16.50 MHz to 26.0 MHz. To accommodate the relocation of Preferred's and AirPeak Communications, LLC's EA- and qualifying Site-Licensed Spectrum comprising one hundred forty (140) channels or 7 MHz, Nextel would vacate one hundred forty (140) of its two hundred (200) Clean Upper 200 Channels. Nextel's Total, MHz/Pops Equivalent and EA-Wide Market Spectrum therefore respectively would be reduced by 7 MHz to 19.0 MHz. While Nextel would experience a slight reduction in its Total Spectrum, its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively would increase by 3.26% and 15.2%.

However, if the *pro rata* distribution approach is applied, Nextel would receive 70.83 % of the three hundred twenty (320) channels available or two hundred twenty-seven (227) channels.⁴⁷ Preferred and AirPeak Communications, LLC would receive the remaining ninety-three (93) channels. Under this approach, Nextel would recover forty-seven (47) channels or 2.35 MHz of spectrum and Preferred and AirPeak Communications, LLC collectively would lose that number of channels. Nextel's Total Spectrum thus would be reduced from 21.55 MHz to 21.35 MHz, or .25 MHz. Its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively similarly would be increased to 21.35 MHz, a considerable increase of 2.95 MHz of MHz/Pops Equivalent Spectrum and 4.85 MHz of Cellular-Service Eligible Spectrum.⁴⁸

By contrast, Preferred and AirPeak Communications, LLC's Total Spectrum would be reduced from one hundred forty (140) to only ninety-three (93) channels, a decrease of forty-seven (47) channels, or 33.58% decrease in Total Spectrum. Preferred's sixty (60) MHz/Pops Equivalent and seventy-five (75) Cellular-Service Eligible channels would be reduced to fifty (50) channels, respectively a 16.7% and 33.3% decrease. AirPeak Communications, LLC's sixty-five (65) Total Channels would be reduced to thirty-eight (38) channels, a 42.54% decrease.⁴⁹ In discussing the *pro rata* distribution approach with respect to Nextel's and Southern's EA- and Site-Licensed

⁴⁷ Although the Cellular Block consists of only 14 MHz, in footnote 444 the FCC used three hundred twenty (320) channels or 16 MHz in its example of how the *pro rata* distribution approach would be applied by the Commission.

⁴⁸ To make up for this perceived Total Spectrum shortfall, the FCC amended its rules so that Nextel could use its 900 MHz Band Spectrum holdings for CMRS. Moreover, the Commission's amendment permitted other 900 MHz Band licenses to sell or otherwise assign their respective licenses to Nextel for CMRS use. See 47 C.F.R. § 90.621(f); *Report and Order*, at ¶ 6. Based upon Nextel's published spectrum holdings, the FCC's amendment would increase Nextel's 800 and 900 MHz EA-Wide Market Spectrum by approximately seventy-two (72) channels, or 3.6 MHz.

⁴⁹ For further discussion of the application of the *pro rata* distribution approach and its practical, mathematical and legal infirmities, please review Appendix I attached hereto.

Spectrum, the Commission noted that both companies would suffer a reduction in their respective total number of channels.⁵⁰ However, the FCC maintained that Nextel has additional spectrum at 900 MHz which it can use to offset the shortfall and is receiving 10 MHz of 1.9 GHz Band spectrum.⁵¹ According to the Commission Southern's loss of total channels was mitigated by its relocation to the Cellular Block and receipt of Clean and contiguous spectrum arguably of greater value and capacity than the spectrum it now occupies.⁵² However, based upon Preferred's analysis of five (5) representative EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with one or more Non-Nextel EA licensees and/or Cellular-Architecture System licensees, it appears that the FCC's characterization of the mitigating effect of Non-Nextel EA and/or Cellular-Architecture System licensees' receiving Clean Spectrum is incorrect.⁵³

In seeking to separate the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum from that of the Nextel Control Group and reduce their respective Total, and in many EA markets, MHz/Pops Equivalent and Cellular-Service Eligible Spectrum, the *Report and Order* impermissibly discriminates against the Non-Nextel EA and Cellular-Architecture System licensees as follows:

- (1) exclusively reserves the former NPSPAC Channels as replacement spectrum to the Nextel Control Group;⁵⁴
- (2) exclusively reserves the 1.9 GHz Band spectrum as replacement spectrum to Nextel and Nextel Partners;⁵⁵
- (3) through application of the *pro rata* distribution approach set forth in paragraph 168 and n. 444, conditions the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum to the Cellular Block to their acceptance of a reduction in their respective Total, and in many EA markets, Clean and Cellular-Service Eligible Spectrum;⁵⁶ and

⁵⁰ See Report and Order, at ¶ 168.

⁵¹ *Id.*

⁵² *Id.* As discussed in Appendix I attached hereto, even in Southern's core EA markets (Georgia, Alabama, southeast Mississippi and northern Florida), the *pro rata* distribution approach operates to reduce Nextel's or Nextel Partners' Total Spectrum slightly while considerably increasing its Clean and Cellular-Service Eligible Spectrum and, by contrast, reduce Southern's Total, Clean and Cellular-Service Eligible Spectrum.

⁵³ For a detailed discussion of the effect of the *pro rata* distribution approach upon the spectrum holdings of Non-Nextel EA and Cellular-Architecture System licensees in the Sacramento, California, Washington-Baltimore, DC-Maryland, Atlanta Georgia, Puerto Rico and the Staunton, Virginia, see Appendix I attached hereto.

⁵⁴ See n. 14 *supra*.

⁵⁵ See *id.*

⁵⁶ See generally Appendix I attached hereto and Nextel Control Group's Clean Spectrum Holdings in Channels 401-600 in Schedule 3 attached thereto.