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

In re Applications of	)	
	)	
NEXTEL COMMUNICATIONS, INC.,	)	
Transferor	)	
	)	
and	)	
	)	
SPRINT CORPORATION,	)	WT- No. 05-63
Transferee	)	
	)	
For consent to the Transfer of Control	)	
of Entities Holding Commission Licenses	)	
and Authorizations Pursuant to Sections 214	)	
and 310(d) of the Communications Act	)	

REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS

Richard W. Duncan d/b/a Anderson Communications ("Duncan"), by its attorneys hereby files its reply to the *Joint Opposition To Petitions to Deny and Reply Comments* filed by Sprint Corporation ("Sprint") and Nextel Communications, Inc. ("Nextel") (collectively referred to as "Joint Applicants") with respect to the above-captioned proceeding. In reply, the following is respectfully shown:

1. Regrettably, Joint Applicants have elected to try and side-step the issues raised by Duncan and others relating to the impact of the proposed merger on the Commission's *Rebanding Order*.[1] By so doing, Sprint and Nextel have missed the opportunity to address, both in their application and now in their Opposition, how the proposed merger would serve the public interest in the context of the nationwide

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

frequency allocation that the Commission awarded to Nextel with the understanding that such spectrum was needed, and would be used, to enable Nextel to construct its next-generation SMR system. Instead, Joint Applicants cavalierly assert that such issues should be more properly addressed in the context of the 800 MHz *Rebanding Order* proceedings and not in the context of the transfer application. The circularity that would arise from adoption of that position only further highlights the need for resolution of the merits of the issues ***before*** the Commission can deem the proposed merger to be in the public interest.

2. Duncan sought reconsideration of the *Rebanding Order* nearly 4 months ago. As of yet, Joint Applicants have not even filed responsive pleadings in that proceeding. While Duncan raised multiple issues in that proceeding, the only issue raised by Duncan there, that has been raised in the context of the merger proceeding, is the impact of the proposed merger on the *Rebanding Order* and the nationwide spectral award associated therewith. Duncan is clearly ***not*** trying to litigate issues unrelated to the proposed merger. Rather, Duncan is raising the obvious; that in deciding whether the proposed merger is in the public interest, the Commission must consider the proposed merger in the context of the *Rebanding Order* before consenting to any transfer of control of any Nextel authorizations associated therewith.

3. The Joint Applicants are asking the Commission to simply allow Sprint, an existing nationwide CMRS carrier, to "step into Nextel's shoes" and acquire the additional nationwide spectrum. While unclear as to Sprint's proposed use of that spectrum, the Joint Applicants make it abundantly clear that they no longer plan to use that spectrum for its originally intended purpose. Indeed, they tout as a merger benefit the savings of "multiple billions" of dollars by ***not*** building the next generation Nextel

system for which the spectrum allocation was intended. Instead of expending funds to build out its next generation network (as it had promised to do in consideration for the spectral allocation), Nextel now stands to reap an immediate monetary benefit from "flipping" the nationwide spectral allocation instead to Sprint. Clearly, the proposed merger has a material impact on the entire financial cost/benefit analysis performed in "valuing" the spectral allocation in the *Rebanding Order*.

4. In their application for consent to the proposed merger, Sprint and Nextel recognize the appropriate level for Commission analysis of the proposed merger.

> The scope of the FCC's review is limited by Section 310(d) which requires the Commission to dispose of the transfer application 'as if the proposed transferee…were making an application under section 308 for the permit or license in question.'[2]

As of this point in time, there is simply nothing in the record to support the conclusion that the Commission would have made the requisite nationwide spectral allocation to Nextel had Nextel advised the Commission that the spectrum was intended to be used to increase the value of Nextel on its sale to Sprint as opposed to actually building out its next generation system. Absent such a showing, the acknowledged scope of Commission review, in the context of the merger applications, cannot be performed.

5. Sprint and Nextel next try to argue that lives may somehow be lost if the impact of the merger on the 800 MHz *Rebanding Order* spectral allocation is dealt with in the context of the Sprint/Nextel proposed merger. While any potential loss of life would be cause for alarm, the Commission's satisfaction its obligation to find all aspects of the merger in the public interest ***before*** granting its consent, poses no threat to the public. Grant or denial of Commission consent to the proposed merger is having no

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

impact whatsoever on the ability of rebanding to proceed. Indeed, Sprint and Nextel acknowledge that the subject rebanding is already "well underway," even in the absence of Commission consent to the proposed merger.[3] In the context of this merger, the issue is not whether the Rebanding Order is proper (an issue which is properly before the Commission in the *Rebanding Order* proceeding), but whether it would be in the public interest to allow the proposed transfer of control, and the resulting spectral "flip" of the *Rebanding Order* spectrum, to proceed. Significantly, in accepting the conditions of the *Rebanding Order*, there was no caveat that Nextel's acceptance of the conditions were, in any way, conditioned on the Commission consenting to Nextel "flipping" the nationwide spectral allocation instead of using it to build its next generation network. If the Commission denies its consent to the proposed merger as it relates to the nationwide spectral allocation awarded to Nextel under the *Rebanding Order*, Nextel remains obligated to proceed with the rebanding and the deployment of its nationwide next-generation network, just as it promised to do in consideration for the nationwide spectral grant in the first place. In other words, denial of Commission consent to the transfer of control of the *Rebanding Order* spectrum, Nextel would simply remain obligated to do that which it represented it would do in obtaining the spectral award. Sprint and Nextel offer no explanation as to how ***that*** poses a public safety threat. If it somehow does, then that would clearly be an additional issue that must also be fully explored in the context of the reconsideration of the *Rebanding Order.*

6. Clearly, Duncan does not seek to use the merger applications as a vehicle to revisit the 800 MHz *Rebanding Order*. Duncan has sought reconsideration of the *Rebanding Order* as the appropriate means to accomplish that. In its reconsideration,

[3] (Opposition at p. 12).

Duncan raised issues with respect to both the treatment of the non-Nextel SMR licensees as well as issues relating to the Sprint/Nextel merger. Duncan has not sought to raise any of the issues from that proceeding in the context of the merger application that do not deal expressly with the merger. Unless and until the Commission considers the impact of the proposed merger on the 800 MHz *Rebanding Order* spectrum, the Commission simply cannot make the requisite finding that the proposed merger is in the public interest *as it relates to Rebanding Order spectrum.* The Commission may either do so in the context of the merger application or the *Rebanding Order* proceeding. But until it does so, it cannot consent to the proposed merger as it relates to the *Rebanding Order* spectrum.

7. Since Sprint and Nextel insist that evaluation of whether the Sprint/Nextel merger is in the public interest in the context of the spectrum involved in the *Rebanding Order* be dealt with in the *Rebanding Order* proceeding, the Commission now really has only two alternative approaches it can take with respect to the pending transfer applications. First, the Commission could deny the request as it relates to the *Rebanding Order* spectrum. Second, the Commission could defer action on the merger application ***as it relates to the Rebanding Order spectrum,*** until that proceeding concludes. What the Commission cannot now do is find that grant of its consent to the proposed merger, as it relates to the *Rebanding Order* spectrum, would serve the public interest.

8. The Commission might also wish to consider the arguments that might be advanced in the 800 MHz reconsideration proceeding should it consent to the proposed merger here. Undoubtedly, Sprint and Nextel would argue their reliance on the *Rebanding Order* spectrum in consummating their merger and assert that inequities would result if the *Rebanding Order* or the spectral allocation awarded there under, were

modified. Withholding consent to the proposed merger prevents such arguments. Indeed, the delay or withholding of Commission consent to the merger, as it relates to the *Rebanding Order* spectrum, could also prove most illuminating inasmuch as Sprint and Nextel would no doubt alter the consideration being paid for the proposed merger and thereby assign a value on the *Rebanding Order* spectrum. If that change in valuation was small, it would be an admission that there would be very little adverse impact on the merger whether or not consent is ultimately granted to transfer control of the *Rebanding Order* spectrum. However, if the change in valuation is large, it would confirm that Sprint's acquisition of the nationwide spectral allocation (without the need to bid for such spectrum at auction), is what Sprint really values in acquiring Nextel and that Nextel was, in fact, "flipping" the *Rebanding Order* spectral grant for monetary gain as opposed to using it for the intended purpose. Either way, the Commission needs to resolve these underlying issues before consenting to any merger that involves this spectrum. Failing to do so in the context of the merger applications and Sprint and Nextel request, mandates the withholding of consent to at least that portion of the proposed merger, until the *Rebanding Order* becomes final.

Conclusion

As filed, the Commission should deny the transfer applications with respect to all spectrum (800 and 1900 MHz) that is subject to the *Rebanding Order*. In the alternative, the Commission should hold action on the proposed transfer in abeyance, as it relates to the spectrum involved in the *Rebanding Order*, unless and until it concludes its full evaluation of the impact of the proposed merger on the *Rebanding Order* and its underlying purposes, and determines that the proposed merger would be in the public interest as it relates to such spectrum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael K. Kurtis, do hereby certify that on this 15th day of April, 2005, copies of the foregoing REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY TO COMMENTS, were delivered by first-class, postage-prepaid mail, to the following parties:

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