

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

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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

**REPLY OF PREFERRED COMMUNICATION SYSTEMS, INC.**

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## SUMMARY

The Joint Opposition To Petitions To Deny And Reply To Comments (“Opposition”) seeks to divert attention from, and indeed ignores, fundamental issues directly relevant to the public interest standard that the Commission has long applied to mergers. The Commission cannot fully assess the competitive impact of a Sprint-Nextel combination without recognizing the import of the *Rebanding Orders* on companies like Preferred and other similarly situated licensees. Further, the Commission cannot ignore the ability of the combined entity to attain essentially a monopoly use of the 2.5 GHz spectrum in many areas to provide mobile telephony services. To do so is to ignore the Commission’s own previously applied definition of the relevant product market and the tested and demonstrated capability of that spectrum to provide such services. The fact is that the Opposition does not address in any degree the analysis by Preferred of spectrum concentration, including 2.5 GHz spectrum, in Preferred’s markets – an analysis that reveals levels of spectrum concentration that are not compatible with any public interest finding. At a very minimum, these issues alone raise substantial and material questions of fact about whether the proposed merger meets the public interest standard. Preferred respectfully submits that the record does not permit such a finding without the imposition of conditions that will ensure access for potential competitors to comparable spectrum.

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**REPLY OF PREFERRED COMMUNICATION SYSTEMS, INC.**

Preferred Communication Systems, Inc. (“Preferred” or “Company”), by its attorneys and pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Communications Act”)<sup>2</sup> and Section 1.939 of the Commission’s Rules,<sup>3</sup> hereby replies to the “Joint Opposition To Petitions To Deny And Reply To Comments” (“Opposition”) filed by Nextel Communications, Inc. (“Nextel”) and Sprint Corporation (“Sprint”) in this matter (collectively “Applicants” or “Sprint/Nextel”).

Preferred renews its opposition to any Federal Communications Commission (“Commission” or “FCC”) approval of the transfer of control to Sprint of licenses and authorizations held both directly and indirectly by Nextel absent the imposition of conditions

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<sup>1</sup> 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 of the file numbers. The Company’s original Petition To Deny was inadvertently filed in the name of Preferred Communications Systems, Inc. The accurate name of the Company is reflected above.

<sup>2</sup> 47 U.S.C. § 309(d).

<sup>3</sup> 47 C.F.R. § 1.939.

necessary to protect and preserve the public interest in a competitive market for mobile telephony services.

## I. INTRODUCTION

Despite the Opposition's disparagement of Preferred's writing style and the Opposition's unconvincing assertion that Preferred's Petition is not pertinent to the Commission's merger review, the Opposition fails to engage or refute Preferred's analysis of the Commission's public interest standard as it applies to the merger. A central element of that analysis relates to "the amount of spectrum suitable for the provision of mobile telephony services that the combined entity would control in the relevant markets."<sup>4</sup> As Preferred and others already have noted in this proceeding, this merger, which will further concentrate the top echelon of the mobile telephony market, will result in the consolidation of large amounts of spectrum in the hands of the combined entity. Despite the Opposition's effort to deflect and divert the Commission's attention from that issue, spectrum concentration must be must be a principal focus of the Commission's review.

## II. THE PROPOSED MERGER CLEARLY WILL HARM COMPETITION BY ELIMINATING ANOTHER NATIONWIDE WIRELESS PROVIDER

A fundamental tenet of the Commission's assessment of any prospective merger 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."<sup>5</sup> Sprint/Nextel's facile assertion that they can complete their proposed merger "without any harm to competition and the public interest" simply defies reality.<sup>6</sup> The combination of Sprint and Nextel,

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<sup>4</sup> *In the Matter of Applications of A T& T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses and Authorizations*, 19 FCC Rcd. 21522, 21594, ¶ 188 (2004) (hereinafter, "A T& T Wireless").

<sup>5</sup> *Id.*, at 21566, ¶ 68.

<sup>6</sup> Opposition, at p. 2. Preferred also objects to the Opposition's characterization that "not a single commenter challenges the competitive analysis submitted by the Applicants." Opposition, at p. 5. Preferred and a number of others have clearly contested the Applicants' assertions that the merger consequences are totally benign. See, eg, Petition To Deny

the third and fifth largest nationwide mobile providers, respectively, clearly enhances market power of the combined entity by diminishing service provider choice to the public. In its most recent – now already outdated because of further intervening consolidation – report on the status of competition in the wireless industry, the Commission identified six nationwide mobile telephone operators.<sup>7</sup> When Cingular and AT&T Wireless merged, the number was reduced to five. This merger will take it to four. Indeed, there may be some areas of the country where the result of the proposed merger will leave fewer than three competitive options for nationwide service. This a decided trend toward a concentration level that would be *per se* harmful to competition.<sup>8</sup>

Even if certain markets do not return to the duopoly that existed in the mobile telephony marketplace from 1982-1996, the Commission itself acknowledged that “a reduction in the number of competing service providers due to consolidation or exit may increase the market power of any given service provider, which in turn could lead to higher prices, fewer services, and/or less innovation.”<sup>9</sup> Preferred respectfully submits that to protect against such an undesirable consequence the Sprint-Nextel merger cannot be approved without the FCC’s imposition of appropriate conditions.

### III. CORPORATE INTERESTS DO NOT NECESSARILY EQUATE WITH THE PUBLIC INTERESTS

The public interest standard enacted by Congress in the Communications Act mandates that the Commission look beyond traditional antitrust principles to determine whether the proposed

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of Consumer Federation of America and Consumers Union (“CFA/CU Petition”); Petition To Deny of Community Technology Centers’ Network; SAFE Competition Coalition Petition To Deny.

<sup>7</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd. 20597 (2004) (hereinafter, “*Ninth Report*”).

<sup>8</sup> The Commission found that a “transaction would almost certainly be harmful to competition if it resulted in a reduction in the number of rival carriers from 2 to 1, or 3 to 2.” *AT&T Wireless*, at 21596, ¶ 193. The Commission is currently also considering a merger between major regional carriers ALLTEL and Western Wireless.

<sup>9</sup> *Ninth Report*, at 20622, ¶ 62.

transaction serves the broader public interest. Here, the Opposition tries to substitute the Applicants' own corporate business interests for the public interest.<sup>10</sup> For example, the Applicants' assertion that they will be "well positioned in some of the fastest growing areas of telecommunications" is in their business interest, but does not explain how that fact enhances the public interest. Perhaps most remarkably, the Applicants state that deploying broadband infrastructure "efficiently," by obviating the need for Nextel to build its own broadband infrastructure, is in the public interest.<sup>11</sup> Given the government interest in the promotion of broadband services, it is difficult to discern how having fewer competing networks, which obviously is in the Applicants' business interests, equates with the public interest.<sup>12</sup> Preferred respectfully submits that in this case, absent appropriate conditions, there can be no such equation.

#### IV. SUPERFICIAL TESTIMONIALS CANNOT BE THE BASIS FOR A PUBLIC INTEREST FINDING

The Commission should accord little weight to the merger "endorsements" filed by various groups in this docket. Superficial, self-serving testimonials do not constitute the public interest analysis required under Sections 214 and 310 of the Act.

Applicants are content to cite selectively to two speculative statements that rural service may improve as a result of the merger. But the Opposition simply ignores the substantive concerns

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<sup>10</sup> This brings to mind the simplistic idea that bigger is simply better; tautologically that what is good for the merger parties is inherently in the public interest.

<sup>11</sup> The Reply To Joint Opposition To Petitions To Deny And Reply Comments filed by Richard W. Duncan properly questions this "public interest" benefit from another perspective. *See* Duncan Reply, at pp. 2-3.

<sup>12</sup> *See*, 47 U.S.C. §157, notes regarding Pub.L. 104-104, Title VII, §706, Feb. 8, 1996, 110 Stat. 153, as amended Pub.L. 107-110, §1076(gg), Jan. 8, 2002, 115 Stat. 2093, which directs the Commission and State commissions to encourage the deployment of advanced telecommunications capability, which is defined as "high-speed, switched broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology." *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996. Notice of Inquiry*, 19 FCC Rcd 5136 (2004). *See also*, FCC Public Notice, "FCC Launches Proceeding to Promote Widespread Deployment of High-Speed Broadband Internet Access Services," released February 14, 2002; FCC Public Notice "FCC and USDA To Help Create Wireless Broadband Model Communities in Rural America," released October 14, 2004; USDA Press Release, "USDA Announces Availability of \$8.9 Million in Broadband Grant Funds," released March 29, 2005.

expressed by most rural carriers, including a major association of rural carriers that participated in this proceeding, that better represent the true state of the market for mobile telephony services in less developed areas. For example, the National Rural Telecommunications Cooperative, which represents 128 rural telephone cooperatives and 189 independent rural telephone companies, expressed concern that “the Applicants’ proposed consolidation of the 2.5 GHz band may block competitors from obtaining access to licensed broadband spectrum, stifle competition and limit choices for wireless broadband services – especially in rural America, where fewer broadband choices area (sic) available.”<sup>13</sup> At the same time, the Rural Cellular Association, representing “approximately 100 small and rural wireless licensees providing commercial service,”<sup>14</sup> noted that, absent Commission action to preserve automatic roaming, consumers will be denied service outside their home territory, thus increasing the likelihood of switching service to a carrier with a national footprint.<sup>15</sup> This concern is validated by the comments of SouthernLINC, currently Nextel’s only roaming partner, which, despite repeated requests to Nextel and the Commission, has never achieved fair roaming arrangements for iDEN equipment.<sup>16</sup>

Through its targeted recitation of support, the Opposition distorts the record of fundamental concern that is already before the Commission. The Commission must treat these concerns with much greater seriousness than does the Opposition.

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<sup>13</sup> National Rural Telecommunications Cooperative (“NRTC”) Comments, at p. 1.

<sup>14</sup> Comments of Rural Cellular Association, at p. 1.

<sup>15</sup> *Id.*, at p. 2.

<sup>16</sup> SouthernLINC Comments, at p. 3 (“To this day, SouthernLINC Wireless, their only iDEN-based competitor in the United States, has no roaming agreement with Nextel Partners and only a limited, non-reciprocal arrangement with Nextel itself, for which SouthernLINC must pay rates that substantially exceed those typically in the industry.”). *See also Motorola and FCI 900, Inc., Order*, DA 01-947 (April 21, 2001) (“Southern also urges that, should the Commission grant these applications, Nextel should be required to provide it roaming on Nextel’s digital SMR frequencies.”).

V. THE COMMISSION MUST ASSESS THE PROPOSED MERGER IN LIGHT OF THE REBANDING ORDERS<sup>17</sup>

The Applicants urge the Commission to ignore the *Rebanding Orders* and their competitive consequences as a wholly irrelevant to its public interest analysis in this case. The Commission cannot give credence to such a myopic public interest perspective that ignores fundamental changes in the agency's rules that will have a profound impact upon competition. The Commission must consider recent events affecting competition and regulation in the mobile telephony marketplace when it conducts its public interest analysis. The *Rebanding Orders* are an important regulatory development that, through regulation, granted Nextel a permanent current and future competitive advantage in the 800 MHz and 1.9 GHz bands.

In its Petition, Preferred detailed the key competitive impacts that the *Rebanding Orders* have on competition in the 800 MHz band.<sup>18</sup> Nowhere does the Opposition take issue with these impacts. It just instructs that the Commission must ignore them.

The major effects include: (a) reducing by 10 MHz the amount of "cellular" spectrum available, and allocating most of the remaining "cellular" spectrum exclusively to Nextel, its affiliates and its contract partners (collectively, "NCG"); (b) allowing only NCG and no other Specialized Mobile Radio ("SMR") licensee to exchange unencumbered non-contiguous spectrum for unencumbered, contiguous spectrum; (c) allowing only NCG and no other SMR licensee to exchange Economic Area ("EA") and site-specific licenses for a nationwide exclusive license in the 1.9 GHz band, while affording EA and site-specific licensees like Preferred no opportunity to gain access to that spectrum. When combined with the Applicants' exclusive access to large amounts of

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<sup>17</sup> *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 ("800 MHz Order"), *recon. and appeal pending*; *Supplemental Order and Order On Reconsideration*, 19 FCC Rcd. 25120 (2004) ("Supplemental Order"), *recon. pending*. (collectively, "Rebanding Orders").

<sup>18</sup> Preferred Petition, at pp. 9-10.

2.5 GHz band spectrum, this combination must raise the “especially worrisome” concern about “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.”<sup>19</sup>

Again, the Applicants never refute Preferred’s argument that the *Rebanding Orders* dramatically reduced current regional and local competition, and permanently impaired the ability for potential competitors, like Preferred, to enter and compete in the 800 MHz band. Rather, the Applicants urge the Commission to only address such issues in the rulemaking context, claiming they are irrelevant to whether further concentration of spectrum is in the public interest. Since the Applicants offer no substantive opposition to Preferred’s allegations, the Commission must consider the impact on 800 MHz competition imposed by the *Rebanding Orders* because that impact will be magnified by the proposed merger. Therefore, it must be part of the public interest analysis in this proceeding.<sup>20</sup>

The *Rebanding Orders* created regulatory uncertainty due to the ongoing reconsideration and appeal process, and practical uncertainty because the relocation period will last many years. Consequently, the *Rebanding Orders* have already made it more difficult for Preferred and similarly situated licenses to finalize system design and attract capital to construct systems. Further, the *Rebanding Orders* permanently established Nextel and its affiliates as the only 800 MHz licensee with unencumbered, contiguous 800 MHz spectrum with which to provide cellular-type service. Unless redressed through merger conditions, potential regional and local competitors will permanently have less spectrum, encumbered spectrum, and geographically limited licenses. With those limited resources, they will attempt to compete with a nationwide operator that has economies of scope and scale that result from a nationwide license, as well as robust spectrum holdings. The Commission

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<sup>19</sup> *AT&T Wireless*, at 21579, ¶ 149.

<sup>20</sup> Others also argue that the impact of the *Rebanding Orders* must be considered. See Duncan Reply, at p. 2.

should not ignore that the *Rebanding Orders* significantly affected the 800 MHz market, and, absent further modifications, significantly enhanced NCG's competitive position in the mobile telephony market.

All parties agree that the 800 MHz band is part of the relevant market for purposes of analyzing the Applicants' merger. Accordingly, the Commission must account for the new competitive reality in the 800 MHz band when reviewing the impact of the proposed merger. Both Applicants hold significant mobile telephony holdings. Allowing the merger to proceed without conditions not only results in one less nationwide carrier, but a combined company that faces significantly fewer regional competitors as well. Such a result is not in the public interest. Therefore, Preferred has proposed merger conditions to redress the combined competitive impact of the *Rebanding Orders* and the merger on regional and local 800 MHz competition.

VI. THE COMMISSION MUST CONSIDER THE 2.5 GHz SPECTRUM AS PART OF ITS PUBLIC INTEREST ANALYSIS

Preferred (as do others) strongly disagrees with the Applicants' cursory conclusion that, because the Commission did not include 2.5 GHz spectrum in its analysis of the AT&T/Cingular merger, it remains appropriate to ignore it in the context of this combination. However, a number of factors require consideration in the Sprint/Nextel context. First, one nationwide wireless competitor was eliminated through the *AT&T Wireless* merger; this merger will eliminate another and bring further concentration at the top of the mobile telephony sector. Second, the FCC adopted the *Rebanding Orders*, which will impair the ability of other EA-based licensees like Preferred to provide competitive service.<sup>21</sup> Third, two major regional carriers – ALLTEL and Western Wireless – announced merger plans. Fourth, technology changes have allowed further convergence among voice, data, and video services. Fifth, this merger envisions the combination of the two

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<sup>21</sup> Issues relating to the 800 MHz band were not at issue in the *AT&T Wireless* proceeding.

largest holders of 2.5 GHz spectrum. Due to these changed circumstances, the Commission must conclude that the 2.5 GHz band is properly part of the mobile telephony market in this proceeding.

In its Petition, Preferred detailed the reasons that the Commission must include the 2.5 GHz band in its mobile telephony market analysis: (a) Nextel and Sprint each already control vast quantities of 2.5 GHz spectrum; (b) Sprint and Nextel advocated for rule changes to allow mobile telephony in the band; (c) the Commission modified its rules to allow mobile telephony in the 2.5 GHz band; (d) the Applicants acknowledged in the press and in FCC filings that its 2.5 GHz spectrum holdings is a major competitive advantage for the combined company; and (e) the 2.5 GHz band has been tested and can be used for voice as well as data services.<sup>22</sup>

Preferred is not alone in urging that the 2.5 GHz spectrum must be considered as part of its analysis. The Consumer Federation of America and Consumers Union do the same.<sup>23</sup> These are credible organizations with a long history of genuine concerns about what is in the public interest. They represent the public that uses mobile telephony services. Therefore, the Commission must give strong credence to their comments on this score.

The Opposition seeks to obscure this important issue by focusing its arguments solely on whether the Applicants can be the dominant carrier in the 2.5 GHz band alone. This diversionary argument is a red herring, designed to shift the Commission and public focus to a side argument. The real issue is whether the merged entity's combined mobile telephony spectrum creates or enhances significant market power or facilitates its use. The Applicants' proposed merger enhances significant market power to the detriment of competing carriers and, more importantly, the public that uses commercial mobile radio service. Absent conditions to redress this undue concentration in market power, the Commission cannot find the merger to be in the public interest. Moreover, even

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<sup>22</sup> In addition, the Applicants admit that there will be a 2.5 GHz spectrum overlap in 84 Basic Trading Areas ("BTAs").

<sup>23</sup> See CFA/CU Petition; Reply of Consumer Federation of America and Consumers Union.

if Sprint-Nextel only uses the 2.5 GHz band for data, it is an integrated component of the merged entity's future spectrum input.

The Commission's public interest 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."<sup>24</sup> Yet the Applicants seek to deflect, indeed, dismiss, the competitive significance of allowing the concentration of spectrum that will result from the merger in the hands of a single entity. The Opposition does so in part by attempting to artificially segregate the "voice" and "data" markets. However, the Commission specifically defined mobile telephony, and the spectrum suitable for mobile telephony, to include both interconnected and mobile data services provided to both residential and enterprise subscribers.<sup>25</sup> There is no basis for changing that analytical framework in the context of this merger. The Applicants' have not presented any arguments for doing so.

Moreover, worldwide, the convergence of the voice and data market in fixed, portable, and mobile settings is occurring.<sup>26</sup> Indeed, the Applicants' own public statements after announcing the merger treat voice and data services as an integrated platform, and stated that the combination of their entire spectrum affords them an "enviable spectrum position."<sup>27</sup> Even within the Opposition, the Applicants' indirectly reserve their right to implement interconnected voice service on these frequencies. First, they state that "no one at this time can predict with any certainty the services that will prove to be commercially viable in the 2.5 GHz band"<sup>28</sup> and "at this point it cannot be predicted

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<sup>24</sup> *AT&T Wireless*, at 21545, ¶ 42.

<sup>25</sup> *AT&T Wireless*, at 21558, ¶ 74.

<sup>26</sup> See, e.g., *Woosh Continues Its Network Expansion* (press release announcing deployment of UMTS TDD technology in New Zealand, <http://www.woosh.com/UserInterface/Woosh/Static/News/News.aspx>).

<sup>27</sup> *Communications Daily*, Vol. 24, No. 241, December 16, 2004, at p. 8.

<sup>28</sup> *Opposition*, at p. 21.

which mix of services and performance requirements will be commercially successful.”<sup>29</sup> If conditions are not imposed on this merger, there is nothing to prevent Sprint-Nextel from changing its mind and begin providing two-way voice services on these frequencies.

Finally, the Applicants’ proposed merger will result in one nationwide 2.5 GHz license. As the Applicants themselves acknowledge, acquiring clear, contiguous nationwide blocks of spectrum in the 2.5 GHz range is difficult. By this merger, then, the Applicants are securing what is potentially the only nationwide 2.5 GHz license that will ever exist. Such a result would allow the Applicants to establish a barrier to entry in a converged market.

In its Petition, Preferred laid out an analysis of the spectrum aggregation, including the 2.5 GHz spectrum, that would result in its EA license markets as a result of the merger. The Opposition does not dispute the picture painted by this analysis. Again, the Applicants’ tactic is to simply ignore it. The Commission cannot ignore, however, the fact that in a number of the Preferred markets the spectrum holdings of the combined entity will far exceed the 70 MHz level that appropriately triggered attention in the AT&T/Cingular transaction. Further, the holdings will far exceed the 80 MHz level that prompted voluntary divestiture by the merged entity in that proceeding.<sup>30</sup>

**VII. THE POTENTIAL AVAILABILITY OF ALTERNATIVE SPECTRUM IS NOT A PANACEA FOR THE MERGER’S SPECTRUM CONCENTRATION**

The Applicants argue that because there is plenty of suitable alternative spectrum available for mobile telephony service, the Commission should ignore the Applicants’ massive accumulation of 2.5 GHz spectrum in combination with 800 MHz, 900 MHz and exclusive 1.9 GHz spectrum. But the vast majority of the spectrum Applicants identify is not yet available in any significant

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<sup>29</sup> *Id.*

<sup>30</sup> *AT&T Wireless* at 21598, ¶199.

amounts to any carrier. Most will not be available for a year or more. Then, it will only be available in geographic license form, where it must be purchased at auction, where a combined Sprint/Nextel, with its even greater financial resources, can also compete for it. More specifically:

- AWS spectrum. The Commission adopted rules for 90 MHz of spectrum (1710-1755 MHz and 2110-2155 MHz) in October, 2003. However, according to the FCC's web site the auction for this spectrum may occur "as early as June 2006."<sup>31</sup>
- For the 10 MHz at H Block<sup>32</sup> and J Block spectrum,<sup>33</sup> the Commission has not yet adopted service rules.<sup>34</sup>
- The 10 MHz of spectrum identified at 2155 MHz to 2165 MHz has not yet been allocated to AWS, although there is a pending rulemaking to do so.<sup>35</sup>
- The C and D Blocks of 700 MHz spectrum that have been auctioned are encumbered by broadcasters, which are not required to move off the spectrum until, at the earliest, December 31, 2006.<sup>36</sup> Given the diminished value of encumbered spectrum, and the uncertainty of when it will become available for service, it is not surprising that these very licenses are among those Nextel returned to the Commission in accordance with the

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<sup>31</sup> See also Public Notice, "FCC to Commence Spectrum Auction That Will Provide American Consumers New Wireless Broadband Services," released December 29, 2004.

<sup>32</sup> 1915-1920/1995-2000 MHz.

<sup>33</sup> 2020-2025/2175-2180 MHz.

<sup>34</sup> *Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, Notice of Proposed Rulemaking*, 19 FCC Rcd. 19263 (2004).

<sup>35</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion*, 18 FCC Rcd. 2223 (2003).

<sup>36</sup> *800 MHz Order*, at 14993, ¶ 8.

*Rebanding Orders*.<sup>37</sup> Once Nextel returns the licenses to the Commission, there is no guarantee when they will be auctioned. The FCC Auctions home page indicates it has not yet scheduled an auction for the A, B, and E 700 MHz frequency blocks, although the FCC has scheduled five other auctions for unrelated frequencies.<sup>38</sup>

- WCS. The FCC completed auctioning this spectrum in 1997. Indeed, Nextel will bring to the table substantial spectrum in the WCS band.
- ATC. Accessibility to Ancillary Terrestrial Components authorized for Mobile Satellite Service providers is hardly available to remedy the excessive spectrum concentration described by Preferred herein.
- Unlicensed Spectrum. The provision of mobile telephony services requires reliability and protection from interference that is inconsistent with use of unlicensed spectrum.

Ironically, the Applicants vehemently argue that future competition cannot be considered in this proceeding. Then, when it identifies how much competition it will face in the 2.5 GHz market, its first argument is the availability of alternative spectrum that, at the earliest, will be allocated 18 months from now. The Applicants clearly will have a significant “first mover” advantage with its “WIMs” service if it takes over 2.5 GHz spectrum well in advance of any other carrier.

### **VIII. APPROPRIATE CONDITIONS**

The Opposition fails to alleviate, or even address, the legitimate issues raised by Preferred and others in this proceeding. For all the reasons outlined by Preferred and others, the merger, at a

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<sup>37</sup> *Supplemental Order*, at 25156, ¶ 8.

<sup>38</sup> [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_sched](http://wireless.fcc.gov/auctions/default.htm?job=auctions_sched); April 16, 2005. The FCC has also announced a July 20, 2005 start date for Auction 60, which will auction five (5) C-Block 700 MHz licenses for Puerto Rico that remained unsold at the Commission’s prior auction of this band. See FCC Public Notice, Auction of Lower 700 MHz Band Licenses Scheduled for July 20, 2005, DA 05-737 (released March 22, 2005), at p. 2.

minimum, cannot be allowed to proceed without reasonable conditions that will ensure access to spectrum. There is just too much concentration of spectrum.

The Opposition attempts to discredit the Preferred proposed conditions as a form of “spectrum grab” by the Company. But these are conditions that Preferred would propose to extend to any EA market in which the Commission finds excessive spectrum concentration, not just the Preferred markets. Further, as in any divestiture, Preferred would contemplate providing consideration in the form of spectrum or payments as part of the process. Finally, this is not an effort to rework the terms of the *Rebanding Orders*. As noted above, the Commission must consider the competitive import of those rulings in analyzing this merger. Preferred’s position is that further concentration in exclusive spectrum holdings only magnify the impact and must be redressed in the merger context.

Under such circumstances, it is totally appropriate (and indeed required) 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, modest conditions to redress the competitive barriers that 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. Again, the Opposition seeks to discredit these proposed conditions as a “spectrum grab” by Preferred.<sup>39</sup> On the contrary, Preferred has made a good faith attempt to suggest conditions to be imposed in any market where the Commission finds that there is an undue concentration of spectrum that will frustrate present and potential competitors. Applicants of course offer no voluntary conditions. As noted above, in the *AT&T Wireless* case, the merger parties voluntarily agreed to divest any mobile telephony spectrum over 80 MHz in a particular market, conceding that was excessive concentration.

#### **IX. SUBSTANTIAL AND MATERIAL ISSUES OF FACT REGARDING THE APPLICANTS’ MERGER REMAIN UNRESOLVED**

The Applicants’ superficial opposition simply refuses to address important factual issues regarding spectrum use and concentration. For example, the Applicants merely ignore the consequences of the concentration of 800 MHz, 900 MHz, 1.9 GHz, and 2.5 GHz spectrum identified in Preferred’s (and presumably other) market areas. As a result, at a minimum, there are substantial and material issues of fact relating to the required public interest analysis that remain unresolved. Although the Applicants request expedited review, they fail to establish a need for such review. Moreover, the merger presents complex and important issues, many not previously addressed by the Commission. Therefore, the Commission must conduct a vigorous investigation to resolve these open issues. Preferred agrees with the comments of SAFE that this proceeding may require a hearing where such evidence can be formally gathered.

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<sup>39</sup>Contrary to the Applicants’ assertions, this is not a “spectrum grab” by Preferred. The Commission adopted the *Rebanding Orders* without knowledge of a proposed Sprint/Nextel merger. Thus, the Commission could not have considered the competitive effects of both the *Rebanding Orders* and a Sprint/Nextel merger. Therefore, Preferred’s proposed conditions are an appropriate mechanism that would allow Sprint and Nextel to merge, but redress the combined competitive impact of the *Rebanding Orders* and the merger on competition in the 800 MHz band.

**X. 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 licensed 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 VIII of Preferred's Petition To Deny.

Respectfully submitted,

**PREFERRED COMMUNICATION SYSTEMS, INC.**

By 

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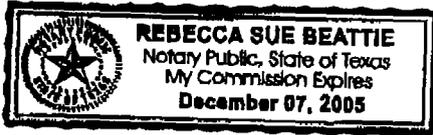
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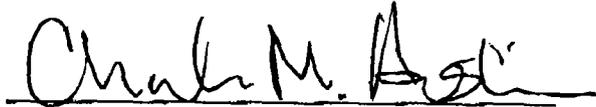
**DECLARATION OF CHARLES M. AUSTIN**

I, Charles M. Austin, do hereby attest and state as follows:

4. I am the CEO and President of Preferred Communication Systems, Inc. ("Preferred")
5. I have read the foregoing Reply Of Preferred Communication Systems, Inc. and I have personal knowledge of the facts stated therein in support of the Petition and the relief requested.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



  
Charles M. Austin

Subscribed and sworn to me this 18<sup>th</sup> day of April 2005.



A notary public of County of Dallas, State of Texas

My Commission Expires: 12/07/05

CERTIFICATE OF SERVICE

I, Paul C. Besozzi, with the law firm of Patton Boggs LLP, hereby certify that copies of the foregoing "Reply of Preferred Communication Systems, Inc." were served this 18<sup>th</sup> of April 2005, by electronic and/or U.S. mail indicated on the following:

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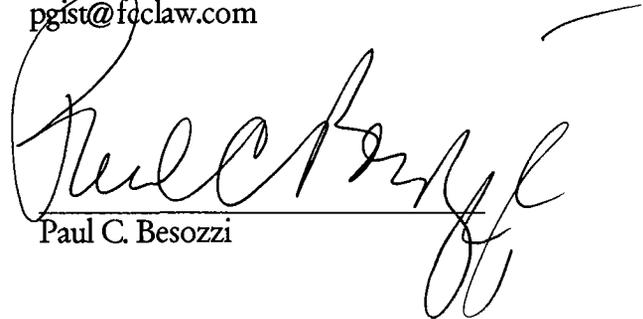
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