

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

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)	
)	
)	
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)	ETDocket 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
)	

REPLY TO OPPOSITION AND COMMENTS OF NEXTEL COMMUNICATIONS, INC. REGARDING PETITIONS FOR RECONSIDERATION

Richard W. Duncan d/b/a Anderson Communications (“Duncan”), by its attorneys and in accordance with Section 1.429 of the Commission’s rules, hereby files its reply to *OPPOSITION AND COMMENTS OF NEXTEL COMMUNICATIONS, INC. REGARDING PETITIONS FOR RECONSIDERATION*, (“Nextel Opposition”) in the above-captioned proceeding (“*Rebanding Order*”).

I. The Commission Must Reconsider the Disparate Treatment it is Affording Existing Licensees.

1. The Nextel Opposition is most notable for its efforts to avoid addressing the merits of the issues raised in Duncan’s Petition. As Duncan explained, at length, the *Rebanding*

Order results in a substantial and material devaluation of Duncan’s licenses. Rather than even attempt to refute this argument, Nextel essentially says “too bad” and actually touts the fact that licensees such as Nextel will no longer be required to fairly compensate other licensees for the value of their spectral holdings. Understandably, Nextel provides no legal support for the notion that the Commission is free to devalue one licensee’s holding to the benefit of others through disparate treatment of similarly situated licensees. Duncan spent years in litigation and invested significant resources to obtain his spectral rights, relying upon the authorized uses for that spectrum under the Commission’s rules and regulations. Awarded on a site-specific basis, Duncan’s license covers one of the largest population centers in the State of North Carolina; one of the most significant portions and some of the heretofore highest valued spectrum in the Economic Area (“EA”). The EA license in this market did *not* include the Charlotte, North Carolina area on this spectrum. The effect of the *Rebanding Order* is to dramatically reduce the value and future use of the license.

2. The premise underlying the *Rebanding Order* is that Nextel is entitled to receive “value-for-value” and not MHz-for-MHz since the FCC acknowledges that all spectrum is not fungible and that other consideration such as limited permissible uses for certain spectrum are relevant to determining whether a proposed spectrum swap is, in fact, equitable. (See, e.g. *Rebanding Order* at ¶¶ 32, and 278). Yet, with respect to licensees such as Duncan, that is precisely what the FCC has done; considered all MHz as fungible. In essence, the Commission effectively takes Duncan’s license and offers replacement spectrum having far fewer permitted uses.¹ Rather than leaving Duncan in the position of having key spectrum in a designated EA, the Commission is offering EA licensees unencumbered spectrum

¹ Even if Duncan were to be able to stay on his current frequencies, there would be reduced permitted use associated that spectrum.

throughout the EA, including the area where Duncan holds the license and further reduces the available uses for Duncan's spectrum. The practical effect is to render Duncan's facilities a non-compatible, isolated island of spectrum with little opportunity to fully develop or realize the value from the license. Duncan is barred from ever deploying cellular technology and will have virtually no market value. As such, the *Rebanding Order* represents a taking from Duncan. Not only has the *Rebanding Order* adversely effected Duncan but has gone out of its way to treat other licensees far more favorably. Aside from Nextel, the *Rebanding Order* carves out an exception for Southern Linc in ensuring that it too, receives "value-for-value." There is no explanation as to why certain large carriers are ensured comparable value while small carriers are relegated to far less valuable spectrum.

3. Duncan sites ample precedent that the Commission cannot discriminate within a class of licensee. With respect to Nextel, the Commission ensured that it had the opportunity to voluntarily decide whether to accept the *Rebanding Order* conditions after having set up a procedure that ensures Nextel receives full "value-for-value". Similarly, for Southern Linc the Commission also ensures that equal value is received. In sharp contrast, and without explanation, the Commission treats virtually all other SMR licensees as disposable and enacts restrictions and limitations that render their licenses of little value. This action is clearly arbitrary and capricious. Understandably, other than laud its windfall, Nextel offers no support for this result in the Nextel Opposition.

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

4. Nextel also offers no response to the issues raised with respect to impact of the proposed Sprint/Nextel merger on the *Rebanding Order*. Conveniently, the Nextel/Sprint merger, which represents a fundamental change in the analysis under which the spectral allocations were awarded to Nextel in the *Rebanding Order*, was not publicly announced

until after the *Rebanding Order* was released.² Indeed, Duncan raised this issue in the context of the pending Sprint/Nextel transfer applications. In opposition to that Duncan filing, Nextel, avoided discussion of the merits by stating that

...whatever the merits of these arguments, they are more properly addressed – if at all – in the 800 MHz proceeding. Coastal, Duncan and Preferred have each filed a petition for reconsideration of the Commission’s 800 MHz decision. *That is the proper forum for their arguments, not this merger review.*³

Apparently, Nextel has now decided that this proceeding is no longer “the proper forum” for addressing these issues since, here Nextel merely hearkens back to the representation in the transfer application that the merged entity is willing to step into Nextel’s shoes. No doubt it is since it is abundantly clear that the record would not support a finding that the Commission would have awarded the spectrum to Nextel if it knew Nextel’s intent to “flip” the spectrum for quick profit rather than use it to construct its next generation network.

Nextel repeatedly chants the “value-for-value” mantra of the *Rebanding Order* in the Nextel Opposition. Nextel highlights the fact that it is contributing “almost \$5 billion” to the rebanding; representing fair value for the spectrum received. However, in the Nextel/Sprint Transfer application, they advise the Commission that by consenting to the proposed merger, Nextel stands to save “billions” of dollars by avoiding the need to build the very network that the spectrum was allocated to build. If the Nextel’s “almost \$5 billion” contribution represented “value for value,” the multi-billion dollars in savings from *not* building the intended next generation network, coupled with the premium being paid to the Nextel

² While it is entirely possible that there were no merger discussions until after the Rebanding Order came out (which is highly unlikely given the timing), if that were the case, it only highlights the fact that the grant of this nationwide spectral allocation is what Sprint is really seeking.

³ *Joint Opposition to Petitions to Deny and Reply To Comments*, filed by Nextel Communications, Inc. Transferor and Sprint Corporation, Transferee, WT Docket No. 05-63 (filed April 11, 2005) at p. 15 (emphasis added).

CERTIFICATE OF SERVICE

I, Michael K. Kurtis, do hereby certify that I have this 28th day of April, 2005, sent by United States First Class Mail, postage prepaid, copies of the foregoing *REPLY TO OPPOSITION AND COMMENTS OF NEXTEL COMMUNICATIONS, INC. REGARDING PETITIONS FOR RECONSIDERATION*, to the following parties:

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