

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

In the Matter of)	
)	
Request for Waiver of Location-Capable Handset Penetration Deadline by Sprint Nextel Corporation)	WT Docket No. 05-286
)	
Request for Waiver of Location-Capable Handset Penetration Deadline by Nextel Partners, Inc.)	WT Docket No. 05-302
_____)	

**SPRINT NEXTEL CORPORATION'S
PETITION FOR RECONSIDERATION**

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February 5, 2007

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Sprint Nextel Corporation (“Sprint Nextel”), pursuant to 47 C.F.R. §1.106, petitions the Federal Communications Commission (“Commission”) for reconsideration of its Orders in the above captioned dockets denying Sprint Nextel and Nextel Partners, Inc. a waiver of the 95% handset penetration requirement and referring Sprint Nextel to the Enforcement Bureau for further proceedings.¹

I. INTRODUCTION AND SUMMARY

In the *Waiver Orders*, the Commission made a factual finding that the Motorola software defect was an unforeseeable event beyond Sprint Nextel’s control.² Given this finding, the Commission should have used Sprint Nextel’s penetration rate, but for this unforeseeable event, as the basis of comparison with other carriers. Based on that calculation, Sprint Nextel’s compliance rate of 88% was substantially similar to Verizon Wireless and other carriers not

¹ *In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Sprint Nextel Corporation*, Order, FCC 06-183, WT Docket No. 05-286 (rel. Jan. 5, 2007) (“*Sprint Nextel Waiver Order*”); *In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Nextel Partners, Inc.*, Order, FCC 06-184, WT Docket No. 05-302, (rel. Jan. 5, 2007) (“*Nextel Partners Waiver Order*”) (together “*Waiver Orders*”).

² See *Sprint Nextel Waiver Order* at ¶ 26; See also *Nextel Partners Waiver Order* at ¶ 23.

referred to enforcement. Indeed, if these phones are excluded from Sprint Nextel's handset base, Sprint Nextel has now met the 95% handset penetration mandate.³

Similarly, the *Sprint Nextel Waiver Order* does not reflect the extensive promotional and marketing efforts outlined in the *Sprint Nextel Waiver Petition*⁴ and other filings. To the extent the Commission suggests that Sprint Nextel could have reached the mandate if it had offered free handsets to consumers without a contract, that finding of fact is not supported by the evidence.⁵

Finally, the Commission should reconsider its apparent finding that Sprint Nextel was required to offer consumers free handsets regardless of whether they intended to remain customers. Although the actual impact of such a mandate on consumer behavior may be difficult to determine, if it had been offered with the success the Commission apparently envisioned, it would have amounted to an improper taking prohibited by the Constitution.

II. BACKGROUND

No major carrier that chose to pursue a handset-based Phase II system was able to meet the mandate requiring 95% of active subscriber handsets be location capable by December 31, 2005, and Sprint Nextel was no exception. In its waiver filing seeking an extension of the implementation deadline, Sprint Nextel demonstrated that it had taken all reasonable efforts to reach the 95% mandate.⁶ Indeed, Sprint Nextel's efforts appear to have been substantially

³ Even if these defective handsets are included, Sprint Nextel's penetration rate now exceeds 91%, including Nextel Partners, Inc.

⁴ *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Sprint Nextel Corporation Request for Limited Waiver, CC Docket 94-102, WT Docket No. 05-286 (Sept. 29, 2005) ("*Sprint Nextel Waiver Petition*"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Petition for Limited Waiver of Nextel Partners, Inc., CC Docket 94-102, WT Docket 05-302 (Oct. 17, 2005) ("*Nextel Partners Waiver Petition*") (together "*Waiver Petitions*").

⁵ See *Sprint Nextel Waiver Order* at ¶ 32; See also *Nextel Partners Waiver Order* at ¶ 29.

⁶ See *Sprint Nextel Waiver Petition* at 11-14, 21-28. See also *In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Sprint Nextel Corporation*, Reply of Sprint Nextel Corporation, WT Docket 05-286 (Oct. 31, 2005) ("*Sprint Nextel Reply Comments*").

similar to, if not greater than, those of the other major carriers. Sprint Nextel's efforts dwarfed those of other carriers, however, when the additional work required to respond to a software defect that disabled some 4.7 million GPS enabled Motorola phones is considered.⁷

As with other carriers, Sprint Nextel engaged in numerous promotional and marketing offers to encourage consumers with older non-GPS enabled handsets to upgrade their equipment.⁸ Despite the Commission's suggestion to the contrary, Sprint Nextel did not merely rely upon "normal handset churn" but instead offered "rebates or generous allowances to encourage trade-ins of non-capable handsets" as the FCC had directed.⁹

Specifically, Sprint Nextel offered free handset upgrades to customers with older handsets who signed a contract extension.¹⁰ Sprint Nextel offered many additional phone models at substantially discounted prices to customers that signed a one or two year contract.¹¹ And, although not reflected in the *Sprint Nextel Waiver Order*, Sprint Nextel also offered free handsets to two classes of customers. After discovering a software glitch in its Motorola handsets, Sprint Nextel offered PSAPs using i58 and i88 phones a free exchange for newer and more feature-rich i730 phones. In addition, some 37,000 large business users were offered free replacement handsets.¹²

⁷ *Id.* at 3.

⁸ *Id.* at 24-25.

⁹ *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17388, 17413, CC Docket 94-102, FCC 99-245 (rel. Oct. 6, 1999) ("Third Report and Order") ¶ 53; *Sprint Nextel Waiver Order* at ¶ 24; *Nextel Partners Waiver Order* at ¶ 21.

¹⁰ *Sprint Nextel Petition* at 24-25.

¹¹ *Id.*

¹² *Id.* at 33.

Recognizing that it could not market GPS enabled devices based upon the availability of E911 service,¹³ Sprint Nextel was also one of the first and only carriers to develop and aggressively market location based services which required the use of GPS handsets, thus giving customers an incentive to take advantage of these free GPS devices.¹⁴ Sprint Nextel also launched new services and features such as camera phones, mobile television and text messaging that would require newer handsets.¹⁵ Finally, Sprint Nextel provided other incidental financial incentives such as establishing a donation program benefiting the Red Cross and the Armed Services which would provide tax incentives for trading in older phones.¹⁶

Unlike other carriers, however, Sprint Nextel also faced a dramatic set back to its compliance efforts when a software defect in its Motorola handsets disabled the GPS capability of more than 4.7 million phones. Sprint Nextel immediately took unprecedented actions to address this crisis. Within days of developing a software patch to correct the problem, Sprint Nextel delivered – via Federal Express – self reflash kits consisting of a CD-ROM containing software updates and data cables to approximately 2.14 million customers with affected handsets (many customers have multiple units that may be reprogrammed by a single kit).¹⁷ Sprint Nextel conducted direct mailings to encourage reflashing of handsets and attempted at least two written contacts with each affected customer.¹⁸ In fact, Sprint Nextel went so far as to initiate a sweepstakes program that offered, among other prizes, twenty Cadillac Escalades with a value of

¹³ As of the date the *Sprint Nextel Waiver Petition* was filed, less than half of all PSAPs had deployed Phase II services. Sprint Nextel long ago concluded that it could not advertise a safety feature that was not ubiquitously available.

¹⁴ *Id.* at 24.

¹⁵ *Id.* at 35-36; *Sprint Nextel Reply Comments* at 17.

¹⁶ *Id.* at 25.

¹⁷ *Id.*

¹⁸ *Id.* at 26.

\$53,000 each to customers that upgraded their defective software. The total value of the prizes offered exceeded \$1.2 million.¹⁹

Based upon the record before the Commission, Sprint Nextel not only matched the efforts of other large carriers, it exceeded these efforts. As a result, Sprint Nextel achieved an 88% penetration rate as of December 31, 2005 and has now reached the 95% penetration level, but for the software defect. Given the Commission's factual finding that the Motorola software defect was an unforeseeable event beyond Sprint Nextel's control, Sprint Nextel respectfully requests that the Commission reconsider its decision to refer Sprint Nextel to the Enforcement Bureau for further proceedings.

III. THE COMMISSION SHOULD TREAT SIMILARLY SITUATED CARRIERS IN A LIKE MANNER

On January 5, 2007, the Commission denied all Tier I and II carrier requests for a waiver of the handset penetration mandate. In doing so, however, the Commission referred only three carriers to the Enforcement Bureau for further action, including Sprint Nextel. The Commission indicated that its decision to refer Sprint Nextel to enforcement was based upon Sprint Nextel's low penetration rate as of the deadline.²⁰ In contrast, the FCC emphasized that the penetration rate and limited extensions sought by Verizon Wireless, Leap Wireless International, Inc., Qwest Wireless, LLC, and Centennial Communications Corp., did not warrant such referral.²¹ Specifically, the Commission compared Sprint Nextel's 81% penetration rate to Verizon

¹⁹ *Id.*

²⁰ *Sprint Nextel Waiver Order* at ¶32 (“Sprint Nextel’s 81.3% penetration level by the December 31, 2005, penetration deadline, and only 86% as of May 31, 2006, warrant referral of the matter to the Commission’s Enforcement Bureau for appropriate action.”); *Nextel Partners Waiver Order* at ¶29.

²¹ *See, e.g., In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Verizon Wireless*, Order, FCC 06-60, WT Docket 05-301 (rel. Jan. 5, 2007)(“*Verizon Waiver Order*”) ¶¶3, 18.

Wireless' penetration rate of 91% to 93%, Leap's penetration rate of 91% to 92%, Qwest's penetration rate of 91.2% and Centennial's penetration rate of 91%.

Based upon the FCC's own findings of fact, however, the 81% penetration figure represents inclusion of handsets which had suffered a software defect "so unique and unforeseeable that Sprint Nextel could not reasonably have anticipated the defect."²² None of the other carriers had suffered a similar technical impediment or been required to take the extreme measures taken by Sprint Nextel to overcome such a setback. Nonetheless, the Commission included these defective handsets in referring Sprint Nextel to enforcement. Sprint Nextel's actual penetration rate but for these defective handsets, however, was 88%, only three percentage points different from those of the other carriers not referred to enforcement.²³

The Commission also emphasized in its enforcement referral that Sprint Nextel had reached "only" an 86% penetration rate as of May 31, 2006. Unnoted by the Commission, however, was that the penetration rate as of May 31, 2006, was in fact 91% but for the defective handsets.²⁴ Sprint Nextel continued to advise the Commission that it was quickly approaching the 95% penetration requirement, noting that it had reached a 94% penetration rate but for the software defect by October 31, 2006.²⁵ By November 31, 2006, Sprint Nextel had effectively reached compliance with the FCC mandate achieving a 94.7% handset penetration rate but for the software defect.²⁶ Accordingly, Sprint Nextel had reached the 95% penetration mandate within a few months of the "limited" extension the Commission deemed acceptable in the

²² *Sprint Nextel Waiver Order* at ¶26; *Nextel Partners Waiver Order* at ¶23.

²³ The 88% figure is a conservative number. Because iDEN handsets use a SIM card which can be transferred to a new phone without Sprint Nextel's knowledge, some percentage of handsets counted as non-GPS enabled are in fact GPS capable.

²⁴ *Sprint Nextel Corporation E911 Deployment Status Report*, CC Docket 94-102 (Aug. 1, 2006).

²⁵ *Letter to Ms. Marlene H. Dortch from Luisa L. Lancetti*, CC Docket 05-286 (Nov. 20, 2006).

²⁶ The 94.7% penetration rate includes Nextel Partners, Inc.'s handset numbers.

Verizon Waiver Order.²⁷ In fact, it is worth noting that Southern Communications Services, Inc. d/b/a SouthernLINC Wireless, the only other significant iDEN based carrier in the United States, was granted an extension almost identical to the amount of time required for Sprint Nextel to reach this compliance milestone.²⁸

Sprint Nextel respectfully requests that the Commission reconsider its decision to refer Sprint Nextel for further enforcement proceedings. Based on the FCC's own factual findings, Sprint Nextel's compliance rate was in fact much higher than the 81% figure relied upon by the Commission and was substantially similar to Verizon Wireless and the other carriers who received no adverse action. Although Sprint Nextel sought a two year extension, it in fact met the compliance deadline, but for the defect, more than a year in advance of its requested extension and only a few months after the six months sought by other carriers not referred to the Enforcement Bureau. The record provides no apparent basis for excusing Verizon Wireless from further proceedings but penalizing Sprint Nextel which reached a similar penetration rate, but for the software defect.

IV. THE EVIDENCE IN THE RECORD DOES NOT SUPPORT A FINDING THAT SPRINT NEXTEL COULD HAVE COMPLIED WITH THE MANDATE

As evidenced by the Commission's Orders, no major carrier was able to meet the 95% handset penetration mandate by December 31, 2005, and all carriers used the same basic strategies to achieve compliance. Indeed, more than fifty carriers sought an extension of the deadline.²⁹ This fact alone is substantial evidence that the 95% mandate, which was by necessity

²⁷ *Verizon Waiver Order* at ¶ 24 (finding Verizon's "requested extension is of limited duration, until June 30, 2006" and holding that a referral to enforcement was thus unnecessary).

²⁸ *In the Matter of Request for Waiver by Southern Communications Services, Inc. d/b/a SouthernLINC Wireless*, Order, FCC 05-188, CC Docket 94-102 (Nov. 3, 2005)(Granting SouthernLINC until November 3, 2006 to meet the 95% penetration mandate).

²⁹ See, e.g., *In the Matter of E911 Compliance Deadlines for Tier III Carriers*, Order, 20 FCC Rcd 7709, CC Docket 94-102 (Apr. 1, 2005).

an arbitrary deadline chosen by the Commission, and which was apparently based on churn estimates in the early years of the industry, was simply not a realistically achievable date.³⁰

As detailed above and in its petition for waiver, Sprint Nextel made all reasonable efforts to convince its customer base to convert their handsets. In rejecting Sprint Nextel's waiver request, however, the FCC merely noted that Sprint Nextel's failure to comply with the law was sufficient evidence that it had failed to take the necessary steps to comply:

The steps taken by Sprint Nextel to meet the December 31, 2005 were limited and ultimately ineffective in achieving 95% penetration, as evidenced by the poor penetration levels obtained by Sprint Nextel.³¹

While the Commission offers criticism of Sprint Nextel's marketing efforts,³² it offers no action that Sprint Nextel could have taken that would have materially affected consumer behavior or substantially changed Sprint Nextel's penetration rate. The Commission suggests that Sprint Nextel should have offered free or reduced-price location capable handsets without an obligation to sign a two year contract. "Elimination of that condition likely would have made its efforts more effective."³³ There is absolutely no basis in the record, however, for this conclusion. Indeed, the record evidence before the Commission directly contradicts this point.

Customers with defective Motorola handsets could have restored GPS functionality to their equipment with almost no effort. They were not required to purchase a new handset. They were not required to enter new contracts. Their preprogrammed dialing lists would not have

³⁰ *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, CC Docket 94-102 (1999) ("Third Report and Order") at ¶50 (noting conversion of the handset base could occur in three years assuming a 2% churn rate).

³¹ *Sprint Nextel Waiver Order* at ¶22; *Nextel Partners Waiver Order* at 19.

³² The Commission notes with apparent disapproval that Sprint did not market Phase II services or the E911 benefits of converting these handsets. As the Commission is well aware, Phase II services cannot be marketed because they are not ubiquitously available. At the time of the waiver filing, not even a majority of PSAPs had yet requested Phase II services. *See Sprint Nextel Waiver Petition* at 30, n. 66.

³³ *Sprint Nextel Waiver Order* at ¶30; *Nextel Partners Waiver Order* at ¶27.

been disturbed. Their ancillary chargers, headphones and carrying cases would not have needed replacing. Indeed, most would not even be required to leave their place of business to have their phones updated. Despite all of these facts, these customers, many of whom work for public safety, have still not restored GPS functionality to their handsets. As of the December 31, 2006, after sweepstakes offers, multiple mailings and endless marketing, there are approximately **1.5 million** customers still using handsets with defective software.

The *Waiver Orders* also fail to note that Sprint Nextel did in fact offer free phones to at least two subsets of customers. After discovering the software defect, Sprint Nextel offered to exchange, for free, new i730 phones with PSAPs using older i58 and i88 phones. Only 48 PSAPs accepted this offer.³⁴ Likewise, Sprint Nextel offered to replace, *free of charge and via direct mail*, some 37,000 handsets in the possession of large business users to replace handsets with defective GPS software. Less than 10% of these customers accepted new handsets, a take rate too low to materially affect Sprint Nextel's handset penetration numbers.³⁵

Based upon this evidence, there is no factual basis to conclude that any additional action taken by Sprint Nextel would have resulted in compliance with the Commission's mandate. Sprint Nextel's compliance efforts equaled or exceeded those of all other major carriers and Sprint Nextel should, at a minimum, not be referred to the Enforcement Bureau.

V. REQUIRING THE PROVISION OF FREE HANDSETS WOULD BE AN IMPERMISSIBLE TAKING

To the extent the Commission has held that a carrier must provide free phones to its customers without contract or other compensation, the *Waiver Order* is an impermissible taking. Sprint Nextel has no legal authority to require its customers to relinquish their phones and is under a contractual obligation to provide service to customers who lawfully purchased non-GPS

³⁴ *Sprint Nextel Waiver Petition* at 33.

³⁵ *Id.*

enabled devices. Accordingly, the Commission suggests that carriers should have considered themselves obligated to offer free phones to customers without any contractual commitment. As noted above, Sprint Nextel's experience demonstrates this avenue was unlikely to convert large numbers of customers. If such an effort were as successful as the Commission suggests, however, such a mandate would amount to an impermissible taking.

For more than two centuries, the Supreme Court has made clear that the government may not take property from private party A and give it to private party B.³⁶ Requiring carriers to provide free handsets to customers is nothing more than a directed transfer of property. It would be similar to requiring auto manufacturers to not only install airbags in cars, but to replace all cars previously sold with new cars equipped with the required safety device.

In *Kelo v. City of New London*,³⁷ the Supreme Court reaffirmed that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."³⁸ If giving away phones for free—or below cost—would have been the only way that Sprint Nextel could have met the December 31, 2005, deadline, it would seem that the Commission's Order holding Sprint Nextel to that deadline violated the "no A to B rule" -- the fundamental principle that the Takings Clause does not permit the government to transfer private property from one person to another.

³⁶ See *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("It is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes *property* from A and gives it to B") (opinion of Chase, J.) (emphasis in original); *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) ("We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.") (Story, J.); *Citizen's Sav. & Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874) (no court "would hesitate to declare void a statute * * * which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."); *Wilson v. New*, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (calling "the taking of the property of A and giving it to B by legislative fiat" as "that method which has always been deemed to be the plainest illustration of arbitrary action"); see also *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 310-311 (C.C.D. Pa. 1795) (Paterson, J.).

³⁷ 125 S. Ct. 2655 (2005).

³⁸ *Id.* at 2661.

VII. CONCLUSION

For the reasons discussed herein, Sprint Nextel respectfully requests that the Commission reconsider its Order referring Sprint Nextel to the Enforcement Bureau for further proceedings.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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February 5, 2007

CERTIFICATE OF SERVICE

I, Jo-Ann Monroe, do hereby certify that, on this 5th day of February 2007, copies of the foregoing "Petition for Reconsideration" were served by electronic mail and/or U.S. first-class mail, postage prepaid, to the following:

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