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 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
Wireless Telecommunications Bureau Seeks Comments on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding	)	**DA 03-19**

TO: The Wireless Telecommunications Bureau

SUPPLEMENTAL COMMENTS OF
ENTERGY CORPORATION AND ENTERGY SERVICES, INC.

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EXECUTIVE SUMMARY

The Consensus Parties' revised proposal is rife with legal flaws, loopholes, and bad policy. First, the Consensus Parties ask the FCC to adopt their self-serving plan wholesale, or not at all. The FCC should not capitulate to this demand, but if the Commission is forced to choose, then it must certainly reject the proffered plan. To do otherwise would be a clear abdication of the FCC's decision-making responsibilities, and would be detrimental the public interest.

The Consensus Parties Supplemental Comments also fail to resolve the problems of the original Consensus Plan, and in fact create new ones. For example, the proposed Guard Band and its associated interference complaint thresholds would clearly endanger vital utility communications, and would have a particularly egregious effect on Entergy's operations. Where current rules and precedent provide interference protection for Entergy over the entire service area covered by a particular site, the proposed rules could slash this by 96%. Because the Consensus Parties have designated the Guard Band as the preferred relocation destination for Business and I/LT licensees currently located in the General Category, Entergy's system would be extremely vulnerable to interference, and Entergy would have little or no recourse by which to protect itself and the safety of its workers and customers.

Numerous elements of the plan also stand on extremely tenuous legal ground, or lack a legal foundation altogether. For example, the Consensus Parties have constructed the RCC in such a manner that it would be populated with self-interested and biased parties, and would function virtually autonomously with little or no oversight from the Commission. It would be able to formulate and establish the rights and obligations of 800

MHz Business and I/LT licensees without their input, and force them into arbitration with no appeal rights. The delegation of the FCC's responsibilities in this manner is clearly impermissible under the plain language of the Communications Act, and would also likely violate the Federal Advisory Committee Act. The lack of appeal rights also condemns the RCC, as the FCC cannot regulate away its constituents' rights under the Administrative Procedure Act. Further, the composition of the RCC violates the right to an impartial decision-maker, and implicates potential antitrust concerns by bestowing the RCC's members with power over their competitors.

The proposed informational disclosures are also extremely invasive, and the plan lacks safeguards to ensure confidentiality. This could potentially place sensitive information regarding this country's critical utility infrastructure not only into the hands of competitors, but even into the hands of those who would inflict damage. This cannot be permitted.

The funding scheme is also full of loopholes and pitfalls. First, it has never been the Commission's policy to permit an interfering party to limit its liability and it should not begin now. With the artificial caps in place, there is a strong potential that funding would be depleted before the entire relocation process is concluded. Moreover, by placing the "collateral" for the fund (whether it is the 1.9 GHz license or other assets) in a separate corporate entity, Nextel can shield itself from liability in a number of respects. For example, this shell company may borrow against the assets it is holding, which would deplete the value of the pledged stock. This could also render any pledged assets vulnerable in bankruptcy. Moreover, there is no clear definition of when Nextel would be in default of its obligation to continue to place money in the relocation fund, making it

easy for Nextel to walk away from the process prior to completion without any consequences. A partially completed realignment could result in *more* 800 MHz interference, not less.

In two significant respects, the Consensus Parties are also asking the Commission to roll back its commitment to spectrum efficiency and innovation. With the proposed freeze, valuable spectrum would lay fallow and it would severely impact utilities' ability to respond to the changing needs of their growing customer bases. With the ban on cellular architectures below 861 MHz, the proposal would freeze public safety, business and I/LT licenses in a state of technology that is quickly becoming outmoded, and would clearly function to inhibit technological progress and spectrum efficiency. This stands in stark opposition to the FCC's stated goals of updating its spectrum management policies and encouraging market-based innovation.

In sum, this plan would harm many licensees who have not contributed to the alleged interference problem. It would endanger vital communications of Critical Infrastructure Industry licensees, who depend on their land mobile systems to ensure the safety of their crews, to ensure that safe and efficient delivery of life-sustaining electricity, heat, and water to hospitals, schools, businesses, government agencies and homes. It is likely illegal in many respects. Rather than rushing to realign the band at the behest of a vocal coalition, therefore, the FCC should carefully and thoroughly evaluate the scope and prevalence of the problem, and should adopt rules that provide for immediate interference mitigation and long term licensing flexibility to encourage individual solutions negotiated in the marketplace.

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TO: The Wireless Telecommunications Bureau

SUPPLEMENTAL COMMENTS OF ENTERGY CORPORATION AND ENTERGY SERVICES, INC.

Entergy Corporation and Entergy Services, Inc. (collectively, "Entergy"), by and through their undersigned telecommunications counsel, hereby submit these supplemental comments in the above referenced docket in response to the Public Notice, DA 03-19, issued by the Wireless Telecommunications Bureau ("WTB" or "Bureau") on January 3, 2003.[1] The Public Notice

[1] Wireless Telecommunications Bureau Seeks Comment on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding, *Public Notice*, DA 03-19 (Jan. 3, 2003). By Public Notice dated January 16, 2003, DA 03-163, the FCC granted a limited extension of time to file comments and reply comments responsive to these "Supplemental Comments."

seeks comment on the supplemental comments filed by the self-styled "Consensus Parties" ("Consensus Parties' Supplement").[2]

I. INTRODUCTION

Entergy's land mobile radio network is vital to the support and maintenance of its expansive, multi-state electric utility system. Entergy holds a significant number of licenses in the 800 MHz band, including licenses in the General Category and in the interleaved channels, as well as in the proposed Guard Band at 859-861 MHz. Due to its potential impact on this critical utility asset, Entergy has submitted Comments,[3] Reply Comments,[4] and Further Comments[5] in this proceeding.

In each phase of this proceeding, Entergy has urged the Commission to take a step back from the calls for realignment, and instead to adopt a rational, measured approach to the current interference problem. Entergy has recommended investigation into the scope and prevalence of the problem, so that the FCC may adopt rule changes to facilitate market-based and technical

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[2] As the Bureau itself notes, the term "consensus" in this context by no means encompasses all of the relevant viewpoints in this proceeding. *Public Notice*, DA 03-19 at n.3. The "consensus" fails to represent the views of a number of 800 MHz constituents with significant operations, particularly electric utilities. Signatories to the "Supplemental Comments of the Consensus Parties" include Aeronautical Radio Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of Public Safety Communications Officials - International, Forest Industries Telecommunications, the Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs Association, the National Sheriffs Association, Nextel Communications, Inc., the Personal Communications Industry Association, the Taxicab, Limousine and Paratransit Association and the National Stone, Sand and Gravel Association (December 24, 2002) and the Association of American Railroads (by letter dated December 31, 2002).

[3] Comments of Entergy Corp. and Entergy Services, Inc., WT Docket No. 02-55 (filed May 6, 2002) ("Entergy Comments").

[4] Reply Comments of Entergy Corp. and Entergy Services, Inc., WT Docket No. 02-55 (filed August 7, 2002) ("Entergy Reply Comments").

solutions. These would include, among other things, flexible licensing rules to encourage channel swaps and to allow the parties to arbitrate their interference disputes. The Consensus Parties, on the other hand, have proffered a complicated, nearly opaque plan laden with self-serving proposals. As described more fully below, the Consensus Parties' Supplement not only fails to remedy the inherent problems with its initial proposal, but also creates new problems. Given this fact, and given the take-it-or-leave it ultimatum issued by the Consensus Parties, the FCC must certainly choose the latter and adopt the immediately available avenue of facilitating a targeted resolution of interference issues. If, however, the FCC determines that rebanding is an effective and necessary means of resolving interference, Entergy recommends that the Commission establish a much more sensible and efficient approach than that urged by the Consensus Parties, as detailed herein.

II. THE FCC MUST NOT ALLOW THE CONSENSUS PARTIES' TACTICS TO FORCE THE ACCEPTANCE OF A FLAWED PROPOSAL

The Consensus Parties stress that "[a]ll the provisions of the Consensus Plan are interrelated"[6] and that any "material modification of the Consensus Plan would *eliminate* the voluntary commitments and cooperation among affected licensees *indispensable* to its successful and expeditious implementation."[7] Further, Nextel's "voluntary" contribution of $850 million is wholly contingent upon the FCC issuing it a nationwide license for 10 MHz of spectrum at 1.9 GHz.[8] Through these statements, the Consensus Parties have issued an ultimatum to the agency:

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[5] Further Comments of Entergy Corp. and Entergy Services, Inc., WT Docket No. 02-55 (filed September 23, 2002) ("Entergy Further Comments").

[6] Supplemental Comments of the Consensus Parties, WT Docket No. 02-55, at 3 (filed Dec. 24, 2002) ("Consensus Parties' Supplement").

[7] Consensus Parties' Supplement at 4 (emphasis added).

[8] Consensus Parties' Supplement at ii.

accept the self-serving Consensus Plan *en toto,* or not at all. Given the overwhelming legal and policy problems associated with the Consensus Plan and its recent supplement, however, the FCC must reject it.

The Consensus Parties characterize the proposal as "widely-supported," stating that the "Consensus Plan is the only proposal before the Commission that enjoys the support of organizations representing over 90 percent of the 800 MHz Land Mobile Licensees affected by CMRS-Public Safety interference."[9] First, it should be noted that this carefully turned phrase camouflages the fact that the majority of the Plan's signatories are *trade associations,* which are not licensees themselves. In fact, the *membership* of these organizations appears to be divided as to the efficacy and advisability of the Consensus Plan.[10] Moreover, regardless of the touted "percentage" of support, the FCC is required to act in the public interest, not in the interests of a vocal coalition. The FCC "abdicates its role as a rational decision-maker if it does not exercise its own judgment, and instead cedes near-total deference" to private parties' demands, even if the parties are unanimous in their recommendation.[11] Ceding to the demands and pressure of the Consensus Parties in this proceeding would be inappropriate and unlawful; the FCC must make an independent assessment of the Consensus Plan and the other plans presented to determine which best serves the public interest. In this regard, Nextel is in no position to be issuing ultimatums to the FCC, which has wide-ranging authority to rectify the interference that appears to be primarily caused by Nextel.

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[9] Consensus Parties Supplement at 3.

[10] *See, e.g.* Further Comments of Southern LINC, WT Docket No. 02-55, at 3-5 (filed Sept. 23, 2002) (detailing the opposition to the Consensus Plan among the public safety community and other industry sectors); Comment of Lake County, Illinois, WT Docket No. 02-55 (filed Jan. 27, 2003).

[11] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001), *citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993).

III. RELOCATION OF CRITICAL INFRASTRUCTURE LICENSEES TO THE GUARD BAND IS UNACCEPTABLE

During the first phase of the process, the Consensus Parties propose to relocate several large, wide area multi-state systems as a whole, rather than requiring them to relocate piecemeal according to the various NPSPAC regions later in the process.[12] While Entergy is gratified that the Consensus Parties recognize Entergy's unique needs (and Entergy agrees that large, integrated systems should be dealt with as a whole should any rebanding be necessary), this concession offers little practical benefit under the Consensus Parties' proposal.

First, the Consensus Parties' proposal requires that licensees subject to relocation during Phase I must relocate their operations within 6 months of the FCC's approval of the licensee's new channel allocation, which would place the final date for retuning to be completed at approximately 21 months from the effective date of the report an order.[13] As for "block EA and wide-area incumbents" such as Entergy, although they are slated to begin the process prior to other Phase I relocatees, Entergy would still have to complete its relocation by the same date, giving them no more than approximately 9 months.[14] This highly abbreviated schedule is far less than the one year that is typically permitted for construction of 800 MHz systems, and even more unrealistically brief when compared with the five years permitted for licensees requesting slow growth. This time frame is unrealistic given the size of Entergy's system.

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[12] Consensus Parties' Supplement at 20, n.31.

[13] Consensus Parties' Supplement at 23. Note, however, that the time frames outlined in Appendix D appear to conflict with this statement, providing for relocation to start in month 14 for Phase I EA and wide area licensees and month 15 for other Phase I regions, and to end in months 23 and 24, respectively.

[14] Consensus Parties' Supplement at 21 n.33. Licensees in Regions 15-55, however, have 12 months to relocate. Consensus Parties' Supplement at 25.

Furthermore, under the Consensus Plan, "non-Nextel site-licensed B/ILT and SMR" licensees displaced from the General Category will be moved to the proposed Guard Band first and until the Guard Band channels are fully licensed.[15] Thus, because the Consensus Parties propose to address Entergy's system first, it is a virtual certainty that Entergy's General Category licenses will ultimately be relocated into the proposed Guard Band. Along with Entergy's operations already located at 859-861, these licenses will be subject to a more hostile interference environment with significantly reduced interference protection rights. This is an unacceptable outcome both for critical infrastructure licensees generally and for Entergy in particular.

A. The Public Interest Does Not Support Placing Critical Infrastructure Licensees In The Guard Band

As the suppliers of electricity and other energy products and services to the public, utilities provide services that are absolutely necessary to modern life, and thus, the power utilities have been characterized in this proceeding and elsewhere as "Critical Infrastructure Industries."[16] The FCC is well aware of the vital role that land mobile communications plays in utility functions, and Congress has long recognized this as well.[17] The importance of utilities to

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[15] Entergy again notes the contradiction in the Consensus Parties' statements about who will occupy the Guard Band. On the one hand, the Consensus Plan asserts that the Guard Band will house "campus" systems or "interference resistant" systems, essentially conceding that the guard band will be subject to increased interference potential. On the other hand, the Consensus Plan designates the Guard Band as the first choice location for relocated General Category licensees. *See* Further Comments of Entergy, WT Docket No. 02-55 at 5, referencing Reply Comments of Aeronautical Radio, Inc. *et al.*, WT Docket No. 02-55, at 13 (filed Aug. 7, 2002) ("Consensus Plan"); Consensus Parties' Supplement at 17, Appx. C-20.

[16] *See In re Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 FCC Rcd. 4873, 4894 at ¶ 36, n.96 (2002).

[17] S. Rep. No. 191, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2250 ("In managing spectrum, the FCC . . . first should attempt to meet the requirements of those radio users which render important services to large groups of the American public, such as

national security is also well established. For example, the NTIA recently reiterated that utilities provide essential public services and are vital components of the Nation's critical infrastructure, and any "system disruptions that are not quickly restored pose potential threats not only to Public Safety, but also to the Nation's economic security."[18] Our Nation's "economic prosperity, and quality of life have long depended on the essential services" that utilities provide.[19]

In light of these factors, the FCC should be particularly circumspect in connection with any measures that might impose unnecessary costs or disrupt utilities' communications systems, which support the safety and security of this critical national infrastructure. As Entergy has stated throughout this proceeding, Critical Infrastructure Industry operations should not be moved at all without a sufficient justification. If the FCC adopts realignment, Critical Infrastructure Industry licensees should not be forced into the proposed Guard Band or required to stay in the Guard Band, where they will be subject to a more hostile interference environment while simultaneously receiving reduced interference protection. This could compromise vital, mission critical utility communications, which is clearly contrary to the public interest.

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governmental entities and *utilities*, rather than the requirements of those users which would render benefits to relatively small groups.") (emphasis added); *See also* Balanced Budget Act, § 3001 et seq., Pub. L. No. 105-33, Title III, 111 Stat. 251, 258 (1997); House Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997), *reprinted in* 1997 U.S.C.C.A.N. 176, 192 (exempting public safety radio services from auction, including those used by utilities as protectors of the safety of life, health, and property).

[18] Marshall W. Ross and Jeng F. Mao, Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Response to Title II of the Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No. 106-553, U.S Dep't of Commerce, National Telecommunications and Information Administration (Jan. 30, 2002) ("*NTIA Report*").

[19] President's Commission on Critical Infrastructure Protections, Critical Foundations - Protecting America's Infrastructures at ix (October 1997).

B. The Consensus Parties' Supplement Virtually Eliminates Entergy's Interference Protection

The Consensus Parties propose a sliding "received signal strength" scale in the Guard Band against which a licensee's ability to obtain relief from harmful interference would be measured.[20] That is, non-cellular licensees would be required to meet a certain signal strength, which increases as they move closer to the upper end of the Guard Band, before the licensee would be entitled to receive any interference protection. This constitutes a significant reduction in interference protection rights for those entities forced to relocate to the Guard Band as well as for those with licenses already located in this segment of the spectrum. For Entergy in particular, this requirement would detrimentally impact its operations.

In its current spectrum locations in the General Category, Entergy is entitled to interference protection over its entire licensed area as a Part 90 licensee with primary status.[21] Moreover, as numerous parties have asserted throughout this proceeding, Entergy and other incumbents are also protected by the FCC's policy and precedent under *Midnight Sun*, which dictates that the "newcomer" to the spectrum in question is ultimately responsible for resolving any harmful interference.[22] In fact, Aeronautical Radio, Inc., a current signatory to the

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[20] Consensus Parties' Supplement at 41-42; Appx. F. Entergy also notes that the interference in question is consistently referred to as "CMRS-Public Safety" interference. This implies that Business and I/LT licensees are not subject to interference, and may not be able to request that an interference situation be rectified. This is unacceptable, as there is no justification for treating other licensees who are subject to interference differently than public safety licensees.

[21] 47 C.F.R. § 2.106.

[22] *See, e.g.*, Entergy Reply Comments at 21; *Midnight Sun Broadcasting Co. v. FCC*, 11 FCC Rcd. 1119 (1997). *See also, Broadcast Corporation of Georgia (WVEU(TV)) Atlanta, Georgia*, 92 FCC 2d 910 (1982) at ¶ 7, *recon. denied*, 96 FCC 2d 901 (1984) ("…there is no doubt that the financial responsibility for eliminating objectionable interference falls upon the 'newcomer.'"); *Sudbrink Broadcasting of Georgia, Inc. v. FCC*, 65 FCC 2d 691 (1977); *Jesse Willard Shirley*, 24 Rad. Reg. 2d 982 (1972); *Jack Straw Memorial Foundation*, 35 FCC 2d 397, *recon. denied*, 37 FCC 2d 544 (1972); *Windmill Broadcasting Co.*, 44 Rad. Reg. 2d 475 (1978).

Consensus Plan, fully recognized this precedent and advocated this position in its initial Comments in this docket.[23]

Entergy is currently operating at the maximum output permitted under the FCC rules, and would be unable, under current regulations, to increase its power to boost signal strength. With current outputs, and Entergy's "tall site, wide area" design philosophy, a representative flat terrain site yields a coverage area with approximately a 35-mile radius from the base station (3900 square miles). As detailed above, Entergy is entitled to interference protection throughout this entire area. Assuming that Entergy qualifies as an "existing system" under the Consensus Parties' proposal,[24] subjecting Entergy to the -92dBm threshold at 859.5 MHz would effectively reduce the area within which Entergy is entitled to interference protection to an area with approximately a 25-mile radius (1900 square miles). Even at the lower end of the Guard Band, this represents a *decrease of approximately 51%*. At the upper end of the Guard Band at 860.5 to 861 MHz, where the threshold would be -65 dBm, *Entergy would only be entitled to interference protection in an area within a 7-mile radius of its base station* (150 square miles). This is a reduction of approximately *96%*. Put more graphically, if Entergy is currently entitled to

[23] Comments of Aeronautical Radio Inc, *et al.*, WT Docket No. 02-55 at 18 (filed May 6, 2002) ("*Tilles Joint Comments*") ("Historically, in the absence of a specific rule, the FCC has relied on the so-called 'last in, fix it' rule of thumb to resolve interference disputes. This doctrine, first annunciated in Midnight Sun Broadcasting Co., has been the touchstone of Commission policy. This policy includes Part 90 stations. Under this criteria, it is patently clear that the Commission may require Nextel (and Cellular A and Cellular B carriers) to remedy the interference."). The Consensus Parties, however, now state coyly in a footnote that the FCC's last in time rule has "never been codified." Consensus Parties' Supplement at 40, n.73. The implication is that Consensus Parties believe that they are not bound to follow the Commission's decisional precedent, which is simply unfounded.

[24] Entergy notes that there is also some definitional ambiguity with respect to what constitutes an "existing system" versus a "new or replacement system" under the definitions of the Consensus Parties' Supplement. A "replacement system," according to the Consensus Parties, is one that is "replaced, modified, or upgraded" after the effective date of a Report and Order adopting the proposal. Consensus Parties' Supplement at F-2. However, under this definition, *every system* affected by the relocation would ostensibly be a "replacement" system, and subject to the even *higher* received signal thresholds.

interference protection over an area the size of a dinner plate, under the Consensus Parties' plan that area would be reduced to about the size of a dime.

Entergy's current operations in the proposed Guard Band would be similarly impacted. Furthermore, the Consensus Parties propose that Business and I/LT licensees currently located in the Guard Band may only relocate elsewhere in the band if it is shown that their communications are "mission critical,"[25] and they must relocate at their own expense.[26] Entergy respectfully submits that all of its communications are, or have the potential to be, mission critical, and should not be subject to decreased interference protection merely because they have the misfortune of being located between 859-861 MHz.[27]

Nextel's efforts to establish an environment in which it has no accountability for interfering with other licensees are outrageous. Non-interfering licensees should not be required to relocate or adjust their operations, at their own expense, to be free of interference, which they are entitled to now. All licensees, including existing and future licensees below 861 MHz must be assured that other interfering licensees will be required to remedy that interference. If Nextel projects that its operations would not meet this standard in a rebanded spectrum environment without a guard band, then the guard band should be located in Nextel's allocation, *i.e.*, above

[25] Consensus Parties' Supplement at Appx. C-20.

[26] Public safety licensees, on the other hand, may relocate freely from the proposed Guard Band with full reimbursement. Consensus Parties' Supplement at 10 n.14. There is no reason for the disparity in treatment given the critical importance of utility communications and the safety of life, health and property endeavors that they support.

[27] It also appears that licensees could not petition for interference relief unless they are in compliance with the most recent manufacturer's maintenance and service bulletins. Consensus Parties' Supplement at F-4. This is an extremely onerous requirement, and should not be imposed.

861 MHz, with whatever technical restrictions are necessary and appropriate to prevent interference to other licensees.[28]

C. Guard Band Spectrum Is Not Comparable

As Entergy and numerous other commenters have reiterated throughout this proceeding, and as the FCC's precedent in the Emerging Technologies docket dictates, incumbent licensees required to relocate are entitled to comparable replacement spectrum and comparable replacement facilities.[29] Given the impossibility of meeting the standard for interference protection as proposed by the Consensus Parties for the Guard Band, it is clear that this criterion is not satisfied.[30] Entergy and other Business and I/LT licensees should not have their rights diminished when they have not contributed to the problem, and should not receive non-comparable replacement spectrum.

The relocation of Channels 1-120 to the Guard Band would have particularly severe impacts on Entergy's operations due to the unique technology limitations of the current system. Many of Entergy's sites (49% of all sites in Arkansas and Louisiana) utilize control channel frequencies in this range. The relationship of the radio's 32 control channels to the site's available control channels has been a complex, well thought out strategy that allows Entergy's older technology radios to roam freely to all sites across the region. This allows efficient mobilization of forces across Entergy's territory, and has been a key factor in utility service

[28] In the 700 MHz band, for example, licensees in the Guard Band between commercial operations and public safety operations are expected to adjust their transmissions to protect non-commercial licensees. The same policy should apply to Nextel's use of the 861-863 MHz band if it is now indicating that its low-site network poses an interference risk to any frequency within 2 MHz.

[29] Further Comments of Entergy at 5; Reply Comments of Entergy at 22; Comments of the United Telecom Council, WT Docket No. 02-55, at 16 (filed May 16, 2002).

[30] See Further Comments of Entergy at 6.

restoration after ice storms and hurricanes. Entergy believes that once control channels are changed, then all of Entergy's older technology radios (approximately 4000 units) will not be able to roam freely, and Entergy may be forced to replace these radios or deal with loss of this important strategic advantage.

IV. THE PROPOSED RCC IS INADVISABLE AND UNLAWFUL

The Consensus Parties propose to vest the "Relocation Coordination Committee" ("RCC") with virtually plenary power over the relocation process. Under the Consensus Parties' proposal, the RCC would, among other things: (1) carry out frequency designation and coordination; (2) oversee dispute resolution; (3) prepare and file license applications; (4) develop and "certify" plans for the realignment process; (5) determine the order of relocation; (6) establish and oversee planning committees for each phase; (7) marshal and house system information for all affected licensees; (8) establish and oversee an arbitration panel; and (9) oversee the realignment process generally.[31] Moreover, the composition of the RCC is designed in a manner that will ensure that the parties who wrote the Consensus Plan will also be given control over its implementation to the exclusion, and likely to the detriment, of those 800 MHz licensees who oppose the plan.

A. Delegation of the FCC's Duties to the RCC Would Be Illegal

The Consensus Parties are essentially requesting that the FCC abdicate its statutorily mandated duty to maintain control over U.S. channels for radio transmission.[32] Operating essentially autonomously and with little or no oversight by the FCC, Nextel and the RCC would

[31] Consensus Parties' Supplement at 15-24.

[32] 47 U.S.C. § 301.

be in a position to dictate the fate of their competitors and opponents with virtual impunity. This result blatantly contradicts the requirements of the Communications Act, the Administrative Procedure Act, and a number of other federal statutes. Moreover, permitting a self-interested committee of private parties to usurp the FCC's policy-making function cannot be allowed, and is not in the public interest.

1. The Communications Act Does Not Permit Delegation to the RCC

Not only is it imprudent to vest the creator of a proposal with the execution of it, the formation and use of the RCC to carry out the functions suggested by the Consensus Parties would also violate a number of statutes. First and foremost, the Communications Act vests the *FCC* with authority to regulate radio spectrum, and specifically prohibits the Commission from sub-delegating its authority to a body such as the RCC. Under 47 U.S.C. section 155(c)(1), the FCC may only delegate its functions to "a panel of commissioners, an individual commissioner, an employee board, or an individual employee." The RCC satisfies none of these criteria. Moreover, agencies are generally prohibited from delegating executive functions or policy-making authority to private parties.[33]

Second, even if the FCC could delegate authority to the RCC, the FCC may not delegate authority the FCC itself does not possess. Particularly, the Consensus Parties propose to permit the RCC to create an arbitration panel to engage in "baseball-style" arbitration of relocation disputes. There are no provisions for review or appeal of the arbitration decision, except when the decision goes to the comparability of the spectrum. Given that the FCC may not itself

[33] *Shook v. District of Columbia Financial Responsibility Management Assistance Authority,* 132 F.3d 775, 783-784 (D.C. Cir. 1998).

foreclose either administrative or judicial review, it follows that it may not, by regulation or through delegation, require FCC constituents to relinquish these rights involuntarily.

2. The RCC's Decisions Would Not Be Subject to Review By Either the FCC or A Court in Violation of APA Section 702

The Consensus Parties' proposal provides no clear path for FCC review of the decisions made by the RCC, the various RCC subcommittees, or the proposed arbitrators, except that a party may appeal an arbitration decision to the FCC if it involves whether or not the replacement frequencies are comparable.[34] Parties are specifically prohibited from appealing funding or timing decisions made by the RCC.[35]

Section 702 of the Administrative Procedure Act guarantees judicial review to those persons "suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Judicial review is a vital procedural part of the checks and balances of a federal system. Particularly in the realm of administrative law, judicial review is the necessary mechanism to ensure that agencies adhere to their mandates to act in the public interest, and not to yield to the relentless influences of industry interest groups.[36] Therefore, the Consensus Parties' suggestion that the decisions of the RCC be insulated from FCC review and from judicial review, whether by "certification," deeming actions in the public interest, or forcing parties into binding arbitration, is unacceptable.

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[34] Consensus Parties' Supplement at Appx. C-22.

[35] *Id.*

[36] *See* Mark C. Niles, *On the Hijacking of Agencies (And Airplanes): The Federal Aviation Administration, "Agency Capture" and Airline Security*, 10 Am. U.J. Gender Soc. Pol'y & L. 381, 385 (2002); Thomas E. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 Chi. Kent L. Rev. 1039, 1087 (1997).

The Consensus Parties' proposals have the potential to cut off this vital right in several respects. By asking the FCC to delegate its authority to a body whose legal status is unclear, the RCC's decisions may escape review because they are not "agency action." Similarly, by requiring arbitration, the Consensus Parties also seek to require licensees involuntarily to relinquish their fundamental right to judicial review in the name of convenience and in an effort to meet a self-imposed and arbitrary deadline. This cannot be permitted as a matter of administrative law and procedure, and it would be an *ultra vires* decision on the part of the FCC to require it.

B. The Proposed RCC Fails to Satisfy the Requirements of the Federal Advisory Committee Act

The Federal Advisory Committee Act ("FACA")[37] was enacted to combat the influence of special interest groups, and to ensure that agency decision making remains an open and public process.[38] Accordingly, the FACA dictates that an advisory committee established or utilized by a federal agency must adhere to a number of requirements, including mandating that the committee: (1) contain a fairly balanced membership; (2) avoid inappropriate influence of special interest groups; (3) have an adequate staff to perform its prescribed function; (4) include an officer or employee of the federal government; and (5) follow the public access requirements of the FACA.[39]

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[37] Pub. L. No. 92-4 63, 86 Stat. 770, *codified* at 5 U.S.C. App. 2.

[38] *See Gates v. Schlesiger*, 366 F. Supp. 797, 799-800 (D.D.C. 1973); *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1098 (D.D.C. 1974); H. Rep. No. 92-116, at 6 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3496 (identifying "the danger of allowing special interest groups to exercise influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.").

[39] 5 U.S.C. App. 2 §§ 5(b), 5(c), 10.

The proposed RCC would clearly constitute a federal advisory committee.[40] However, it would violate the provisions of the FACA designed to guarantee fair and public decision-making. Specifically, as described below, the composition of the RCC is skewed, and would not function to ensure that the agency would consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee.[41] Furthermore, there are no provisions to ensure that the recommendations of the RCC are not influenced by special interests.[42] In fact, one of the reasons that Nextel believes it should be placed on the RCC is the fact that holds a significant portion of the licenses in the band. Rather than being neutral, Nextel is vitally and directly interested in ensuring that the RCC's recommendations are favorable to Nextel.

The RCC also fails to fulfill FACA's requirements that an officer or employee of the federal government (here, likely a FCC employee) chair or attend each meeting of the committee. Advisory committees must also conduct their activities publicly, including publishing advance notice of their meetings, keeping minutes and making them publicly available, and permitting interested persons to attend meetings.[43]

Most fundamentally, *an advisory committee advises*. Section 2 of the FACA states that "the function of the advisory committees should be advisory only, and …all matters under their consideration should be determined, in accordance with the law, by the official, agency, or

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[40] An advisory committee is defined as "any committee, board, commission, council, conference, panel, task force, or other similar group or any subcommittee" that is "established or utilized by one or more agencies in the interest of obtaining advice or recommendations for …one or more agencies or officers of the Federal Government…" 5 U.S.C. App. 2 § 3.

[41] *See, e.g., Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 424 (D.C. Cir. 1989); *see also, Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999).

[42] 5 U.S.C. App. 2 § 5(b)(3).

[43] *Id*. at § 10.

officer involved."[44] The FACA prohibits the delegation of policymaking authority. In the case of the RCC, the RCC would autonomously develop and implement the regional realignment plans, make judgments as to the relative merit of reimbursement claims, and oversee relocation disputes. These functions would clearly exceed the advisory role, and improperly cross into the implementation and policymaking realm.

C. The Proposed Composition of the RCC Would Violate Due Process

The proposed composition of the RCC would also undermine its legality. The Consensus Parties' Supplement states that the RCC will consist of Nextel and four members appointed by the LMCC. As more fully discussed below, this raises grave due process and potential antitrust concerns that cannot be overlooked.

1. The Composition of the Proposed RCC is Skewed and Violates the Right to an Impartial Decision Maker

The proposed realignment represents a massive revision to the multi-million dollar operations constructed by 800 MHz licensees. The changes suggested would have a substantial impact on Entergy's planning and utilization of its entire land mobile communications system, which represents an enormous corporate investment, both in terms of money and manpower. Entergy and the other licensees affected by this proceeding are entitled to a fair and equitable process to determine the ultimate fate of their operations. A fundamental aspect of ensuring the due process rights of parties is the right to an impartial decision-maker.[45] Given the likely biases held by the proposed members of the RCC, the RCC does not fulfill this requirement.

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[44] *Id.* at § 2(b)(6).

[45] *See*, *Connally v. Georgia*, 429 U.S. 245 (1977); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

Impermissible bias is often present when a decision-maker has a pecuniary interest in the outcome of a proceeding.[46] In determining if bias is present, one must evaluate the degree of pecuniary interest and the extent to which the circumstances (including the prior relationship between the decision-maker and the party and statements of the decision-maker) support an inference of bias.[47] A direct and substantial pecuniary interest in the outcome of a proceeding may constitute a *per se* violation of due process.[48]

The proposed composition of the RCC is even more objectionable and skewed than the previous recommendation that Nextel, the LMCC and the Regional Planning Committees oversee the relocation process.[49] First, as Entergy has previously argued, Nextel should not be permitted to determine its own fate in this process and dictate the fate of its competitors.[50] Given the selection criteria and "qualifications" established for the RCC, it also appears that the most likely members of the LMCC to sit on the RCC would be APCO, ITA and PCIA (all signatories to the Consensus Plan). Each of these entities, as described below, also has a large financial stake in the outcome, which supports the inference of unacceptable bias if not a *per se* bias in violation due process.

APCO and Nextel are already fiscally intertwined. APCO's "Public Safety Foundation of America" received a substantial grant from Nextel ($3.75 million) approximately one week after the consensus plan was filed.[51] ITA and PCIA also stand to gain significant benefits in the form

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[46] *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995).

[47] *Id.*

[48] *Id.*

[49] *See* Further Comments of Entergy at 8.

[50] *Id.*

[51] *APCO Foundation Receives Grant from PSAP Readiness Fund*, PR Newswire, Aug. 15, 2002. The PSAP Readiness Fund was created by Nextel to distribute $25 million to organizations to encourage deployment of enhanced 911 services. Nextel Announces Creation of Independent

of coordination fees stemming directly from the RCC's proposed relocations, and both entities already handle a significant amount of coordination work from Nextel. Entergy notes that from August 1, 2002 to December 31, 2002, PCIA submitted approximately 768 Nextel applications to the FCC, representing approximately 20% of PCIA's applications for that period. During the same time frame, ITA submitted 1,313 Nextel applications, representing over 30% of ITA's applications for that period.[52]

Entergy also notes that PCIA, which could ostensibly occupy a place on the RCC as a representative of private wireless licensees, does not appear to represent those interests any longer. Specifically, the PCIA mission statement reflects that it represents "companies that develop, own, manage, and operate *towers, commercial rooftops and other facilities* for the provision of all types of wireless, broadcasting, and telecommunications services."[53] PCIA describes itself as "the principal trade association representing the wireless telecommunications and broadcast *infrastructure* industry,"[54] and has even moved to change its name from the "Personal Communications Industry Association" simply to the acronym PCIA, with the subheading: "The Wireless Infrastructure Association."[55] This is clearly an organization that no longer constitutes an adequate representative of private wireless licensees, and its inclusion as

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Fund for Wireless Enhanced 911 Improvement, Press Release (July 22, 2002), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=NXTL&script=410&layout=-6&item_id=317905.

[52] Numbers are derived utilizing a search of the ULS database for applications received from August 1, 2002 to December 31, 2002, employing "Nextel" for the licensee search criteria and designating either ITA or PCIA as the frequency coordinator.

[53] About PCIA, *available at* http://www.pcia.com/pcia_about.htm (last visited Jan. 23, 2003) (emphasis added).

[54] Comments of PCIA, WT Docket No. 02-46 (filed Nov. 15, 2002) (emphasis added).

[55] PCIA Update: New Name, New Look, New Shows, Press Release (Oct. 1, 2002), *available at* http://www.pcia.com/pcia_about.htm.

one of five members of a body with authority to dictate the fate of a large portion of that industry would be inappropriate, and contribute to the flaws in the RCC's composition.

2. The Use of the Proposed RCC Implicates Potential Antitrust Concerns

The Consensus Parties are asking the FCC to endow the RCC members with the power to affect the vital communications networks of their competitors, with little or no oversight by the FCC or any other reviewing body. While legislative and regulatory activities are generally immune from antitrust enforcement, activities outside the scope of legitimate regulatory activity may result in antitrust violations.[56] Of course, entities are not shielded from anti-competitive activities that are outside the scope of protected legislative and regulatory activities. Even so, establishing the RCC and populating it with self-interested industry representatives will create in an unacceptable risk of anti-competitive behavior, and could facilitate possible violations of antitrust law. Although it is assumed that the relocation fund would be sufficiently protected from claims for violations by the constituent members of the RCC, the potential for such claims to paralyze the RCC should counsel the FCC to eschew any action that could promote such a result.

V. THE PROPOSED INFORMATIONAL DISCLOSURES ARE OVERBROAD AND IMPRUDENT

The immensely detailed information requested from affected licensees in the Consensus Parties' proposed rules are vastly overbroad and unnecessary for the relocation process. Moreover, the information is highly sensitive, and has the potential to be used for anti-

[56] *Litton Systems Inc. v. AT&T*, 700 F.2d 785, 809 (2d Cir. 1983); *Huron Valley Hospital Inc. v. City of Potomac*, 650 F. Supp. 1325, 1340 (E.D. Mich. 1986).

competitive or even destructive purposes if disclosed. As discussed in more detail below, neither the Consensus Plan nor the Consensus Parties' Supplement provides adequate protection for the information requested.

A. The Information Requested is Proprietary and Unnecessary for Relocation Purposes

The FCC has effected relocations in the past without requiring the disclosure of significant quantities of proprietary information. The information now requested in the Consensus Parties' proposed rules is vastly over-inclusive and is unnecessary to perform a licensee's relocation. Entergy believes that, in the event that the FCC adopts a realignment approach, the information already publicly available through ULS would be sufficient for these purposes and additional disclosure would be unwarranted, particularly given the risk of disclosure outside of the relocation process and the danger posed to the Nation's critical infrastructure and national security by such a leak. Already publicly available information contained in ULS, which includes frequency, control points, number of mobiles and locations (among other things), provides the vast majority of information necessary to the relocation process. Entergy would provide specific technical parameters, such as required frequency spacing, on a per site basis as needed to the coordinating authority. Furthermore, even if all the information requested by the Consensus Parties were necessary, 45 days is an extremely short time frame within which to amass such data, and there are no provisions as to how a request for an extension would be treated. It is also unclear if the FCC even has the authority to levy fines for failure to meet this deadline, as suggested by the Consensus Parties, and even more unclear if the FCC could order such funds to be deposited into the Relocation Fund.

B. The FCC Cannot Guarantee Non-disclosure

Congress has recognized that information regarding the Nation's critical infrastructure is highly sensitive and that specific measures are necessary to ensure that this information is not made generally available to the public.[57] For example, critical infrastructure information accumulated by the Directorate for Information Analysis and InfraStructure Protection under the Homeland Security Act is exempt from public disclosure under the Freedom of Information Act, and may not be disclosed by officers or employees of the United States except under certain limited circumstances.[58] The Homeland Security Act also prescribes criminal penalties for the disclosure of such confidential information.[59]

Neither the FCC nor the RCC can provide similar guarantees for non-disclosure. Although FOIA itself provides that certain information disclosed to an agency is exempt from disclosure, the FCC cannot guarantee that it will be protected. Even with confidentiality provisions, the information is of enormous strategic value, and the damage would be irreparable if the information is disclosed. This is particularly true when the information is disclosed to a third party consultant affiliated with a frequency coordinator or other contractor with whom the disclosing licensee has no direct relationship. In short, there are insufficient guarantees with respect to the integrity and confidentiality of any information submitted to the FCC or the RCC, which is unacceptable given the sensitive nature of the data.

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[57] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[58] Homeland Security Act of 2002 at § 214(a), Pub. L. No. 107-296, Title II, 116 Stat. 2135, 2152 (2002, *codified at* 6 U.S.C. § 133(a).

[59] Homeland Security Act of 2002 at § 214(f), Pub. L. No. 107-296, Title II, 116 Stat. 2135, 2152 (2002, *codified at* 6 U.S.C. § 133(f).

VI. THE CONSENSUS PARTIES' FUNDING PROPOSAL WOULD NOT ACCOMPLISH ITS OSTENSIBLE PURPOSE

The funding proposed in the Consensus Parties' Supplement continues to be deficient for what it is intended to accomplish. As more conditions and caveats are added to Nextel's obligation, it becomes more likely that the funding will ultimately be illusory. As explained more fully below, from a corporate perspective, a bankruptcy perspective, and a common sense perspective, the sketchily outlined funding mechanism, including the fund administrator, Nextel's control over the fund, the cap on Nextel's liability, and the use of separate corporate entities with the "pledge" of the licenses as collateral, provides myriad opportunities for Nextel to walk away from the process prior to its completion - without any consequences to Nextel.

A. Nextel's Plan to Set Up Separate Corporate Entities Could Endanger The Pledged Assets

Nextel suggests that it will secure its ability to fund the retuning costs by setting up separate corporate entities. Particularly, a separate corporate entity would hold the coveted 1.9 GHz license, and its stock would be pledged to the trustee as collateral in the event Nextel fails in its obligations.[60] Nextel, however, reserves the right to use the 1.9 GHz spectrum and to revise the amount or nature of the collateral.[61] This plan offers the clear opportunity for Nextel to isolate itself from liability through the use of the corporate form. More particularly, a separate corporation holding the licenses in question may itself borrow money to fund the plan, which could directly and adversely affect the equity value of the stock pledged to the trustee.

[60] Consensus Parties' Supplement at 8.

[61] The Consensus Parties' Supplement does not indicate under what conditions or what type of arrangement that Nextel would be able to use such spectrum if it is held by a separate entity.

Moreover, the value of the asset in question - the 1.9 GHz license - has not been established. By pledging $850 million in relocation costs, plus the value of its other licenses (whatever their current value may be), Nextel is effectively *purchasing* a nationwide 1.9 GHz license.[62] This is money that could otherwise go to the U.S. Treasury pursuant to an auction of this spectrum, which may well be in excess of the funds now "pledged" to the relocation process. Moreover, since Nextel is obligated to resolve the interference it causes in any event, Nextel could be receiving an unjustifiable windfall. Furthermore, if the licenses *decline* in value, or if the corporation holding the licenses borrows so heavily that there is little or no equity value remaining, Nextel itself could easily walk away.[63] Accordingly, if Nextel is to receive any spectrum at all at 1.9 GHz, it should only be provided *after* the entire realignment process is complete and all reimbursements have been paid.

B. The Fund Could Be Depleted Before Relocation Is Complete

By "volunteering" $600 million in relocation funding for public safety and $150 million for non-public safety 800 MHz licensees, Nextel has attempted to artificially cap its liability. It is

[62] The "purchase" of the 1.9 GHz spectrum also begs a number of additional questions. For example, what type of operational rules will be imposed? What types of services may be provided? Moreover, given that there do not appear to be any established operational parameters for this new spectrum, it may very well be that the license qualifies as an "initial license" as that term is used in section 309(j)(1) of the Communications Act, which requires the use of competitive bidding for mutually exclusive applications. *See, e.g. Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (defining an initial license as "one involving a different set of rights and obligations for the licensee."); *see also, Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000) (determining that a license is an initial license if the newly issued license "differ[s] in some significant way from the license it displaces."). Entergy respectfully submits that a nationwide, contiguous license with undefined operating requirements differs substantially from the scattered and encumbered 700, 800, and 900 MHz licenses that Nextel proposes to relinquish.

[63] Even if the separate company does not borrow against the assets it holds, it is possible that any bankruptcy affecting Nextel itself could reach these assets as well The Bankruptcy Code is extremely broad in this regard, and, depending on the corporate structure and control of the corporation, a Nextel bankruptcy may encompass assets held by a Nextel affiliate.

highly likely Nextel has underestimated the costs of such a massive undertaking, and there are no provisions to cope with the possibility that funds may be depleted prior to the completion of any realignment. This is particularly true with respect to the $150 million provided for non-public safety licensees, because the Consensus Parties' estimates do not appear to account for mixed high-site, low-site licensees such as Southern LINC. There is also no reasonable explanation to establish separate "caps" for different categories of licensees, which adds the potential for one fund to be depleted before the other, again with disastrous results if any relocation effort is cut short.

Nextel also retains an extraordinary amount of control over the fund once established. This is particularly true with respect to Nextel's "veto" power over the identity of the fund administrator, and the fact that non-signatories to the Consensus Plan have absolutely no say in who this should be.[64] Entergy also notes that it also is unclear what would constitute a "default" on Nextel's part, triggering the sale of the assets held as collateral (which may or may not be the 1.9 GHz license, if in fact Nextel has already "substituted" alternate collateral). Nextel is only required to make "periodic" contributions to the fund. Who determines if this standard is met? What does "periodic" mean? These issues are insufficiently defined in the Consensus Plan and its supplement, providing substantial opportunity for Nextel to avoid its obligation.

As Entergy and many other commenters have previously argued, there is no precedent to permit an entity causing interference to limit its liability with respect to remedying that interference.[65] Moreover, if permitted to cap its liability, there is a strong possibility that the fund would be depleted before the entire relocation process is completed. With a cap in place, and with its prized 1.9 GHz license in hand, Nextel will have no incentive to see the plan through

[64] Consensus Parties' Supplement at 7.

to completion, while those languishing in the partially reconfigured bands will be left with no recourse against Nextel and more chaos and interference than previously. This outcome must not be permitted.

C. The Fund May Be Vulnerable In Bankruptcy

The telecommunications industry has undergone a profound transformation in the last several years, seeing the financial destruction of small and large companies alike. No company is immune from these economically uncertain times. Accordingly, any undertaking as massive as the one proposed by the Consensus Parties must contain the appropriate safeguards.

As recently reiterated by the Supreme Court in *FCC v. Nextwave Personal Communications*, federal agencies are required to act in accordance with all laws, not just those that they administer.[66] Moreover, this case also makes clear that bankruptcy law applies to those debts owed to the Commission, which may be stayed or discharged by a bankruptcy court. Given this precedent, the Consensus Parties' funding proposal should give the FCC pause.

First, the "installment" plan by which Nextel is to "periodically" deposit monies into the relocation fund is problematic. *Nextwave* makes clear that this obligation would be unenforceable by the FCC in bankruptcy, regardless of any security interest the FCC may take in Nextel's licenses, either with respect to their current holdings or if they receive the requested spectrum at 1.9 GHz. Moreover, if, as discussed above, this proceeding is tantamount to a licensing proceeding rather than a rulemaking, the parallel with the *Nextwave* case is even more profound, and the FCC would likely have difficulty requiring Nextel to relinquish its licenses

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[65] Further Comments of Entergy at 18.

[66] 5 U.S.C. § 706(2)(A); *FCC v. Nextwave Personal Communications, Inc.*, Case No. 01-653, slip op. at 6 (S. Ct. Jan. 27, 2003); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971).

should it declare bankruptcy, regardless of whatever deficiency may lie with the relocation fund. Further, by creating what is essentially a shell corporation to hold the 1.9 GHz license, the bankruptcy of that subsidiary corporation would likely have a minimal impact on Nextel itself but could still serve to thwart the collection of any monies promised. Accordingly, if the FCC adopts a proposal such as the Consensus Plan, Nextel must be required to *fully fund* the relocation at the outset in cash or a cash equivalent, and Nextel should not be permitted any avenue to renege.

VII. THE PROPOSED LICENSING FREEZE IS UNWARRANTED

The Consensus Parties are now requesting that the FCC institute a licensing freeze when a Report and Order is issued in this proceeding, which would last for the duration of the realignment process in each region. This freeze, they state, "will prevent speculators from 'grabbing up' the remaining 'white space' on B/ILT pool channels solely to impede the relocation of channel 1-120 incumbents and potentially profit thereby."[67] This statement makes little sense for those who would like to license available Business and I/LT channels in the interleaved spectrum that is not located in the proposed Guard Band. Non-Nextel Business and I/LT spectrum in the interleaved channels is not designated as a potential home for relocated public safety or displaced General Category licensees, and it makes little sense to require this spectrum to lie fallow while any relocation process goes on.

As Entergy and others have already discussed, the proposed licensing "preference" to go into effect upon completion of the relocation process also acts as a practical freeze on Business and I/LT licensing.[68] This would severely impair the ability of utility licensees to accommodate

[67] Consensus Parties' Supplement at 26.

[68] Further Comments of Entergy at 19.

of their expanding electric consumer base, as utilities are already struggling to find the spectrum necessary for their current needs. Further, preventing additional licensing by utilities will likely result in decreased employee and public safety, less efficient communications, increased likelihood of power loss, and longer repair times for power outages. This is clearly not in the public interest.

VIII. THE CONSENSUS PARTIES' PROPOSAL CONTRADICTS THE RECOMMENDATIONS OF THE SPECTRUM POLICY TASK FORCE AND WOULD RETARD INNOVATION

Last year, almost concurrently with this proceeding, the FCC initiated a comprehensive review of the current regulatory models driving Commission spectrum policy. The culmination of this initiative was a detailed report issued by the FCC's Spectrum Policy Task Force.[69] One of the principle conclusions reached by the Task Force was the need to transition away from the "command and control" mode of spectrum allocation with its specific service rules and technical restrictions, and to move toward more flexible models that create opportunities for new, efficient and beneficial uses.

The complicated and highly restrictive rules proposed by the Consensus Parties' Supplement stand diametrically opposed to this philosophy. Rather than flexible use, the proposal restricts classes of users to specific segments of the 800 MHz band. As Entergy and others have noted previously, this is particularly troubling given that many public safety entities rely on Business and I/LT licensees, and utilities in particular, to partner with them to develop shared systems that the Public Safety entity could not sustain independently. And rather than promoting technological advancement and spectrum efficiency, the Consensus Parties recommend a complete ban on cellularized systems below 861 MHz.

As many parties have argued, the cellular ban is ill advised and would tend to result in a situation in which "we could freeze ourselves in time to the detriment of the market, the technology, and our citizens."[70] By locking public safety and Business-I/LT users into a specific technology, innovation will be stifled and many users that could benefit from next generation systems will be stymied. This restriction is unwarranted and inconsistent with the Commission's policy of promoting the use of advanced, spectrum efficient technologies.

Moreover, the definition of what constitutes a cellularized system under the Consensus Plan would likely encompass a number of analog sites currently operating in the band, including several held by Entergy. Specifically, in its Reply Comments, the Consensus Plan uses the definition of "cellular system architecture," which includes systems that have (1) more than five overlapping, interactive sites featuring hand-off capability; (2) antenna heights of less than 100 feet on HAAT of less than 500 feet; and (3) more than 20 paired frequencies at each site.[71] The Consensus Parties' Supplement prohibits conversion of "high-site, high-power wide-area systems" to "cellular use" in the "non-cellular" block.[72] If existing sites qualifying under these criteria are currently not causing interference, they should not be prohibited. Moreover, given that they are not causing interference, this also indicates that the proposed definition is overbroad.

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[69] Spectrum Policy Task Force Report, ET Docket No. 02-135, at 16, 46 (Nov. 2002).

[70] FCC Chairman Michael K. Powell Outlines Elements of Future Spectrum Policy, Press Release (Aug. 9, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-225310A1.doc.

[71] Consensus Plan at 10.

[72] Consensus Parties' Supplement at Appx. C-1.

IX. A MARKET-BASED PROPOSAL REMAINS A SUPERIOR OPTION THAT AVOIDS THE PROBLEMS OF THE CONSENSUS PARTIES' PROPOSAL

Entergy renews its call for a more complete evaluation of the scope of the problem before a massive, disruptive plan is adopted merely at the behest of a vocal and self-interested coalition. Further, Entergy continues to believe that modest rule changes will bring significant relief while avoiding the legal and practical pitfalls of the complicated rebanding proposal presented by the Consensus Parties. As Entergy has previously argued, by adopting rules that permit parties to negotiate spectrum swaps and other interference resolution agreements with minimal oversight from the Commission, the FCC will be able to proactively address public safety interference while maintaining the rights of incumbents and encouraging innovation.

X. CONCLUSION

At best the Consensus Parties' revised proposal is highly flawed, and at worst it is illegal. It would endanger critical utility communications by relocating them into an interference-prone Guard Band, and would reduce the utility's ability to complain of such interference. In Entergy's case, it would lose interference protection for 96% of its current coverage area. It would place virtually unchecked power in the hands of the self-interested RCC in violation of the Communications Act, the Administrative Procedure Act, the Federal Advisory Committee Act and due process. It would risk the disclosure of sensitive information on this Nation's Critical Infrastructure. The complicated funding mechanism proposed also remains unsound, with myriad of loopholes available that would permit Nextel to walk away before any realignment is complete, or that would leave the process vulnerable if a party were to declare bankruptcy. The proposal would cripple Business and I/LT licensees' ability to expand and fine-tune their

systems, and would lock licensees into outdated and inefficient technology. This plan would harm many licensees who have not contributed to the alleged interference problem.

For all these reasons, and given the Consensus Parties' ultimatum, the FCC must reject the Consensus Parties' proposals. Rather, the FCC should take the time necessary to examine the true scope of the issue, and should adopt an immediate solution proportionate to the problem. Entergy respectfully submits that its market-based proposal, providing for negotiated spectrum swaps and licensee-specific solutions, fits the criteria.

WHEREFORE, THE PREMISES CONSIDERED, Entergy respectfully requests that the Commission consider these Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: February 10, 2003

CERTIFICATE OF SERVICE

I, Christine S. Biso, do hereby certify that on this 10th day of February 2003, I caused a copy of the foregoing "Supplemental Comments of Entergy Corporation and Entergy Services, Inc." to be hand-delivered to each of the following:

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