

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of

Improving Public Safety Communications in
the 800 MHz Band

Consolidating the 900 MHz Industrial/Land
Transportation and Business Pool Channels

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WT Docket No. 02-55

To: The Commission

**REPLY COMMENTS OF
MOBILE RELAY ASSOCIATES**

Mobile Relay Associates (“MRA”), by its attorney and pursuant to Section 1.419 of the Commission’s Rules, hereby submits its Reply Comments in the captioned proceeding. As discussed below, MRA opposes the various proposed solutions that would require MRA and similarly-situated small business, analog-only 800 MHz licensees that cause no harmful interference to anyone else to relocate, as all such proposed solutions threaten to wipe out the remaining small business operators in this band while rewarding the entities (primarily Nextel) that have caused the interference to Public Safety that prompted this proceeding.

Description of MRA

MRA is a small, family-owned business operating in California and Colorado. It has been providing service to Part 90 eligibles continuously for over twenty years.¹ Today, MRA holds

¹MRA is a long-time member of the American Mobile Telecommunications Association (“AMTA”), and a principal of MRA sits on the AMTA board. MRA believed that AMTA would represent the interests of MRA and the traditional SMR community in this rulemaking proceeding, and therefore did not file comments. However, after seeing what was filed, and reviewing a draft of the reply comments in which AMTA plans to participate, it is clear to MRA that AMTA is now representing the interest of its single largest dues-payer, Nextel, and that

numerous licenses used for both internal communications and service to customers, all of which operate analog-only using the same type of system architecture (*i.e.*, high elevation, high-power repeater transmitter, reaching mobile and portable units over a large geographic area) as do most other traditional SMR, B/ILT and Public Safety licensees in the 800 MHz band. MRA causes no harmful interference to other licensees, Public Safety or otherwise.

MRA holds licenses for or assists in the management of 34 channels in the 800 MHz band in the area of Southern California. Of these, five channels are in the 856-860 MHz band, and the other 29 are in the 851-854 MHz band.

MRA competes directly with Nextel's digital, cellular-architecture ESMR system. Nextel offers a combination of dispatch and cellular service, portable handsets, and a higher price per unit; MRA offers non-interconnect dispatch-only service with either larger portable handsets or vehicular-mounted units, but at a lower price. Significantly, MRA also has the competitive advantage of inertia. That is, the customers have been MRA's customers for many years, and, especially in the case of vehicular units, the units are already installed in all of the fleet's vehicles, so there is no disruption, not even a single day, if the customer simply keeps its business with MRA.

Nextel has been trying to compete against this inertia factor with only limited success; no fleet operator wants to have to bring in its entire fleet for either retuning existing equipment or swapping it out in favor of new equipment. The Nextel Proposal, as well as the so-called "Compromise Plan" that was sent to MRA in draft on August 5, would force analog competitors such as MRA to retune, which eliminates Nextel's inertia disadvantage and opens the way for Nextel to win the customers away from the analog competitors.

It is in this context that the various rebanding proposals, and their impact upon MRA and the

MRA must file separately in order for its concerns to be heard.

other small business analog competitors to Nextel, should be viewed when considering the merits.

Summary of MRA's Position

MRA's position in this proceeding may be summarized as follows. Neither MRA nor the similarly-situated small business, analog-only SMR and B/ILT licensees in the 800 MHz band (hereafter collectively, the "Small Operators") cause any harmful interference to Public Safety or other users of the 800 MHz band. The Small Operators would obtain no benefit from being forced to migrate to other channels -- in fact, such a requirement would put most or all of them out of business. All of the harmful interference is caused by licensees who operate with a cellular architecture and digital transmissions, and the vast bulk is caused by a single entity, Nextel.

From the filing of its White Paper, Nextel has been attempting to turn a shortcoming (Nextel causing harmful interference to other, protected licensees) into a vehicle to crush its competitors and steal new spectrum from the government. Stated simply, in the guise of "solving interference issues," Nextel is using the regulatory process to get a leg up competitively. Even the so-called "Compromise Plan" to be put forward today in reply comments by Nextel, AMTA and others is an arbitrary and unfair proposal.² By originally threatening licensees in the 854-860 MHz band (in its White Paper), Nextel has intimidated licensees in that band and their trade groups into supporting this so-called Compromise Plan, which, while sparing the incumbents at 854-860 MHz, sacrifices the less politically powerful incumbents in the 851-854 MHz band (including MRA).

To accept the Compromise Plan would be to reward Nextel for its past violation of Commission interference protection rules, put MRA and the other Small Operators out of business

²Because a number of commenters are apparently going to join in Nextel's reply (as a *quid pro quo* for Nextel modifying its demands to target other incumbents and not those who join it), the bulk of MRA's Reply Comments are devoted to responding to Nextel's reply pleading being filed today. A draft of that reply pleading was delivered to MRA on August 5, 2002.

(with Nextel picking up their customers), and enable Nextel to swap less valuable 700 MHz and 900 MHz spectrum for more valuable 2 GHz spectrum on a MHz-pop for MHz-pop basis. All of this would be done to ameliorate (not eliminate) harmful interference which Nextel is causing today in violation of Commission rules.

There is no precedent for the Commission requiring an incumbent licensee or group of licensees to relocate without adequate compensation, when the targeted group of licensees has violated no Commission rules. There is no precedent for the Commission to remedy a particular licensee's repeated rule violations by rewarding the wrongdoer and crushing its competitors. There is no precedent for the Commission to allow a single, favored licensee to obtain otherwise auctionable spectrum by trading in other, less valuable spectrum that it no longer desires to hold. Thus, the proposed Compromise Plan, like the Nextel plan it replaces, is inconsistent with all precedent and contrary to the public interest.

There is a viable short-term solution, and a viable long-term solution. The short-term solution is to codify the *Best Practices Guide* and to enforce it against Nextel. The long-term solution is to move all of the Public Safety operations into the 700 MHz band, as previously proposed by Cingular and Alltel, once the legacy equipment at 800 MHz has been fully depreciated.

I. Neither MRA nor Other Small Operators Are Causing Harmful Interference

Dozens of Public Safety entities filed comments in this proceeding. In addition, the APCO Project 39 Report and its supplement are apparently part of the record. MRA was unable to find anywhere in that mountain of Public Safety filings any evidence that MRA or other analog-only operators are causing harmful interference to Public Safety in the 800 MHz band.

Rather, all of the evidence indicates that the problem that Public Safety is incurring is

primarily one of intermodulation interference, that this problem is caused solely by the operation of digital, cellular architecture systems using multiple, low-power transmitters, and that by far the single largest source of interference is one licensee -- Nextel.

The record also contains evidence, primarily from the Project 39 Report and its supplement, that where interference is reported and the procedures of the *Best Practices Guide* are then implemented, the interference has been able to be resolved on a case-by-case basis. While the *Best Practices Guide* may not necessarily be a long-term solution, given the continued growth of Nextel's cellular architecture systems around the country, it appears to be a viable solution for the next three to five years. This is significant, because Public Safety's stated reason for resisting a relocation to 700 MHz is that to do so would prematurely obsolete legacy systems operating at 800 MHz. That concern goes away if the relocation is postponed until those systems are depreciated.

II. The So-Called "Compromise Plan" Is No True Compromise

Nextel's original White Paper was a patently overreaching proposal that threatened other 800 MHz licensees with severe disruptions, forced migrations without compensation, and huge spectrum windfalls for Nextel. Nextel's apparent regulatory clout with the staff of the Wireless Telecommunications Bureau aroused and frightened a whole host of disparate industry sectors. However, that White Paper was a straw man -- Nextel proposed it with the idea that it would be struck down, and that whatever arose in its place would seem mild by comparison.

Nextel's strategy worked. MRA is told that today there will be a filing of a so-called Compromise Plan endorsed by Public Safety, Nextel, and virtually all of the trade associations and other commenters representing incumbent licensees in the 854-860 MHz band. The reason for Nextel to support this "Compromise" is obvious -- Nextel receives a spectrum windfall without

having to compete at auction against the cellular and PCS licensees; Nextel no longer need worry about complaints of interference to Public Safety, and Nextel's analog competitors in operating in the 851-854 MHz band will be destroyed, and their dispatch customers will be acquired by Nextel.

The licensees in the 854-860 MHz band support the proposal because they saw themselves as being disrupted or destroyed if the Commission were to adopt any of Nextel's earlier proposals, and this "Compromise" spares them from being relocated. It insulates those licensees from the threat that Nextel's White Paper had posed to them.

Each of the parties now supporting the so-called Compromise Plan is doing so to advance its own private interests, and those parties represent only their own narrow interests, so their plan is not a true "compromise". More importantly, the so-called Compromise Plan is inconsistent with the interests of analog incumbents in the 851-854 MHz band such as MRA, and is inconsistent with the public interest as well.

III. No Precedent Supports the Compromise Plan

The so-called Compromise Plan contemplates the forced relocation (without compensation) of analog-only incumbent licensees now operating in the 851-854 MHz band. It does so even though the record in this proceeding established that these incumbents have not caused harmful interference to other licensees. It does so even though the record in this proceeding shows these relocated incumbents will derive no benefit from this forced relocation, and even though, as MRA has explained, such a relocation will prompt a massive migration of their customer base over to Nextel when each customer is told that every radio in its dispatch fleet must be brought in for retuning. The so-called Compromise Plan forces the relocation of 851-854 MHz licensees whether they acquired their licenses prior to the advent of auctions or pursuant to the Commission's Auction

No. 34.

When the Commission decided to clear a former microwave band for Emerging Technologies (primarily broadband PCS), the Commission required the new, auction-winning licensee in each instance to pay all costs of migration, including not only new infrastructure equipment, but also engineering and design costs, legal and accounting costs, and all other costs attributable to the forced relocation.³ In that case, the incumbent licenses were point-to-point, so there was no issue of how to compensate for the loss of retail mobile customers; however, the wording of the Commission's order would imply that had such a cost existed, it would have had to be reimbursed.⁴

When, in the 800 MHz band, the Commission decided to require the forced relocation of incumbents who did not move voluntarily, the Commission required the new auction winners to reimburse all costs of the forced relocation. There is no precedent where this Commission has required a group of licensees to relocate *en masse* without compensation such as the forced relocation of incumbent 851-854 MHz licensees which the so-called Compromise Plan proposes. There is a reason for this dearth of precedent -- to do so constitutes a confiscatory "taking" by the government in violation of the Fifth Amendment of the US Constitution.⁵

Aside from the constitutional violation involved, this proposed forced relocation makes no

³*ET First Report and Order*, 7 FCC Rcd. 6886, 6890 (1992).

⁴*Id.*, 7 FCC Rcd. at 6890, which, for example, said:
The emerging technology provider must guarantee payment of all relocation costs. This includes all engineering, equipment, site, and FCC fees, *as well as any reasonable additional costs that the relocated fixed microwave licensee may incur...* (Emphasis added.)

⁵*Cf. FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987), upholding FCC rule as non-confiscatory, but indicating that a confiscatory rule would run contrary to the "takings" clause.
Reply Comments, p.7

policy sense. To the extent that harmful interference exists, Nextel is causing it. To punish incumbent 851-854 MHz licensees such as MRA for Nextel's rule violations, while declining to punish Nextel, is the epitome of arbitrary and capricious action.

IV. There Is No Rational Basis for Nextel's Proposed Spectrum Swap

Nextel holds a hodge-podge of site-specific and auction spectrum at 800 MHz. Sometimes Nextel holds a site-specific license for a given frequency but not the EA auction license, sometimes it owns the EA auction license but not the site-specific license, sometimes it owns both, and sometimes the involved spectrum was not subject to auction. However, in putting forward its various proposals over time, Nextel has consistently pretended that it holds all rights to a channel within an EA whenever it held either a site-specific license or an EA license (but not both), even if there are co-channel site-specific licenses within the involved EA.

Through this subterfuge Nextel has claimed to have 2.5 MHz of 800 MHz spectrum to trade for other 800 MHz spectrum. To this ephemeral 2.5 MHz, Nextel adds 4 MHz of 700 MHz spectrum that it purchased previously, as well as approximately 3.8 MHz of 900 MHz spectrum. (This 900 MHz spectrum also is a hodge-podge of site-specific and auction spectrum, where there are co-channel licensees existing in at least some of the EA markets that Nextel is claiming.)

Other than the supposed 2.5 MHz of 800 MHz spectrum, there is no apparent public interest reason for Nextel to be offering any of this spectrum back to the FCC. The so-called Compromise Plan states that any migration by incumbent 800 MHz licensees into either 700 MHz or 900 MHz spectrum would be "voluntary", and neither MRA nor any other incumbent of whom MRA is aware wants to migrate there. So apparently the FCC would just get to sit there with this 700 MHz and 900 MHz spectrum that Nextel would be exchanging.

And that is the key -- Nextel is not “giving” anything back to the FCC. Rather, Nextel is proposing to exchange less valuable spectrum at 700 MHz and 900 MHz (even though such spectrum is at best tangential to the so-called Compromise Plan’s implementation) in exchange for exceedingly more valuable 2 GHz spectrum.⁶ Even assuming, for the sake of argument, that the 800 MHz relocation portion of the so-called Compromise Plan were not completely arbitrary and capricious, there would be no rational basis for the Commission to agree to take Nextel’s 700 MHz and 900 MHz to implement that “Plan”, and no rational basis for the Commission to give Nextel a chunk of virgin CMRS spectrum at 2 GHz that is statutorily required to be licensed by auction.⁷

V. The Commission Should Balance the Benefits and Costs; and Reject Forced Relocation of Innocent Licensees

As noted in Part I, *supra*, although the record shows that Nextel is gradually causing more and more harmful interference to Public Safety, at least so far, even Nextel’s interference has been susceptible to cure on a case-by-case basis when the affected Public Safety entity has alerted Nextel and the involved parties have adhered to the procedures in the *Best Practices Guide*. Thus, at least in the short term, the bulk of the harmful interference can be ameliorated or eliminated simply by codifying the *Best Practices Guide* as a rule, without incurring the substantial disruption and cost that would accompany large-scale relocations. As a long-term solution, the so-called Compromise Plan is a failure, because so long as Public Safety entities remain in an 800 MHz band shared with

⁶That this 2 GHz spectrum is not so valuable today because it is currently allocated as a reserve for the Mobile Satellite Service is irrelevant. Nextel is proposing that this spectrum be reallocated to CMRS use, and its value must be assessed on the assumption that such reallocation is part of the package.

⁷Indeed, the mere presence of this spectrum exchange proposal within the so-called Compromise Plan exposes that “Plan” for the sham that it is.

myriad other users, there will always be some level of interference, and because the use of digital, cellular-architecture systems at 800 MHz is only going to continue to increase over time.

The only viable long-term solution is that proposed by Cingular and Alltel -- obtaining Congressional authority to move Public Safety into its own spectrum at 700 MHz, and relocating it there once the current legacy 800 MHz Public Safety infrastructure has been fully depreciated.

The supposed drawbacks of this solution are overstated. It is said that Congressional action is needed, but even the Compromise Plan would require Congressional action to authorize millions in taxpayer dollars to compensate the many small business operators such as MRA that would be forced out of business (without which taxpayer compensation the "Plan" would be unconstitutional and could never be implemented). Moreover, there are very powerful companies ready to lobby in support of the relocation of Public safety to 700 MHz, and those lobbyists would have the advantage of lobbying for something that is fair and reasonable, so they stand a chance of succeeding.

It is also said that 700 MHz is not viable unless and until the current UHF broadcasters migrate off that spectrum. However, that migration is scheduled for 2006, which should coincide nicely with the full depreciation of legacy 800 MHz Public Safety systems and the commencement of the next generation of Public Safety infrastructure purchases. Moreover, incumbent broadcasters cover only a portion of the United States today; especially west of the Mississippi, there are huge regions without any broadcast incumbent. And if some compensation were required for displaced broadcasters to ensure they leave by 2006 (high definition TV penetration or not), then this Commission needs to at least assess whether that could be done less expensively compared to the cost and disruption of mass relocations at 800 MHz.⁸

⁸In this regard, a displacement of a broadcaster would not affect its viewers who are cable

subscribers, only those with older televisions that receive the signal over-the-air, a substantial minority of viewers. It would probably be much cheaper to buy each such viewer a HDTV set (thereby reaching the 85% penetration threshold timely) than it would be to require these massive forced licensee relocations contemplated by the Compromise Plan.

In summary, if the Commission were to undertake a cost-benefit analysis, the proposal to require mass relocations to ameliorate but not eliminate an interference problem that is still going to require a different long-term solution, would never pass muster. This Commission should resist falling prey to the panic being engendered by Nextel, and should eschew the so-called Compromise Plan in favor of less expensive but still effective and fair solutions.

CONCLUSION

The record in this proceeding demonstrates overwhelmingly Nextel causes virtually all of the harmful interference received by Public Safety at 800 MHz, which harm could be greatly ameliorated in the near term by Nextel's stricter adherence to the procedures of the *Best Practices Guide*. Other SMR and B/ILT licensees operating in a traditional (non-cellular architecture) manner in the 800 MHz band are not causing harmful interference.

The vast bulk of non-cellular architecture licensees in the 851-854 MHz band are small businesses such as MRA that compete with Nextel in the business of offering fleet dispatch service. Far from "benefitting" from any forced relocation, these small companies will almost certainly be forced out of business by any such forced relocation. Their dispatch customers would become Nextel's dispatch customers, resulting in a windfall for Nextel.

The Fifth Amendment of the US Constitution prohibits the government, including this Commission, from taking private property without just compensation. That limitation on governmental power precludes the forced taking of incumbent licenses from innocent persons to ameliorate a harm being caused by an unaffiliated third person. Moreover, to engage in such a prohibited taking while simultaneously handing a special benefit to the wrongdoer is arbitrary and capricious as a matter of policy. Thus, the so-called Compromise Plan should not be adopted.

The mere fact that Nextel's earlier proposals threatened so many other groups in addition to the 851-854 MHz licensees, and that Nextel has now inveigled support from these other groups by offering, as a "compromise", to limit the pain and disruption to the 851-854 MHz band, is irrelevant. The Commission should not measure the worth of a proposal by the number of signatories. One of the greatest merits of the American political system is that it protects the minority from the tyranny of the majority. Rather, the Commission should measure the worth of any proposal by whether it punishes the innocent or rewards the wrongdoer. By that measure, the Compromise Plan fails.

The Commission should immediately codify the procedures in the *Best Practices Guide* and start to enforce them, as a near term solution. It should move with the private sector to relocate Public Safety to the 700 MHz band as a longer term solution. In any event, before the Commission decides to require forced relocations at 800 MHz, the Commission must first analyze the costs and benefits involved, including without limitation methods of freeing 700 MHz spectrum from incumbent broadcasters by 2006.

Respectfully submitted,
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