

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 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

)

)

To: The Commission

**COMMENTS OF MOBILE RELAY ASSOCIATES  
ON SUPPLEMENTAL COMMENTS OF THE “CONSENSUS PARTIES”**

Mobile Relay Associates (“MRA”), by its attorney and pursuant to Public Notice, *Wireless Telecommunications Bureau Seeks Comments on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding*, DA No. 03-19 (WTB, released January 3, 2003) (“*Supplemental Request Notice*”),<sup>1</sup> hereby submits its Comments on the new, approximately 150-page, Supplemental Comments (“Supplement”) filed by Nextel Communications and others, who style themselves collectively as the so-called “Consensus Parties” (“Nextel Group”). As set forth herein, the supplement fails to adequately address the defects that were exposed in the Nextel Group’s earlier “Consensus Plan”, and their Consensus Plan, even as amended by the Supplement, remains an unfair and inappropriate solution to the problems of interference to Public Safety at 800 MHz.

**Introduction and Summary of Prior MRA Filings in This Proceeding**

---

<sup>1</sup>These Comments are timely filed. *See Order Extending Time for Filing of Comments*, DA 03-163 (WTB, released January 16, 2003).

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. Today, MRA holds licenses for 36 channels at 800 MHz in Colorado, 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. Half of MRA's 800 MHz channels are in the 851-854 MHz band. MRA has approximately 3,000 800 MHz units in service. MRA causes no harmful interference to other 800 MHz licensees, Public Safety or otherwise.

MRA competes directly with Nextel's digital, cellular-architecture SMR 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.<sup>2</sup>

---

<sup>2</sup>MRA has a great deal of personal experience in the dynamics of the mass relocation/retuning of subscriber units over the past seven years, particularly in MRA's California operations. Any SMR licensee that is forced to relocate/retune the entire customer base from a particular channel loses its "inertia" advantage respecting those customers. Over one-half of the customer units, and sometimes as many as two-thirds, will churn off the system during such retuning/relocation. This is as reliable an occurrence as the sun rising in the east.  
Comments on "Supplemental Consensus Plan", p.2

In its prior filings herein, MRA explained that the so-called “Consensus Plan” is no true consensus, but rather a coalition of one party that gains (Nextel), one group that gains (Public Safety) and various other groups that avoid major relocations and desire to shift the pain elsewhere. Nobody who is proposed to be materially damaged is a part of the so-called “consensus.”<sup>3</sup>

MRA documented that neither it nor similarly-situated SMR licensees are causing any of the harmful interference being suffered by Public Safety, and argued it is unfair that they should be materially damaged by the proposed solution without full compensation. MRA noted that there was no compensation proposed for SMR operators under the original “Consensus Plan.” MRA also noted that unlike B/ILT and other Private Radio licensees, SMR operators serve unaffiliated subscribers, not internal fleets, creating a whole new and different dynamic in terms of the costs of relocation or retuning. This is so because unlike internal fleet units, units of unaffiliated subscribers/customers have a strong tendency to churn off any system being retuned or relocated.

Finally, MRA pointed out that it and numerous others had paid extra for spectrum in the 800 MHz channels 1-120 (either at auction or in the aftermarket), precisely because the Commission said that this spectrum in particular is and will be available for cellularized, digital-format SMR systems, while conversely, Nextel had paid relatively little (on a MHz-pop basis) for its 700 MHz spectrum. To force existing licensees on channels 1-120 into less valuable spectrum not useable for cellularized operations while providing Nextel with two essentially virgin blocks of spectrum at 800

---

<sup>3</sup>As MRA noted, channels 1-120 are currently allocated exclusively for SMR operations. Although pre-existing non-SMR licensees were grandfathered in 1995, the Commission said then one reason for making these channels SMR was that they were populated overwhelmingly by SMRs and there were few remaining non-SMR incumbents. Thus, by limiting the damages to incumbents in channels 1-120, PCIA, ITA and other non-SMR private wireless groups have successfully dodged the bullet. It is easy for them to join the “consensus.”

MHz and 1.9 GHz,<sup>4</sup> would be an unconstitutional confiscatory taking from MRA and other incumbents, as well as a windfall for Nextel.

**Summary of the Proposals in the “Supplement”**

---

<sup>4</sup>Once the current NPSPAC 800 MHz spectrum (above channel 600) is vacated by Public Safety under the Consensus Plan, it becomes virgin spectrum.  
Comments on “Supplemental Consensus Plan”, p.4

In their Supplement, the Nextel Group pretends to address the concerns of those who would be unfairly harmed by the Consensus Plan, but except for protecting a few isolated entities (*e.g.*, Southern Linc), the new proposals are essentially window dressing. Whereas before the Nextel Group had proposed that displaced innocent SMR operators would both lose their existing spectrum and also pay their own costs of relocation or retuning, the Supplement proposes to dribble a little money in the direction of partially covering the costs of private wireless entities. Specifically, the Nextel Group now proposes to put up \$18 million to cover the reimbursement of all SMRs currently licensed in channels 1-120 nationwide.<sup>5</sup>

This SMR reimbursement funding is part of an overall increase in the amount of money pledged by Nextel from \$500 million to \$850 million (the rest of the funds allocated to other private wireless interests and Public Safety). However, instead of Nextel putting the pledged funds into an escrow account (as before), Nextel now proposes to establish a “Relocation Fund” and to pay into it in \$25,000,000 increments, as and when needed by the Relocation Fund to make reimbursements. As security for Nextel’s promise to continue paying into the Relocation Fund, Nextel would establish a new corporate subsidiary to hold its existing 700 MHz spectrum and pledge that subsidiary’s stock as collateral. When that spectrum is returned to the Commission and Nextel receives its coveted 1.9 GHz spectrum, the new spectrum also would be held by the same subsidiary.<sup>6</sup>

---

<sup>5</sup>Supplement, Appendix A, p.6. In addition, the Supplement presents an unstated but small amount for reimbursement of legal/consulting fees or FCC filing fees. Assuming a proportionate share of such fees were allocated to SMRs compared to other private wireless entities, the Supplement offers about another \$1.3 million reimbursing SMRs. *Id.*

<sup>6</sup>Supplement, p.8. If the trustee of the Relocation Fund is forced to sell the 1.9 GHz spectrum due to a Nextel default, and (as likely) the sale nets more than Nextel’s funding shortfall, Nextel would get to keep the excess proceeds from the sale.

Comments on “Supplemental Consensus Plan”, p.5

The Supplement makes a number of assumptions regarding which damages are reimbursable and which are not, as well as how many mobile/portable units would have to be replaced as opposed to retuned, in order to justify its claim that the \$850 million is enough funding to cover 100% reimbursement. For example, these assumptions include: a) moving SMRs into spectrum above channel 120 where cellularized operations would be prohibited is not a reimbursable taking; b) SMRs are entitled to no reimbursement whatsoever for any customer churn caused by retuning/replacement of subscriber units; and c) only about 5% of SMR subscriber units would have to be replaced as opposed to retuned. As discussed below, none of these assumptions is valid.

Curiously, the Supplement fails to set forth many more basic assumptions, such as the assumed average per unit cost for retuning or replacement. Thus, there is no way to determine whether the Supplement's estimate of overall funding needs is rational or reasonable.

The Supplement apparently recognizes the unreliability of its cost estimates, and addresses it via a kangaroo arbitration process that will keep reimbursement disbursements to SMRs low, irrespective of actual damages. Specifically, the Supplement proposes to determine the amount of reimbursement for each incumbent through arbitration before a panel named by a proposed Relocation Coordination Committee ("RCC"). *Id.*, Appendix C, p.22. The RCC itself will consist of one Nextel representative, two Public Safety representatives, and two private wireless representatives (with no likelihood that either of those would represent SMR interests). *Id.*, Appendix C, p.5. Thus, the majority of any arbitration panel will consist of persons representing Nextel and Public Safety, each with a vested interest in keeping SMR reimbursement payments down, and each with no intention of treating devalued replacement spectrum or customer churn as

legitimate reimbursement expenses. Also, the arbitration would be an “all-or-nothing” type arbitration. *Id.*, Appendix C, p.22.

The Supplement purports to create an incentive for SMRs and other incumbents to voluntarily relocate to the 900 MHz band, but this new incentive comes with a number of significant caveats. The incentive is the prospect of receiving spectrum on a “two-for-one” basis; that is, 50 kHz of spectrum at 900 MHz for every 25 kHz of spectrum vacated at 800 MHz. *Id.*, pp.25-26. However, an incumbent licensee must decide whether to relocate within 800 MHz or move to 900 MHz within sixty days of the release of the Commission’s report and order adopting the Consensus Plan, or seven months before Nextel is obligated to tender its reimbursement offer. *Id.*, compare Appendix C, p.20 (sixty days to elect 900 MHz relocation) with Appendix C, p.18 (Nextel to deliver reimbursement proposal within nine months). Moreover, for any incumbent licensee electing to voluntarily relocate to 900 MHz, it receives immediate use of only one-half of the new 900 MHz spectrum; the other half is issued on a secondary, non-interference basis to Nextel’s co-channel operations unless and until Nextel returns its 900 MHz spectrum for cancellation.<sup>7</sup>

## DISCUSSION

### I. The “Consensus Plan” Remains a Consensus of Only the Unharmful

Although the Nextel Group has taken steps to ameliorate the harm to a few specific entities, such as Southern Linc, no new entities have signed on to the Consensus Plan. It remains a proposal by entities that are not going to have to locate or retune, such as PCIA and ITA, and those who would directly benefit, such as Public Safety and Nextel. Those entities support the Consensus Plan because any material damage will be suffered by incumbent SMRs and non-Nextel EA 800 MHz

---

<sup>7</sup>*Id.*, Appendix C, pp.20-21. The only way to receive the entire 50 kHz on a primary basis is to waive any and all cash reimbursement, *id.*, meaning that the licensee is essentially buying the additional spectrum from Nextel, not receiving it for free.

Comments on “Supplemental Consensus Plan”, p.7

licensees, not by their members. To repeat, the presence of AMTA in the Nextel Group is a red herring, a recognition of the overwhelming power which Nextel holds within that organization.

AMTA is not the voice of non-Nextel SMR licensees in this proceeding.

## **II. The Supplement Is Unduly Complicated, for the Sole Purpose of Creating a Windfall for Nextel**

The Supplement proposes to move Public Safety from the current NPSPAC 800 MHz spectrum (channels 601 and above, *i.e.*, 866-869 MHz) to channels 1-120 (*i.e.*, 851-854 MHz), ostensibly in order to ameliorate (not eliminate) harmful interference to Public Safety by moving it further away, spectrum-wise, from the cellular block and from cellularized SMR operations at 800 MHz, which would henceforth be prohibited below channel 401.<sup>8</sup> Under the Supplement, Public Safety would trade its current exclusive 3 MHz block at 866-869 MHz for a replacement 3 MHz block at 851-854 MHz.

But if this is the proposed solution for Public Safety, then it is much easier to simply have a reciprocal trade -- each current licensee in either 3 MHz block simply relocates to the equivalent spectrum in the other block on a coordinated basis, once relocation costs are computed. Thus, a current SMR license for 851.0125 MHz in Denver would become a license for 866.0125 MHz in Denver, a current NPSPAC license for 866.025 MHz in St. Louis would become a license for 851.025 MHz in St. Louis, etc. Relocations could be done on a region-by-region basis once the funding were available to pay both the incumbents at 851-854 MHz and those at 866-869 MHz. Of course, the “problem” with such a solution is that Nextel has been attempting all along to use this

---

<sup>8</sup>So far as MRA can discern from various earlier Public Safety filings, the single greatest cause of harmful interference to Public Safety is from desensitization of mobile/portable Public Safety units from nearby cellularized base transmitters, a form of interference that would not be ameliorated by the remedies in the proposed Supplement.

proceeding as a vehicle to wheedle unfair competitive advantage, and this alternate solution inhibits Nextel's ability to manipulate this proceeding in such a way.

MRA and the other incumbent non-Nextel licensees in the 851-854 MHz band, both those holding site-specific licenses and those holding EA auction licenses, acquired (or declined to divest) this spectrum precisely because this Commission said the 851-854 MHz band was perfect for cellularized operations, now or in the future. MRA and the other non-Nextel incumbents relied specifically upon this Commission's decision to make the 851-854 MHz band especially hospitable for cellularized SMR operations.<sup>9</sup>

Although Nextel has already acquired some of this 851-854 MHz spectrum, there is much Nextel has not acquired, and whatever Nextel does not own is available to be used by cellularized competitors, now or in the future. The Supplement eschews the easier and more workable solution of a straight reciprocal trade of one 3 MHz block for another, because in that case Nextel would have the same "problem" it has today -- other people also own spectrum useable for cellularized operations and might compete. Conversely, under the Nextel Group's convoluted Supplement, all the soon-to-be virgin 866-869 MHz band goes to Nextel, and not to any other current 851-854 MHz

---

<sup>9</sup>See, e.g., *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd. 19079, 8 CR 809 (1997) ("*Second R&O*"), at ¶22 ("licensees seeking to deploy contiguous spectrum [*i.e.*, cellular] technology will have the opportunity to acquire [such spectrum in the General Category, channels 1-150, band]."); at ¶34 (adopting broadband PCS-like build-out requirements for auction licensees at channels 1-230 specifically in order to encourage "the rapid deployment of new technologies and services" on these particular channels); and at ¶83 ("most applicants for EA licenses on [lower 230] channels will be SMR applicants who seek to provide interconnected service, thus meeting the statutory definition of CMRS."). See also News Release, *800 MHz Specialized Mobile Radio Services Auction Raises \$319,451,810.00*, released September 5, 2000 ("Winners may use licenses to provide . . . mobile telephony,"). Of course, that the auction of these channels, although heavily encumbered, raised over three hundred million dollars net (after deduction for bidding credits), confirms that this Commission had been successful in touting these particular channels as appropriate for cellularized SMR operations.

licensee. Instead, all other current 851-854 MHz licensees are, under the Supplement, forever divested of their right to engage in cellularized operations and forced into the intermediate band (channels 121-400) where cellularized operations are to be prohibited.

There is no engineering or other legitimate reason for this portion of the Consensus Plan as revised in the Supplement -- it is just a crass effort by Nextel to force all others off potentially cellularized spectrum and hoard all such spectrum for itself without having to buy it.

### **III. The Supplement Fails to Propose Adequate Reimbursement to Innocent Persons**

#### **A. Licensees Forced onto Inferior Spectrum Are Entitled to Reimbursement**

As discussed in Part II, *supra*, all current licensees in the 851-854 MHz band hold valuable spectrum, valuable in large part precisely because this is spectrum where this Commission said cellularized SMR operations would be not merely tolerated, but encouraged. This Commission recently sold the limited remaining white space in this band for over three hundred million dollars by so advertising this spectrum, and created an aftermarket in incumbent licenses in this band when it did so. The Supplement proposes to take all current non-Nextel licensees in this band and force them onto other, far less valuable spectrum, where cellularized operations are to be forever prohibited.

This type of forced relocation into less valuable spectrum is a confiscatory taking, equivalent to a government exercise of eminent domain to take real estate. As such, under the Fifth Amendment of the US Constitution, the persons whose licenses are taken must receive full reimbursement, and less valuable spectrum is only partial reimbursement.<sup>10</sup>

---

<sup>10</sup>We realize that the Commission previously forced relocation of 800 MHz incumbents off the "upper 200" channels. However, in that proceeding, there was no claim before the Commission that the new spectrum to which incumbents were being forced was less valuable.

Nor is it correct to say that the Commission always holds the power to modify existing licenses in the public interest, and that this continuing power limits the justified expectations and rights of spectrum licensees. Here, the Commission has just spent the last seven years touting this specific spectrum as available for cellularized operations and selling off the remaining white space on that basis. Whatever the general powers of the Commission may be, they must be exercised fairly. In context, any move now by this Commission to forcibly relocate existing 851-854 MHz licensees to less valuable spectrum must provide for compensation for the diminution in spectrum value, or it will be deemed arbitrary and capricious.

MRA already has documented to this Commission that it alone will suffer a diminution in the value of its Colorado 800 MHz spectrum holdings of over two million dollars if it is forced onto less valuable spectrum where cellularized operations are prohibited, and MRA is only one current licensee in one mid-sized market. When the damages to be suffered by other, larger incumbents in larger markets are considered, as well as the damages suffered by the various non-Nextel EA licensees, the required compensation for the forced taking of spectrum will be hundreds of millions, if not billions, of dollars. And none of this necessary reimbursement is covered by the Supplement.<sup>11</sup>

## **B. Reimbursement Must Include Compensation for Churn**

---

(Indeed, since much of the relocation was to channels 1-120, the new spectrum generally was of equal value.) Thus, that situation is inapposite to the question of whether compensation for a forced trade to less valuable spectrum is an eminent domain type of taking. The issue was not before the Court of Appeals when it upheld the Commission's decision in that case. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 972 (DC Cir. 1999).

<sup>11</sup>As discussed in Part II, *supra*, if the Consensus Plan were amended to make it a straight reciprocal trade of 851-854 MHz for 866-869 MHz, there would be no diminution in spectrum value and this particular damages element would be eliminated.

Comments on "Supplemental Consensus Plan", p.11

There is not a single dollar allocated in the Supplement to reimburse SMR licensees for damages caused by the churn of customer units due to the forced relocation/retuning. However, as with diminution in spectrum value, churn of customer units is a real cost of forced relocation/retuning, and under the Fifth Amendment of the US Constitution, it must be reimbursed for the Consensus Plan to pass constitutional muster.

Nor is it relevant that this Commission once before forced incumbent SMRs to relocate off the upper 200 channels without providing for churn compensation. That case was the first time the Commission had forced the relocation of licensees serving unaffiliated subscribers/customers, so at the time, no one could know whether in fact forced relocations would result in massive and immediate churn. And as there was no record, there was no attempt by any interested person to raise the matter before the Court of Appeals on review of the Commission's decision.<sup>12</sup>

In its decision forcing the relocation of upper 200 incumbents, the Commission encouraged private parties to voluntarily work out contractual arrangements to cover relocation, and also encouraged parties to enter into voluntary agreements to clear potentially cellularized spectrum even where, as in channels 1-230, there was no forced migration imposed. In keeping with the Commission's enunciated policies, MRA did negotiate with Nextel respecting MRA's very significant analog SMR operations in southern California, and entered into agreements voluntarily with Nextel regarding that spectrum. Those agreements called for MRA to relocate its subscribers/customers from 800 MHz to other spectrum that MRA either owned or was obtaining in the bands below 512 MHz.

---

<sup>12</sup>At the time, the most recent forced relocation decision was the decision to force point-to-point microwave incumbents off the newly-reallocated broadband PCS spectrum, but those incumbents had universally used their incumbent microwave systems only for internal communications -- they had no subscriber units, and therefore no potential for churn to occur. Comments on "Supplemental Consensus Plan", p.12

Far from assisting MRA in that relocation process, Nextel's marketing department used the occasion of MRA's customer relocation to poach MRA's customers, emphasizing to them in sales calls the inconvenience associated with replacement/retuning of the customer's entire fleet all at once, and the relative ease of simply becoming a Nextel customer instead. Despite MRA's best efforts at customer retention, over 50% of MRA's California customer base churned off MRA's system rather than relocate to new channels. Only the absolute size of the southern California fleet dispatch market (the world's largest consumer of fleet dispatch services) enabled MRA's southern California operations to survive. Were MRA to suffer a similar percentage loss in Colorado (where fixed costs are spread over a smaller number of units), the operation would be forced out of business.

Thus, what was lacking in the upper 200 channels proceeding exists here -- a history and a track record that demonstrates the size and scope of churn damages when subscriber/customer units are involved. In the case of MRA's Colorado operations alone, churn losses will be over one million dollars.<sup>13</sup> The record now exists to go to the Court of Appeals.

### **C. The Supplement Materially Understates Replacement/Retuning Costs**

The Supplement, Appendix A, p.4, estimates that only "5% of the Business/Industrial/SMR radios will have to be replaced during realignment. . ." Nextel bases this assumption on its supposed experience in the upper 200 channels relocation. *Id.*, Appendix A, p.2. However, based upon MRA's experience and its knowledge of the units in its customers' Colorado fleets, at least 25% of all mobile units cannot be retuned and would have to be replaced. This means that the Supplement's

---

<sup>13</sup>Specifically, MRA calculates that it will lose an average of five years of revenue for each unit churned, that there are no offsetting cost savings, because all of the base stations must remain in service to serve the remaining customers and all site leases are at least that long anyway, and that half of the customers will be lost, with a total churn loss of \$1,080,000. (\$12/mo. revenue/unit x 60 months x 1,500 lost customer units = \$1,080,000.)

estimate of the cost of replacing units that cannot be retuned is only one-fifth of the actual cost of replacements.

The cost of replacement includes not merely the purchase of the new unit, but also programming, tuning, removal of the old unit and installation of the new unit, which collectively comes to \$395 per radio unit replaced. This compares with an average cost of \$35 per radio that only needs to be retuned. (A retuned radio does not need to be uninstalled or installed, or programmed, and no new equipment need be purchased.) In other words, by so significantly understating the amount of units that will have to be replaced vs. retuned, the Supplement has significantly underestimated the costs involved.<sup>14</sup>

Because Nextel never states how much Nextel assumed as the average cost per unit for either retuning or replacement, there is no way to make any valid assessment of any of Nextel's cost estimates. More important, there is no way that any rational decision could be made which relies upon Nextel's figures. Thus, the Commission cannot rationally find that Nextel's proposed \$850 million fund, even if actually tendered by Nextel, would be anywhere near enough to cover the involved costs.

#### **IV. The Proposed 900 MHz "2-for-1" Incentive Is a Mirage**

The supposed 2-for-1 offer to encourage existing 800 MHz licensees to voluntarily move to 900 MHz is not a real offer. Under the proposal in the Supplement, pp.24-25, any existing licensee

---

<sup>14</sup>Of course, the Supplement is conveniently silent as to how much it assumes is the cost of either retuning or replacing a unit, and makes absolutely no break-out as to how much is estimated to be needed for individual cost categories.

Although Nextel boasts that "[t]he information developed in this process may be the most complete and comprehensive compilation of information ever assembled," Supplement, Appendix A, p.2, Nextel does not share the information so compiled. There is no method to test whether Nextel is just making everything up. In contrast, MRA set forth two pages worth of specific assumptions whose validity Nextel could test, in MRA's earlier *ex parte* filing herein. Comments on "Supplemental Consensus Plan", p.14

wishing to avail itself of this “opportunity” must irrevocably elect to do so in writing within 60 days after the Commission issues a decision in this proceeding. After that, the opportunity is gone forever.

Additionally, the licensee must make this irrevocable decision seven months before Nextel is obligated to put forth any reimbursement proposal should the licensee desire to stay at 800 MHz. Thus, the existing licensee is deprived of any chance to compare or weigh the differing options, or to make any rational assessment of which alternative would be preferable.

Finally, if the licensee flips a coin and decides to relocate to 900 MHz, it receives a primary license for only the same amount of spectrum that it relinquishes, a 1-for-1 trade, not 2-for-1. Specifically, one-half of its new 900 MHz spectrum is to be issued on a secondary, non-interference basis to Nextel’s co-channel 900 MHz operations so long as Nextel remains licensed at 900 MHz, which is an indefinite period, especially if funding for relocations runs out part way through the process. (Although a licensee is offered the extra spectrum early if it waives all of its legitimate reimbursement payments, this is nothing more than an offer by Nextel to sell some of its 900 MHz spectrum for cash; it is in no fashion a donation.)

Under the circumstances, the Supplement makes no viable offer regarding 900 MHz spectrum. Again, the Supplement provides only window dressing to present the trappings of reasonableness without the substance.

#### **V. The Proposed Arbitration Process Is a Stacked Deck**

The Supplement proposes to resolve disputes between Nextel and a relocating licensee concerning the timing and amount of reimbursement due through the vehicle of arbitration panels run by a so-called Relocation Coordination Committee (“RCC”). The RCC is proposed to have five

members: one from Nextel, two from Public Safety, and two others from private wireless interests. It is not explained how the two private wireless interests would be chosen, but presumably they would come from representatives named by the same private wireless groups that are today part of the Nextel Group supporting the amended Consensus Plan -- PCIA, ITA, ARINC, or perhaps the American Petroleum Institute. Stated simply, a minimum of 80 % of every panel, and generally 100% of every panel, would be completely antithetical to existing SMR licensees.

According to the Supplement, SMRs would have no right of review of any arbitration decision. Moreover, the arbitration panel in each case would not have the power to “split the baby”, but would accept *in toto* the dollar amount put forth by either Nextel or the SMR licensee, so the only way for any SMR licensee to win the arbitration is if the panel decides to completely reject Nextel’s position, even though Nextel pays its bills and holds major sway in the RCC for which the arbitrators work. To think that MRA or any other existing SMR licensee could hope to have a fair hearing under such circumstances is laughable.

## **VI. The Proposed Funding Collateral Mechanism Is Incomplete**

In the earlier version of the Consensus Plan, Nextel had proposed to escrow \$500 million to cover all costs of reimbursement to let the relocations go forward. The Supplement eliminates the proposed escrow fund, replacing it with Nextel’s promise to continue paying (up to a cap of \$850 million).

As security for this promise, Nextel now proposes to move its 700 MHz spectrum into a new corporate subsidiary and to pledge the stock of that subsidiary as collateral. (If this spectrum is returned, Nextel proposes to move the 1.9 GHz spectrum it covets into this same subsidiary.) There are shortcomings and difficulties with this approach.

Unless the Commission placed special conditions on the face of these licenses prohibiting their transfer or assignment pursuant to the Commission's forbearance policies, the subsidiary could return the licenses to Nextel at any time without prior Commission approval, thereby gutting the value of the pledged stock. Even with such a condition, if the subsidiary assigned the licenses back to Nextel without prior Commission approval in violation of the Communications Act and of the license condition, one would still have to litigate the issue of whether such violations rendered the purported assignment void *ab initio* (such that the subsidiary still would be deemed to be the licensee) or merely exposed the subsidiary and Nextel to enforcement action (in which case, the licenses would be deemed assigned back to Nextel, again gutting the value of the subsidiary's pledged stock).

As the Nextel Group implicitly recognizes, the Commission and other entities would have no method to perfect a lien on any licenses held directly by Nextel. For as the Supreme Court just recently affirmed, Section 525 of the US Bankruptcy Code, 11 U.S.C. §525, precludes the Commission canceling and re-auctioning any spectrum license held by a person that has filed a petition under the Code, due to failure to make payments respecting such license.<sup>15</sup>

---

<sup>15</sup>See *FCC v. Nextwave Personal Communications, Inc.*, \_\_\_ U.S. \_\_\_, 71 U.S.L.W. 4085 (January 27, 2003).

In addition, if Nextel ceased to make additional contributions to the Relocation Fund in the middle of the program and instead filed for Chapter 11 reorganization, Nextel could presumably claim that its obligations to fund the relocation are a “fraudulent conveyance” and should be reduced, and that in the meantime, the court should prevent the Commission from taking away Nextel’s licenses. In such event, Nextel would keep the spectrum and be out from under its funding obligations, just as Metro PCS (formerly GWI) succeeded in doing with respect to its payment obligations that were supposedly secured by its spectrum licenses.<sup>16</sup>

Accordingly, the Commission should proceed with extreme caution in adopting any plan that calls for Nextel to collateralize its funding commitment, directly or indirectly, using spectrum licenses. The Supplement’s proposal is too incomplete to be adopted.

### CONCLUSION

The Nextel Group’s Supplement is an unfair and unworkable proposal. Even as supplemented, the so-called Consensus Plan remains a consensus only among those who avoid being damaged. Those undamaged interests have achieved a consensus position that all the harm should be suffered by existing licensees at 851-854 MHz, and not by their respective constituencies.

The Plan as supplemented violates the Takings Clause of the Fifth Amendment. It arbitrarily and capriciously conveys a spectrum windfall upon Nextel while eschewing the much simpler and more workable relocation idea of a reciprocal trade between the licensees of the two spectrum blocks (*i.e.*, 851-854 MHz and 866-869 MHz). Indeed, Nextel’s failure to propose a simple reciprocal spectrum trade for this aspect of its Consensus Plan speaks to the existence of ulterior motives on the part of Nextel.

---

<sup>16</sup>*See United States ex rel. FCC v. GWI PCS I, Inc.*, 230 F.3d 788 (5th Cir. 2000), *cert. den.* 533 U.S. 964 (2001).

The Supplement fails to propose adequate compensation to innocent persons that would be harmed by the Consensus Plan. Among other things, the Plan proposes no compensation for the diminution in spectrum value that all relocating SMRs and EA licensees (except Nextel) would suffer from losing their current right to operate in a cellularized format. The Plan proposes no compensation whatsoever for losses due to customer churn due to relocation disruptions. The Plan materially underestimates the relative number of units that would have to be replaced vs. returned, which in turn means that overall reimbursement costs are materially underestimated. Although Nextel claims that its compilation is the most thorough ever made in terms of assessing costs, Nextel does not share that compilation, but simply asks the Commission and the public to take Nextel's word for it that its cost estimates are based upon rational assumptions.

The Plan as supplemented makes no real incentive for voluntary relocations to the 900 MHz band. Rather, the Plan offers an illusory incentive which requires a relocating licensee to choose which frequency band to migrate into, before it can collect the necessary data to make any informed decision.

The new proposed arbitration process is stacked against any non-Nextel SMR or EA licensee. Such licensees cannot hope to have a fair hearing before a tribunal made up only of pro-Nextel interests, which is what the Supplement proposes.

Finally, Nextel's proposal in the Supplement to collateralize its funding commitment using spectrum licenses is fraught with pitfalls, and there is no assurance that any lien on the proposed collateral could be perfected. This new proposal is far inferior to establishing an escrow fund.

For all of the foregoing reasons, this Commission should reject the so-called Consensus Plan as modified by the Supplement. The Commission should first review again the concept of relocating

Public Safety to its own virgin spectrum at 700 MHz, which would eliminate not only interference due to intermodulation, but also due to desensitization. If the Commission decides not to move Public Safety to 700 MHz, then the Commission should adopt only a plan which will fully compensate innocent persons for all costs of relocation, including by example churn and (if the new spectrum is not useable for cellularized operations) diminution in spectrum value.

Respectfully submitted,  
**MOBILE RELAY ASSOCIATES**

February 10, 2003

By: \_\_\_\_\_/s/\_\_\_\_\_  
David J. Kaufman, Its Attorney

Brown Nietert & Kaufman, Chartered  
2000 L Street, N.W., Suite 817  
Washington, D.C. 20036  
Tel.: (202) 887-0600  
Fax: (202) 457-0126

I:\Client\859\Rebanding Rulemaking\Comments on Supplement.wpd