

**THIS REPRESENTS A RE-FILING OF NAM/MRFAC COMMENTS ORIGINALLY  
SUBMITTED IN PAPER FORM (TOGETHER WITH AN ELECTRONIC VERSION ON  
COMPUTER DISKETTE) ON FEBRUARY 10, 2002.**

**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	)	
	)	

To: The Commission

**COMMENTS  
OF THE NATIONAL ASSOCIATION OF MANUFACTURERS  
AND MRFAC, INC.**

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**TABLE OF CONTENTS**

**SUMMARY ..... i**

**INTRODUCTION.....1**

**DISCUSSION .....4**

**CONCLUSION .....17**

## SUMMARY

The Coalition Supplement reflects a substantial effort at coming to grips with the myriad issues presented in re-tuning the 800 MHz band. While NAM/MRFAC believes the Supplement represents an important contribution toward ultimate resolution of this proceeding, it nevertheless raises a host of issues.

On the plus side, the strengthened “Best Practices” principles represents a positive proposal. On the minus side, Supplement’s creation of an entirely new, terribly complex regime for implementation of retuning/reimbursement is unnecessary -- when tried and true existing Rules, with adjustments, could be made to work just fine.

No less troubling is the disparate treatment afforded B/ILT users as compared with public safety: The relegation of displaced B/ILT users to the Guard Band, the failure to allow B/ILT licensees to review and approve their own applications, the freeze on modification of existing (and the filing of applications for new) B/ILT systems for a period of many years, and the five year set-aside of vacant frequencies for public safety only -- represent a few of the problems of this type.

Beyond this, the Plan contemplates an unlawful delegation of Commission functions to an administrative entity (the Relocation Coordination Committee) without adequate safeguards against discriminatory practices, and with an inappropriate limitation on appellate rights of incumbent licensees. Further, the RCC process relies on an arbitration mechanism which is flawed: The process sharply restricts the range of issues subject to arbitration and, even as to those, would use a form of arbitration (baseball) which is ill-suited to the task.

For these and other reasons articulated herein and in earlier NAM/MRFAC filings, the Coalition Plan is not suitable for adoption.

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The National Association of Manufacturers and MRFAC, Inc. (“NAM/MRFAC”), by their counsel, hereby submit their views on the “Supplemental Comments of the Consensus Parties” filed December 24, 2002 (the "Supplement").<sup>1</sup> The Supplement supplies data regarding funding for re-tuning incumbents in the 800 MHz band; a plan for re-tuning incumbents in the border areas adjacent to Canada and Mexico; and proposals for strengthening the Best Practices Guide as a means of addressing individual cases of cellular (primarily Nextel) interference.

**INTRODUCTION**

NAM/MRFAC have participated actively in this proceeding, starting with the filing of Nextel’s “White Paper.” NAM/MRFAC filed its own rebanding plan on December 21, 2001, and since then have submitted various comments and reply comments, and participated in

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<sup>1</sup> The Wireless Telecommunications Bureau (“Bureau”) requested comments on the Supplemental Comments by Public Notice, DA 03-19, released January 3, 2003 (“Wireless Telecommunications Bureau Seeks Comment on ‘Supplemental Comments of the Consensus Parties’ Filed in the 800 MHz Public Safety Interference Proceeding - WT Docket No. 02-55”). In “Order Extending Time for Filing of Comments,” DA 03-163, released January 16, 2003, the Bureau extended the deadline for submitting responsive comments until February 10, 2003.

meetings with the Commission and its staff. NAM/MRFAC also have engaged with numerous other parties, including participating in the joint Opening Comments of the Private Wireless Coalition. Throughout this proceeding NAM/MRFAC have urged the Commission to ensure the development of a complete record on the scope of the 800 MHz interference problem and the costs and complexities of the various proposals. As that record has developed, more has become known about the extent and nature of the interference, the complexities of resolving the problem, and the efficacy of proposed solutions.

The parties filing the Supplement (hereinafter the “Coalition Parties”) have expended considerable time and effort in developing their 800 MHz proposal (the “Coalition Plan”). Their Supplement represents an important contribution toward clarifying the issues presented for Commission resolution and, in certain limited respects, toward resolution of those issues. In particular, Appendix F, “Policies and Procedures for Post-Realignment Interference Mitigation,” if codified, would represent an improvement over the existing, and non-binding, Best Practices Guide.<sup>2</sup>

NAM/MRFAC also support the basic concept of the Coalition Plan: To remove the NPSPAC channels from a sea of cellular service, and to move Nextel out of the interleaved spectrum.<sup>3</sup> Thus, the spectrum below 861 MHz would become generally a non-cellular block providing enhanced protection for public safety and B/ILT.<sup>4</sup>

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<sup>2</sup> NAM/MRFAC understands that the Appendix F principles would apply equally for the benefit of non-public safety and public safety incumbents -- even though there is language in the Supplement which can be read to suggest otherwise. See *id.*; note 76 (referencing the processes which “a public safety communications operator” may invoke in the event of cellular interference). Clarification on this point is necessary.

<sup>3</sup> NAM/MRFAC have consistently urged that the best long-term solution would include the use of 700 MHz spectrum as a relocation option. See *e.g.*, NAM/MRFAC Comments filed May 3, 2002, at 4; and Comments filed September 23, 2002, at 3. However, such a solution would require Congressional legislation. Thus, NAM/MRFAC have addressed other potential

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In evaluating the merits of any 800 MHz plan, including the Coalition's, NAM/MRFAC have urged that certain principles serve as guideposts; namely, that the plan: (1) represents a solution to the Nextel-public safety interference problem; (2) protects innocent bystanders -- including Business and Industrial/Land Transportation ("B/ILT") licensees -- from having to bear the burden of curing interference caused by others;<sup>5</sup> (3) ensures that, to the extent B/ILT licensees are asked to modify their systems (such as re-tuning to other frequencies in the band) with full compensation, it should be part of a larger effort which truly "fixes" the interference; and (4) does not unduly advantage or disadvantage any individual company or industry.

Viewed under the foregoing principles the Supplement raises a host of issues regarding the implementation of re-tuning and reimbursement, and protections that would be available for the numerous B/ILT incumbents required to relocate under that plan. NAM/MRFAC address a number of those issues in these Comments<sup>6</sup>. These, and other issues which NAM/MRFAC has

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resolutions of the interference problems which the Commission could implement on its own. Accordingly, these comments focus on the details of the Coalition Plan as further developed in the Supplement.

<sup>4</sup> The Coalition Plan calls for two separate blocks of contiguous spectrum in the 800 MHz band; one block for non-cellularized systems, the other for cellular-like systems. Future requests for cellular-like systems in the non-cellular block would be addressed through the Commission's waiver process pursuant to certain conditions. *See* Reply Comments, filed August 7, 2002, by the Association of Public-Safety Communications Officials-International, Inc., *et. al.*, at 8-10; Consensus Comments, filed September 23, 2002, at 4-5. Such waiver requests would be subject to review by affected licensees. *Ibid.* Except as noted below, NAM/MRFAC understands that waivers would be required for any entities desiring to establish cellular systems in the non-cellular block -- whether the entity already holds a license for high site facilities in the non-cellular block, or not; however, this should be confirmed (see Supplement at note 79 (referencing that waivers would be required for "non-cellular band licensees desiring to deploy future cellular-like technologies ...")). The one exception is SouthernLINC's existing systems operating at 809-821/854-866 MHz, which would be grandfathered. *See* Supplement at 44.

<sup>5</sup> NAM/MRFAC members also have experienced interference to their 800 MHz B/ILT facilities. *See, e.g.*, NAM/MRFAC Comments at 6-8 (May 3, 2002).

<sup>6</sup> NAM/MRFAC do not address herein issues concerning the border regions, which NAM/MRFAC members will be addressing individually.

identified in earlier presentations to the Commission, continue to be of concern, and preclude any characterization of the Coalition Plan as a “consensus proposal.”<sup>7</sup> Likewise, they preclude adoption of the Coalition Plan in its current form.<sup>8</sup>

## **DISCUSSION**

To facilitate discussion of the Coalition Plan, these comments are organized into three broad categories: Funding/Reimbursement, Retuning/Relocation, and Procedural issues, and specific problems within each.

### **Funding/Reimbursement**

NAM/MRFAC have consistently maintained that innocent third parties, should not be asked to bear the cost of solving the Nextel interference problem. Although the Supplement states that Nextel has increased its funding commitment for incumbent licensees to implement the Coalition Plan, questions remain as to whether the increased commitment will be sufficient to cover the required costs. Moreover, there are significant discrepancies between the reimbursement treatment of public safety licensees under the Coalition Plan, and the reimbursement of B/ILT incumbent licensees -- which discrepancies raise additional questions about the adequacy and fairness of the reimbursement mechanism.

Adequacy of Funds. The Coalition Parties state that they are “highly confident” that Nextel’s commitment of funds will cover the reasonable costs of retuning/relocating incumbent

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<sup>7</sup> Besides the manufacturing sector, other major industrial groups which have declined to endorse the plan include utilities, wireless carriers and large users, each of which has a vital stake in the ultimate resolution of this proceeding.

<sup>8</sup> A recommended resolution of this exceedingly complex proceeding, agreed-to by all of the major interest groups and industries, would be in the interest of all concerned. To this point that has not proved possible. Nevertheless, NAM/MRFAC are willing to continue conversations with representatives of the Coalition Parties towards a possible resolution of outstanding issues as expressed herein and earlier NAM/MRFAC filings.

licensees. Supplement at 6. However, they then concede that uncertainties regarding the costs of retuning/replacing public safety radios “will have a significant impact on the total cost of implementing the [Coalition] Plan.” *Ibid.* at 6-7. The admitted uncertainties concerning the cost of implementing the public safety component of the Coalition Plan raise significant questions about the adequacy of Nextel’s overall commitment of \$850 million for retuning.<sup>9</sup>

Moreover, there is no suggestion that the B/ILT retuning obligation is conditioned on the availability of adequate funding. This contrasts with the express commitment that public safety retuning obligations are contingent on funding availability. *See Ibid.* and at Appendix C-18. Put another way, while public safety licensees would not be obligated to move without full compensation, that does not appear to be the case for incumbent B/ILT licensees.<sup>10</sup>

Increased Operating Cost Reimbursement. The Coalition Parties recognize that increased operating costs should be reimbursable. Reimbursable “Operating Costs” are defined as those increased operating costs “directly attributable to system relocation,” which are “reimbursable for two years” from the closing date of a voluntary relocation agreement. Supplement at Appendix C-23. However, the Commission has determined for other 800 MHz retuning

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<sup>9</sup> The proposed Phase I relocation rules require incumbent licensees to submit extensive information regarding their system characteristics shortly after release of a Report and Order. The required information consists of pages of detailed technical data concerning each licensee’s system. *See* Supplement, Appendix C-11 to C-14 (required technical information for B/ILT incumbents). Although the Coalition Parties state that such information will be used solely for the frequency coordination and frequency planning activities needed to complete the 800 MHz realignment (Supplement at 19), the requirement for submission of this information seems at odds with the Coalition Parties’ avowed confidence in its aggregate cost estimates for relocating non-public safety incumbents. There is no adequate explanation as to why actual system data is required only after the Commission adopts a Report and Order, when the total amount that Nextel is required to contribute to the relocation fund is to be established based on mere estimates.

<sup>10</sup> NAM/MRFAC understands that B/ILT incumbents might be required to move before public safety, thus providing some assurance of funds availability. Nonetheless, the absence of the kind of explicit assurance for B/ILT incumbents as is given public safety is troubling.

evolutions that a party reimbursing a retuning licensee must cover increases in operating costs for five years. *See e.g.*, 47 C.F.R. Section 90.699(d)(4). While the Coalition proposes covering increased recurring operating costs for a far shorter period than the Commission's rules now provide, no explanation appears provided for such this departure.

Reimbursement of Guard Band Incumbents. Under the Coalition Plan, a public safety licensee required to relocate from the new Guard Band (859-861 MHz) would be eligible for reimbursement. However, this dispensation is not available for non-public safety licensees finding it necessary to relocate from the Guard Band -- licensees who would have to bear all of their own relocation costs. Supplement at 10, n.14. There is no basis in equity for this disparate treatment.

Reimbursement Role of the RCC vs. Nextel. The proposed framework of the Coalition Plan lacks specificity as to whether the Relocation Coordination Committee ("RCC") or Nextel is ultimately responsible for determining the amount of a relocation cost reimbursement. The Coalition Plan gives the RCC responsibility to approve licensee costs "to ensure consistency," but reimbursement must first be negotiated with Nextel (which also sits on the RCC), or decided by arbitration if the parties cannot agree. *See* Supplement at 21-22 (discussing the negotiation and arbitration process); Appendix C-5 (defining the role of the RCC in approving reimbursement costs). The Supplement is silent as to what happens if the RCC rejects a negotiated (or arbitrated) reimbursement amount, and either the retuning licensee (public safety or non-public safety) or Nextel is dissatisfied with the RCC's determination. The Coalition Plan does not appear to contemplate any right of appeal to the Commission or any other body with

respect to whether a reimbursement decision of the RCC is adequate.<sup>11</sup> See Supplement, Appendix C-22, C-30-31.

### **Retuning/Relocation Issues**

Implementation of the Coalition Plan would have a disproportionately adverse effect on B/ILT licensees. It would preclude needed expansion or modification of existing B/ILT facilities, reduce B/ILT spectrum for future expansion, and potentially reduce the coverage areas of B/ILT facilities forced to relocate.

Application Freeze. The Coalition Plan contemplates imposition of a freeze upon adoption of a Report and Order, precluding applications for new B/ILT/SMR licenses on channels 121-400.<sup>12</sup> No freeze would apply to public safety applications on the Public Safety Pool channels. Supplement at 26. The freeze would remain in place until all retuning/relocation applications in the non-cellular block in each NPSPAC Region are granted.<sup>13</sup> Such a freeze, together with the five-year licensing set-aside for public-safety of any channels vacated by Nextel (discussed below), could effectively preclude any expansion of B/ILT facilities, including new or modified facilities. Combining the estimated three to four year implementation time period for the Coalition Plan, and the five-year public safety set-aside, it could be eight, nine or

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<sup>11</sup> As discussed *infra*, the only issue appealable to the Commission is whether replacement frequencies meet the definition of “comparable”. See Supplement, Appendix C-22.

<sup>12</sup> The freeze would not preclude applications required to complete channel exchanges to clear Upper-200 SMR EA-licensed channels, other transfer/assignment applications, or site-modifications for existing authorizations provided the modified site’s 22 dBu contour is wholly within the original site’s 22 dBu contour. Supplement at 26, n. 43.

<sup>13</sup> Subsequent applications filed after the freeze would have to conform to the realigned spectrum plan and incumbent licensing. Supplement at 27, n. 44.

more years after a Report and Order before a B/ILT licensee had the opportunity to expand its facilities.<sup>14</sup>

The manufacturing and business operations of numerous NAM/MRFAC member companies (including many small and mid-sized manufacturers), as well as other sectors affected by the proposed application freeze, can not be expected to stand still during this period. B/ILT radio systems are vital to the business of America, and the health and safety of the 18 million people who make products for member companies. The freeze contemplated by the Coalition is thus contrary to the public interest.<sup>15</sup>

Moreover, it is fundamentally unfair to implement an application freeze effective upon the date of a Report and Order. Expansion of B/ILT radio systems is not something that happens overnight. It frequently requires years and the expenditure of millions of dollars to plan and implement. At a minimum, if the Commission should consider an application freeze as part of a retuning plan, it should not commence until any Report and Order is final. This would at least provide B/ILT licensees an opportunity to file applications while the Commission considers the inevitable petitions for reconsideration and possible appeals, before implementation of a retuning/relocation plan begins.<sup>16</sup>

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<sup>14</sup> The time could actually be longer, as implementation of the Coalition Plan will likely be delayed subsequent to the Report and Order depending on requests for reconsideration and appellate challenges.

<sup>15</sup> While NAM/MRFAC recognize public safety's need for additional spectrum, B/ILT also licensees have a need for more spectrum. Unlike public safety, which has already received a 24 MHz allocation in the 700 MHz band, B/ILT licensees have no new spectrum for expansion.

<sup>16</sup> NAM/MRFAC appreciate that having a fixed set of frequency assignments from which to start may be a necessary element of designing a retuning/relocation plan for incumbent licensees. If the Commission should determine to adopt a freeze, it should wait until finality of Report and Order, or at least provide an application window prior to the effective date of a freeze to give B/ILT licensees an opportunity to file any needed applications.

Five-Year Public Safety Set-Aside. The Coalition Plan contemplates that, upon completion of the realignment process in each NPSPAC region, any remaining 800 MHz channels which Nextel vacates in the non-cellularized block (and any remaining white space on Public Safety Pool channels) would be available exclusively for public safety for five years. Supplement at 12. The only apparent exception is that B/ILT (or public safety) entities may file applications for new licenses on unlicensed (white space) B/ILT Pool channels in the new Guard Band. *Ibid.* at n. 18.

The approval of such a privately negotiated frequency set-aside would likely preclude any future expansion of B/ILT facilities in the 800 MHz band. Few, if any, channels are likely to remain available for B/ILT use at the end of the five-year period. As discussed below, it also would result in a loss of B/ILT frequency assignments in the 800 MHz band.

De Facto Reallocation of Vacated B/ILT Channel Assignments. Although the Supplement does not fully address this issue, analysis of the Coalition Plan reveals that it would result in a *de facto* reallocation of B/ILT channels in the 800 MHz band to public safety. The first element of the reallocation process would occur if a B/ILT licensee vacates 800 MHz to move to 900 MHz, at which time its 800 MHz license would be assigned to Nextel or cancelled by the Commission. Supplement, Appendix at C-21. If the 800 MHz B/ILT license is cancelled, Nextel could immediately use the frequencies under its new licensing authority, Special Temporary Overlay Authority, or Economic Area authority. *Ibid.*

The de facto reallocation to public safety would be completed as a result of the five-year public safety set aside discussed above, which would include the former B/ILT channels that Nextel occupied in Phase I as part of the B/ILT 900 MHz exchange. It is expected that during

that five-year period public safety would take advantage of the newly available channels, transforming them from B/ILT to public safety assignments.<sup>17</sup>

The reallocation of the B/ILT channels results in both short- and long-term adverse consequences: In the short-term, it would increase Nextel's use of interleaved spectrum in Channels 120-320, thereby increasing the risk of additional interference to B/ILT users on interleaved channels; in the long-term, it reduces the spectrum available for B/ILT expansion. Fundamental fairness requires that any vacated B/ILT channels at 800 MHz should remain available for future B/ILT use.

Comparability of Coverage. Under the Coalition Plan, B/ILT and high site SMR licensees in the General Category would be relocated first to the new Guard Band at 859-861 MHz. Only if there is insufficient spectrum in the Guard Band would the interleaved spectrum at 809-814/854-859 MHz become available. Supplement at 17. At the same time, public safety licensees undergoing relocation would have available vacant Public Safety Pool channels in the interleaved spectrum, and interleaved channels vacated by Nextel. *Ibid.* The Supplement has not explained why relocating B/ILT General Category licensees should be under a mandate to move to the less desirable Guard Band channels as opposed to the interleaved spectrum, particularly any vacant B/ILT channels.<sup>18</sup>

The Coalition Plan contemplates that geographic coverage on replacement channels “must be co-extensive with that of the original system, but replacement channels meeting the quality of service factors shall be presumed by a rebuttable presumption to provide co-extensive

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<sup>17</sup> The Coalition Plan also would give public safety access to vacated B/ILT channel assignments in the new Guard Band (upon a showing that there are no public safety pool channels available).

<sup>18</sup> It also appears that, except for very large systems, it is not necessary that replacement channels be contiguous. *See* Supplement, Appendix C-3, C-16 and C-17.

coverage.” Supplement, Appendix C-3. However, reference to the “Quality of Service” definition fails to reveal any requirement that geographic coverage be co-extensive with the original system’s coverage. *Ibid.* Thus, the practical consequences of a B/ILT relocation to the Guard Band, which is more susceptible to interference from adjacent cellularized services, may be significantly reduced coverage. Exacerbating this is the fact that the Coalition Plan does not contemplate any recourse to the Commission in the event that relocated facilities, once built, are not “comparable” to those previously utilized by the licensee. *See* Supplement, Appendix C-2. This is at variance with current Commission rules pursuant to which an Economic Area licensee seeking the relocation of an incumbent must build and test for comparability with the existing 800 MHz system. *See* 47 C.F.R. Section 90.699(c)(3). There is no basis for not applying the current rule.

### **Procedural Issues**

The foregoing discussion has focused on substantive issues concerning critical funding/reimbursement and retuning/relocation issues. There also are a number of procedural concerns. The Coalition Plan would create an exceedingly complex, and wholly new and untested, regulatory regime to implement re-tuning/reimbursement. However, the Commission has existing rules which address similar issues and requirements in the context of the upper 200 channels in the 800 MHz band. *See* 47 C.F.R. Section 90.699. The use of these existing Rules and policies -- with appropriate adjustments -- would provide the needed procedural framework. This would relieve the Commission and industry of the need to grapple with myriad complexities, inconsistencies, and omissions in the Coalition Plan, however well-intentioned it may be.

There is no entity in the United States which has more experience relocating existing users than Nextel: It has done it in the upper 10 MHz block (861-866 MHz); and it has done it in

the case of B/ILT incumbents. Indeed, its entire business has been based on the notion of relocating and/or buying-out incumbents. Thus, the Commission need not create a brand new regulatory regime beyond the purview of the agency or the courts.<sup>19</sup> Instead, it need simply give Nextel the kinds of tools it has given Nextel in the past.

If, despite the foregoing, the Commission should wish to consider the merits of the RCC plan, a number of specific concerns should be noted including the following:

Relocation Coordination Committee. It is contemplated that the Land Mobile Communications Council (“LMCC”) will designate four of the five members of the RCC. Two of the four designees would represent public safety, and two would represent private wireless licensees. Nextel would designate the fifth member. Supplement at 15-16. The RCC would have responsibility for final retuning plans and approving reimbursement to relocating licensees. Supplement, Appendix C-5.

However, the Coalition Plan includes no anti-discrimination rules applicable to the RCC and its processes. Not surprisingly, its membership (or at least a majority) will likely be comprised of representatives of the Coalition Parties, and not fully representative of the industries or sectors (let alone all parties) ultimately forced to retune/relocate. Particularly since the Commission is being asked to delegate so much authority to this private entity (assuming such a delegation is even legal), there must be guarantees that the RCC not be able to discriminate against, or in favor of, any particular party, industry or sector in devising a realignment plan.<sup>20</sup>

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<sup>19</sup> Whether the Commission has the statutory authority to implement the plan as proposed, and whether it would infringe statutory rights of licensees, also are significant questions.

<sup>20</sup> Reliance on the LMCC as providing a safeguard against such behavior, or as a guarantor of impartiality, is unrealistic.

Another issue is the absence of any Commission representation on the RCC. The RCC will be engaged in frequency assignment decisions, affecting an entire band, and thousands of radio systems. Assuming for the sake of argument that the Commission even has the authority to delegate such responsibilities to the RCC, it should not take a “let’s wait and see” approach to the operation of the RCC and what it comes up with. Active Commission participation in the process would be vital, even if a third party should be charged with making initial frequency recommendations.

RCC Application Preparation and Filing. Under the Coalition Plan, the RCC would be entitled to “directly” file with the Commission applications for B/ILT licensees, approval for which “would be presumed in the public interest.” Supplement at 22-23. Public safety applications, on the other hand, would be submitted to a certified public safety frequency coordinator, which would complete a final review and submit the application to the Commission. Id. at 23. The Coalition Parties state that “Final coordination by a certified public safety coordinator, notwithstanding the proposed RCC process, is necessary to provide an added level of assurance to public safety agencies that their new channel assignments will not lead to any reduction in coverage or increase in interference potential.” *Ibid.* at 23. If an added level of review by a certified coordinator is “necessary” to assure public safety licensees of no reduction in coverage or increase in potential interference, why is a similar review not appropriate for non-public safety licensees? The Supplement does not address this issue.

There also is the material question as to whether an RCC would have the legal authority to file B/ILT applications in the manner apparently contemplated, i.e. without licensee review or approval. Section 308(b) of the Communications Act (the “Act”) requires the signature of an application by the “applicant and/or licensee in any manner or form ... as the Commission may prescribe by regulation.” 47 U.S.C. Section 308(b). While the Commission has discretion in the

form a signature may take (*e.g.*, original, facsimile, electronic), the rules also hold an applicant/licensee responsible for the accuracy and truthfulness of information contained in its application. If an applicant has neither the right to review or sign “its” application, it cannot be held responsible for the contents of that application. Perhaps more importantly, an application neither reviewed nor approved by the applicant itself would not be legally before the Commission, depriving the agency of statutory authority to act on it. See Section 308(b) of the Act.

Further, after the RCC has certified a Phase I clearing plan to the Commission,<sup>21</sup> it would then submit reciprocal assignment applications for each planned channel exchange. The Commission would then issue a 30-day public notice giving any party with standing right to oppose an application. Supplement at 20, n. 32. This raises the potential anomaly of a licensee, which has neither reviewed nor signed an application filed in its name and which is dissatisfied with the RCC plan, being required to file a petition to deny against “its own” application. Although the Coalition Parties concede that applications to implement the channel exchanges must be subject to 30-day public notice procedures (Supplement at 23, n.39; Appendix C-17), it is unclear that the Coalition would allow a licensee to file against “its own” application.<sup>22</sup>

900 MHz Relocation. The Coalition Plan would give an incumbent B/ILT licensee 60 days from the date of a Report and Order in which to notify the RCC of its election to relocate to

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<sup>21</sup> The RCC is to establish a “detailed frequency plan setting forth post-relocation spectrum assignments for clearing the 1-120 channel block” in each of the NPSPAC regions that it would then certify to the Commission. Supplement at 21. Incumbent licensees will have no voice in determining the new frequencies to which the RCC would have them move.

<sup>22</sup> The Coalition Parties state that petitions to deny such applications could address “the limited issues involved in each application.” Supplement at 23, n.40. They do not, however, elaborate on what those “limited issues” would be. Note too that under Section 316(a)(1) of the Act, a licensee has the right to protest a proposed modification of its license.

900 MHz spectrum. Supplement at 25. This is likely before the finality of the Report and Order, quite possibly before any petitions for reconsideration of the Report and Order would be due,<sup>23</sup> and certainly before a licensee would have any idea how it might otherwise be affected by the new rules and procedures. Simply put, this is wholly inadequate for B/ILT licensees to apprise themselves of the issues involved and make any sort of informed decision.

Baseball-Type Arbitration. According to the Supplement, the only issues to be resolved during the mandatory negotiation period would be the timing of individual relocations within each NPSPAC region, the specific costs incurred during the relocation, and a specific relocation plan for each relocating licensee. Supplement at 21. If an incumbent licensee and Nextel are unable to reach a relocation agreement, according to the Plan either party could invoke a baseball-type arbitration. That is to say, a process under which the arbitrator is not permitted to fashion his or her own solution; instead, the arbitrator is obligated to select one of the two competing solutions proposed by the parties.

Timing issues related to the wholesale modification of a complex radio system are ill-suited for baseball-type arbitration, where the primary issue is whether Joe Big-Bat is worth \$5 million vs. \$6 million per year. Moreover, by apparently excluding from arbitration, issues dealing with the adequacy of measures to avoid incumbent disruption, the process the Coalition Parties have designed appears to leave key details of a relocation plan in an unresolvable “Twilight Zone.”<sup>24</sup>

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<sup>23</sup> Petitions for reconsideration, if filed, would be due 30 days following publication of a summary of the Report and Order in the Federal Register. *See* 47 U.S.C. Section 405.

<sup>24</sup> The Supplement is not consistent in describing the arbitration process. Although it would limit the scope of an arbitration to “unresolved cost and timing issues” -- apparently excluding the relocation plan itself and the details of that plan insofar as they are designed to “prevent significant disruption of [the licensee’s] operations” -- the rule framework in Appendix C does not contain a similar limitation. *See e.g.* Appendix C-22 (F), C-30-31 (E). Given the discussion

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Appellate Rights. Following an arbitration, incumbent licensees would have no right to appeal to the Commission any aspect of the relocation plan except whether the replacement frequencies meet the definition of “comparable facilities” set forth in the Report and Order. See Supplement, Appendix C-22, C-30-31. In other words, there is no right of appeal with respect to whether adequate reimbursement would be paid to a relocating incumbent, the timing of a relocation, whether a relocation process would significantly disrupt a licensee’s business operations, or whether the relocation facilities as actually constructed do, in fact, provide “comparable facilities.”<sup>25</sup> Thus, not only is almost the entire retuning/relocation process in the hands of private parties, but their decisions would be largely beyond Commission review.<sup>26</sup>

This represents a major and unwarranted infringement on licensee rights. Resolution of the issues referenced above could have material consequences for an incumbent. Since action on its application should be predicated on a fair and equitable resolution of such issues, the failure to provide for Commission review is contrary to licensee rights under the agency’s Rules. See Rules 1.105 and 1.115.

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of the arbitration process in the Supplement, NAM/MRFAC have assumed that to accurately reflect the Coalition Parties’ intent; however, this requires clarification.

<sup>25</sup> Because an appeal would follow shortly after an arbitration process and precede actual construction, it would not encompass the question as to whether relocation facilities, as constructed, are in fact “comparable.” No licensee would have recourse to the Commission after its relocation facilities are constructed. See Supplement, Appendix C-2. This should be contrasted with Rule 90.699(c)(3) where “build and test” is required for relocating 800 MHz licensees.

<sup>26</sup> Although the Commission would necessarily have to act on the relocation applications, the Coalition Parties assert that the Commission should consider them “pre-coordinated,” since the RCC will have previously “certified” the relocations. Supplement at 22-23.

## CONCLUSION

NAM/MRFAC see no reason for reinventing the wheel when it comes to retuning/reimbursement policies. The Coalition Parties fail to demonstrate that there is a need to create a wholly new, complex, and untested regulatory regime, especially one which is beyond Commission review in important respects. The Commission has existing rules and procedures which should be used as a framework to accomplish a realignment of the 800 MHz band.

In addition, there is no basis for the disparate treatment of B/ILT incumbents forced to relocate as compared with public safety incumbents, nor any basis for the radical delegation of Commission authority to third parties without proper safeguards and preservation of appellate rights.

Certain basic elements of the Coalition's re-banding proposal contain positive elements which the Commission could build upon in fashioning a remedy for the 800 MHz interference problem. However, combined with concerns previously identified by NAM/MRFAC, the

Supplement reflects numerous flaws which preclude adoption of the Coalition Plan in its present form.

Respectfully submitted,

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