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July 15, 2003

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Federal Communications Commission  
Division of Enforcement

**BY HAND**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re. Notice of Written *Ex Parte* Presentation;  
WT Docket No. 02-55

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this notice is being filed. Concurrently herewith, Mobile Relay Associates and Preferred Communication Systems, Inc. are delivering the attached written *ex parte* presentation to each of Bryan Tramont, Samuel Feder, Jennifer Manner, Paul Margie, and Barry Ohlson (advisers to the members of the Commission), as well as to John Muleta, D'wana Terry, Michael J. Wilhelm, Karen D. Franklin, John Evanoff and Shellie Blakeney of the Wireless Telecommunications Bureau ("WTB"), regarding the above-referenced proceeding.

An original and one copy of this letter are submitted for inclusion in the file of the above-referenced proceeding. Please direct any questions to the undersigned.

Sincerely,



David J. Kaufman

Enclosure

cc: All persons named in this letter  
Mobile Relay Associates  
Preferred Communications Systems, Inc.

02-55-100-1

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

JUL 15 2003

Federal Communications Commission  
Office of Secretary

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

**SUPPLEMENTAL COMMENTS OF  
MOBILE RELAY ASSOCIATES AND  
PREFERRED COMMUNICATION SYSTEMS, INC.**

Mobile Relay Associates (“MRA”) and Preferred Communication Systems, Inc. (“Preferred”) by their attorney and pursuant to Section 1.1206 (a) of the Commission’s Rules, hereby submit these Supplemental Comments (“Supplement”) This Supplement is prompted by recent remarks of counsel to the Personal Communications Industry Association (“PCIA”)<sup>1</sup> and counsel to APCO at the recent convention of the American Mobile Telecommunications Association (“AMTA”), coupled with the fact that PCIA counsel has filed a notice of having engaged in a post-Reply Comment oral *ex parte* presentation in this proceeding, and may have made similar arguments to Commission decision-making personnel as he made at the AMTA convention. This Supplement contains a rebuttal to the arguments made by PCIA and APCO counsel, for inclusion in the record in this proceeding

Simply stated, PCIA counsel argued that, but for the “elimination of their exit strategy,” non-Nextel SMR licensees in the 851-854 MHz band would not be financially harmed by the adoption of the Nextel consensus plan As MRA and Preferred have at explained at length in their respective

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<sup>1</sup>PCIA counsel is also counsel of record herein to the City of Denver, Colorado.

previous filings herein, that argument is false, because non-Nextel SMRs will suffer financially in multiple ways other than the confiscation of their existing “exit strategies.” However, the purpose of today’s filing is to rebut the implicit assumption of PCIA counsel that the government has the power to “eliminate an exit strategy” that a licensee owns and paid for when acquiring a license, without compensating that licensee. The implicit assumption of PCIA counsel is neither rational nor acceptable under the Fourth and Fifth Amendments to the US Constitution.

**I. The Fair-Market Value of an Asset Is Its Sale Value (aka “Exit Strategy”)**

The value of an asset, whether spectrum, real estate, infrastructure, intellectual property or other, is generally measured by the price that a willing buyer would pay to a willing seller at arms’-length. That is the foundation of this Commission’s auction bidding rules and policies, as well as of the American economy in general. We are a market economy, not a totalitarian “command” economy.

Thus, where the government takes action which materially reduces the value of a private asset, measured by the price it would bring at arms’-length, the Fourth and Fifth Amendments of the US Constitution require the government to compensate the involved property owner. Generally this is done via eminent domain, but one way or another, it must be done, to avoid the constitutional prohibition against confiscation of private property.

Imagine two houses, physically identical to each other, built at the same time using the same materials -- one located in Potomac, Maryland, and the other in the middle of the Mohave Desert. A buyer will pay substantially more for the former, and if borrowing money for the purchase, can reliably expect that if he/she loses his/her job and must sell the house, the house would bring a sufficient price (aka “exit strategy”) to pay off the debt. The government could not constitutionally

confiscate the house in Potomac and replace it with the house in the Mohave Desert under the claim that the owner is losing “only the exit strategy ”

Yet this is precisely the theory that counsel for PCIA/Denver espouses. Nor is it appropriate to say that “spectrum is not property” or that all spectrum licensees acquire spectrum knowing it is a regulated industry. Here, the FCC specifically set up an entire regulatory regime that touted the 851-854 MHz spectrum as particularly appropriate for digital cellular-architecture usage, auctioned off the white space for many millions of dollars on that basis and encouraged private entities to acquire the incumbent spectrum on the secondary market by specifically ruling there would be no forced migration. Then the FCC put a huge cloud over this same spectrum by issuing the NPRM in this proceeding only fifteen months after the new auction licenses were issued.

Even conceding that the FCC has a reasonable amount of flexibility to change rules in the public interest, this particular wholesale change proposed by Nextel so soon after the fact would constitute not merely “bait & switch” if conducted by a private sector property seller, but probably felony fraud. Under the circumstances, such a regulatory action as proposed by the Nextel plan would be an unconstitutional confiscation, and as such, arbitrary and capricious rulemaking.

## **II. Allowing Government to Confiscate Private Spectrum Is Antithetical to the Public Interest Even Where Some of the Confiscated Spectrum Will Go to Public Safety**

At the AMTA convention, counsel for APCO defended the Nextel plan on the ground that it would take occupied spectrum away from incumbent licenses and give some of it to Public Safety, at no charge to Public Safety licensees. This is certainly true of the Nextel plan, and it explains why many Public Safety licensees (though by no means all) support Nextel. In the normal course, if these agencies wanted to expropriate spectrum from incumbent licensees in their geographic area, they would have to do so via eminent domain, and would have to pay the incumbent licensees being

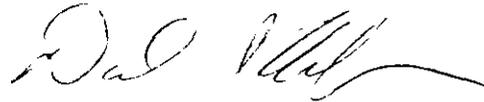
forcibly displaced for the fair market value of the spectrum. So allowing these same Public Safety agencies to confiscate the spectrum at no charge provides a financial windfall to them. And once they own the spectrum, they can always ask for a further waiver to sell some or all of it if and when their government needs additional revenue. But APCO's support for Nextel on such grounds is antithetical to the overall public interest.

For the foregoing reasons, the Nextel plan, even if adopted, could never survive appellate scrutiny. The Commission can better serve the public interest by adopting a plan, such as that proposed by the 800 MHz Users' Coalition, that could actually be placed into effect.

Respectfully submitted,  
**PREFERRED COMMUNICATION SYSTEMS, INC.**  
**MOBILE RELAY ASSOCIATES**

July 15, 2003

By



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