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October 8, 2004

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

Federal Communications Commission
Office of Secretary

Re: Written Ex Parte Presentation;
WT Docket No. 02-55

Dear Ms. Dortch:

On behalf of Mobile Relay Associates and Skitronics, LLC, and pursuant to Section 1.1206(b) of the Commission's Rules, enclosed herewith is a written *ex parte* presentation for inclusion in the public record of the captioned proceeding. This presentation consists of suggested corrections to the new rules to be adopted, as set forth in Appendix C to the Commission's decision in the proceeding, FCC 04-168, released August 6, 2004 ("*Rebanding Decision*"), which decision has not yet been published in the *Federal Register*. In the *Rebanding Decision* itself, the Commission repeatedly stated that it was implementing a solution that would be both equitable and impose a minimum disruption to innocent 800 MHz band users (*see, e.g., Rebanding Decision*, p.5 at ¶¶ 2 & 4); however, the actual rules as set forth in Appendix C were partially inconsistent with that text. The attached suggestions would eliminate that internal inconsistency.¹

These suggested changes are focused on three main areas. First, this Commission has never before involuntarily modified a properly granted license by relocating the licensee to different spectrum, where the former spectrum allowed the licensee to engage in multiple types of activities and to change within that universe of permitted activities at will, but the new spectrum would only permit a much smaller universe of permitted activities. Such a forced relocation would violate the Commission's own requirement that its solution be "equitable," and the suggestions correct that problem. Second, the suggestions clarify that voluntary negotiations between Nextel and incumbent licensees may take a variety of forms, and that Nextel's use of creative mechanisms will be counted towards its reconfiguration expenditures, however a

¹If the changes suggested herein were deemed not susceptible to implementation via *Erratum*, then they could be implemented by means of the Commission rendering a partial reconsideration of the *Rebanding Decision sua sponte*, as the deadline for such reconsideration has not yet passed.

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Marlene Dortch, Secretary

October 8, 2004

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voluntary transaction is labeled. Third, the suggestions clarify that losses from subscriber churn during the reconfiguration process are a legitimate reimbursable expense for subscriber-based licensees being forcibly relocated.

Please direct any questions to the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read 'David J. Kaufman', with a long horizontal flourish extending to the right.

David J. Kaufman

Enclosure

cc (w/encl.):

Honorable Michael K. Powell
Honorable Kathleen Q. Abernathy
Honorable Kevin J. Martin
Honorable Michael J. Copps
Honorable Jonathan S. Adelstein
John Muleta, Chief, WTB
Michael Wilhelm, Chief, PS&CID
Brian Marengo, PS&CID
Mobile Relay Associates
Skitronics, LLC

**Proposed Corrections to New Rules to Render Them Consistent with the Text of the
Rebanding Decision**

90.617(e) The Channels listed in §90.614(b) and (c) of this chapter are available to eligibles in the SMR category- which consists of Specialized Mobile Radio (SMR) stations and eligible end users. ESMR licensees which employ an 800 MHz cellular system as defined in §90.7 are permitted to operate on these channels in non-border areas. ESMR licensees authorized prior to **[Effective date of Report and Order]**, as well as any other 800 MHz licensees whose licenses are modified to specify operation on channels 511-830 pursuant to Section 90.677, may continue to operate, if they so choose, on the channels listed in Table 5. These licensees will be grandfathered indefinitely.

* * *

90.617(i) Specialized Mobile Radio Systems licensees who operate non-cellular systems on any of the public safety channels listed on Table 1 prior to **[Effective date of Report and Order]** and who choose not to have their licenses modified to channels 511-830 pursuant to Section 90.677 are grandfathered and may continue to operate on these channels indefinitely. These grandfathered licensees will be prohibited from operating 800 MHz cellular systems as defined in §90.7. Site based licensees who are grandfathered on any of the public safety channels listed in Table 1 may modify their license only if they obtain concurrence from a certified public safety coordinator in accordance with §90.175(c). Grandfathered EA-based licensees, however, are exempt from any of the frequency certification requirements of §90.175 as long as their operations remain within the Economic Area defined by their license in accordance with the requirements of §90.683(a).

* * *

90.617(k) Licensees may operate systems other than 800 MHz cellular systems (as defined in §90.7) on channels 511 - ~~550 at any location vacated by an EA-based SMR licensee~~830. For operations on these channels, unacceptable interference (as defined in §§22.970 & 90.672) will be deemed to occur only at sites where the following median desired signals are received (rather than those specified in §§22.970(a)(1)(i) & 90.672(a)(1)(i)). The minimum required median desired signal, as measured at the R.F. input of the receiver, will be as follows:

* * *

§90.676(a)(1) Obtaining estimates from licensees regarding the cost of reconfiguring their systems and ensuring that all estimates contain a firm work schedule. The Transition Administrator will retain copies of all estimates and make them available to the Commission on request. In addition, the Transition Administrator shall review any voluntary purchase agreements entered into between Nextel and any incumbent pursuant to Section 90.677(b), to confirm that such agreements are arms'-length.

§90.677 Reconfiguration of the 806-824/851-869 MHz band in order to separate cellular systems from non-cellular systems.

In order to facilitate reconfiguration of the 806-824/851-869 MHz band ("800 MHz

band”) to separate cellular systems from non-cellular systems, Nextel Communications, Inc. (“Nextel”) may, and shall as to any incumbent non-Public Safety 800 MHz licensee on channels 1-510 who elects to retain the spectrum usage rights that were associated with its license prior to [effective date of Report and Order] by relocating into channels 511-830, relocate incumbents within the 800 MHz band by: (1) providing “comparable facilities:” as defined in subsection (f) below; and (2) in the case of 800 MHz licensees serving paying subscribers, reimbursing for losses incurred due to churn caused by the relocation process. For the limited purpose of band reconfiguration, the provisions of § 90.157 shall not apply and inter-category sharing will be permitted under all circumstances. Such relocation is subject to the following provisions:

* * *

§90.677(b) *Voluntary negotiations.* Thirty days before the start date for each NPSPAC region, the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau will issue a Public Notice initiating a three-month voluntary negotiation period. During this voluntary negotiation period, Nextel and all incumbents may negotiate any mutually agreeable relocation agreement. Nextel and relocating incumbents may agree to conduct face-to-face negotiations or either party may elect to communicate with the other party through the Transition Administrator. Maximum flexibility is afforded to Nextel and relocating incumbents in the context of voluntary negotiations, including without limitation the entry into system purchase agreements, whereby Nextel acquires the incumbent 800 MHz system in lieu of reconfiguring such system. Where such a purchase agreement is entered into at arms'-length on or after August 7, 2004, and the acquired 800 MHz spectrum is thereby added to the spectrum being contributed by Nextel as part of the reconfiguration process, the purchase price and associated reasonable transaction costs incurred by Nextel shall be counted toward Nextel's overall relocation expenses.

* * *

§90.677(f) *Comparable Facilities.* The replacement system provided to an incumbent must be at least equivalent to the existing 800 MHz system with respect to the four factors described in §90.699(d). In addition, the replacement spectrum shall have at least the same usage rights as the former spectrum had prior to August 7, 2004 (*i.e.*, be in the band of channels 511-830), including without limitation the right to operate indefinitely either as an 800 MHz cellular system or as a non-cellular system; *provided however*, that this sentence shall only apply to a relocating incumbent that agrees to the interference protection standards set forth in Section 90.617(k) with respect to such replacement spectrum.

* * *

§90.693 (a) *General provisions.* These provisions apply to “incumbent licensees,” all 800 MHz licensees authorized in the 806-821/854-8669 MHz band who obtained licenses or filed applications on or before December 15, 1995.

Clean Draft of Corrected New Rules, Consistent with the Text of the *Rebanding Decision*

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* * *

90.617(k) Licensees may operate systems other than 800 MHz cellular systems (as defined in §90.7) on channels 511 - 830. For operations on these channels, unacceptable interference (as defined in §§22.970 & 90.672) will be deemed to occur only at sites where the following median desired signals are received (rather than those specified in §§22.970(a)(1)(i) & 90.672(a)(1)(i)). The minimum required median desired signal, as measured at the R.F. input of the receiver, will be as follows:

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