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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Part 90 of the Commission's)	PR Docket No. 93-144
Rules to Facilitate Future Development of)	RM-8117, RM-8030,
SMR Systems in the 800 MHz Frequency Band)	RM-8029
)	
Implementation of Sections 3(n) and 322 of the)	GN Docket No. 93-252
Communications Act -- Regulatory Treatment)	
of Mobile Services)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive Bidding)	

To: The Commission

REPLY COMMENTS TO OPPOSITION TO
PETITION FOR RECONSIDERATION

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

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April 20, 2000

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), by its attorneys, respectfully submits its reply to the Nextel Communications, Inc. ("Nextel") Opposition ("Opposition") to Petition for Reconsideration ("Petition") filed by AMTA in respect to one aspect of the Federal Communications Commission ("FCC" or "Commission") Memorandum Opinion and Order in the above-referenced proceeding.¹ Nextel's Opposition ignores the central issue in AMTA's Petition: in the MO&O the FCC incorrectly concluded that it had addressed the issue of progress payments to incumbents subject to retuning in an earlier stage in this proceeding and simply "affirmed" its earlier determination by citing a rule provision that relates to the timing of payments among geographic auction winners, not between the geographic licensee and an incumbent being retuned. Moreover, Nextel's insistence that this matter be left to negotiation between the auction winner, which in virtually all instances is Nextel, and the incumbent raises troubling questions about the future of the 800 MHz migration process, particularly as the parties transition from the Mandatory Negotiation period into the Involuntary Relocation process.

I. BACKGROUND

1. There is no record support for the statement in the MO&O that "payment of relocation costs [from geographic EA auction winners to incumbents being retuned] will not be due until the incumbent has been fully relocated and the frequencies are free and clear."² The MO&O plainly was incorrect in concluding that the matter of progress payments had been considered and resolved by the Commission. This error is evidenced by the fact that the Order's cited support for

¹*Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 64 Fed Reg 71042 (rel. Oct. 8, 1999)("MO&O" or "Order").

²MO&O at ¶ 58.

that proposition referenced a discussion of the timing of payments **between and among EA licensees**, a determination codified by the FCC in Rule Section 90.699(f), Cost- Sharing Plan for 800 MHz SMR EA licensees. By contrast, FCC Rule Sections 90.699(b) and (c), in which the FCC defines the obligations of EA licensees and incumbents both during the Voluntary and Mandatory Negotiation periods and during the Involuntary Relocation period, contain no such language. They are silent as to the timing of payments from the EA auction winner to the incumbent as is the entire record in this proceeding, other than the Commission's misstatement in the MO&O of its own previous determination.

2. Thus, contrary to Nextel's declaration, there is no evidence that the FCC has ever "reasoned" that the relocation process would function best by adopting an affirmative determination that EA licensees would not be obligated to pay for relocation costs as they were incurred.³ The only record support for such a conclusion is a statement reiterating what erroneously was believed to have been determined at an earlier stage of this proceeding. In fact, in AMTA's opinion, the decision adopted in the MO&O is entirely contrary to the FCC's repeated affirmations of its intention to make this transition as seamless and painless as possible for incumbents and their customers, and runs counter to both the letter and the spirit of the rules codified in Sections 90.699(b) and (c).

3. In its Petition for Reconsideration, AMTA acknowledged that the relocation process has gone relatively smoothly to date. However, it cautioned the FCC that the relative rights of incumbents versus EA licensees would take on heightened significance as the parties complete the

³Opposition at p. 3.

one-year Mandatory Negotiation period and enter into the Involuntary Relocation period. The Association noted that the negotiating balance would shift almost entirely in favor of the EA licensee as this occurs and that the affected incumbents most likely would be the smaller and more rural operators whose spectrum was of lesser immediate value to Nextel and whose bargaining clout was concomitantly limited.⁴

4. The Association explained that once an EA licensee was no longer required to negotiate a retuning arrangement with the incumbent, but could trigger its retuning rights pursuant to FCC Rule Section 90.699(c), it would be imperative for incumbents to secure progress payments to cover the potentially very significant costs of relocating their systems and their entire customer base to other channels. AMTA urged the FCC to correct the error in the MO&O and to confirm unambiguously that incumbents would not be required to fund their own relocation in reliance on subsequent repayment by the EA licensee.

II. THE RECORD SUPPORTS GRANT OF THE RELIEF REQUESTED IN AMTA'S PETITION

5. AMTA's Petition was supported by the Personal Communications Industry Association ("PCIA") and Mobex Communications, Inc. ("Mobex"). Both commenters confirmed that the erroneous and unsupported position adopted in the MO&O would have seriously negative consequences for incumbents. Both noted the fundamental inequities in the "bargaining" position

⁴In its Opposition, Nextel argues that it has negotiated transaction with all sizes of operators in both rural and urban areas which it claims is contrary to AMTA's assertion. Opposition at n. 9. However, AMTA made no such assertion. The Association did note that EA activity during the Voluntary Negotiation period was "concentrated largely" on larger, rather than smaller, systems and on urban, rather than rural, areas, a statement it believes is consistent both with the FCC's records and with a eminently reasonable channel migration plan on the part of EA licensees.

of the parties involved, particularly during the Mandatory Negotiation and Involuntary Relocation periods when EA licensees no longer will be under any obligation to do more than the rules require. These commenters endorsed AMTA's recommendation that the Commission address this fundamental imbalance by ensuring that incumbents are not deprived of rights seemingly secured to them under the rules because of their inability to fund a relocation not of their choosing and, most assuredly, not to their benefit.

6. The need to correct the error in the MO&O, and to do so promptly, is highlighted by Nextel's Opposition. Nextel piggybacks on the FCC's misstatement to buttress its otherwise unsupported position that progress payments should be left entirely to the negotiation process. Of course, that ignores the reality that incumbents already are in what oxymoronically is entitled a period of "Mandatory Negotiation" and soon will be stripped of the right to negotiate the terms of their retuning at all as they fall under the entirely FCC-defined Involuntary Relocation Procedures. Contrary to the free market, no holds barred negotiating scenario painted in the Opposition, incumbents hold only a limited number of bargaining chips today and will lose even those once the Involuntary Relocation Procedures are invoked by Nextel.

7. Thus, Nextel's reliance on the relatively successful retuning process to date as a template for future activities is misplaced because the rules under which the parties will be "negotiating" will change. Nextel is correct that incumbents with strong channel positions in markets like New York and Los Angeles have been able to negotiate mutually acceptable arrangements in respect to their relocation or acquisition. That is because these arrangements were made during or even before the Voluntary Negotiation period and involved spectrum for which Nextel had a compelling, time-sensitive need. It simply is not credible to assume that smaller, less

financially secure operators with spectrum in markets where Nextel has no immediate demand will be equally successful, particularly those who have had no contact from Nextel since the initial incumbent notification letter. By the time Nextel initiates discussions with those parties, any negotiating opportunity they might have had will have become subject to the Commission's Involuntary Relocation Procedures. The Commission cannot allow the further abrogation of the limited rights left to them under those regulatory strictures because of their inability to fund their own relocation costs.

8. Finally, Nextel notes that neither AMTA nor PCIA cited an instance of an EA licensee that did not agree to some form of progress payments or an incumbent that has been harmed by the current rule structure.⁵ That, of course, as described above is largely due to the fact that the harm will become more pronounced as the rules change. However, the undersigned does certify that some incumbents have reported being advised by Nextel employees that they should agree to a relocation proposal now because Nextel will not be required to make progress payments to them once the Involuntary Relocation Procedures become effective. In AMTA's opinion, those incumbents clearly have been harmed by Nextel's interpretation of its EA retuning obligations.

III. CONCLUSION

9. The Commission should proceed immediately to correct its misstatement in the MO&O and to confirm that incumbents are entitled to reasonable progress payments under FCC Rule Sections 90.699(b) and (c).

⁵Opposition at p. 5.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this April 20, 2000 caused to be mailed, first-class, postage prepaid a copy of the foregoing Reply Comments to Opposition to Petition for Reconsideration to the following:

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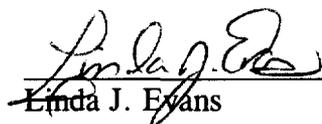
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