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 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service	)	ET Docket No. 95-18

To: Secretary Marlene H. Dortch

COMMENTS OF
AIRPEAK COMMUNICATIONS, LLC
AND
AIRTEL WIRELESS SERVICES, LLC

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EXECUTIVE SUMMARY

AIRPEAK Communications, LLC and Airtel Wireless Services, LLC urge the FCC to reject Nextel's proposal to "clarify" the relocation options for non-Nextel ESMR licensees. The Commission's Order specifically recognized the interference potential of ESMR systems operated by entities other than Nextel. It made a reasoned and deliberate decision to encourage those licensees to relocate to the newly-named ESMR portion of the band, consistent with the overall objective of minimizing interference. It made that decision explicitly recognizing that it could require Nextel to share the ESMR band with other licensees.

Nextel's requested "clarification" cannot be reconciled with the clear language of the FCC's decision. It would eliminate the option for ESMRs other than Nextel itself, Nextel Partners and Southern LINC to relocate to the ESMR band. Leaving aside the legal infirmities of an approach that would treat similarly-situated licensees in a dissimilar fashion, the recommendation would require cellularized systems to operate within or on channels immediately adjacent to the interleaved portion of the 800 MHz band, albeit on a secondary, non-interference basis. It would replicate the existing band plan that the FCC and Nextel have declared inconsistent with the public interest since it does not prevent but, at best, simply retroactively fixes interference problems. That was not the intent of the Order and cannot be deemed in the public interest.

The ultimate result of Nextel's recommendation would be elimination of all ESMR competition other than Southern LINC. It would not be possible to obtain continued funding for systems that operate on a secondary, non-interference basis, particularly in light of the interference history of this band. That outcome would be inconsistent with the FCC's commitment to adopt a rebanding solution that is equitable for all licensees. It would deprive

areas such as Montana, in which Airtel operates but in which Nextel does not provide service, without access to the integrated digital dispatch and cellular telephone offerings available with iDEN/Harmony technology. It simply does not comport with the public interest.

Nextel's "clarification" request is particularly surprising because it directly contradicts a 2003 Consensus Parties' filing in which Nextel participated. In that pleading, the Consensus Parties supported the right of all cellularized licensees to relocate to the ESMR band. Nextel recently urged the Commission to estop a party in this proceeding from supporting a position that was inconsistent with positions taken earlier. The Commission must do the same here. Nextel cannot be permitted to reject a position it endorsed previously in respect to non-Nextel ESMR relocation rights.

Finally, the parties request the Commission to confirm that the entire ESMR band is available for non-Nextel ESMR relocation. Specifically, to the extent NPSPAC spectrum is vacant, as it is in certain tertiary markets and rural areas, rebanding to that spectrum would be faster, less complicated and, therefore, less costly than moving to Nextel-occupied channels that will have to be cleared.

Cost is a significant issue as it is not simply a matter to be negotiated by Nextel and ESMR licensees. Incumbents are required to certify to the cost-necessity of their relocation proposals because the Federal Treasury is entitled to the difference between the valuation the FCC has placed on the 1.9 GHz spectrum being assigned to Nextel and its rebanding expenditures, plus the value of the spectrum it is relinquishing. If non-Nextel ESMR licensees are not permitted to relocate to unoccupied NPSPAC channels, it is doubtful they will be able to certify to the TA that their rebanding costs are the minimum needed to secure comparable facilities and, therefore, that the Federal Treasury is not being deprived of funds rightly due it.

AIRPEAK Communications, LLC ("AIRPEAK) and Airtel Wireless Services, LLC ("Airtel") (AIRPEAK and Airtel, collectively, the "Companies"), by their attorneys and in response to the Federal Communications Commission ("FCC" or "Commission") October 22, 2004 Public Notice[1] respectfully submit their comments on *ex parte* filings submitted in the above-identified proceeding.[2] For the reasons detailed *infra,* the Companies urge the FCC not to compromise the 800 MHz rebanding plan adopted in the R&O. Specifically, the Companies urge the Commission to retain the 800 MHz relocation options available to non-Nextel Communications, Inc. ("Nextel") ESMR[3] licensees. The Commission adopted those options based on an extensive record and after due deliberation. There is no record support for the radical "clarification" of that decision proposed by Nextel.

Additionally, the Companies urge the FCC to confirm that the entire ESMR band (817-824/862-869 MHz), including the current NPSPAC allocation (821-824/866-869 MHz), is available for the relocation of ESMR systems as suggested in the Companies' September 23, 2004 *ex parte* clarification request in this proceeding.[4] The Companies explained that moving to unused NPSPAC spectrum would accelerate the relocation process and thereby reduce the costs of relocating their systems. It also would eliminate costs Nextel otherwise would incur in clearing its own spectrum for use by other ESMR licensees. It would permit the Companies to certify that their relocation costs are the minimum required to provide them with comparable facilities as required by the R&O.[5] The Order is silent on this point, so the availability of the

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[1] *Public Notice,* Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, 69 FR 224, p. 67823 (2004).
[2] *Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) ("R&O" or "Order").
[3] As noted in the Order, the term "ESMR" does not appear in the Commission's rules although it has been used in case law. *Id* at n. 6. The term was first used by Nextel to describe its own enhanced Specialized Mobile Radio ("SMR") service and generally is used in reference to an SMR system that has deployed a cellular-like system architecture. An ESMR definition has been included in the Order under FCC Rule Section 90.7.
[4] *Ex Parte* Presentation of AIRPEAK and Airtel, filed Sept. 23, 2004.
[5] R&O at ¶ 198.

entire ESMR band for relocation purposes should be codified in the FCC's rules to eliminate any potential ambiguity.

I. BACKGROUND

It now has been more than three years since Nextel submitted its so-called "White Paper"[6] outlining a proposed solution to the interference being caused to public safety and other 800 MHz systems by Commercial Mobile Radio Service ("CMRS") operators that use cellular architecture -- primarily Nextel itself.[7] The Commission subsequently initiated the instant rule making proceeding to address that interference issue. The result was adoption of the 164-page R&O which represents a careful balancing of complex, competing interests while remaining focused on the FCC's key objective: abatement of the ongoing interference caused to public safety and other traditional 800 MHz incumbents by cellularized CMRS licensees.[8]

The core of the Commission's solution is a band reconfiguration to create a cellularized ("ESMR") block from 817-824/862-869 MHz while reserving the spectrum from 806-817/851-862 MHz for entities operating non-cellularized facilities. Nextel and its affiliated entity, Nextel Partners, Inc. ("Nextel Partners"), will be the dominant, in most areas the only, licensee operating in the new ESMR band.[9] However, consistent with its intention of segregating cellular-like and non-cellular systems, the Order also provides three relocation options for non-Nextel ESMR licensees:

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[6] *See* Promoting Public Safety Communications, Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs, Nextel Communications, Inc. submitted by Robert S. Foosaner, Nextel Communications, Inc., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau (FCC) (cover letter dated Nov. 12, 2001).

[7] Under Nextel's original proposal, all non-public safety 800 MHz licensees, including those causing no interference to public safety or any other incumbent, would have been required to relocate to other spectrum and to pay all costs associated with doing so.

[8] *See*, e.g., R&O at ¶ 2.

[9] The Order also recognizes an agreement between Nextel and Southern LINC ("Southern"), an iDEN operator and Nextel competitor in several Southern states, that will permit both Nextel and Southern to operate in the ESMR band by moving the line of demarcation between the cellularized ESMR and non-cellularized band segments in areas in which both companies operate. *Id* at ¶¶ 164-169.

1) Relocate all of their systems in a market into the ESMR portion of the band where they will share spectrum with Nextel; or
2) Relocate their systems as close as possible to the ESMR portion of the band but remain in the non-cellular portion of the band, *i.e.* in order of preference: (a) the 816-817 MHz/861-862 MHz Guard Band; (b) the 815-816 MHz/860-861 MHz Expansion Band; and (c) channels below 815/860 MHz if necessary. These licensees will operate on a strict non-interference basis, subject to pre-coordination of any new or modified operations; or
3) Remain on their current channels in the non-cellular portion of the band on a strict non-interference basis, subject to pre-coordination of any new or modified operations.[10]

Both AIRPEAK and Airtel operate cellularized 800 MHz networks and are classified as ESMRs. Both have selected the first option and intend to relocate their systems to the ESMR portion of the 800 MHz band. That choice is consistent with the FCC's desire to separate the operations of systems with incompatible architectures and thereby reduce the likelihood of interference.

The Nextel *ex parte* filings on which the Commission has requested comment urge the FCC to "clarify" the R&O to eliminate the relocation option selected by the Companies.[11] Specifically, Nextel seeks the following "clarification":

> ESMR incumbents (other than Nextel and Southern LINC) that elect to be relocated out of the "non-cellular" channel block will be retuned first to the 816-817/861-862 MHz block (starting at 861.9875 MHz and working downward; to the extent the 816-817/861-862 MHz block does not contain a sufficient number of replacement channels, an ESMR incumbent's remaining channels will be retuned to 817/862 MHz and above on consecutive, contiguous channels.[12]

The Nextel *Ex Partes* offer no rationale for this radical bowdlerization of the R&O.[13] There is no explanation for why, or legally how, the FCC could discriminate among different ESMR licensees by allowing Nextel, Nextel Partners, Inc., and Southern access to the ESMR band while

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[10] *Id.* at ¶ 162.
[11] *See* Letter from Regina M. Keeney, Esq., Counsel to Nextel, to Marlene H. Dortch, Secretary, FCC (filed Sept. 16, 2004; Letter from Regina M. Keeney, Esq., Counsel to Nextel, to Marlene H. Dortch, Secretary, FCC (filed Sept. 21, 2004) ("Nextel *Ex Partes*").
[12] *Id*
[13] Presumably Nextel offered an explanation for this proposal in its meetings with the FCC but it did not include any such details in the Nextel *Ex Partes*.

relegating all other ESMR licensees to effectively unusable spectrum.[14] This proposal for a fundamental revision to the Order is included in a laundry list of changes sought by Nextel and described simply as "clarifications" that "would facilitate "important retuning flexibility and efficiency."[15]

As detailed *infra,* should the FCC "clarify" the Order as requested by Nextel, it not only will jeopardize the ongoing existence of both Companies, but will eliminate any 800 MHz ESMR competition other than in Southern's market areas. It will eliminate the only ESMR operator in the State of Montana since neither Nextel nor Nextel Partners' has ever offered service there. That result would be entirely inconsistent with the reasoning in the Order, with the Commission's commitment to treat all 800 MHz incumbents equitably,[16] and with the agency's overarching responsibility to promote the public interest. The Companies urge the FCC to reject Nextel's "clarification" request.

II. DISCUSSION

A. The ESMR Relocation Options Reflect an Express FCC Decision that Cannot be Altered By "Clarification"

1) The Commission Adopted the ESMR Relocation Options Because It Recognized the Interference Potential of all ESMR Systems

Although Nextel and Southern were the most vocal ESMR operators in this proceeding, the Order correctly recognized that they were not the only 800 MHz licensees operating cellularized systems.[17] AIRPEAK and Airtel each had purchased and begun deployment of a Harmony network, an iDEN-derivative, digital, switched, integrated dispatch and mobile telephone technology developed by Motorola, before this proceeding was initiated. Harmony

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[14] *See, e.g., Melody Music v. FCC,* 345 F.2d 730 (D.C.Cir.1965); *Telephone and Data Systems v. FCC,* 19 F.3d 655 (D.C.Cir. 1994); *Telephone and Data Systems v. FCC,* 19 F.3d 42 (D.C.Cir. 1994).
[15] Nextel *Ex Partes* at p 2 and Slide 6.
[16] R&O at ¶ 2.
[17] R&O at ¶ 159.

uses iDEN base station transmitters and subscriber units and, like iDEN, is designed to be deployed in a cellular-like configuration.

AIRPEAK has implemented its Harmony network in a number of markets including, for example, Reno, NV, Spokane and Richland/Kennewick WA, Eugene/Medford, OR, and Albuquerque/Santa Fe, NM. Airtel operates throughout the State of Montana. The Companies' networks use a combination of site-specific licenses and EA authorizations acquired by auction from the FCC on channels interleaved with those of public safety, business, industrial/land transportation and traditional SMR users.[18]

The language in the Order leaves no question that the FCC recognized the interference potential of non-Nextel ESMR systems and made a conscious determination to encourage their relocation to the ESMR band. This approach is entirely consistent with the Commission's objective to reduce or eliminate interference before it occurs rather than attempting to fix it after the fact. The FCC noted:

> ...there is no evidence that these [Southern] operations currently cause interference to other 800 MHz band licensees. However, we can foresee that Southern LINC, in order to meet increasing subscriber demands, may desire to deploy "low-site" cells which could be a source of interference to public safety and other non-cellular licensees. The interference potential is heightened because many of Southern LINC's channels are immediately adjacent to channels used by non-cellular licensees in the interleaved portion of the band.[19]

The Companies are in that same situation and present the very interference potential that the FCC is attempting to resolve in this proceeding. They operate cellular architecture systems on interleaved channels in the 800 MHz band. In fact, AIRPEAK already has experienced

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[18] AIRPEAK was one of the few successful non-Nextel bidders in Auction 16 for "upper 200" 800 MHz spectrum. It subsequently entered into a frequency exchange with Nextel in which AIRPEAK assigned its "upper 200" spectrum to Nextel in exchange for Nextel site-specific authorizations in the 811-815/856-860 MHz band. It did so because the rules permitted channels in either band segment to be deployed in a cellularized system configuration. Having already deployed its Harmony network, AIRPEAK would never have agreed to that swap if the "lower 80" channels it received in exchange would not be useable in the network.

[19] R&O at ¶ 160.

interference with local government operations in the States of Nevada and Washington. The problems have been resolved, but their frequency and severity will increase as both AIRPEAK and public safety licensees continue deploying 800 MHz facilities in those states. Airtel has not had interference problems in Montana, but there are relatively few incumbents and no public safety entities using 800 MHz in the state at present. In both cases, the interference potential will increase over time for the same reasons recognized specifically by the FCC in respect to Southern's operations.

In fact, Section C(2)(d) of the Order entitled "Relocating ESMR Operations in 800 MHz Band" specifically referenced both Airtel and AIRPEAK (previously Nevada Wireless, LLC) as operating Harmony systems, and noted that some such networks (presumably AIRPEAK's) already had experienced interference problems with public safety systems.[20] Even when discussing Southern's situation, the Commission made it clear that Southern was only one of several systems that presented interference potential. "We therefore believe that the overall interference environment at 800 MHz would improve were we to allow licensees **such as Southern LINC** to relocate their systems to the ESMR portion of the band."[21] Having concluded that, "As a general proposition, ESMR systems operating in the 817-824/862-869 MHz segment of the band are less likely to cause interference than ESMR systems operating in the interleaved portion [below 862 MHz],"[22] the FCC adopted the three relocation options described *supra* for the express purpose of providing incentives for ESMR licensees to relocate to the ESMR band.[23]

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[20] R&O at ¶ 159.
[21] *Id.* at ¶ 161 (emphasis added).
[22] *Id.*
[23] *Id.* at ¶ 162.

The Commission's strategy was well-conceived. There is a powerful incentive for an entity operating an ESMR network to elect option one and relocate to the ESMR band since options two and three would relegate its system to secondary status with continued exposure to being shut down if an interference complaint was lodged against it. That status is entirely untenable for a commercial network, indeed for virtually any system. Because it would not be fiscally prudent to continue financing a system that has only secondary status, particularly in light of the interference history in this band, the Companies would have no realistic opportunity to pursue their business plans if they elected options two or three.

Yet that would be the result of Nextel's proposed "clarification." The Companies would be deprived of their first option. Instead they would be left with the Hobson's choice of remaining on their existing interleaved channels or being relocated to the "Guard Band" between 816-817/861-862 MHz, despite the very real potential for interference in either band segment. Indeed, it is difficult to reconcile the proposed "clarification" with Nextel's recent Opposition to Motion for Partial Stay in which it expressly recognized the FCC's "strong public interest justification for distinguishing between licensees...which operate non-cellular H-SMR facilities, from cellular ESMR licensees such as Nextel and Southern LINC."[24]

Nextel presumably acknowledges that the Companies (and perhaps others) are properly classified as ESMRs, since otherwise there would be no need for an ESMR relocation provision at all, much less a "clarification" of that provision.[25] Nextel has stated such systems "...pose a significant interference risk to high site public safety, SMR and private wireless systems...."[26] Thus, Nextel must anticipate that the Companies' systems will not satisfy the secondary, non-

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[24] *Opposition of Nextel Communications, Inc to Motion for Partial Stay,* WT Docket No. 02-55, at p. 7 (filed Nov. 26, 2004) ("Opposition").

[25] The ESMR relocation options do not apply to Nextel, Nextel Partners or Southern, since the spectrum to which they will relocate is defined in the Order.

[26] *Id.*

interference conditions applicable to the spectrum Nextel has recommended for their use and ultimately will be forced out of operation.[27] That result presumably would be advantageous for Nextel, since it would eliminate any 800 MHz ESMR competition other than in Southern's area. However, it would be entirely inconsistent with the FCC's commitment to adopt a solution that "...is both equitable and imposes minimum disruption to the activities of all 800 MHz band users...."[28] It would leave areas such as Montana, in which neither Nextel nor Nextel Partners ever have provided service, without access to the integrated service offerings provided by the iDEN/Harmony technology. A "clarification" or *sua sponte* modification to implement Nextel's request would contradict the clear language and intent of the Order and would not withstand judicial scrutiny.

2) <u>The Commission Recognized that ESMR Relocation Options Could Require Nextel to Share the ESMR Band with Other Licensees</u>

Adoption of Nextel's "clarification" would leave Nextel in the enviable position of holding all spectrum in the ESMR band except in those areas in which it will need to share with Southern. But that result is expressly contradicted by the express language in the Order that contemplated Nextel sharing the band with other ESMRs. The Order stated:

> Parties are hereby put on notice that disputed matters concerning ESMR channels **in any area of the country,** including the area shown in Appendix G [in which Nextel and Southern will share ESMR spectrum] may be resolved by the Commission making a *pro rata* distribution of the ESMR channels.[29]

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[27] It has been suggested that Nextel might be willing to provide filters to ESMRs operating on a secondary basis to reduce the likelihood of interference. Even if Nextel was prepared to provide filters in perpetuity as the Companies continue to expand their operations, which is doubtful, it would not solve the irreconcilable, real world problem of financing systems that have only secondary status. Indeed, if the use of filters was an adequate solution, Nextel itself could have remained in the bands they are recommending for AIRPEAK's and Airtel's use.

[28] R&O at ¶ 2.

[29] *Id.* at ¶ 168 (emphasis added).

Thus, it is clear the FCC did not intend a reduction in Nextel's ESMR spectrum holdings to be a bar to election of the first ESMR relocation option.[30] Attachment A compares the spectrum positions of the Companies and Nextel in the EAs in which the Companies have elected to move to the ESMR band and calculates what Nextel would retain under the rules set out in the Order. Given the relatively limited populations in most of those markets, it is apparent that the *de minimis* impact on Nextel's spectrum holdings will not compromise its ability to maintain a high quality of service. It surely is within the parameters of the shortfalls anticipated by the FCC.

B. Nextel is Estopped From Opposing the Relocation of Other ESMR Systems into the ESMR Band

Indeed, it is extraordinary that Nextel would suggest its ESMR "clarification" since to do so is contrary to principals of law and equity according to Nextel itself. Only last week, Nextel took the position that Skitronics, LLC ("Skitronics") could not oppose the 800 MHz rebanding plan adopted in the R&O, because it was essentially identical to the Consensus Plan proposal that Skitronics previously had endorsed.[31] Nextel admonished Skitronics that "courts have invoked their equitable powers to estop parties from pressing a claim that is inconsistent with a position taken by [a party] either in a prior legal proceeding or in an earlier phase of the same legal proceeding."[32] It explained that the doctrine is intended to safeguard the integrity of judicial and administrative proceedings and to prevent manipulation of the system.[33]

We agree: that same doctrine of estoppel should be applied to Nextel's recommendation because Nextel previously took a directly contrary position in this proceeding. Nextel was an active member of the Consensus Parties and a prime author of many of the filings submitted by

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[30] In fact, the FCC specifically observed that Nextel had 900 MHz spectrum to offset any shortfall and also would be receiving a 10 MHz allocation at 1.9 GHz. *Id*

[31] Opposition at pp 4-5.

[32] *Id.* citing *Alternative Systems Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004).

[33] *Id.*

that group. On February 25, 2003, the Consensus Parties filed Reply Comments in which they addressed the issue of non-Nextel EA licensee relocation.[34] At that time, Nextel and other Consensus Parties took the following position:

> The Supplemental Comments proposed that non-Nextel EA licensees operating in Channels 1-120 be relocated to comparable existing Nextel EA licensees [sic] in Channels 121-400. Several non-Nextel EA licensees raised concerns with this proposal. Nevada Wireless [now AIRPEAK], for example, supported the Consensus Plan but noted, however, that its system uses a cellular architecture and that its site-specific and EA-licensed facilities need to be relocated to the cellular block at Channels 401-720.
>
> **The Consensus Parties agree that an incumbent EA licensee offering interconnected telephone service employing a low-power, low-site cellular architecture should be relocated to the cellular channel block, with its relocation costs covered by the Relocation Fund.** In other words, a non-Nextel EA licensee which has deployed service over a large geographic area with (1) more than five overlapping interactive sites featuring hand-off capability; and (2) sites with antenna heights of less than 100 feet above ground level on HAATs of less than 500 feet; and (3) sites with more than 20 paired frequencies, could be relocated to the cellular block.[35]

Nextel's recent recommendation on this issue cannot be reconciled with the position it took previously as part of the Consensus Plan. Thus, just as it has urged the FCC to estop Skitronics from pursuing its current position because of earlier, conflicting statements, Nextel must be estopped from requesting a "clarification" that would preclude entities such as AIRPEAK and Airtel from relocating to the ESMR band – a position previously supported by the Consensus Parties including Nextel.

C. The FCC Should Clarify to Which ESMR Channels Licensees May Relocate

The Order clearly permits ESMR licensees to elect relocation to the ESMR band. However, the document is silent as to where within that band these systems should be permitted

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[34] In light of the almost 2,500 filings in this proceeding, many of which are voluminous and complex, it is not surprising that the FCC was under the mistaken impression that the Consensus Parties had not addressed this issue. R&O at ¶ 160.

[35] Reply Comments of the Consensus Parties, WT Docket No. 02-55 (filed Feb. 25, 2003) (emphasis added).

to move. In a previous *ex parte* filing in this proceeding, AIRPEAK and Airtel requested the FCC to clarify that the rules permit them to select any channels within that band provided their choice: (1) did not increase the cost of retuning their systems; (2) did not delay the retuning process; and (3) did not adversely impact the ongoing operations of either Nextel or public safety entities.[36]

This issue has particular significance for the Companies because of the markets in which they operate and because of their obligation to certify to the Transition Administrator that the relocation funds requested "are the minimum necessary to provide facilities comparable to those presently in use."[37] Both AIRPEAK and Airtel serve primarily tertiary and rural markets. In many of these lightly populated areas, the public safety community has not yet deployed any systems on the NPSPAC spectrum between 821-823/866-869 MHz. Deployment in other markets has been minimal to date. By contrast, Nextel is constructed and providing service on spectrum that includes 817-821/862-866 MHz in a number of those same areas.

It clearly would be faster, less complicated, and less costly to relocate the Companies' facilities to vacant NPSPAC spectrum rather than to channels Nextel currently occupies. A swap to unused NPSPAC frequencies could begin immediately once the rules are effective. Since the Companies add subscriber units and infrastructure daily, accelerating the relocation timing would reduce the overall cost since there will be less equipment that needs to be touched. Relocating to vacant NPSPAC channels also would save money by eliminating the need for Nextel to modify its facilities or reprogram its subscriber units to clear channels for use by the Companies.

The costs incurred in relocating these systems is not simply a matter to be negotiated by Nextel and the Companies. Incumbents are required to certify as to the cost-necessity of their

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[36] *See* n. 4.
[37] R&O at ¶ 198.

relocation proposals, because the Federal Treasury is entitled to the difference between the valuation the FCC has placed on the 1.9 GHz spectrum being assigned to Nextel and its rebanding expenditures plus the value of the spectrum it is relinquishing.[38] That certification is made to the Transition Administrator ("TA") who is charged with managing the 800 MHz rebanding and associated funding process.[39] If the Companies are not permitted to relocate to unoccupied NPSPAC channels where available, it is doubtful they will be able to certify to the TA that their rebanding costs are the minimum needed to secure comparable facilities and, therefore, that the Federal Treasury is not being deprived of funds rightly due it. For these reasons, the Commission should codify in its rules that the ESMR relocation options include the entire ESMR band, including vacant NPSPAC spectrum, as long as moving to that spectrum satisfies the three criteria specified *supra*.

III. CONCLUSION

Nextel's request to "clarify" away the one ESMR relocation option that will both permit non-Nextel ESMR licensees to remain in operation and protect against interference to 800 MHz incumbents must be rejected. It is inconsistent with the plain language of the Order, with the FCC's obligation to accord consistent treatment to similarly-situated entities, and with the public interest. Further, the Commission should confirm that vacant NPSPAC spectrum can be used for

[38] *Id.* at ¶ 330.
[39] *See* n. 5.

ESMR relocation, subject to the three conditions suggested *supra*, and it should codify that decision to provide clear guidance to the TA.

Respectfully submitted,

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ATTACHMENT A

COMPARATIVE SPECTRUM POSITIONS*

	Nextel			Airtel/ AIRPEAK	
Market	800	900	1.9	800	Nextel Total
BEA144	14.00	4.25	10.00	4.20	24.05
BEA145	14.00	4.25	10.00	4.60	23.65
BEA146	14.00	4.25	10.00	3.75	24.50
BEA094	14.00	3.25	10.00	2.50	24.75
BEA136	14.00	4.00	10.00	1.25	26.75
BEA138	14.00	4.00	10.00	2.50	25.50
BEA139	14.00	4.25	10.00	5.00	23.25
BEA147	14.00	4.25	10.00	3.75	24.50
BEA148	14.00	3.00	10.00	2.50	24.50
BEA151	14.00	4.50	10.00	6.45	22.05
BEA153**	14.00	3.25	10.00	3.70	23.55
BEA154	14.00	3.25	10.00	2.50	24.75
BEA155	14.00	4.25	10.00	1.25	27.00
BEA156	14.00	4.25	10.00	2.50	25.75
BEA157	14.00	4.25	10.00	3.75	24.50
BEA162**	14.00	4.50	10.00	0.25	28.25
BEA163**	14.00	4.50	10.00	0.25	28.25
BEA164**	14.00	4.50	10.00	3.30	25.20
BEA165	14.00	4.50	10.00	0.30	28.20
BEA166	14.00	4.50	10.00	3.05	25.45
BEA167**	14.00	4.50	10.00	0.75	27.75
BEA168	14.00	4.25	10.00	2.75	25.50
BEA169	14.00	4.25	10.00	3.75	24.50
BEA171	14.00	4.75	10.00	5.00	23.75

*In MHz

** Markets with populations of more than 1,000,000.