

An additional advantage of Nextel's ESMR block licensing proposal is that it would permit ESMR operators to designate a group of control channels from the contiguous ESMR channel block. Alternatively, the Commission should set aside a group of frequencies that would be used exclusively as control channels for ESMR systems to ensure that ESMR users have equipment compatibility and roaming ease equivalent to that of competing cellular services.

Nextel's experience with its ESMR network indicates that a minimum of 45 channels are required for optimal control channel purposes.<sup>57/</sup> If the Commission does not adopt Nextel's proposal to establish a contiguous block of channels for ESMR operations, Nextel requests that the Commission designate the frequencies listed in Figure 2 as nationwide ESMR control channels. These have been selected based on current ESMR licensing as the most desirable channels for efficient control channel operations.

D. Equal Employment Opportunity

Nextel supports the application of EEO rules to Part 90 operators reclassified as CMRS providers at the end of the mandated three-year transition period. Such application will further assist the achievement of regulatory symmetry.

**VI. OTHER LICENSING ISSUES**

A. Construction and Operational Requirements

To ensure that the spectrum is being utilized effectively, the Commission must require all CMRS licensees to construct and operate

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<sup>57/</sup> More control channels are required by the ESMR network than a cellular network because the digital SMR network has additional advanced services.

their systems in a timely fashion. Instead of simple construction deadlines, however, the Commission should adopt coverage benchmarks similar to those imposed upon PCS licensees. In the Broadband PCS Order,<sup>58/</sup> the Commission required that all PCS licensees offer service to "one-third of the population in each market area within five years, two-thirds within seven years, and 90 percent within ten years of being licensed."<sup>59/</sup> Any PCS licensee's failure to meet these benchmarks results in forfeiture of the license.

Similar coverage requirements should be enacted for ESMR systems. This would promote broad coverage within a service area and promote the development of ubiquitous service. ESMR licensees already have strong incentives to extend and build out systems expeditiously to compete with other CMRS providers, including PCS and cellular. Thus, to achieve and ensure regulatory parity among PCS providers, the Commission should adopt a geographically-defined ESMR block license, as discussed above, and impose similar phased coverage requirements on ESMR systems. This is consistent with the Budget Act and would protect the public interest by ensuring timely and efficient spectrum use for the benefit of the broadest range of consumers.

B. Transferability

The FNPRM seeks comment on whether CMRS licensees should be allowed to assign or transfer unconstructed licenses or

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<sup>58/</sup> See Note 28, supra.

<sup>59/</sup> Id. at 134.

systems.<sup>60/</sup> Current SMR rules prohibit assignment or transfer of unconstructed systems. Cellular systems do not face a similar prohibition for not having constructed one or more of their 416 channels per market. Regulatory symmetry requires similar treatment for similar services.

Nextel submits that ESMR licensees should not face restrictions on assignment or transferability based on construction status. The Commission should encourage aggregation of channels on the SMR band for spectrum-efficient, multi-feature service. Such aggregation promotes competition with cellular providers. In addition, CMRS providers obtaining authorizations via auction, as well as existing cellular providers, have already demonstrated the seriousness of their intent to operate by making their capital investment; those licensees should similarly not be hindered in transfer and assignment of their systems.

Thus, the Commission should permit ESMR block licensees to transfer their systems without restriction, provided the licensee complies with the prior Commission approval requirements of Section 310 of the Act. Permitting the transfer of ESMR licenses will facilitate the consolidation of systems, particularly those within a single MTA, and thereby increase the economies of scale of ESMR operators and improve the efficiency of service provided to the public.

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<sup>60/</sup> See FNPRM at paras. 144-146.

C. Clarification of Section 90.137 Authority

The FNRPM sets forth the Commission's desire to promote wireless competition and follow the Congressional mandate for regulatory parity. Current Commission rules hamper ESMR stations from commencing commercial service at new transmitter sites to meet public demand. ESMR licensees must normally first file an FCC Form 574 application for a new site and wait for Commission review and approval of that application before operating from that new site; cellular system operators, on the other hand, may commence operation upon filing an FCC Form 401 pursuant to Section 22.903 of the Commission's Rules.

Nextel's ESMR block licensing proposal, as discussed above, would alleviate this ESMR disability by permitting all CMRS licensees to construct and modify systems within the borders of an MTA without prior Commission approval. The Commission has already proposed a similar operational scheme for cellular operators in its NPRM to revise Part 22 of the Commission's Rules.<sup>61/</sup> Pending the ESMR block licensing, the Commission should provide ESMR licensees authority to commence commercial operation upon "notice" filing as allowed to cellular licensees in Section 22.903 of the Commission's Rules.

In addition, the Commission should expand the authority contained in Section 90.137 of the Commission's Rules to allow commercial operation of systems under licenses granted pursuant to

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<sup>61/</sup> Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, released May 20, 1994, at paras. 7-9 (the "Part 22 NPRM").

that rule.<sup>62/</sup> This would authorize ESMR licensees to conduct the following activities pursuant to their Section 90.137 authorizations: 1) conduct testing and optimization activities; 2) initiate commercial service as systems become constructed; and 3) add additional sites to operational systems.

These changes should be made effective immediately. The three-year transition period for private radio licensees subject to CMRS rules only applies to new burdens placed on those licensees. Rule changes for transitioning must be implemented by the August 10, 1994 statutory deadline.

D. Application Fees

The FNPRM proposes to standardize the FCC filing fee structure for applications filed by Part 90 and Part 22 applicants by imposing the Part 22 cellular fee of \$230.00 per application on all CMRS applicants.<sup>63/</sup> Under current SMR licensing processes, this would place excessive costs on ESMR entrepreneurs who are not assigned an exclusive use frequency block.

For example, an ESMR licensee seeking to construct a base station must file an application that specifies the specific

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<sup>62/</sup> Section 90.137 of the Commission's Rules permits multiple base stations to be operated for indeterminate periods of time at temporary locations under a single call sign, provided that the licensee files applications for permanent authority for base stations that will remain at the same location for more than one year. The Commission invited Nextel to apply for such authority. See In Re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 at para. 20, recon. den., 6 FCC Rcd 6989 (1991).

<sup>63/</sup> FNPRM at para. 115.

frequencies to be used at that site. Typically, the ESMR licensee requests to license all the frequencies from that ESMR system's channel pool that are available at that site. In contrast, a cellular licensee obtains authorization to use all 416 cellular channels with each cell site application. If, an ESMR licensee expands its channel pool by acquiring additional SMR stations, it must file another application at each previously licensed site to add these channels. Further, the Commission has proposed to eliminate licensing for any cellular base stations that do not constitute part of the CGSA border, while an ESMR system must continue to license all of its sites.<sup>64/</sup>

Thus, the proposed revised application fee would impose much higher costs on ESMR carriers with significantly less spectrum than other CMRS carriers. To avoid this regulatory imbalance and create parity, the Commission should adopt Nextel's ESMR block licensing concept, as discussed above. Pending action on this proposal, Nextel urges retention of the \$35.00 fee per application for SMR and ESMR applicants.

E. Regulatory Fees

The FNPRM also proposes to apply a uniform "regulatory fee" of \$60.00 per thousand subscribers on all CMRS licensees. While Nextel generally favors uniformity of fees, the regulatory fee imposed on ESMR carriers should be phased in over time. There is at present only one commercially operating ESMR system in the country. As ESMR is still in the corporate start-up phase, ESMR

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<sup>64/</sup> See the Part 22 NPRM at paras. 7-9.

operators are and will for some time experience large operating losses. In addition, in evaluating the parity impacts of the proposed regulatory fee, the Commission should recognize that existing private radio subscribers use dispatch services rather than mobile telephone service more than 90% of the time. Such users have significantly lower monthly bills, resulting in the proposed fees being a higher percentage of an SMR's operating revenues.

As a private carrier subject to regulation as a PMRS provider until August 10, 1996, the new CMRS annual regulatory fee would not apply to Nextel's ESMR operations until that time. After that, Nextel suggests that the Commission phase in the fee, perhaps at a level of \$20.00 for the first three years, \$40.00 for the next three years, and then \$60.00 thereafter. This approach would ultimately achieve full regulatory parity among CMRS providers for fee purposes while mitigating the disproportionate impact of such fees on new entrant businesses.

F. Removal of Miscellaneous Outdated Regulatory Inequities

Three additional outdated rule distinctions still apply to ESMR systems, but do not apply to cellular systems. The Commission squarely addressed the first such distinction, end user eligibility, in the FNPRM.<sup>65/</sup> Nextel supports the Commission's proposal to eliminate end user eligibility limitations applicable to Part 90 CMRS providers so that such providers may serve the

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<sup>65/</sup> See FNPRM at paras. 74-75.

public without restriction. The Budget Act mandates the elimination of such distinctions for "substantially similar" services.

The Commission also addressed the second distinction, permissible uses of mobile radio systems, in the FNRPM.<sup>66/</sup> The Commission has proposed eliminating "the Part 90 prohibition on common carrier service as it applies to SMR...."<sup>67/</sup> Nextel supports this proposal. Nextel also supports deletion of the outdated restrictions on purpose of communications and duration of messages which have no counterpart in Part 22 of the Commission's Rules. If ESMR systems and cellular systems compete for the same customers, the distinctions no longer make sense.

The Commission did not address the third distinction, end user licensing, in the FNPRM. Pursuant to the Order in Docket 92-78,<sup>68/</sup> relatively few SMR end users still must obtain separate licenses. Cellular subscribers, however, face no end user licensing requirements whatsoever. Nextel is not aware of any problem arising from cellular customers not being subject to licensing requirements. Nextel therefore submits that SMR customers should similarly be free of such restrictions.

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<sup>66/</sup> Id. at paras. 76-79.

<sup>67/</sup> Id. at para. 78.

<sup>68/</sup> Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, 7 FCC Rcd 6344 (1992).

## VII. CONCLUSION

A CMRS spectrum cap should not be applied to ESMR providers since they are new market entrants with no wide-area license, no defined geographic service area, and no contiguous channel blocks. Nonetheless, if the Commission decides to impose one, the Commission must recognize that the spectrum allocated to all CMRS providers is not equivalent and cannot be compared on a one-to-one basis. ESMRs are allocated spectrum on a non-exclusive, non-contiguous basis while cellular and PCS have been allocated spectrum in contiguous broadband blocks of exclusive-use channels. ESMR operators must comply with an antiquated allocation methodology originally intended for high-tower, high-power dispatch services. SMR spectrum assignments result in significantly more complicated operational conditions than those that exist for cellular and PCS. The Commission, therefore, cannot fairly or equitably account for ESMR spectrum on a one-to-one basis in comparison to cellular and PCS spectrum.

Regulatory parity among all CMRS providers requires that the Commission create a contiguous channel, exclusive use spectrum block for ESMR operators. This ESMR block is readily available in the 800 MHz SMR spectrum at channels 401-600 -- those channels allocated primarily to SMR services. ESMR spectrum blocks should be assigned according to MTA-defined markets. The clearing of that spectrum block can be achieved through the retuning of traditional SMR operators located therein, a process that would require little effort and little expense since these operators would be moved from

one frequency within the 800 MHz band to another frequency within that same band.

An ESMR block license is necessary to the implementation of CMRS services because it moves the Commission closer to the creation of a level playing field for all wide-area CMRS services. Like PCS and cellular, ESMR would be granted the ability to serve a Commission-defined service area, competing for customers against other CMRS providers in that area. Once operational within that service area, Nextel proposes that the Commission streamline the technical and operational rules currently applicable to ESMR. A few of the existing SMR rules are simply not applicable to the wide-area services provided by ESMR systems and therefore should no longer be applicable to ESMRs. The Commission should maintain its flexible SMR rules pertaining to emission masks and antenna height and transmitter power limits, each of which is necessary to ensure ESMR operators the flexibility they need to promote innovation and a more competitive CMRS industry.

Other licensing changes must also be made to ensure regulatory parity. These include allocating a nationwide set of control channels for ESMR systems, replacing rigid construction periods currently applicable to ESMR with coverage benchmarks similar to those imposed upon PCS licensees, eliminating license transfer restrictions, eliminating prior approval regulations for ESMR station modifications within the defined service area, and creating an equitable fee structure which accounts for the dissimilarities that will remain among CMRS providers.

All of these rule changes are required for a CMRS regulatory environment in which all providers are subject to similar treatment. Congress has mandated that the Commission make all of the changes necessary to achieve regulatory parity among all CMRS providers by August 10, 1994. Nextel asserts that the changes and proposals contained herein will fulfill Congress' goal and create a CMRS industry wherein all participants are treated equitably and fairly, and are capable of providing advanced telecommunications services to the public.

Respectfully submitted,

**NEXTEL COMMUNICATIONS, INC.**



Robert S. Foosaner  
Senior Vice President  
Government Affairs

Lawrence R. Krevor  
Director - Government Affairs

Laura L. Holloway  
General Attorney

Nextel Communications, Inc.  
800 Connecticut Avenue, N.W.  
Suite 1001  
Washington, D.C. 20006  
202 296-8111

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TABLE 1

CONTROL CHANNEL LIST

| <u>Channel</u> | <u>Frequency</u> |     | <u>Channel</u> | <u>Frequency</u> |                |
|----------------|------------------|-----|----------------|------------------|----------------|
| 321            | 859.0125         | MHz | 543            | 864.5625         | MHz            |
| 322            | 859.0375         |     | 544            | 864.5875         |                |
| 323            | 859.0625         |     | 545            | 864.6125         |                |
| 324            | 859.0875         |     | 546            | 864.6375         |                |
| 325            | 859.1125         |     | 547            | 864.6625         |                |
| 326            | 859.1375         |     | 548            | 864.6875         |                |
| 327            | 859.1625         |     | 549            | 864.7125         |                |
| 328            | 859.1875         |     | 550            | 864.7375         |                |
| 341            | 859.5125         |     | 551            | 864.7625         |                |
| 342            | 859.5375         |     | 552            | 864.7875         |                |
| 343            | 859.5625         |     | 553            | 864.8125         |                |
| 344            | 859.5875         |     | 554            | 864.8375         |                |
| 345            | 859.6125         |     | 555            | 864.8625         |                |
| 346            | 859.6375         |     | 556            | 864.8875         |                |
| 347            | 859.6625         |     | 557            | 864.9125         |                |
| 348            | 859.6875         |     | 558            | 864.9375         |                |
| 521            | 864.0125         |     | 559            | 864.9625         |                |
| 522            | 864.0375         |     | 560            | 864.9875         |                |
| 523            | 864.0625         |     | 228            | 856.6750         | Mexican Offset |
| 524            | 864.0875         |     | 229            | 856.7000         | Mexican Offset |
| 525            | 864.1125         |     | 230            | 856.7250         | Mexican Offset |
| 526            | 864.1375         |     | 231            | 856.7500         | Mexican Offset |
| 527            | 864.1625         |     | 232            | 856.7750         | Mexican Offset |
| 528            | 864.1875         |     | 233            | 856.8000         | Mexican Offset |
| 529            | 864.2125         |     | 234            | 856.8250         | Mexican Offset |
| 530            | 864.2375         |     | 235            | 856.8500         | Mexican Offset |
| 531            | 864.2625         |     | 236            | 856.8750         | Mexican Offset |
| 532            | 864.2875         |     | 237            | 856.9000         | Mexican Offset |
| 533            | 864.3125         |     | 238            | 856.9250         | Mexican Offset |
| 534            | 864.3375         |     | 239            | 856.9500         | Mexican Offset |
| 535            | 864.3625         |     | 240            | 856.9750         | Mexican Offset |
| 536            | 864.3875         |     | 429            | 861.7000         | Mexican Offset |
| 537            | 864.4125         |     | 431            | 861.7500         | Mexican Offset |
| 538            | 864.4375         |     | 433            | 861.8000         | Mexican Offset |
| 539            | 864.4625         |     | 435            | 861.8500         | Mexican Offset |
| 540            | 864.4875         |     | 437            | 861.9000         | Mexican Offset |
| 541            | 864.5125         |     | 439            | 861.9500         | Mexican Offset |
| 542            | 864.5375         |     |                |                  |                |

## CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 20th day of June, 1994, I caused a copy of the attached Reply Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

Chairman Reed E. Hundt  
Federal Communications Commission  
Room 814  
1919 M Street, NW  
Washington, D.C. 20554

Commissioner H. Quello  
Federal Communications Commission  
Room 802  
1919 M Street, NW  
Washington, D.C. 20554

Commissioner Andrew C. Barrett  
Federal Communications Commission  
Room 826  
1919 M Street, NW  
Washington, D.C. 20554

Commissioner Susan P. Ness  
Federal Communications Commission  
Room 832  
1919 M Street, NW  
Washington, D.C. 20554

Commissioner Rachalle B. Chong  
Federal Communications Commission  
Room 844  
1919 M Street, NW  
Washington, D.C. 20554

Blair Levin  
Federal Communications Commission  
Room 814  
1919 M Street, NW  
Washington, D.C. 20554

Karen Brinkmann  
Federal Communications Commission  
Room 814

1919 M Street, NW  
Washington, D.C. 20554  
Rudolfo M. Baca  
Federal Communications Commission  
Room 802  
1919 M Street, NW  
Washington, D.C. 20554

Byron Marchant  
Federal Communications Commission  
Room 826  
1919 M Street, NW  
Washington, D.C. 20554

Jane Mago  
Federal Communications Commission  
Room 844  
1919 M Street, NW  
Washington, D.C. 20554

Rosalind K. Allen  
Federal Communications Commission  
Room 832  
1919 M Street, NW  
Washington, D.C. 20554

Ralph A. Haller  
Chief, Private Radio Bureau  
Room 5002  
Federal Communications Commission  
2025 M Street, NW  
Washington, D.C. 20554

Beverly G. Baker  
Deputy Chief Private Radio Bureau  
Federal Communications Commission  
Room 5002  
2025 M Street, NW  
Washington, D.C. 20554

David Furth  
Private Radio Bureau  
Federal Communications Commission  
Room 5202  
2025 M Street, NW  
Washington, D.C. 20554

Ron Netro  
Private Radio Bureau  
Federal Communications Commission  
Room 5002  
2025 M Street, NW  
Washington, D.C. 20554

A. Richard Metzger, Jr.  
Acting Chief  
Common Carrier Bureau  
Federal Communications Commission  
Room 500  
1919 M Street, NW  
Washington, D.C. 20554

Gerald Vaughn  
Common Carrier Bureau  
Federal Communications Commission  
Room 500  
1919 M Street, NW  
Washington, D.C. 20554

John Cimko  
Mobile Service Division  
Federal Communications Commission  
Room 644  
1919 M Street, NW  
Washington, D.C. 20554

Terry Fishel  
Chief, Land Mobile Branch  
Licensing Division  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA 17325

Alan R. Shark  
President  
American Mobile Telecommunication  
Association  
1150 - 18th Street, NW, Suite 250  
Washington, D.C. 20036

Elizabeth Sachs  
Lukas, McGowan, Nace &  
Gutierrez  
Suite 700  
1819 H Street, NW  
Washington, D.C. 20006

Mary Broomer  
Mike Kennedy  
Joe Vestel  
Motorola, Inc.  
Suite 400  
1350 Eye Street, NW  
Washington, D.C. 20005

Mark Crosby  
ITA, Inc.  
Suite 500  
1110 N. Glebe Road  
Arlington, VA 22201

Alan Tilles  
Meyer, Faller, Weisman &  
Rosenberg  
Suite 380  
4400 Jennifer Street, NW  
Washington, D.C. 20015

Michael Carper  
General Counsel  
OneComm  
Suite 500  
4643 S. Ulster Street  
Denver, CO 80237

Bill DeKay  
Dial Page  
Suite 700  
301 College Street  
Greenville, SC 29603-0767

Russell H. Fox  
Gardner, Carton & Douglas  
Suite 900, East Tower  
1301 K Street, NW  
Washington, D.C. 20005

  
Rochelle L. Pearson