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JUL 11 1994

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

In the Matter of)
)
Implementation of Sections 3(n)) GN Docket No. 93-252
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

In this proceeding, the Federal Communications Commission (the "Commission") sought comments on modifying its rules and regulations to achieve regulatory parity among providers of Commercial Mobile Radio Services ("CMRS"). In the Omnibus Budget Reconciliation Act of 1993, Congress mandated that these rule revisions be adopted by August 10, 1994 so that carriers reclassified from private mobile service to CMRS would have two years -- until August 10, 1996 -- to conform their operations, marketing, strategic plans and services to the new CMRS regulatory requirements.

To achieve regulatory parity among CMRS providers, the Commission must create a contiguous channel exclusive use spectrum block for Enhanced Specialized Mobile Radio ("ESMR") operators assigned on a Major Trading Area ("MTA") basis, as detailed in Nextel Communications, Inc.'s Comments and refined herein. This would enable ESMRs, like PCS and cellular, to serve a Commission-defined service area. It would enable ESMRs to utilize additional spectrum efficient technologies requiring a contiguous spectrum block. It would also permit licensing and operational simplifications that would reduce regulatory burdens on both ESMR licensees and the Commission.

Where there are multiple eligible ESMRs in an MTA, the Commission would not issue an ESMR block license until the parties reach a resolution permitting issuance of a single ESMR block license. The ESMR block licensee would then clear the spectrum

through retuning traditional SMR operators located therein to other comparable 800 MHz private radio frequencies at its expense.

Unfortunately, most of the comments did not address the specific technical, operational and licensing rule revisions proposed by the Commission. Commenters with established services and dominant market power seek instead to handicap potential competitors and to solidify their market share at the expense of competition. They repeat the mantra of "regulatory parity" while ignoring the long-standing licensing and spectrum assignment disadvantages of former private land mobile licensees as well as the advantages of their own dominant competitive positions.

A general CMRS spectrum cap was proposed in this proceeding. There is no basis for applying any spectrum cap to ESMR licensees. A spectrum cap is intended to constrain excessive spectrum aggregation by entities with dominant market power or to curtail unlimited entry in a new service. The Commission's recent decision limiting cellular eligibility for Personal Communications Services ("PCS") promotes competition by constraining excessive PCS spectrum aggregation in a new service by dominant carriers. Superficial notions of regulatory parity do not justify a comparable cap for ESMR licensees -- just because they may offer similar services -- in the absence of comparable market power.

Finally, the Commission should maintain certain existing rules for ESMR systems, such as the current antenna height and power limits, which provide ESMR licensees essential flexibility to promote innovation and a more competitive CMRS industry.

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Nextel Communications, Inc. ("Nextel"), pursuant to Section 1.415 of the Federal Communications Commission's ("Commission") Rules, hereby respectfully submits its Reply Comments in the above-captioned proceeding. These Reply Comments respond to the Comments filed on June 20, 1994 in response to the Further Notice of Proposed Rule Making ("FNPRM") adopted on May 20, 1994.^{1/}

In its Second Report and Order in this proceeding (the "CMRS Order"),^{2/} the Commission established a comprehensive new regulatory structure for the mobile services including a new category of "Commercial Mobile Radio Service" ("CMRS"). This action was taken pursuant to the Omnibus Budget Reconciliation Act

^{1/} FCC 94-100, released May 20, 1994.

^{2/} Implementation of Sections 3(n) and 332(c) of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411 (1994), erratum, Mimeo No. 92486, released March 30, 1994 ("CMRS Order").

of 1993 ("the Budget Act"),^{3/} which amended the Communications Act of 1934 (the "Act"), wherein Congress required the Commission to ensure that similarly situated mobile service providers are subject to similar -- but not identical -- rules and regulations.

Congress mandated that comparable CMRS rules and regulations for reclassified private land mobile services be adopted by the Commission no later than August 10, 1994. This is essential to effectuate Congress' intention that those providers being reclassified from private mobile service to CMRS have an additional two-year period until August 10, 1996 to conform their operations, marketing and strategic and service plans to the new CMRS regulatory requirements.^{4/} As stated by Congressmen Ed Markey and Jack Fields, the Chairman and Ranking Member, respectively, of the House Subcommittee on Telecommunications and Finance,

"In enacting this new regulatory structure, Congress realized that it would be disruptive and unfair to immediately subject private land mobile radio services, such as specialized mobile radio (SMR), that are reclassified as a result of the legislation to a regulatory scheme that does not yet exist. For that reason, section 6002(c)(2) provides a three-year period during which services that are reclassified will continue to be regulated as private land mobile services. During this three-year period, the Commission is required to revise regulations now applicable to the SMR industry and those whose services become

^{3/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2)(B), 107 Stat. 312, 392 (1993).

^{4/} Section 6002(c)(2)(B) of the Budget Act provides a three-year period during which reclassified services will continue to be regulated as private land mobile services.

reclassified as commercial mobile services are given time to comply with the new requirements."5/

Therefore, to meet the Congressionally-mandated timetable, the Commission must implement by August 10, 1994 CMRS rules and regulations which permit ESMR, Personal Communications Services ("PCS"), cellular and others CMRS services to operate on a level -- although not necessarily identical -- playing field.6/

II. BACKGROUND

Established in 1987 as Fleet Call, Inc., Nextel has become one of the largest providers of Specialized Mobile Radio ("SMR") and Enhanced Specialized Mobile Radio ("ESMR") services in the United States.7/ Nextel's ESMR systems provide customers with enhanced telecommunications services including mobile telephone services, paging, private network dispatch and mobile data capabilities all in a single handset. Nextel's traditional SMR systems provide primarily fleet dispatch services. Nextel initiated full commercial service on its first ESMR system in Los Angeles earlier this year. On July 8, 1994, Nextel commenced full commercial service in San Francisco and Sacramento with expansion throughout

5/ See Letter dated January 28, 1994 from Congressmen Markey and Fields to the Honorable Reed Hundt; See also, note 66 herein and accompanying text.

6/ Section 6002(d)(3) of the Budget Act.

7/ Nextel uses the term "ESMR" throughout this pleading to refer to mobile communications systems licensed on SMR or other private radio frequencies employing digital technology in a wide-area multiple base station configuration to provide high capacity mobile telephone, dispatch and other advanced communications services.

California's Central Valley later this year.

In its Comments, Nextel asserted that achieving regulatory parity among all CMRS providers requires the Commission to create a contiguous channel exclusive use spectrum block for ESMR operators assigned on a Major Trading Area ("MTA") basis.^{8/} Cellular carriers are assigned a contiguous exclusive use spectrum block; PCS providers will also receive contiguous exclusive use spectrum assignments. Clearing the proposed ESMR block can be achieved through retuning traditional SMR operators located therein at the expense of the ESMR block licensee. A geographic area license would enable ESMRs, like PCS and cellular, to serve a Commission-defined service area, competing for customers against other CMRS providers in that area.

Nextel opposes imposition of a general CMRS spectrum cap. The Commission's stated basis for having applied a cap to cellular eligibility for PCS licensing in the cellular carrier's service area is current and absolute market dominance.^{9/} ESMR licensees are new market entrants with no market power; therefore the need for a general CMRS spectrum cap to control excess ESMR market power is nonexistent. Moreover, Nextel stressed that ESMR spectrum assignments consist of non-contiguous, non-exclusive channels, i.e., not broadband, while cellular and PCS licensees are assigned

^{8/} The ESMR block would use the 200 contiguous channels numbers 401 through 600 in the 800 MHz trunked SMR allocation.

^{9/} See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, GEN Docket No. 90-314, released October 22, 1993 ("PCS Second R&O") at paras. 104-106.

large blocks of broadband contiguous channels. Thus, all CMRS spectrum is not equivalent and cannot be compared on a one-to-one basis for spectrum cap purposes.

Nextel supported streamlining the Commission's technical and operational rules for SMR systems. Some of the current SMR rules no longer are relevant to the wide-area services provided by ESMR systems and should be revised or eliminated. In addition, some of the rules in Part 22 applicable to cellular carriers should be made applicable to similar ESMR systems. The Commission should maintain, however, its existing flexible SMR rules pertaining to emission masks and antenna height and transmitter power limits to ensure ESMR operators the flexibility necessary to promote innovation and a more competitive CMRS industry.

While Nextel and other prospective ESMR providers have made great strides in developing advanced wireless services, the reality is that ESMR is still in its infancy with less than 10,000 customers nationwide -- a 0.06 percent share of the more than 16 million customer cellular market. This has important and essential ramifications for this proceeding. While Congress mandated that carriers providing similar services should be regulated similarly, it specifically authorized the Commission to implement differential regulation of various CMRS providers to account for disparities in market power, market presence, competitive conditions and other distinguishing factors.^{10/} The Commission expressly recognized

^{10/} See H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report").

in the CMRS Order that it should forbear from certain Title II obligations for all CMRS carriers and initiated a proceeding to determine whether further forbearance is warranted for some classes or groups of CMRS providers, such as ESMR and other new market entrants.^{11/}

In considering the issues in this FNPRM, the Commission's overriding objective should be to create a flexible regulatory structure that accounts for differences among CMRS carriers and creates conditions that foster development of a diverse and competitive CMRS marketplace. In contrast, many commenters with established services and dominant market power are insidiously seeking to handicap potential competitors and solidify their market share at the expense of competition. They cry "regulatory parity" like a mantra while ignoring the long-standing licensing and spectrum assignment disadvantages of former private land mobile licensees, as well as the realities of their own dominant competitive position.

If Congress' mandate and the Commission's goal of creating a competitive and diverse CMRS marketplace is to be achieved, the Commission must not ignore the enormous market power differences among established and new entrant CMRS providers in designing the CMRS regulatory structure. The cellular market is not competitive today and will not become so in an adverse regulatory environment designed to protect incumbent dominant carriers from competition.

^{11/} Notice of Proposed Rule Making, GN Docket No. 94-33, FCC 94-101, released May 4, 1994.

III. ESTABLISHING AN ESMR BLOCK LICENSE IS INDISPENSABLE TO CREATING COMPARABLE LICENSING RULES AND PROCEDURES FOR CMRS PROVIDERS OFFERING SIMILAR COMPETING SERVICES

- A. Station-by-station licensing of ESMR systems is outdated, inefficient and creates regulatory disparity with other CMRS services

In the FNPRM, the Commission sought comment on whether channel assignment rules for ESMR systems should be revised to allow for licensing on a wide-area, multi-channel basis comparable to that used for the cellular and PCS services. A wide-area license allowing ESMR operators exclusive use of a contiguous block of channels within a defined geographic area is essential for regulatory parity. A geographic coverage area, as Southwestern Bell Corporation ("Southwestern Bell") stated in its Comments, is "one of the single most critical selling points for wireless carriers."^{12/} This critical component of wide-area services should therefore be equally available to PCS, ESMR and cellular licensees. A wide-area ESMR license would provide a much more efficient and streamlined licensing process, permitting more rapid and effective deployment of advanced telecommunications services to the public.

Commenters addressing this issue voice strong support for an ESMR wide-area license.^{13/} For example, Pittencrieff calls the

^{12/} Comments of Southwestern Bell Corporation ("Southwestern Bell"), filed June 20, 1994 at 9.

^{13/} See Comments, filed June 20, 1994, of the Personal Communications Industry Association ("PCIA"), Pittencrieff Communications, Inc. ("Pittencrieff"), the American Mobile Telecommunications Association ("AMTA"), Geotek Communications, Inc. ("Geotek"), WJG Maritel Corporation ("WJG"), RAM Mobile Data USA Limited Partnership ("RAM Mobile"), Paging Network, Inc.,

modification of wide-area SMR channel assignment and service area regulations "an absolute requirement to facilitate the conversion from private carrier to commercial mobile radio service provider."^{14/} AMTA stated that because current SMR licensing rules do not allow wide-area licensees to obtain geographic licenses or contiguous blocks of spectrum, ESMRs are at a considerable disadvantage to cellular.^{15/}

RAM Mobile's Comments highlight the procedural burdens imposed upon Part 90 licensees attempting to create an ESMR-type wide-area system through station-by-station licensing. RAM Mobile states it has filed over 7,000 applications, an average of six each day, to enable it to make the modifications and adjustments necessary to create a wide-area system under the Part 90 rules.^{16/} Similarly, Nextel has had to file approximately 3,000 license applications over the last three years for its ESMR systems. When compared to the single license granted to cellular for a similarly-structured system, the disparity between the two licensing procedures is evident. Rules requiring prior per-site licensing cause significant regulatory delays and additional burdens not imposed upon cellular systems. A wide-area ESMR license is needed to achieve comparable regulation with cellular giving ESMRs the

National Association of Business and Education Radio ("NABER"), and Air Spectrum III.

^{14/} Comments of Pittencrieff at p. 5.

^{15/} Comments of AMTA at p. i.

^{16/} RAM Mobile at p. 6.

ability to design, construct, and operate wide-area systems in an effective and efficient manner.

In an earlier proceeding, the Commission tentatively concluded that it should establish a wide-area, geographically-defined license for ESMR-type systems on an MTA basis.^{17/} No commenter has opposed creation of such a license in this proceeding.^{18/} The constraints of building ESMR systems on a station-by-station basis, and the fact that ESMR operators continue to share spectrum with other operators, as discussed below, deny ESMRs regulatory parity and place them at a distinct competitive disadvantage.^{19/}

In addition, the existing ESMR licensing regime has led to a "goldrush" of applications for 800 MHz systems -- many of which have been filed by speculative parties hoping to "cash in" on the popularity of ESMR by selling their licenses to ESMR entrepreneurs.

^{17/} See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 8 FCC Rcd 3950 (1993) (the "EMSP Order").

^{18/} Dial Page, Inc. ("Dial Page") generally supported the wide-area licensing concept but asked that the Commission postpone its decision on the issue. Comments of Dial Page, filed June 20, 1994 at p. 7. Nextel submits that a wide-area ESMR license is an integral part of the technical and operational rules that will be applicable to CMRS providers and therefore must be completed by August 10, 1994 if the Commission is to fulfill the duties and obligations imposed upon it by Congress.

^{19/} Similarly, WJG states that its wide-area public coast station systems are unnecessarily burdened by outdated station-by-station licensing, requiring that WJG "continually update and maintain nearly 100 licensing files." Comments of WJG at p. 5. A wide-area license, WJG continues, "would relieve multi-station public coast operators from a costly and time-consuming application process now inherent in building broader coverage." *Id.* The same considerations apply to and support wide-area ESMR licensing, as discussed above.

This has created a severe backlog in the licensing process impeding both the initial licensing and subsequent growth, expansion and modification of legitimate SMR and ESMR operations. In addition, unscrupulous licensing scams have occurred necessitating action by the Federal Trade Commission and the Securities and Exchange Commission.

Despite the encumbrances on SMR spectrum created by the Commission's traditional SMR assignment rules, Nextel has aggregated sufficient spectrum and developed unprecedented efficient technologies to create the customer capacity and advanced services needed to begin competing with existing cellular communications systems. These achievements highlight the pioneering genius of Nextel's ESMR technology. Creating an ESMR block license, as discussed below, will minimize the SMR licensing disadvantages and enable ESMR carriers to bring to the public the full benefits of their advanced mobile communications services. The Commission must create an ESMR block license by August 10, 1994 to assure that reclassified private mobile radio licensees are provided the full two-year transition period mandated by Congress.

B. The Commission Can Facilitate Greater Parity Among CMRS Providers By Establishing An ESMR Block License and "Retuning" Traditional SMRs to Operate on Non-ESMR Block Frequencies

1. Nextel's ESMR Block Licensing Proposal

To conform the licensing schemes of cellular, PCS and ESMRs, to streamline ESMR application processing, and to minimize the impact of digital ESMR systems on traditional dispatch providers, Nextel proposed that the Commission establish a contiguous 10 MHz

block of 200 SMR channels -- channels 401 to 600 -- for exclusive use assigned on an MTA basis.^{20/} To clear these channels for the exclusive use of ESMR operators, Nextel proposed that existing traditional analog SMR stations in the 401-to-600 band be "retuned" to operate on the remaining channels of the 800 MHz Private Land Mobile allocation.^{21/} The retuning would occur at the option of the ESMR block licensee (but would be mandatory for traditional licensees once commenced), would require no physical relocation, could be completed with no service disruption, and would be completed at the expense of the ESMR operator.^{22/}

Nextel proposed that the Commission limit ESMR block license eligibility to licensees with an ESMR (wide-area) grant or ESMR application pending within the MTA as of August 10, 1994.^{23/} In the event that there is more than one eligible ESMR block licensee applicant for an MTA, Nextel proposed that the existing ESMR licensees in the MTA enter into a voluntary consultation period lasting no more than three months. If there is an impasse at the

^{20/} Comments of Nextel at p. 11. See also Comments of Geotek at p. 10; Comments of RAM Mobile at p. 3; Comments of Pittencrieff at p. 6; Comments of AMTA at p. 15. Different channel plans will be necessary in the Mexican and Canadian border regions to accommodate the channel allocations in these areas.

^{21/} Comments of Nextel at p. 11. This proposal is not intended to limit the ability of ESMR licensees to obtain frequencies outside the proposed ESMR block, as discussed infra.

^{22/} Retuning would provide traditional SMR licensees with spectrum having identical propagation and would in no way diminish or degrade their ability to provide the same type and quality of service.

^{23/} See Comments of Nextel at p. 17.

end of the three-month voluntary consultation period, Nextel suggested that the Commission impose a settlement on the parties dividing the ESMR block channels among the eligible ESMRs based upon a six-month average of the number of revenue producing mobiles each operator has in actual operation within that MTA.^{24/}

Upon further discussions with other ESMR industry commenters through AMTA's Digital Mobile Council, Nextel proposes the following simplification of its ESMR block licensing proposal. Specifically, the Commission should award only one ESMR block license in each MTA. If the MTA has only one qualified ESMR licensee, the Commission would grant it the ESMR block license. For MTAs with more than one eligible applicant, the licensee would be decided after negotiation among all existing ESMR licensees and bona fide applicants as of August 10, 1994. Existing ESMR licensees, and entities with ESMR applications on file with the Commission as of July 11, 1994, would be eligible for the ESMR block license upon Commission approval of the pending applications. Applicants for ESMR authorizations filed between July 11, 1994 and August 10, 1994 would have to include in their proposed ESMR systems a minimum of 84 discrete constructed and operational channels within the MTA to be eligible for the ESMR block license.^{25/} Of course, all pending applications would have to meet the definition of an ESMR (wide-area) system articulated by

^{24/} Comments of Nextel at p. 18.

^{25/} The 84 channel minimum would substantially limit speculation by requiring applicants during this period to propose bona fide ESMR systems.

the Private Radio Bureau on December 23, 1992 (the "Haller/Weisman letter") and be approved by the Commission.26/

There would be no cutoff date for negotiations among the eligible parties for an MTA ESMR block license and no reliance upon the use of "revenue producing mobiles" as a means to divide the ESMR block license among multiple applicants. Unless and until the eligible parties create a partnership, joint venture, "buyout" or other resolution of their competing applications, they could operate under their existing licenses and no ESMR block license would be awarded. Upon presenting a single qualified application, the Commission would grant that entity the ESMR block license.27/

The economic viability of ESMR systems in a competitive CMRS industry requires large numbers of frequencies over large geographic areas. Indeed, an ESMR system with a small number of frequencies would not be economically viable and likely would never be built. It is highly doubtful that any market can economically support more than one ESMR, particularly given the onset of digital cellular, the creation of multiple PCS licenses and the coming implementation of satellite-based wireless telecommunications

26/ By letter dated December 23, 1992, the Chief, Private Radio Bureau articulated the necessary criteria for granting ESMR, or wide-area, license applications. Strict application of these criteria is critical to assigning the ESMR block license to deserving applicants and to ensuring the most efficient and effective use of spectrum for public benefit. See Letter from Ralph A. Haller, Chief, Private Radio Bureau, to David E. Weisman, on behalf of the Ad Hoc Specialized Mobile Radio Industry Group.

27/ At this time, the ESMR licensee, at its discretion, could initiate mandatory retuning of existing traditional SMR licensees.

systems. In many cases, firms pursuing the ESMR initiative have already established distinct, non-overlapping service areas facilitating efficient ESMR block assignment. In most MTAs with more than one eligible ESMR block applicant, market realities will facilitate the transactional activities necessary for one applicant to emerge -- again without extensive Commission proceedings. For ESMR to be a viable competitor to multiple similar CMRS services, there should be only one ESMR licensee per MTA.

Thus, the above-described simplification of ESMR block licensing will facilitate cooperation among ESMR licensees to create effective, competitive ESMR systems. It would protect the interests of existing licensees and pending applicants, while minimizing the likelihood of a "goldrush" of speculative applications. It would eliminate the cause of 90% of the lengthy Commission ESMR processing backlog. It offers a simple, fair and equitable method for allocating ESMR block licenses among eligible applicants. It imposes no burden on the Commission since the parties themselves would have to resolve service area overlaps within MTAs, and it provides an expeditious approach to evolving from the existing self-defined ESMR licensing scheme to a geographic-based license while assuring that non-ESMR licensees are made whole. Moreover, no ESMR licensee or applicant would be disadvantaged since in the unlikely event of a continuing impasse, the Commission would take no action, issue no ESMR block license for that MTA, and simply allow the ESMR licensees in that MTA to continue operating under their existing licenses.

2. The Commission Must Adopt ESMR Block Licensing To Achieve Partial Regulatory Parity for ESMR Competitors

Nextel's ESMR block licensing and retuning proposal benefits all interested parties -- the traditional SMR operator, the ESMR operator, the Commission and the general public. Most importantly, it provides reclassified CMRS providers with a licensing scheme comparable to that of other competitive CMRS providers. The contiguous and exclusive ESMR channel assignments provided by an ESMR block license -- without interference from traditional SMR operators -- is imperative to creating regulatory parity among CMRS service providers, albeit with only a small percentage of the spectrum licensed to each cellular provider.

Under a block licensing approach, ESMRs could operate in a more comparable manner to cellular systems. There would no longer be a need for prior approval of each and every system change or for the licensing of each and every base station within the service area. The ESMR block license would permit the Commission to eliminate the 40-mile rule, loading requirements and station identification requirements for ESMR systems.^{28/} It would also

^{28/} Several parties concur with Nextel's position to eliminate the 40-mile rule and the loading requirements for ESMR or other wide-area systems. The 40-mile rule and loading requirements should be retained for traditional SMR systems. See e.g., Comments of AMTA at p. 12; Comments of The E.F. Johnson Company at p. 20; Comments of PCC Management Corp. ("PCC") at p. 9; Comments of Pittencrieff at pp. 11-12; Comments of Nextel at p. 20. Several other commenters supported eliminating the station identification requirement. See e.g., Comments of Airtouch Paging, Inc. at p. 12; Comments of Johnson at pp. 18-19; Comments of NABER at p. 34; Comments of New Par at p. 13; Comments of Pittencrieff at p. 13; Comments of RAM Mobile at p. 10.

make possible the future introduction of more spectrally efficient technologies.

For example, future generations of ESMR systems cannot employ "spread spectrum" and other advanced highly-efficient broadband technologies without access to a contiguous block of exclusive use channels. Such technologies will be available to cellular and PCS systems with contiguous broadband assignments. Regulatory parity cannot be achieved, therefore, unless ESMR systems are given the means to obtain exclusive contiguous spectrum permitting them to implement future advanced technologies necessary to compete with other CMRS systems. An ESMR block license, as described herein, would make this possible.

Nextel emphasizes that ESMR block licensing should impose no undue hardship on traditional SMR licensees. The ESMR licensee would bear the cost of the retuning, including the arrangements needed to retune customer mobile units at a time most convenient to them. In today's SMR industry, most equipment is operable on all of the frequencies within the Private Land Mobile band and will therefore require few, if any, hardware changes. Finally, the traditional SMR would likely find itself operating in a more friendly environment, away from the interference of ESMRs, as the bulk of ESMR low power operations would take place in the 401 to 600 channel block.

3. ESMR Block Licenses Should be Assigned on an MTA Basis

Assigning ESMR block licenses on an MTA basis would ensure some uniformity among CMRS services since it is similar to the geographic service areas used for PCS services. The Southern Company ("Southern") argued in its Comments that Commission-defined service areas would only be appropriate for allocating clear spectrum -- such as the Commission did with cellular and PCS spectrum.^{29/} However, by initiating a retuning process for existing traditional SMRs located within a particular spectrum block within a geographic area, Southern's concern is addressed.

Further, as the Commission has stated previously, MTAs are most appropriate for ESMRs because the MTA is:

"large enough to permit systems to re-use spectrum efficiently, ... and provide licensees the flexibility and coverage required to fulfill their customers' desires for complete coverage throughout their particular business areas."^{30/}

Moreover, Geotek argues that an MTA is "more conducive to dispatch business," which will be provided by ESMR licensees.^{31/} For those licensees who have already developed wide-area ESMR systems on a self-defined basis, the use of the MTA, according to Pittencrieff, will "prevent major modifications from having to be

^{29/} Comments of The Southern Company at 8-9.

^{30/} See EMSP Order, supra at note 16.

^{31/} Comments of Geotek at p. 10. Geotek further explains that a BTA would simply be too small for commercial fleet customers located in an urban center while nationwide licenses would be too large, requiring "build-out costs disproportionate to typical dispatch customer service needs." Id.

made to wide-area SMR systems" since it provides a wider coverage area than the BTA or other alternatives.^{32/} Thus, assigning ESMR block licenses by MTA is in the public interest.

Conversely, commenters agree that self-defined service areas are not a particularly effective or efficient use of spectrum as they encourage "spectrum grabs," nuisance greenmail applications and licensing backlogs. As Pittencrieff stated in its Comments, despite the fact that setting pre-defined boundaries "at this late date" may be difficult, the use of self-defined areas:

"may cause rampant speculation by persons that do not have the intent or financial resources to build-out a self-defined area. Accordingly, [Pittencrieff] recommends that the Commission identify a defined geographic area."^{33/}

As Nextel previously stated in its Comments, self-defined service areas are ever-changing and would perpetuate the current operational and licensing disparities between ESMR systems and cellular, in contradiction of Congressionally-mandated regulatory symmetry.^{34/}

Even with a 200-channel ESMR spectrum block, ESMRs will still suffer a significant spectral disadvantage relative to cellular and PCS operators. The ESMR block license, therefore, is not intended, nor should it operate, to establish an upper limit on the amount of

^{32/} Comments of Pittencrieff at p. 6.

^{33/} Comments of Pittencrieff at p. 6.

^{34/} Comments of Nextel at p. 15.

SMR spectrum an ESMR operator can hold.^{35/} ESMR systems require more than 200 of the 530 private radio frequencies to be effective competitors to other CMRS providers.^{36/} Thus, Nextel's proposal for an ESMR block license is not intended to prevent ESMR operators from accumulating SMR spectrum outside the block subject, of course, to their retuning obligations. It is intended to provide symmetry in ESMR, cellular and PCS licensing to the extent possible given the dramatically different historic allocation and spectrum assignment practices of these services.

IV. IMPOSITION OF A GENERAL CMRS SPECTRUM CAP IS NOT SUPPORTED BY THE RECORD IN THIS PROCEEDING

A. The Comments Evidence Nearly Unanimous Opposition to a General CMRS Spectrum Aggregation Cap

In the FNPRM, the Commission sought comment on whether to limit the amount of CMRS spectrum that can be licensed to any one entity in a defined area. It expressed concern that some CMRS licensees could aggregate large amounts of CMRS spectrum in a given area, that such licensees might thereby achieve excessive market

^{35/} In its Comments, NABER agrees that there should be neither a maximum nor a minimum number of channels which a wide-area licensee can obtain. Comments of NABER at p. 16.

^{36/} The Southern Company argues for a limit of 140 channels per ESMR. Comments of The Southern Company, filed June 20, 1994 at p. 15. This "cap" would simply continue the existing disadvantage that wide-area SMRs have relative to cellular. With only 140 channels, an ESMR would be unable to expand its system and potentially provide a wider array of enhanced telecommunications services. Not only would this perpetuate regulatory disparity with cellular and PCS, but it would handicap the ability of ESMRs to attract investment since the cap would artificially limit customer capacity and the ability to introduce improved services. The Commission must ensure that all CMRS providers are given equivalent opportunities and incentives to broaden the scope of their services.

power and that this could potentially reduce the number of competing CMRS providers. The Commission proposed a 40 MHz general CMRS cap -- the same limitation placed on cellular licensee interests in broadband PCS in a given licensing area and on the total aggregation of broadband PCS spectrum by a licensee in any licensing area.^{37/}

The commenters were nearly unanimous in opposing a general CMRS spectrum cap. Cellular carriers, SMR and ESMR providers and paging licensees all opposed the proposal as one which could only be based upon theory, rather than economic reality. The commenters found no factual or evidentiary basis to support imposition of a general CMRS cap;^{38/} that its impact would be contrary to the Commission's goal of fostering innovation, investment, diversity and competition among CMRS providers;^{39/} that defining geographic areas for cap application, permissible geographic overlap and attribution standards would be extraordinarily complex and difficult to administer;^{40/} that no existing or prospective provider of broadband CMRS services has any market power whatsoever -- except for the cellular carriers -- and the Commission has already limited dominant cellular carrier aggregation of PCS and

^{37/} FNPRM at para. 93.

^{38/} See e.g., Comments of Airtouch Communications, Inc. at p. 6; Comments of the AMTA at p. 28; Comments of Comcast Corp. ("Comcast") at p. 2; Comments of GTE Service Corp. ("GTE") at p. 18.

^{39/} Comments of AMTA at p. 30.

^{40/} Comments of McCaw Communications, Inc. ("McCaw") at pp. 14-16; Comments of Comcast at p. 6; Comments of GTE at p. 21.