cellular spectrum;41/ that historic differences in licensing among SMR (non-exclusive, non-contiguous spectrum assignments) and other CMRS services prevent equating SMR and other CMRS frequencies on a one-for-one basis for spectrum cap purposes;42/ and that the large amount of CMRS spectrum now available and competitive market structure for both broadband and narrowband CMRS services negates any need for a cap.43/ In short, all segments of the CMRS industry agreed that imposition of a general CMRS spectrum cap would be premature and unwarranted at this early stage in CMRS industry development.

Airtouch Communications, Inc. ("Airtouch Communications"), for example, criticized the proposal as "arbitrary and capricious" and lacking "any basis in economic theory, antitrust law or fact."44/ It stated that because the competitive dynamics among CMRS services and the demand characteristics of CMRS users are not fully understood at this time and "are certain to change," it would be "irrational and unsupportable" to apply a proposed general spectrum cap.45/ Similarly, McCaw asserted that the Commission failed to "specify the basis for the anticompetitive concerns at

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41/ Comments of Nextel at pp. 25-27; Comments of Comcast at p. 8; Comments of Motorola at p. 4.

42/ Comments of Nextel at p. 29-32; Comments of Comcast at p. 3; Comments of Motorola at p. 12; Comments of Dial Page, Inc. at p. 5.

43/ Comments of Cellular Telecommunications Industry Association ("CTIA"), filed June 20, 1994, at p. 8.

44/ Comments of Airtouch Communications at p. 6.

45/ Id. at pp. 8-9.

the root of its spectrum cap proposal."46/ McCaw concluded that a generalized CMRS spectrum cap is contrary to the Commission's goal of promoting competition and diversity in the CMRS marketplace.

A few commenters supported a general CMRS spectrum cap. Johnson stated that a cap will foster multiple communications providers in a market and ownership opportunities for small, local providers.47/ Johnson failed to provide any facts showing that excess market power will result in the absence of a cap or that the existing PCS and PCS-cellular spectrum aggregation limits will not assure multiple mobile communications providers.

New Par asserts that there are 25 MHz of SMR spectrum available; thus Part 90 licensees should be subject to the same 35 MHz spectrum cap as cellular licensees with similar attribution standards and geographical limits.48/ New Par's position is internally inconsistent and factually erroneous. First, New Par asserts that the 800 MHz SMR spectrum, the 900 MHz SMR spectrum and the additional Business Radio frequencies are comparable to

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46/ Comments of McCaw at p. 11.

47/ Comments of Johnson at p. 19.

48/ New Par, a partnership of Airtouch Communications and Cellular Communications, Inc., operates cellular systems in MSAs and RSAs in the Midwest. Like Airtouch Communications, New Par takes care to exclude paging and other "narrowband" services offered by its partner Airtouch from its support for a general CMRS cap. New Par's comments are essentially an attempt to misuse the concept of regulatory parity to disadvantage new entrant ESMR services vis a vis the incumbent cellular carriers. They are illustrative of the ways in which some companies are trying to manipulate not only this proceeding, but the overall concept of regulatory parity to preserve their overwhelming market power.

cellular's 25 MHz assignments. This is nonsense.

As detailed in Nextel's Comments in this proceeding,49/ each of the two cellular licensees in every market are assigned 25 MHz of exclusive use contiguous spectrum. A cellular licensee shares its spectrum with no other licensee in its exclusive geographic area. In contrast, as New Par expressly recognizes in advocating disadvantageous antenna height and power limits for SMR systems,50/ SMR assignments are on non-contiguous spectrum with co-channel licensees sharing frequencies within a geographic market.

Second, it is not simply error, but patent misrepresentation to suggest that an ESMR licensee can aggregate 25 MHz of SMR spectrum when there is a total Private Mobile Radio spectrum allocation of only 19 MHz. Moreover, 800 MHz SMR spectrum assignments and 800 MHz Business Radio frequencies have a 25 kHz bandwidth, 900 MHz SMR assignments have only a 12.5 kHz bandwidth -- less than half a cellular frequency. Not only are the two SMR bands not interoperable, but each provides less bandwidth and therefore less spectrum than 30 kHz cellular assignments. Non-contiguous, non-exclusive SMR spectrum is not equivalent to the 25 MHz contiguous, exclusive use 30 kHz bandwidth cellular spectrum assignments in every market in the country. The SMR spectrum cannot be equated to a single cellular license for spectrum cap purposes.

49/ Comments of Nextel at pp. 28-29.

50/ Comments of New Par at p. 9.

B. There Is No Market Power Justification for Limiting ESMR Eligibility for PCS Licenses

A number of commenters suggest that service specific caps, such as the PCS spectrum cap, would more effectively address the competitive concerns raised by the Commission.51/ Some of them also assert that ESMR providers, because they can provide services that will compete with cellular, should be subject to the 40 MHz cellular-PCS spectrum aggregation limit.52/

There is no reason to apply service specific caps to each CMRS service. The Commission imposed a 40 MHz limit on PCS spectrum aggregation to create maximum market opportunities for prospective PCS providers, on the one hand, and to restrain the exertion of undue market power, on the other.53/ It did so to ensure that no individual or single entity could amass undue market power through partial ownership in multiple PCS licenses in a single service area; i.e., to assure that there would be at least three PCS licensees in every service area. This is appropriate in the initial licensing of a new service with unprecedented large license

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51/ See e.g., Comments of Century Cellnet, Inc. at p. 3; Comments of GTE at p. 18; Comments of McCaw at p. 17; Comments of Motorola at p. 7; Comments of NYNEX at p. 2; Comments of OneComm Corp. ("OneComm") at p. 10; Comments of PCIA at p. 9; Comments of Southwestern Bell at p. 4.

52/ Comments of Bell Atlantic Companies ("Bell Atlantic") at pp. 2, 8-9; Comments of Airtouch Communications at p. 7; Comments of McCaw at pp. 17-18; Comments of New Par at p. 17.

53/ See PCS Second R&O, supra Note 9, at para. 62.

assignments.54/ No other CMRS service has the same characteristics at this time and the same concerns that it offer effective competition to the duopoly cellular industry.

In evaluating whether regulatory symmetry requires an ESMR-PCS cap given the existence of the cellular-PCS cap, the Commission must look to the actual market power concerns that underlie the cellular-PCS cap. In limiting cellular licensees to a single 10 MHz PCS license in their cellular service areas, the Commission stated that its **"principal concern is that an incumbent cellular owner may exert undue market power."**55/ The Commission has found that cellular carriers have market power;56/ in fact, cellular carriers are the only CMRS providers with market power.57/ Accordingly, the Commission found that the cellular-PCS spectrum aggregation limit strikes an "appropriate balance between fostering broad participation in PCS and ensuring that cellular operators do not exert undue market power."58/

In its recent reconsideration of the cellular-PCS cap, the

54/ No land mobile licensee has previously been awarded more than a 20 MHz initial assignment whereas the Commission will be auctioning three 30 MHz PCS licenses.

55/ PCS Second R&O at para. 107.

56/ The Commission has previously classified the duopoly cellular carriers as dominant and has found that the cellular market is not competitive at this time. See CMRS Order at paras. 138, 139 and 145.

57/ See CMRS Order at para. 137, ". . . all CMRS service providers, other than cellular service licensees, currently lack market power."

58/ Id. at para. 108.

Commission noted:

> "Our goal in crafting these rules shall not be to prevent anticompetitive behavior which may or may not materialize, but rather, to promote competition."59/

The same principle should guide the Commission's consideration herein. Superficial notions of regulatory symmetry, without a sustainable finding that ESMR carriers, like cellular carriers, have market power such that their PCS participation must be constrained to assure competitive PCS services, is not a sufficient basis for imposing a cap. ESMR's 0.06 percent of the existing cellular market belies that possibility.

The cellular and local exchange carrier ("LEC") commenters that would apply the PCS-cellular spectrum cap to ESMR ignore the market power considerations discussed above. Congress did not intend that every CMRS service be regulated identically; on the contrary, it expressly authorized the Commission to provide for differential regulation of CMRS services.60/ Nearly every commenter proposing an ESMR-PCS spectrum aggregation cap -- or otherwise limiting ESMR spectrum -- necessarily avoids any discussion of competitive realities or the inequality of ESMR

59/ Amendment to the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, GEN Docket No. 90-314, released June 13, 1994 ("PCS MO&O") at para. 103.

60/ See Conference Report at 491, supra, note 7; Comments of U.S. West, Inc. ("U.S. West") at p. 1.

spectrum vis a vis cellular and PCS licensing assignments.61/ Instead these market power entities misuse the concept of regulatory parity to solidify their dominant position and handicap or forestall competition.62/ A general CMRS spectrum cap, or a specific ESMR-PCS cap undercuts the Commission's stated pro-competitive objectives for the CMRS services. The Commission should not permit the mantra of regulatory parity to be substituted for critical analysis of the regulatory actions needed to promote robust, long-term CMRS competition.

C. The Budget Act Prohibits a CMRS or ESMR Spectrum Cap From Applying to ESMR Licensees Until After August 10, 1996

The FNPRM sought comment on whether, if a CMRS spectrum cap is adopted, it would apply to private land mobile licensees reclassified as CMRS prior to the end of the three-year transition period on August 10, 1996.63/ A few commenters asserted that an ESMR-PCS spectrum cap should apply to ESMR carriers immediately, regardless of the Congressionally-mandated transition.64/

Pursuant to the Budget Act, Nextel will not be subject to the CMRS rules and regulations adopted herein until August 10, 1996. As an existing private mobile service provider, Nextel "shall be treated as a private mobile service until three years after

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61/ For example, cellular service is available nationwide with a ten year marketing and customer recognition headstart while the first ESMR systems entered commercial service this year.

62/ See, e.g., Comments of Bell Atlantic; Comments of McCaw; Comments of Southwestern Bell.

63/ FNPRM at para. 104.

64/ See Southwestern Bell at p. 16.

enactment, except for the foreign ownership provisions in Section 332 (c)(6)."65/ This provision in the legislative history suggests that in those instances where Congress intended to apply a CMRS provision to reclassified PMRS providers prior to the end of the transition period, Congress expressly provided for it. Thus, according to the Budget Act and the Commission's interpretation thereof, none of the CMRS rules and regulations adopted in this rule making can be made applicable to Nextel or any other reclassified PMRS until the end of the Congressionally-mandated three-year transition period.

Nextel's position herein is further supported by a January 28, 1994 letter from Congressmen Edward J. Markey and Jack Fields, Chairman and Ranking Member, respectively, of the House Subcommittee on Telecommunications and Finance, to Commission Chairman Reed Hundt.66/ Chairman Markey explains that Congress' intent behind the three-year transition period was to give reclassified private mobile radio service providers "time to comply with the new requirements" since "it would be disruptive and unfair to immediately subject [them] to a regulatory scheme that does not yet exist."67/ The transition period, therefore, is intended to provide reclassified private mobile service providers a two-year period during which they are aware of the new CMRS rules and are

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65/ See Conference Report at 498. No other exception to the transition period was permitted.

66/ See Letter to The Honorable Reed Hundt, dated January 28, 1994.

67/ Id. at p. 1.

given the opportunity to conform their systems to this new regulatory scheme. To impose any of the rules adopted herein upon Nextel and other reclassified CMRS providers would violate the intent and purpose behind the transition period mandated by Congress.

In the CMRS Order, the Commission interpreted the Budget Act as reclassifying Nextel and other private mobile service providers as CMRS, but postponing the effectiveness of that reclassification until August 10, 1996.68/ According to the Commission, this three-year transition period was intended to "ensure an orderly transition for all reclassified private services" by allowing the Commission one year to establish the "rules, regulations, and policies that will govern reclassified services[,]" and thereby provide notice to reclassified private mobile service providers of the regulations and policies that will be governing them at the end of the final two years of the transition period.69/ The Commission, therefore, has interpreted Congress' mandate as requiring it to reclassify mobile services into CMRS and PMRS, establish CMRS rules and regulations within one year, and then refrain from imposing any of those regulations on the reclassified providers such as Nextel until the end of the two year period -- the date upon which "reclassification becomes effective" for the reclassified private services.70/

68/ Id. at para. 280.

69/ Id.

70/ Id.

Therefore, any cap adopted herein cannot apply to reclassified CMRS licensees until August 10, 1996. As discussed in Nextel's initial Comments, ESMRs must be given a reasonable time period after that date to divest any holdings necessary to conform to any then-effective cap.71/ If the Commission adopts a CMRS cap, Nextel suggests that the Commission follow the same procedures it adopted for cellular carriers to divest excess spectrum after the conduct of PCS auctions.72/

D. If the Commission Adopts Any Spectrum Cap for ESMR Services, the Equivalent Yield of Encumbered ESMR Spectrum Must be Evaluated Against the Non-Encumbered Spectrum of CMRS Competitors

As the FNPRM suggests, the manner in which CMRS spectrum is assigned to licensees is relevant to determining whether such spectrum should be included in a cap, and if so, how it should be counted for cap purposes.73/ Without an analysis of the equivalent yield of encumbered non-contiguous SMR spectrum, any decision on a cap would be arbitrary and capricious. Equating a channel available in only part of an ESMR service area with an exclusive use, contiguous cellular channel available throughout an MSA or multiple contiguous MSAs and RSAs does not achieve regulatory parity.

Accordingly, in the event the Commission inappropriately imposes any CMRS spectrum cap on ESMR licensees, such licensees

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71/ Comments of Nextel at p. 39.

72/ PCS MO&O at paras. 145-146.

73/ FNPRM at para. 96.

should never be charged with greater than five MHz of ESMR spectrum in a given service area -- even if it has the right to use a total number of channels at some sites within its service area that calculate to greater than five MHz --so long as SMR spectrum is licensed on a station-by-station non-contiguous basis.74/ This provides a reasonable allowance for the encumbrances of SMR spectrum. Of course, an ESMR licensee would be free to demonstrate that it has an even lower equivalent spectrum yield based on its actual assignments.

In its initial Comments in this proceeding, Nextel demonstrated that the unweighted per site equivalent yield of its existing 800 MHz licenses in San Francisco (its strongest market in terms of spectrum aggregation), was 7.8 MHz -- approximately 31 percent of the 25 MHz cellular spectrum assignment at every site in a cellular service area.75/ In other Nextel markets, it is less.76/ Moreover, because the non-contiguous spectrum available to SMR is not equivalent to the contiguous, exclusive use spectrum available to cellular, these comparisons overstate the equivalent yield of SMR spectrum. This impacts ESMR system design, efficiencies and functionalities. For these reasons, the

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74/ Two hundred 25 kHz SMR channels are the equivalent of 10 MHz if available on an exclusive, contiguous basis.

75/ Comments of Nextel at pp. 32-35.

76/ In the Houston MTA, Nextel is licensed to use an average of 27 percent of the channels available to a competing cellular system. Again, adjusting for the greater bandwidth of cellular channels, Nextel has an unweighted per site average equivalent spectrum yield of 5.7 MHz -- approximately 23 percent of the cellular license assignment.

Commission should count SMR assignments such that no ESMR licensee is charged with more than five MHz of ESMR spectrum for cap purposes.

In conclusion, the proposed CMRS spectrum cap has no basis in fact or economic reality. It relies purely on speculation about the turns a newly-created CMRS market may take. A service-specific cap on ESMR providers is unjustified as these systems are still in their infancy, have few or no customers, and have no market power at this time. Finally, any spectrum cap imposed on CMRS providers cannot be applied on a one-to-one basis among ESMR operators -- operating on non-contiguous, co-channel spectrum -- and cellular operators, and it further cannot be applied to ESMR operators until the end of the transition period, at which time the CMRS classification becomes effective for reclassified private mobile radio operators.

V. TECHNICAL AND OPERATIONAL ISSUES

A. The Commission Should Not Reduce Antenna Height and Transmitter Power Limits for SMR and ESMR Stations

The FNPRM sought comment on conforming the maximum allowed base station heights and powers of the cellular and SMR rules. Most comments support conforming these rules but are divided on the means to achieve parity -- reducing the permissible height and power for SMR stations or increasing these standards for cellular facilities.77/ Nextel strongly opposes any reduction in the

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77/ For example, Geotek has developed a frequency hopping system designed under the current rules that relies on a few high power base stations to achieve spectrum efficiency. See Comments of Geotek at p. 15. Both Geotek and Pittencrieff point out that

power levels presently authorized for ESMR base and mobile stations. The majority of commenters support, or would accept, raising the cellular antenna height and power levels to that permitted for SMR stations or do not express a preference.78/

At its June 9, 1994 Open Meeting, the Commission increased the height and power limits for PCS systems to enable operators to build higher power stations where appropriate, thereby reducing capital costs and reducing excessive infrastructure.79/ The Commission provided PCS operators this flexibility to promote more efficient and economic design and implementation of PCS services and potentially lower costs to the public. By the same logic, the flexible rules that have enabled SMR entrepreneurs to develop traditional high power single site systems, as well as multiple base station low power ESMR configurations, should be maintained.

As recognized by New Par, most cellular systems, particularly those in metropolitan areas, are constructed to their borders.80/ These fully built cellular systems now require the addition of small fill-in base stations, not high power base stations. Fully constructed cellular systems would not be at a

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ESMR systems will not simply provide cellular like interconnect but will continue to provide dispatch service over wide areas requiring the use of high power stations. Comments of Geotek at p. 15; Comments of Pittencrieff at p. 9.

78/ See, e.g., Comments of Ram Mobile at p. 8; Comments of PCIA at p. 12; Comments of Southwestern Bell at p. 11; Comments of McCaw at p. 26.

79/ PCS MO&O at para. 172.

80/ See Comments of New Par at p. 11.

competitive disadvantage if ESMR systems were allowed higher powers. Cellular operators do not seek to achieve parity through the reduction of allowed ESMR powers; instead, they seek an anti-competitive advantage designed to slow the growth of ESMR systems.81/

Some of the commenters point to the 1992 ANSI/IEEE radiation exposure standards as the limit to be adopted for hand held portables.82/ Nextel agrees with this position. However, Nextel opposes the reduction of transmitter output power of vehicular mobile units which will primarily be used for ESMR wide area dispatch service. Reducing vehicular mobile power would further reduce the efficiencies currently designed into ESMR systems.

B. Modulation and Emission Mask

The majority of the commenters support removing emission and modulation restrictions where frequencies are authorized on an exclusive basis and therefore would not cause co-channel and adjacent channel interference.83/ Nextel supports this position. There is no public interest basis for emission and bandwidth limitations under these circumstances. This would permit individual licensees to use the most appropriate modulation and emission schemes available to meet their customers' requirements.

81/ Nextel does not oppose increasing the height and power of cellular stations to those permitted SMR and ESMR stations.

82/ Comments of Ram Mobile at p. 8.

83/ See Comments of McCaw at p. 27; Comments of CTIA at p. 3.

Maximum flexibility in both emission masks and emission schemes allows licensees to take advantage of technological advancements and thereby promote innovation and a more competitive CMRS industry.

C. Control Channels

In its comments, Nextel identified the need to codify a set of ESMR control channels if the Commission does not adopt Nextel's proposal to establish a contiguous block of channels for ESMR operations.84/ Nextel identified a set of nationwide ESMR control channels that were selected based on current ESMR licensing as the most desirable channels for efficient control channel operations. If the Commission does not establish an ESMR block license as proposed herein, the Commission should designate these frequencies as ESMR control channels to establish partial regulatory parity with the cellular industry.85/

D. Equal Employment Opportunity

The majority of commenters supported applying the Commission's EEO rules to Part 90 operators reclassified as CMRS providers at the end of the mandated three-year transition period. Nextel continues to agree that this will promote regulatory symmetry.

84/ Comments of Nextel at p. 42.

85/ As discussed in Nextel's initial Comments, the Commission has allocated cellular systems both a contiguous set of 416 frequencies and a separate group of 21 control channels for use on a ubiquitous basis. Comments of Nextel at p. 29. In contrast, the proposed ESMR control channels would come from the limited group of SMR frequencies available for customer use. Thus while establishing a common group of ESMR channels for control purposes will benefit ESMR operations, it does not achieve full parity with the cellular licensing and control channel assignments.

VI. OTHER LICENSING ISSUES

A. Construction and Operational Requirements

Most commenters support a uniform 12-month construction period for single base station CMRS systems and extended construction periods for more complex systems.86/ Nextel supports these construction periods, but Nextel also supports coverage benchmarks similar to those imposed upon broadband PCS licensees for the extended construction period. These benchmarks will ensure efficient spectrum use and the provision of timely service to the public.

Under Part 90, SMR licensees may discontinue service for up to 12 months before forfeiting a station license. PCIA proposes to reduce this time period to 90 days to conform with Part 22.87/ Nextel does not oppose this 90-day time period if the Commission adopts a wide-area, geographically-defined license for ESMR systems. If the Commission fails to adopt a geographically-defined ESMR block license that provides exclusive use spectrum, the 12-month time period cannot be reduced. ESMR systems need this flexibility to maintain co-channel protection when deconstructing high power facilities which are to be replaced by multiple low-power ESMR stations.

Currently, ESMR licensees rely on the co-channel protection provided by high power, high elevation stations which have been

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86/ See, e.g., Comments of Johnson at p. 16; Comments of NABER at p. 29.

87/ Comments of PCIA at p. 16.

deconstructed to allow the reuse of frequencies at low power sites. If these high power station licenses are cancelled before the low power station designs are fully licensed -- a process that can consume from several months up to a year or more -- the ESMR licensee is vulnerable to "greenmail" applications requesting transmit sites in the areas previously protected by the high power stations. Accordingly, if the Commission does not adopt a ESMR block license, Nextel recommends that the Commission increase the period during which an SMR licensee constructing an ESMR system may deconstruct its existing facilities without license cancellation to be equivalent to the extended construction period currently provided for the ESMR system.

B. Transferability

In the FNPRM, the Commission sought comment on whether it should permit the transfer of unconstructed CMRS facilities authorized exclusive use channels. The response was varied, with some commenters opposing the transfer of unconstructed stations,88/ and other commenters supporting such transfers in the case of a license obtained through competitive bidding.89/ Still others support the more liberal Part 22 transfer rules.90/

Nextel concurs with AMTA's opposition to any restrictions on

88/ Comments of Pittencrieff at p. 15.

89/ Comments of NABER at p. 47; Comments of U.S. West, at p. 9.

90/ Comments of PCC at p 19; Comments of McCaw at p. 34.

the transfer of "unbuilt" ESMR licenses.91/ As AMTA correctly points out, ESMR systems are only authorized when the applicant demonstrates that the ESMR service area contains a group of constructed, operational and fully loaded traditional SMR stations. While the digital sites of an ESMR system may be unbuilt, the analog stations that define the ESMR system are by definition constructed and operational. Thus, the transfer of an unbuilt ESMR system does not constitute trafficking in unbuilt stations; rather it represents the transfer of the underlying constructed stations and the channel reuse permitted thereunder.

Moreover, adoption of Nextel's geographically-defined ESMR licensing proposal will likely require the transfer of "unbuilt" ESMR systems when two or more ESMR systems are present in the same MTA. ESMR licensees attempting to build out a system should not face restrictions on assignment or transferability based on construction status. Regulatory parity requires treatment similar to that of cellular operators.

C. Pre-Authorization Construction and STA Procedures

The Commission sought comment on the pre-authorization construction of CMRS stations. The responding commenters universally support more liberalized pre-authorization construction authority.92/ The commenters urge the Commission to allow pre-authorization construction, at the understood risk of the licensee,

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91/ Comments of AMTA at p. 43.

92/ See, e.g., Comments of BellSouth at p. 19; Comments of PCIA at p. 34; Comments of Johnson at p. 24; Comments of AirTouch Paging at p. 12.

if the licensee has fulfilled all airspace and environmental regulations. This, the commenters agreed, will speed delivery of CMRS services to the public.

Section 309(f) of the Act allows the Commission to grant STA's to common carrier applicants only under "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.93/ In contrast, Section 90.145 of the Commission's Rules permits the granting of STAs in circumstances requiring the temporary use of radio facilities for either new or modified operations. The FNPRM proposed adopting procedures that would subject STA requests by Part 90 CMRS applicants to the more restrictive requirements of Part 22.

Several commenters agreed that service to the public will be delayed unless the Commission adopts a more liberal interpretation of Section 309(f). ESMR systems are currently licensed on a station-by-station basis while a cellular licensee can commence commercial operation of new base stations in its service area upon notice to the Commission. Without STA authority or block licensing, ESMR operators may face unreasonable delays in initiating service while waiting for Commission authority to operate each new base station.94/

To ensure parity among CMRS licensees in their ability to construct and develop systems in a timely fashion, the Commission

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93/ 47 U.S.C. Section 309(f).

94/ The processing time for 800 MHz SMR license applications now exceeds one year for stations proposed in some regions of the U.S.

must adopt Nextel's ESMR block licensing proposal and allow all ESMR licensees to construct and modify systems within the borders of a service area without prior Commission approval. Pending the ESMR block licensing, the Commission should provide ESMR licensees authority to commence commercial operation upon a "notice" filing as allowed for cellular licensees in Section 22.903 of the Commission's Rules.

Additionally, 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 that rule. This would allow ESMR licensees to conduct testing and optimization activities, initiate commercial service as systems become constructed, and add additional sites to operational systems.

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. Most commenters agree that the application fees should be conformed in some manner.95/ However, Part 90 commenters such as RAM Mobile point out that equalizing the application fee would not make the fee structures equivalent.96/

Under current SMR licensing processes, equalizing the fees

95/ See, e.g., Comments of NABER at p. 40; Comments of AMTA at p. 36.

96/ Comments of Ram Mobile at p. 11.

would place excessive costs on ESMR entrepreneurs who are not assigned an exclusive use frequency block. Cellular systems have been built out in all of the top markets and cellular licensees in these markets do not need to submit numerous applications to perfect their systems. In contrast, only two ESMR systems, Nextel's Los Angeles and San Francisco/Sacramento systems, are in commercial operation. Under the present licensing system, ESMR licensees must submit numerous applications as they construct and develop their systems. In addition, the present ESMR allocation scheme requires many more applications than were required during the cellular system buildout, and the Commission has proposed to eliminate licensing for all cellular base stations that are not part of the CGSA border, while an ESMR system must continue to license all of its sites. Thus, any increase in ESMR application fees -- without adopting a geographically-defined ESMR block license that reduces the required licensing of interior base station sites -- would simply be a financial impediment to the build-out of ESMR systems and undercut the concept of regulatory parity.

To avoid the regulatory and financial imbalance that would result from the cellular fee structure, the Commission should adopt Nextel's ESMR block licensing concept, as discussed above. Pending action on the block licensing proposal, Nextel urges retention of the $35.00 fee per application for SMR and ESMR applicants.

E. Regulatory Fees

The Commission also proposes to apply a uniform "regulatory fee" of $60.00 per thousand subscribers on all CMRS licensees. The commenters generally supported a uniform fee based on the number of subscribers.97/ Although Nextel generally favors uniformity of fees, the regulatory fee imposed on ESMR carriers should be phased in over time. As ESMR is still in its infancy, ESMR operators will, for some time, experience large operating losses. Moreover, the Commission must recognize that existing private radio subscribers use dispatch services -- rather than mobile telephone service -- more than 90% of the time. These users, therefore, have significantly lower monthly bills, which will result 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 the end of the transition period. Nextel suggests that a Commission phase-in of the fee begin at the end of the transition period, providing for 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.

97/ See, e.g., Comments of NABER at p. 40; Comments of McCaw at p. 34; Comments of PCIA at p. 28.

F. Removal of Miscellaneous Outdated Regulatory Inequities

The Commission proposed eliminating end user eligibility limitations applicable to Part 90 CMRS providers, and all commenters who addressed this issue agreed that Part 90 end user eligibility should be eliminated.98/ Nextel supports elimination of this outdated restriction so that ESMR systems may serve the public without restriction.

The Commission also asked for comment on the restrictions on purpose of communications and duration of messages. Most commenters believe that these can be eliminated where the frequencies are licensed for exclusive use.99/ Some commenters caution that this restriction should remain where frequencies are used on a shared basis.100/ Nextel supports deletion of outdated restrictions where the frequencies are licensed for exclusive use.

Nextel also addressed another distinction between Part 22 and Part 90 regulations in its comments -- end user licensing.101/ Some SMR end users must still obtain separate licenses. Cellular subscribers, however, face no end user licensing requirements. Nextel is not aware of any problem arising from the fact that cellular customers are not being subjected to licensing

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98/ See, e.g., Comments of Ram Mobile at p. 10; Comments of NABER at p. 33.

99/ See, e.g., Comments of PCIA at p. 18.

100/ Comments of NABER at p. 33.

101/ Comments of Nextel at p. 50.

requirements, and therefore reiterates that SMR customers should similarly be free of such restrictions.

G. Prohibition on Scanners Receiving SMR Frequencies

In ET Docket No. 93-1, the Commission amended Parts 2 and 15 of its rules to deny equipment authorization for any scanning receiver that can receive transmissions on frequencies allocated to the cellular service, be readily altered by the user to receive such transmissions, or be equipped with decoders that convert digital cellular transmissions to analog voice audio.102/ Nextel supported these rules and urged that they be expanded to include SMR frequencies.103/ The Commission determined that Nextel's request was outside the scope of that proceeding.

In accordance with the Budget Act, regulatory parity now requires that SMR and ESMR services, being reclassified as CMRS, be provided the same protections as cellular services from monitoring through the use of scanners. Accordingly, the Commission should amend its rules to deny equipment authorization to any scanner which can receive SMR frequencies, be altered to receive SMR frequencies, or can be equipped with a decoder to convert digital ESMR transmissions to analog voice audio.

H. Loading, The 40-Mile Rule, and Station Identification

The Commission seeks comment on whether to continue existing

102/ See Amendment of Parts 2 and 15 to Prohibit Marketing of Radio Scanners Capable of Intercepting Cellular Telephone Conversations, 8 FCC Rcd 359 (1993).

103/ See Comments of Nextel, filed February 22, 1993 and Reply Comments of Nextel, filed March 8, 1993, in ET Docket No. 93-1.

Part 90 loading standards. Commenters overwhelmingly supported elimination of loading standards and the associated 40 mile rule.104/ Accordingly, Nextel continues to support eliminating loading requirements and the 40 mile rule for ESMR stations. Nextel's proposed ESMR block license would preclude the possibility of spectrum warehousing, thus eliminating the need for both the loading requirements and the 40-mile rule.

The Commission also proposes to modify its rules to allow CMRS licensees, operating multiple station systems, to use a single call sign on a system-wide basis. Nearly all commenters supported this change,105/ and Nextel likewise reiterates support for the use of a single call sign within an ESMR system.

I. Application Forms

In the FNPRM the Commission introduced a new application form to be used by all CMRS and PMRS applicants. Nextel applauds the Commission's efforts in developing the new form, as well as its decision to facilitate electronic filing. However, Nextel supports the comments of others who propose to defer action on the form.106/ The particular aspects of the form cannot be addressed prior to the release of the final regulatory changes being addressed in this proceeding. Further, the scope and pace of

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104/ See, e.g., Comments of Ram Mobile at p. 10; Comments of NABER at p. 32; Comments of AMTA at p. 11; Comments of PCIA at p. 19.

105/ See, e.g., Comments of NABER at p. 34; Comments of PCIA at p. 38; Comments of Ram Mobile at p. 10.

106/ See, e.g., Comments of McCaw at p. 31; Comments of PCIA at p. 22; Comments of Air Touch Paging at p. 5.