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JUL 12 1994

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

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

In the Matter of)
)
Further Forbearance from) GN Docket No. 94-33
Title II Regulation for Certain Types of)
Commercial Mobile Radio Service)
Providers)

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc.

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Dated: July 12, 1994

DEPARTMENT OF COMMERCE

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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.^{1/}

On February 3, 1994, the Commission adopted its Second Report and Order in GN Docket No. 93-252 (the "CMRS Order"),^{2/} which implemented the provisions of Section 6002(b) of the Omnibus Budget Reconciliation Act (the "Budget Act")^{3/} by creating a new class of service providers, the "Commercial Mobile Radio Services" ("CMRS"). CMRS providers are subject to regulation under Title II

^{1/} The Commission issued a Notice of Proposed Rule Making (the "NPRM"), FCC 94-101, on May 4, 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 (the "CMRS Order").

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

of the Communications Act of 1934, as amended (the "Act"), but pursuant to the Budget Act, the Commission is authorized to "specify certain provisions of Title II as inapplicable to a 'service or person.'" 4/ With the exception of Sections 201, 202 and 208, the Commission is expressly empowered to forbear from imposing Title II provisions on all CMRS providers, or to forbear from imposing them on certain subclasses of CMRS providers.

In its Comments, Nextel urged the Commission to examine these Title II provisions on a competitive, cost/benefit and consumer protection basis to assure that non-dominant, new CMRS entrant ESMR carriers are subjected to minimal regulatory burdens.5/ Nextel also concurred with the Commission's conclusion that no Title II obligations can apply to ESMR systems during the three-year transition period, which ends on August 10, 1996.

As to the specific Title II provisions enumerated in the NPRM, Nextel supported forbearance from Section 226, the Telephone Operator Consumer Improvement Act (TOCSIA), and Section 228's informational tariff filing requirement.6/ Nextel also stressed that ESMR carriers should not be required to comply with Section

4/ CMRS Order at para. 155, citing the Act, Section 332 (c)(1)(A), 47 U.S.C. Section 332 (c)(1)(A).

5/ In the NPRM, the Commission specifically sought comment on whether to forbear from applying Sections 213, 215, 218, 219, 220, 221, 233, 225, 226, 227 and 228 of Title II to some or all CMRS services.

6/ Section 228 regulates the blocking of access to pay-per-call services.

225's Telecommunications Relay Service ("TRS") requirements until compliance is technically feasible.

II. DISCUSSION

A. THE COMMISSION SHOULD IMPLEMENT DIFFERENTIAL REGULATION FOR CMRS PROVIDERS WHERE NECESSARY TO PROMOTE EFFECTIVE COMPETITION IN THE CMRS MARKETPLACE

The commenters generally agreed with the Commission on the specific Title II provisions for which forbearance is warranted. Most of the existing Part 22 common carriers asserted, however, that any differential regulation among CMRS services would not be consistent with achieving "regulatory parity." They argued, for example, that differential regulation is contrary to Congressional intent,^{7/} would "take the Commission on a new path which would undermine those strides toward symmetry,"^{8/} and would "undermine the recently established structure of regulatory parity for CMRS."^{9/} On the contrary, existing Part 90 private land mobile carriers generally supported differential regulation for various CMRS services where necessary to promote competition in light of different regulatory structures, spectrum assignments, licensing procedures and operational capabilities.^{10/}

^{7/} See Comments of Southwestern Bell Mobile Systems ("Southwestern Bell"), filed June 27, 1994 at p. 3 ("imposing a system of subclasses and regulatory favoritism . . . would certainly fly in the face of the goals of Congress.").

^{8/} Id. at 2.

^{9/} Comments of Cellular Telecommunications Industry Association, filed June 27, 1994 at p. 2.

^{10/} See e.g., Comments of American Mobile Telecommunications Association ("AMTA"); Comments of Dial Page, Inc.; Comments of the Southern Company.

The Budget Act does not require identical regulations for similarly situated CMRS providers. On the contrary, Congress recognized that the creation of a competitive marketplace may require differential regulation among classes of CMRS services:

"The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services...[T]his provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier. For instance, the Commission may, under the authority of this provision, forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition or to protect consumers against unjust or unreasonable rates or unjustly or unreasonably discriminatory rates."11/

Thus, if the Commission finds that certain Title II provisions are not necessary to protect consumers or promote competition, they may be forborne -- particularly if the burden of compliance on certain CMRS providers would outweigh the consumer benefits.

In its Comments, Bell Atlantic Mobile Systems ("BAMS")

11/ H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report"). This legislative history interprets Section 332 (c) (1), which provides Commission discretion to forbear when:

- (i) enforcement of such provision is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly discriminatory;
- (ii) enforcement of such provision is not necessary for the protection of consumers; and
- (iii) specifying such provision is consistent with the public interest.

recognizes that the Budget Act "requires the Commission to consider whether forbearance will facilitate the development of a competitive marketplace, including whether it will enhance competition between providers."^{12/} However, BAMS further argues that ensuring regulatory parity is the Commission's "paramount" concern.^{13/} This conclusion is nonsensical in that it advances superficial regulatory parity at the expense of competition, rather than promoting competition through rules and regulations -- whether or not identical for all -- that create a competitive environment for all similar CMRS services. The Commission's foremost responsibility under the Budget Act is to promote competition among all CMRS providers.^{14/}

BAMS further argues that the Commission has no authority to impose a size-based standard for determining further forbearance.^{15/} This also flies in the face of the Budget Act. As the Commission interpreted the Budget Act, "the major policy reason to establish different categories of CMRS is the possibility

^{12/} Comments of Bell Atlantic Mobile Systems ("BAMS") at p. 2.

^{13/} *Id.* at p. 3.

^{14/} BAMS also argues for a standard that would have the Commission forbear "where the particular Title II provision has no relevance to the regulation of a certain service." Comments of BAMS at p. 4. This, however, is not consistent with the Budget Act. Congress specifically stated that further forbearance may be necessary where the costs of complying with certain Title II requirements outweighs their benefits to consumers and where further forbearance would enhance competition among a diversity of CMRS entities. See Conference Report at 491; see also Section 332 (c)(1)(A) of the Act.

^{15/} Comments of BAMS at p. 1.

that one carrier or class of carriers has market power that requires continued Title II regulation to protect consumers or the public interest."16/ Cellular CMRS licensees with completed systems, long-established services, numerous customers, and significant revenues have dominant market power. New CMRS entrants with systems still being developed, few customers, and a small slice of the marketplace do not. In addition, some small former private carriers reclassified as CMRS do not have sufficient spectrum to provide services substitutable for other CMRS services. The Commission, therefore, is well within its authority to forbear from most Title II requirements for new entrants, small carriers and those without market power.

BellSouth argues that the CMRS marketplace does not present the competitive situation envisioned by Congress for justifying forbearance.17/ This, however, ignores the fact that cellular providers enjoy a ten-year headstart, are providing services to approximately 16 million customers, and are assigned large blocks of contiguous spectrum with exclusive use of all channels therein. In contrast, reclassified ESMR providers are only now developing and constructing their systems, are serving less than 10,000 customers nationwide, and have non-contiguous, non-exclusive

16/ CMRS Order at para. 162.

17/ Comments of BellSouth, filed June 27, 1994 at p. 2 ("market conditions do not justify forbearance . . . with respect to certain CMRS providers.").

spectrum assignments.^{18/} Moreover, the Commission has not even begun licensing Personal Communications Services ("PCS").

Thus, contrary to BellSouth's assertion, the CMRS market has the very characteristics which warrant further forbearance for non-dominant service providers. Forbearance from some of the provisions raised in the NPRM are therefore appropriate not only for "small" CMRS providers, but also for non-dominant ESMR licensees and other new market entrants. The current CMRS market warrants a case-by-case appraisal of both existing and future proposed regulations consistent with the statutory test established in the Budget Act.

B. TOCSIA IS NOT APPLICABLE TO MOBILE TELECOMMUNICATIONS SERVICES AND SHOULD NOT BE IMPOSED UPON ANY CMRS PROVIDER

Nextel reiterates that TOCSIA was enacted to prevent consumer abuses by segments of the communications industry other than mobile telecommunications and therefore should not be imposed upon any CMRS provider.^{19/} Several other parties, representing all segments of the CMRS industry, agreed with Nextel.^{20/} Imposing

^{18/} Pacific Bell and Nevada Bell argue that MCI/Nextel already has a "significant market share." Comments of Pacific Bell/Nevada Bell at pp. 7-8. While Nextel has acquired SMR spectrum throughout the country, it and other ESMRS are just beginning to compete with the cellular industry. Nextel notes that Pacific Bell's former affiliate PacTel (now Airtouch) has nearly 500,000 customers in Southern California alone; Nextel's entire ESMR operations currently serve less than 10,000 customers.

^{19/} Comments of Nextel, filed June 27, 1994 at p. 15.

^{20/} See, e.g., Comments of McCaw Communications, Dial Page, Inc. Southwestern Bell, In-Flight Phone Corp., OneComm Corp., and the National Association of Business and Educational Radio ("NABER").

TOCSIA on CMRS providers is not necessary to protect consumers from unjust and unreasonable rates and practices.^{21/} As Dial Page, Inc. stated in its Comments, the Commission should forbear until such time as the Commission has developed a record demonstrating that such regulation should be imposed upon CMRS providers.^{22/} If, in the future, the Commission finds that CMRS providers are engaging in acts that violate TOCSIA, then the Commission should subject CMRS providers to its provisions. Until that time, there is no need or justification for imposing this costly, burdensome and unnecessary regulation on CMRS.

C. ALTHOUGH TELECOMMUNICATIONS RELAY SERVICES SHOULD BE REQUIRED OF ALL CMRS PROVIDERS, THE COMMISSION MUST ALLOW RECLASSIFIED CMRS PROVIDERS A PHASE-IN PERIOD DURING WHICH THEY CAN CONFORM THEIR SYSTEMS FOR THE PROVISION OF THESE SERVICES

Some commenters seek forbearance from TRS obligations,^{23/} arguing that the burdens and costs of implementing TRS outweigh any benefits to the public.^{24/} Nearly all commenters agreed, however, that CMRS providers should be required to contribute to the TRS fund.

^{21/} Imposing TOCSIA on dispatch-only CMRS providers is particularly inappropriate since dispatch service providers will never be in a position to offer these operator services on their systems.

^{22/} Comments of Dial Page, Inc., filed June 27, 1994 at p. 8. See also Comments of OneComm Corp., filed June 27, 1994 at p. 12 (the Commission should not assume TOCSIA is needed in the wireless market without first developing a record).

^{23/} Section 225 of the Act.

^{24/} See Comments of AMTA at pp. 12-13; Dial Page, Inc. at pp. 6-7; E.F. Johnson Company at p. 10; NABER at pp. 7-8; OneComm Corp. at p. 8.

Nextel supported imposition of TRS on CMRS providers, as well as the contribution requirement, due to the important public interest of ensuring that hearing and speech-impaired persons have access to telecommunications -- including wireless telecommunications -- services.^{25/} Because the technical changes necessary to do so require some time, however, Nextel seeks a phase-in of TRS on CMRS systems. Nextel believes that it will be technically possible to support the use of Telecommunications Devices for the Deaf ("TDDs") on its ESMR networks within six months after August 10, 1996 -- the end of the transition period for reclassified Part 90 carriers -- at which time the TRS requirements would become effective if not forborne.^{26/} Accordingly, Nextel supports application of Section 225 to ESMR services as of February 10, 1997.^{27/}

^{25/} Nextel Comments at p. 11.

^{26/} See Nextel's Comments at p. 13 ("Nextel supports application of Section 225 to reclassified Part 90 ESMR carriers as of February 10, 1997.")

^{27/} As discussed in note 24 of Nextel's Comments, it may be necessary to seek short-term waivers of the TRS requirements for some ESMR systems placed in service shortly before this date if the digital data transmission capabilities necessary to support TRS cannot be phased in on a particular system by that time.

III. CONCLUSION

For the forgoing reasons, Nextel respectfully requests that the Commission exercise its forbearance authority where necessary to promote competition among all CMRS providers.

Respectfully submitted,
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Dated: July 12, 1994

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 12th day of July, 1994, I caused a copy of the attached Reply Comments of Nextel Communications, Inc., to be served by hand delivery or first-class mail, postage prepaid to the following:

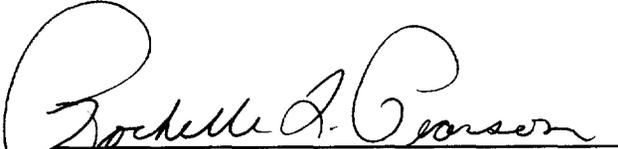
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