

AUG - 9 1994

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)

GN Docket No. 93-252

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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I. INTRODUCTION

Pursuant to Section 1.415 of the Commission's Rules and Regulations, Nextel Communications, Inc. ("Nextel") submits its Comments in response to the Second Further Notice of Proposed Rule Making ("SNPRM") in the above-captioned proceeding.^{1/}

In this SNPRM, the Commission seeks comment on whether certain non-equity interests such as management agreements, resale contracts, and joint marketing agreements should be attributable to an entity for purposes of applying the Personal Communications Services ("PCS") spectrum cap, the PCS-cellular cross-ownership cap, and the potential Commercial Mobile Radio Services ("CMRS") spectrum cap. As explained herein, Nextel opposes the attribution of any non-equity interests for purposes of measuring the cumulative spectrum acquired by an entity.

^{1/} FCC 94-191, released July 20, 1994.

II. BACKGROUND

Nextel is one of the largest providers of Specialized Mobile Radio ("SMR") and Enhanced Specialized Mobile Radio ("ESMR") services in the country. Although Nextel has not utilized the management agreement to a large extent, it is nonetheless a widely-used tool in the SMR and ESMR industries. The attribution of these contracts could impact ESMR and SMR licensees for CMRS spectrum cap purposes. Accordingly, Nextel files these Comments on the Commission's proposal to attribute management agreements and resale contract interests in the SMR industry.

III. DISCUSSION

A. Management Agreements Do Not Confer Ownership or Control on the Managing Party and Should Therefore Not Be Attributable For Purposes of Any Spectrum Cap.

Management agreements have been used in the SMR industry for more than ten years and were expressly authorized by the Commission in 1985.^{2/} Pursuant to the Commission's guidelines, licensees may enter into third party management agreements, provided that the licensee retains overall supervision and control over the station and has a proprietary interest in the facilities.^{3/} This policy has remained in effect since that time, and the Commission has not viewed any management agreement meeting these criteria as a transfer of control or a creation of an ownership interest in the

^{2/} See Applications of Motorola, Inc., (July 30, 1985), announced by FCC News Release No. 6440 (August 15, 1985); see also "Commission Public Notice on Guidelines Concerning the Operation of SMR Stations Under Management Agreements," released March 3, 1988.

^{3/} Id.

managing party.^{4/} Management agreements permit a broader array of licensees to participate in the SMR industry by authorizing entrepreneurs to contract with experienced third parties to operate their systems.^{5/}

The SNPRM proposes to attribute spectrum to a party who has been found to have neither de jure nor de facto control of a managed license. In Intermountain Microwave,^{6/} the Commission established its criteria for determining whether a managing party has obtained control over a licensee's system. These criteria include looking at whether the licensee has unfettered use of all facilities and equipment, whether the licensee has retained control over daily operations, whether the licensee has retained authority over policy decisions, including the filing of applications with the Commission, and whether the licensee has control over all personnel decisions, such as the hiring and firing of employees. Thus, a management agreement, by definition, confers no ownership interests in the managing party. Therefore, the Commission should

^{4/} In the SMR industry, management agreements are often coupled with an option agreement giving the manager an option to purchase the station in the future under defined circumstances. This evidences the fact that the management agreement itself does not confer any ownership or control on the manager.

^{5/} Thus, management agreements can promote competition since entrepreneurs, who might not otherwise have the experience and expertise to participate in the industry, are given an opportunity to invest in SMR systems, contract with an experienced operator to run the system, and thereby fully load the channels and provide service to more consumers.

^{6/} Intermountain Microwave, 24 Rad. Reg. 7 (P&F) 983.

not attribute managed SMR systems to the manager for spectrum cap purposes.

Attributing these agreements for spectrum cap purposes would create inconsistency in the Commission's policy governing management agreements. For one purpose, these agreements would not confer ownership and would therefore require no transfer of control application while, on the other hand, for the limited purpose of applying the spectrum caps, the management agreements would be considered a transfer of ownership rights. This would unfairly attribute spectrum to parties whom the Commission has already determined have no ownership or control over that spectrum.

B. Nextel Supports the Commission's Decision Not To Attribute Resale Contracts.

Nextel agrees with the Commission that resale contracts do not create the potential for a reseller to exercise control over the licensee's spectrum. Under these contracts, the reseller has no authority to make any decisions regarding the licensee's operations, has no right to use any of the licensee's equipment or facilities, and simply has no control or ownership interest in the licensee's system. Therefore, the attribution of these resale contracts is not justified.

IV. CONCLUSION

A party managing a licensee's system pursuant to a management agreement has no ownership interest in that licensee's system and therefore will not be in a position to diminish competition in the CMRS industry. Under these circumstances, the attribution of these management agreements and other non-equity interests which confer

no control would not further the Commission's spectrum cap policies and should not be considered an attributable interest.

Respectfully submitted,
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By, 

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August 9, 1994

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 9th day of August 1994, I caused a copy of the attached Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

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