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

In the Matter of	)	
	)	DA 94-1087
Applications of	)	
NEXTEL COMMUNICATIONS, INC.	)	
	)	
For Transfer of Control of	)	
ONECOMM CORPORATION, N.A.	)	File No. 903335
and	)	
C-CALL CORP.	)	File No. 903334

TO: Rules Branch
Land Mobile and Microwave Division
Private Radio Bureau

COMMENTS ON PROPOSED ANTITRUST FINAL JUDGMENT

Clarks' Electronics, Lewiston, ID ("Clarks"); Teton Communications, Idaho Falls, ID ("Teton"); Radio Service Company, Burley and Twin Falls, ID ("RSI"); Zundel's Radio, Inc., Pocatello, ID ("Zundel's"); Business Radio, Inc., Kennewick, WA, ("BRI"); and Accu Comm, Inc., Mukilteo, WA ("AccuComm"); Earl's Distributing·Inc. and Earl's Wireless Communications ("Earl's") (collectively "Clarks"), by their attorneys and pursuant of Section 1.41 and 1.46 of the Commission rules, hereby files its comments in support of and in supplement to its Preliminary Comments filed on November 30, 1994.[1]

These comments primarily provide factual information which demonstrate monopolization of the 800 MHz Specialized Mobile

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[1] On November 30, 1994, Clarks filed a Motion to Accept Pleading and filed preliminary comments, indicating that additional factual showings were under preparation but could not have been completed by November 21. See Declaration of William Holesworth attached hereto. Acceptance of this additional information is in the public interest. An additional Motion for Acceptance is filed simultaneously.

Radio ("SMR") market, resulting from the proposed transfer of control of Nextel and OneComm. As a result of the proposed merger, Nextel will monopolize[2] SMR frequencies in sixteen (16) western states.

I. JUSTICE DEPARTMENT'S FILINGS.

On October 27, 1994, the U.S. Department of Justice ("DOJ") filed an antitrust complaint and proposed Final Order, among other papers, with the District of Columbia District Court, complaining that Nextel's proposed merger with Motorola would monopolize SMR service in the thirteen (13) largest urban markets.[3]

On November 3, Motorola filed in this proceeding the proposed Final Judgment, citing its relevance to the issues herein. Motorola failed to file all the papers DOJ filed with the District Court, including the complaint and the DOJ's Competitive Impact Statement ("CIS"). Those additional papers

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[2] Monopoly control is used herein in its strict antitrust definition, i.e., control of greater than 70% of the relevant market. See Caldwell v. American Basketball Association, 825 F. Supp. 558, 575 (S.D.N.Y. 1993) (noting that courts usually find monopoly power where defendants possess more than 70% of the market); United States v. Paramount Pictures, Inc., 334 U.S. 131, 167-69, 68 S.Ct. 915, 934-935 (1948) (finding monopoly power where five major film-production companies effectively controlled which theaters could exhibit first-run films through the companies' affiliation with at least 70% of the first-run theaters in major U.S. cities).

[3] United States of America v. Motorola, Inc. and Nextel Communications, Inc., Case No. 1:94CV02331 (Hogan, J.) (D.C., District of Columbia, filed October 27, 1994) (hereinafter "US v. Motorola, Nextel").

clearly are relevant to this proceeding. The CIS gives the context and reasoning of DOJ, and the complaint explains what was examined in detail and what was not. The "missing" papers are attached hereto as Exhibit A. Motorola's selective proffer of the Final Judgment as the only document "relevant" to this proceeding is, to say the least, a most narrow definition of relevancy.

In its complaint, the DOJ identified the relevant product market as "trunked SMR service in 800 MHz, 900 MHz and 220 MHz." Complaint at 6. The relevant geographic markets were defined as "the service areas in which the FCC has issued licenses for the provision of SMR service." Id. The DOJ noted that Nextel had agreed to acquire OneComm's "accumulated 800 MHz spectrum in sixteen Western states," and DialPage, Inc.'s 800 MHz holdings in "twelve Southeastern states." Id. at 8. The DOJ did not further analyze the monopoly effect of such acquisitions on the relevant geographic markets in these twenty eight (28) states, concentrating only on the competitive impact of Nextel's acquisition of Motorola licenses in the top thirteen urban markets. The DOJ justified its lack of analysis of the OneComm acquisition with only minimal discussion:

> As an alternative to the proposed Final Judgment, the United States considered litigation seeking to limit the number of 800 MHz channels Nextel held in each affected city. The United States rejected that alternative for two reasons: First, it is satisfied that the relief it has obtained relating to 900 MHz frequencies will adequately address the harm to competitive alleged in the complaint; Second, the

> Department did not want to inhibit Nextel's ability to offer cellular telephone service.[4]

The DOJ did not adequately analyze the anti-competitive impact on the SMR markets in the sixteen (16) western states which would result from the proposed OneComm merger. Indeed, the DOJ did not analyze the impact at all, because that merger was not the focus of its complaint -- only the Motorola merger was. However, Nextel's ability to dominate the SMR markets through market concentration following the OneComm merger will violate Section 7 of the Clayton Act in the following ways:

a) Actual and potential competition between Nextel and OneComm (and the licenses they manage) in the sale of SMR services in the sixteen (16) western states and their submarkets will be eliminated;

b) Competition generally in the sale of trunked SMR services in the sixteen (16) Western states where OneComm has licenses will be substantially lessened; and

c) The deployment of alternative technologies will be inhibited.

The following sections discuss these conclusions.

II. NEXTEL WOULD MONOPOLIZE TRUNKED SMR SERVICE IN SIXTEEN (16) WESTERN STATES FOLLOWING THE ONECOMM MERGER.

Nextel will monopolize trunked SMR service in sixteen (16) Western states following the OneComm merger, if approved. Clarks has selected three of those states for detailed study -- Washington, Oregon and Idaho. Clarks, et. al., believe, through their knowledge of SMR license concentration in Western states

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[4] CIS at 17-18.

that the concentration levels are higher than or equal to the concentration levels in the three surveyed states.

Following the merger, Nextel will control 91% of all licensed frequencies in Washington, Oregon, and Idaho. Nextel would control ninety-one percent (i.e., 90.65%) of all licensed frequencies in Washington, Oregon, and Idaho:

State	Nextel/Onecomm Freq.	Total Freq.
Washington	10,018	10,424
Oregon	6,543	7,461
Idaho	1,404	1,932
TOTAL	17,965	19,817 = 90.65%[5]

Nextel would control 96% of all 800 MHz SMR channels in Washington State, 88% of all 800 MHz SMR channels in Oregon, and 73% of all licensed channels in Idaho.[6] This level of concentration meets the classic case law definitions of monopoly under the relevant case law.[7]

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[5] Source - FCC Database as of November 10, 1994, frequencies in the 800 MHz band licensed for trunked SMR (YX) service. See attached Declaration of William Holesworth, Exhibit D.

[6] See attached Declaration of William Holesworth.

[7] United States v. Grinnell Corp., 385 U.S. 563, 571, 86 S. Ct. 1698, 1704 (1966) (stating monopoly power "ordinarily is inferred from the seller's possession of a predominant share of the market" and finding monopoly where company controlled approximately 87% of the market); Hiland Dairy, inc. v. Kroger Co., 402 F.2d 968, 974 and n.6 (noting that "a substantial part of the market must be controlled by the monopolist to enable the raising the lowering of prices and the undue restriction on competition" and surveying monopoly findings in cases where companies controlled at least 70% of the markets).

A. Relevant Product Market.

Clarks agrees with the Department of Justice that a relevant product market is the trunked SMR market. The trunked SMR market in Washington, Oregon, and Idaho is slightly different from the thirteen (13) largest urban markets, in that it does not primarily include 900 MHz channels, and only includes 220 MHz channels to a limited extent.[8]

The 800 MHz SMR business dominates the SMR product and geographic markets and is the only market for analyzing SMR concentration outside the top 50 markets. Substantial 800 MHz market domination by Nextel in the Western states also is a predictor of future 900 MHz and 220 MHz frequency concentration. Many of the presently viable competitors to Nextel would be eliminated prior to introduction of 900 MHz and 220 MHz channels, based on the proposed Nextel/OneComm merger.

B. Geographic Market.

The relevant geographic market was defined by the Department of Justice for the top 13 markets as a 25-mile radius from center city.[9] Most current independent SMR operators serve BTA[10] or

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[8] The 900 MHz band presently is not licensed outside the top 50 urban markets. The 220 MHz band, while licensed, has not been substantially constructed, based on lack of equipment. Neither of these bands is a significant factor in the Western states smaller cities or rural areas.

[9] See Final Judgment 2. It is unclear whether this definition is the only DOJ definition since it is not employed in the complaint. See Complaint at 6-7.

[10] Rand McNalley Basic Trading Areas.

MSA[11] markets. The Commission has proposed that 800 MHz SMRs be licensed through auctions on an MTA market basis.[12] The MTAs are indeed large markets not reflective of the current market, but of what the FCC would like the market to become through auction.[13]

For example, the Salt Lake City MTA includes most of Utah, all of Southern Idaho, including Boise and Twin Falls, and Eastern Oregon. No one SMR operator presently provides service to this entire region; however, through acquisition of OneComm, Nextel proposes to serve state-sized regions in the Western states.

Clarks analyzed 800 MHz frequency concentration in the three Western states in which its members provide service. Given the various geographic market definitions currently operating in the SMR industry, state-wide and 3-state combined analysis approximates actual business patterns and the future prospective market sizes, including MTAs. The results are set forth in the Declaration of William Holesworth, attached hereto, showing frequency concentration levels in 800 MHz SMR above 85% in many Western markets, and above 70% in virtually all markets.

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[11] Census Bureau Metropolitan Statistical Areas.

[12] Rand McNalley Major Trading Areas. There are 51 MTAs used by the FCC for PCS purposes.

[13] See Further Notice of Proposed Rule Making, PR Docket 93-144 (November 4, 1994).

DOJ found that:

> ... Nextel holds a dominant share of the 800 MHz SMR spectrum available for trunked SMR services in most of the largest markets in the country.

It can be concluded, based on the material submitted herein, that:

> Following the Nextel/OneComm merger, Nextel will hold a dominant share of the 800 MHz SMR spectrum available for trunked SMR service in most markets, large and small, in the states of Washington, Oregon, and Idaho.

Further, based on this survey and based on the FCC's database records of licensed frequency use by Nextel and OneComm, Nextel cannot be heard to deny that it will hold a dominant share of the 800 MHz SMR spectrum available for trunked SMR service in most markets in the 16 Western states in which OneComm operates if the merger with OneComm is approved.

III. ANTI-COMPETITIVE IMPACT OF UNDUE CONCENTRATION IN THE 800 MHz SMR MARKETS.

Will Nextel's market domination in Washington, Oregon and Idaho, and in the 13 other states in which OneComm is licensed, reduce actual and potential competition, affect price and quality of service, and inhibit the development of alternative technologies?[14]

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[14] See DOJ Complaint at 15. See also American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S.Ct. 1125, 1139-40 (1946)(finding monopoly where "power exists to raise prices or to exclude competition when it desired to do so"); United States v. Pabst Brewing Co., 384 U.S. 546, 86 S.Ct. 1665 (1966) (explaining purpose of Clayton Act is to prevent companies from lessening competition through acquisition).

Attached are declarations of various independent SMR operators in Washington, Oregon, and Idaho describing in detail the present and future effect of Nextel's proposed market domination through acquisition of OneComm. Those effects include:

1. Product Market Expansion. Elimination of competitors' ability to expand product service and maintain service quality.

2. Geographic Expansion. Elimination of competitors' ability to expand geographic service areas, through dominant control and warehousing of available frequencies, many of which frequencies will not and cannot be built.

3. Consumer Prices. Increased pricing. Nextel is charging and proposes to charge higher prices in its markets than independent analogue SMR operators.[15]

4. Inhibiting Restraints on Competing Technologies. Nextel's dominance threatens the development of new wide-area alliances by independent operators, e.g., Northwest Wireless, by inhibiting expansion and the continued viability of competing equipment manufacturers to Motorola.

A. The Merger Would Inhibit the Deployment of Alternative Technologies.

The Nextel/OneComm merger would inhibit the deployment of the Northwest Wireless Network in these Western states, and would effectively inhibit competition from other manufacturers. In Washington State, where Nextel would dominate 96% of the available frequencies using Motorola equipment, only 4% of the

[15] See Declaration of Rick E. Hafla, and attachments thereto.

market is left to competing SMR equipment manufacturers.[16] This is hardly sufficient to sustain a market presence. The percentage of the market available to competitors in Oregon and Idaho is not much better - i.e., 13% and 27%, respectively. If that largest market in Idaho is equally divided three ways, each of the three competing equipment manufacturers could only expect to serve less than 10% of the market.

The impact on the development of independent roaming alliances such as Northwest Wireless Network would also be severe. NWN was formed to give the operators of EF Johnson equipment an opportunity to offer their customers an alternative to Motorola's planned MIRS system. However, with continued short-spacing of SMR operators using EF Johnson SMR equipment on the local level, and forcing small market shares on competing manufacturers in the various states, Nextel/Motorola/OneComm can use their dominant market position to keep NWN from successfully offering alternative digital SMR service to new and existing customers.

B. Nextel and OneComm's Dominance of Available Frequencies is Already Affecting the Quality of Service.

The monopoly impact on quality of service is already being experienced in 1994, even in advance of the merger. The merger will exacerbate the situation, by permitting Nextel to combine

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[16] E.g., EF Johnson; Ericsson/GE; and Uniden, the major competitors at this time in the SMR market.

its Questar and Motorola license holdings with those of OneComm.[17]

A number of the attached declarations demonstrate that service quality among independent operators is declining as a result of the inability to get access to frequencies OneComm/Nextel have warehoused.[18] SMR frequency domination is leading to lessened service quality to existing customers, both on a "dropped call" basis, and through customer inability to expand on non-Motorola systems. These are <u>exactly</u> the kind of anti-competitive effects the Clayton Act is designed to prevent. This Commission also should take very seriously the public interest considerations inherent in permitting market concentration to squeeze out competing manufacturers and operators, and to reduce quality service to the public.

C. **<u>The Proposed Merger Will Reduce Competition Between Nextel and OneComm.</u>**

Nextel has purchased Questar's and Motorola's licenses in the Western states, and has monopolized trunked SMR service in the major urban markets, including Seattle, Washington among others.[19] OneComm is a major potential competitor to Nextel,

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[17] The concentration is continuing with OneComm acquiring seventeen (17) "speculator" channels recently constructed in the Southwestern Idaho market.

[18] See Declarations of Rick Hafla, Steven T. Earl.

[19] Seattle is one of the subject markets in the DOJ Complaint. See Complaint at 6.

both now and in the FCC's proposed auctions of SMR markets.[20] That actual and potential competition would be completely eliminated by the proposed merger. OneComm and CenCall are by far the largest SMR license holders in the Western markets; in contrast, Motorola was the second largest "provider of service" in the nation.[21]

By eliminating this competition in the sixteen (16) Western states, Nextel eliminates the potential for the following competitive environment:

1. Sale of some of OneComm's frequencies to existing operators to permit expansion, including possible forced divestiture by the FCC to avoid anti-competitive effects.
2. Merger prevents another equipment manufacturer from obtaining a significant share of the SMR market in the Western states.

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[20] See Further Notice of Proposed Rule Making, D. 93-144 (November 4, 1994).

[21] DOJ Complaint at 8. OneComm's systems are not substantially constructed, and therefore it is not presently the most significant provider of service in all 16 states. However, its unconstructed license holdings are prodigious in the Western states, including Washington, Oregon, and Idaho, and every bit as dominant as Motorola's existing operations on the present and near future status of SMR services.

D. **Impact on the Cellular Market.**

The DOJ admits that it could litigate against Nextel on its 800 MHz concentration - i.e., that the Clayton Act is violated by those concentrations:

> As an alternative to the proposed Final Judgment, the United States considered litigation seeking to limit the number of 800 MHz channels Nextel held in each affected city.[22]

The DOJ refuses to disturb an admitted monopoly, in order, it says, to permit Nextel to enter the "cellular market."[23]

Contrary to DOJ's assumptions, Nextel is not entering the cellular market. Motorola's MIRS technology is not competitive with cellular:

> ... Motorola, Inc.'s officials last week stressed the need to adjust their marketing strategy for ESMR technology. The greatest marketing change would attempt to alter the perception that ESMRs would soon be a third cellular competitor, focusing instead on integrated wireless services for dispatch, said Lise Farmer, spokeswoman for the Motorola division supplying ... MIRS technology to Nextel ... and its potential partners, OneComm Corp. and DialPage, Inc.
>
> Robert Pass: "They just started talking about being a third cellular carrier ... but they didn't have technology that was superior to cellular." [Without superior technology] and if they can't price it well below cellular, then how are they going to [compete with cellular]."[24]

Thus, DOJ's concern that the Nextel should be allowed to enter the cellular market through concentrating 800 MHz frequencies in

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[22] DOJ CIS at 17.

[23] Id., at 17-18.

[24] Land Mobile Radio News, Vol. 48, No. 47, p. 1, (December 2, 1994). (Emphasis and brackets in original.)

one operator ignores two important facts. Nextel/MIRS will not compete effectively with cellular, and, as a system, is not designed to compete effectively.

Take away the "hype" about entering the cellular market, which Nextel and Motorola have successfully sold to the FCC (and now DOJ) over the past few years, and it now becomes clear what independent operators have been saying all along. The SMR market, as a stand-alone, competitive, independent low-cost alternative market, has been and is being systematically eliminated by Nextel's predatory acquisitions and anti-competitive practices, simply so Nextel can dominate the frequency spectrum's value.

The FCC has encouraged such predatory practices through permissive rule changes which encouraged frequency warehousing and short-spacing rules which have been used to squeeze independent operators out of the market. The FCC and DOJ acted in the mistaken belief they were creating a third cellular operation. That premise is no longer tenable.

Nextel is offering a "next generation" of digital SMR service, which independent operators intend to provide also, through co-operatives and alliances such as Northwest Wireless Network. The public interest considerations which guide this Commission should not lead it to approve a merger which will establish single-provider dominance, once and for all, and eliminate independent competition in the emerging and still growing mobile radio markets.

There is enough room for everyone - dispatch, mobile telephone services, low-powered digital, high-powered analogue and digital, high-cost and low cost operations. However, if the FCC signals telecommunications providers that they can ignore the antitrust laws, acquire 91% of a relevant market, drive equipment suppliers and low-cost service providers, small businesses, and rural service out of the market, and force service quality reductions on the surviving market segments, then the Communications public interest standard does not stand for much. While the Commission may not have jurisdiction to enforce the Clayton Act, it is not empowered to ignore its existence or impact on the public interest, especially where the impact on a relevant market is so pronounced.

In fact, Congress intended for the Commission to avoid license concentrations which would tend to lessen competition when the Congress enacted 47 U.S.C. § 309(j). Within the statute, Congress expressed its interest in promoting the public interest through its promotion of economic opportunity and competition. See 47 U.S.C. §309(j)(3)(B). In the House Report, the House Committee on Energy and Commerce declared that although the Committee noted the Commission did not need to apply any particular antitrust tests, the Commission should take into account single licensee's domination of a service. H. Rep. No. 103-111, at p. 254. The Committee expressed its concern "that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." Id. At no point did Congress declare the anti-trust laws inapplicable to the Commission's considerations.

The FCC should not approve mergers which will eliminate markets it has created, nurtured and promoted over a quarter century. The FCC also should adjust its short-spacing and warehousing policies to prevent the present anti-competitive effects of those policies on existing, viable businesses.

WHEREFORE, the premises considered, the above referenced applications for transfer of control should be denied.

Respectfully submitted,

BY: ______________________
Raymond J. Kimball

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Business Radio, Inc.
Accu Comm, Inc.
Earl's Distributing, Inc. and
Earl's Wireless Communications

Dated: December 14, 1994

ATTACHMENTS TO PLEADING OMITTED

ATTACHMENT B

EX PARTE OR LATE FILED

ORIGINAL

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202 296-8111 FAX 202 296-8211

NEXTEL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

September 9, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

EX PARTE

Re: GN Docket No. 93-252

Dear Mr. Caton:

On behalf of Nextel Communications, Inc. and pursuant to Section 1.1206 of the Federal Communications Commission's Rules, this letter constitutes notice that Robert Foosaner and Lawrence Krevor met yesterday with Commissioner Susan Ness, and David Siddall, Legal Advisor to Commissioner Ness, to discuss the implications for Nextel of a freeze on the processing of 800 MHz SMR license applications. At this meeting, Mr. Foosaner and Mr. Krevor presented Commissioner Ness and Mr. Siddall with a series of charts which depict the licensing of SMRs. Commissioner Ness and Mr. Siddall were also presented a map depicting the extent to which certain 800 MHz SMR channels are currently licensed throughout the United States. These handouts are attached herewith.

An original and one copy of this letter have been filed with the Secretary pursuant to Section 1.1206. Should any questions arise in connection with this notification, please do not hesitate to contact the undersigned.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

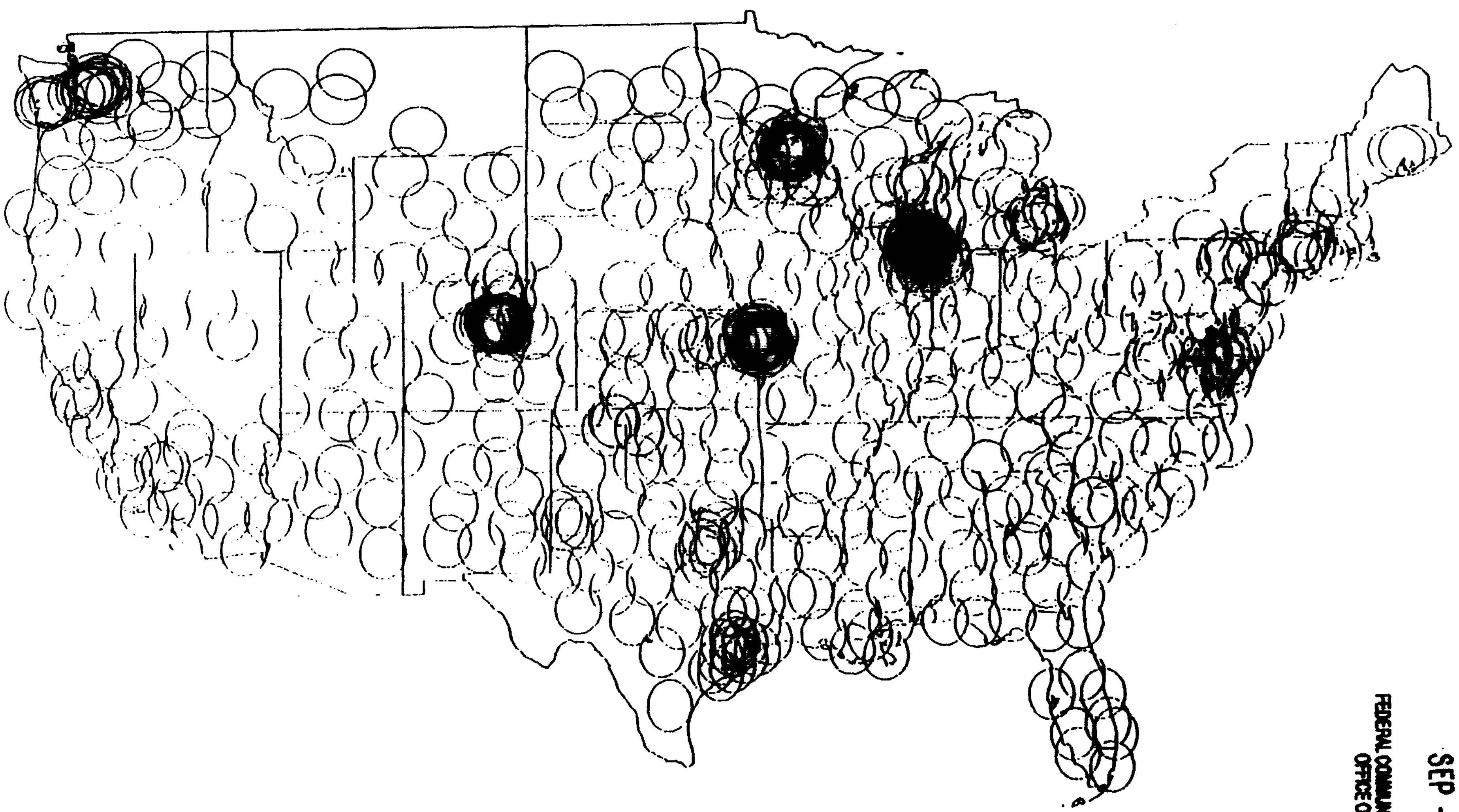
Lawrence R. Krevor
Director - Government Affairs

No. of Copies rec'd 0+1
List ABCDE

cc: Commissioner Ness
Mr. David Siddall

Attachments

55 MILES ARCS FROM LICENSED SMR STATIONS ON CHANNEL 440 - 861.9875MHZ



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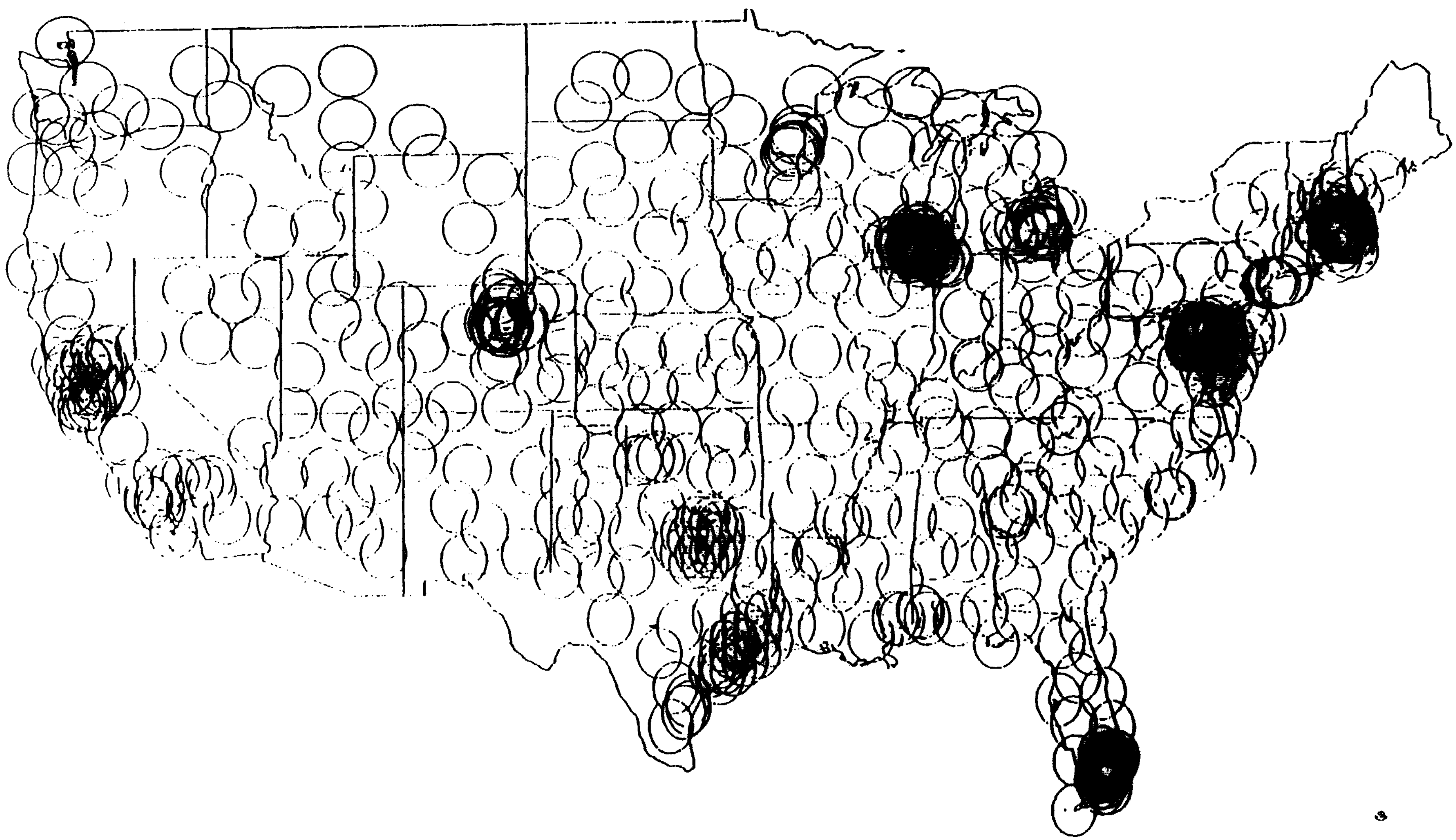
OFFICE OF SECRETARY

55 MILES ARCS FROM LICENSED SMR STATIONS ON CHANNEL 460 - 862.4875MHZ



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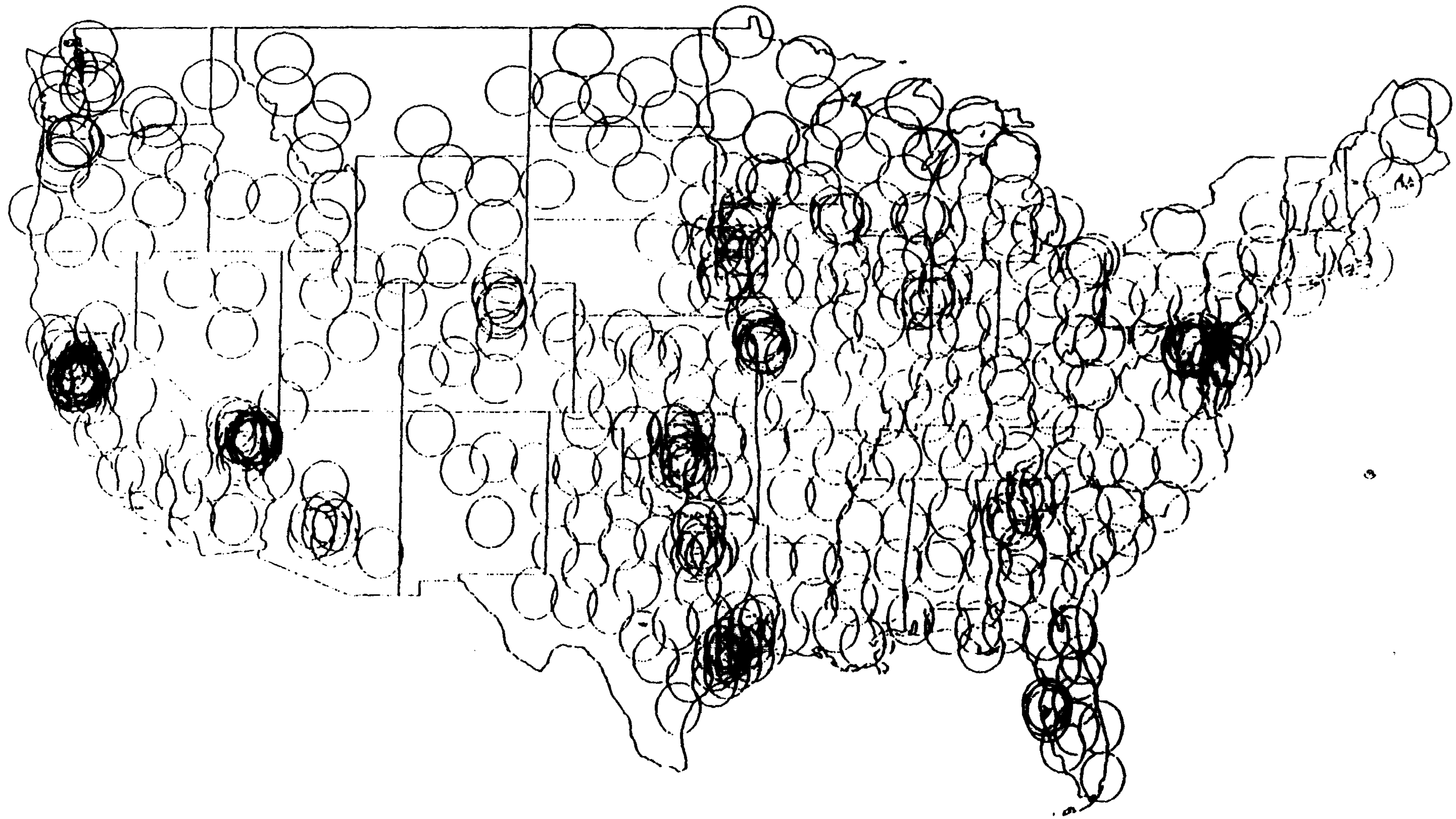

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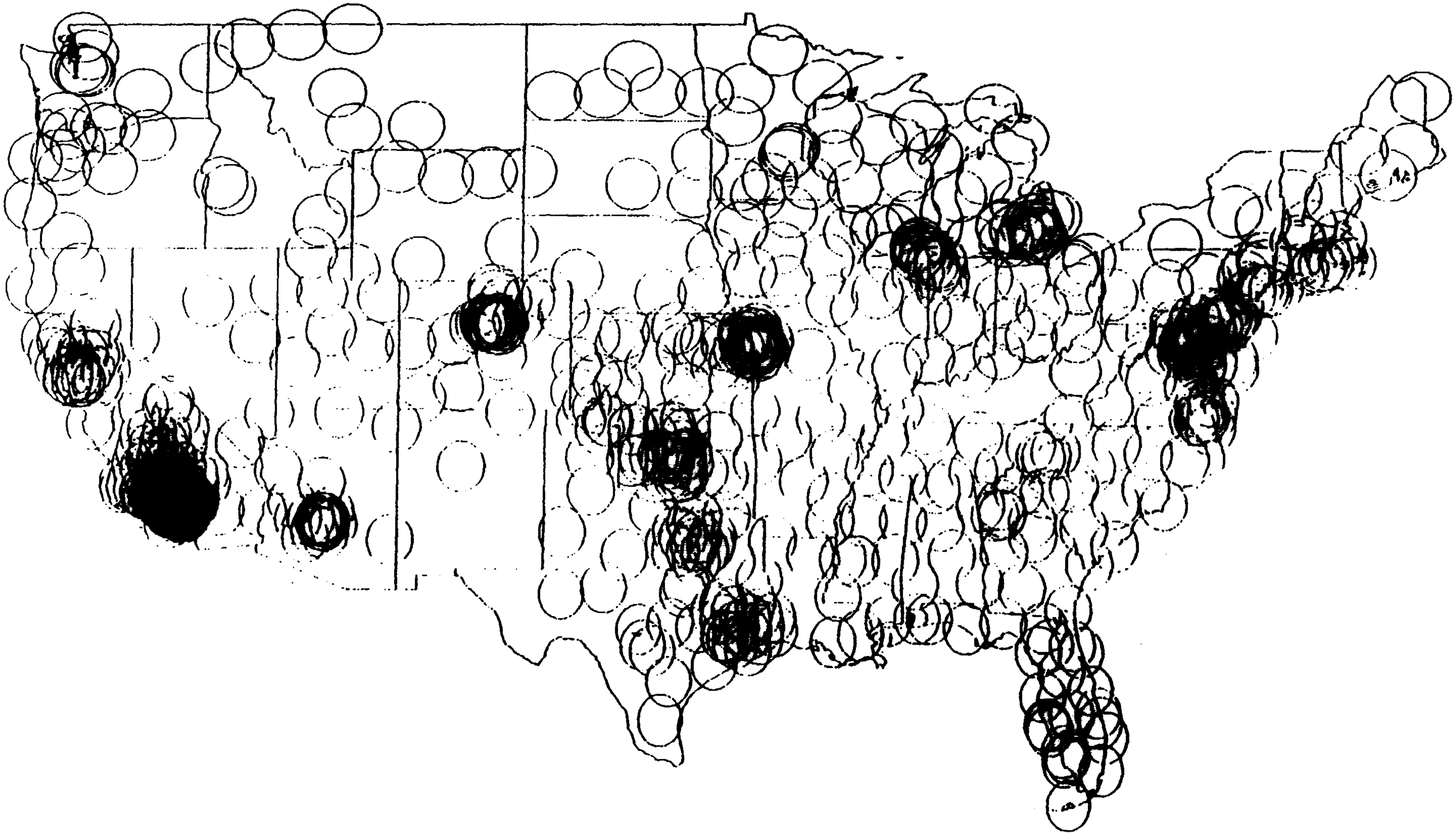

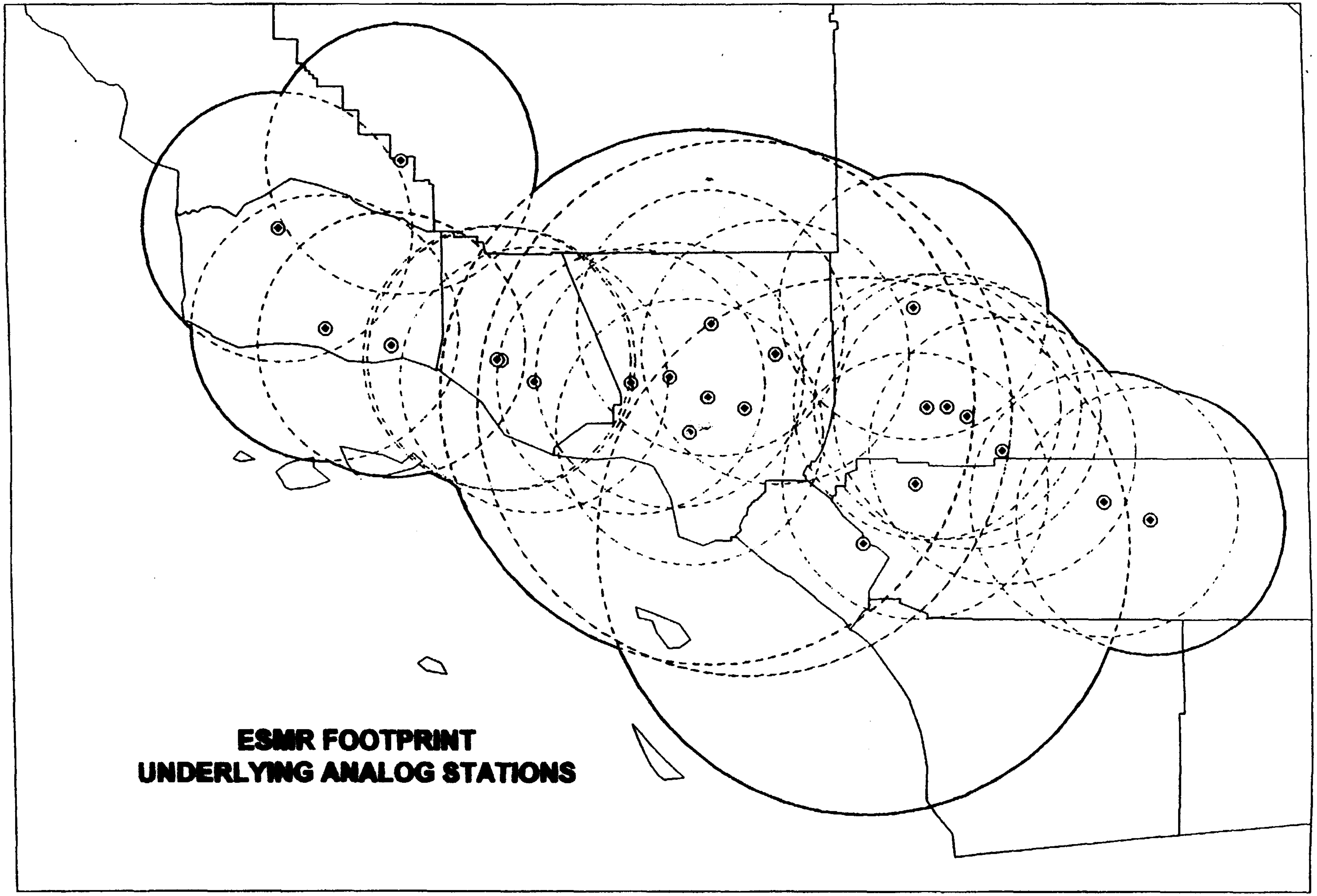
ESMR FOOTPRINT
UNDERLYING ANALOG STATIONS