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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)))	PR Docket No. 93-144 RM-8117, RM-8030, RM-8029
and		
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 800 MHz SMR	)))	PP Docket No. 93-253

To: The Commission

COMMENTS

Kevin Lausman d/b/a Communications Service Center ("Lausman") hereby submits comments to the above captioned Further Notice of Proposed Rule Making. Lausman submits that the Commission's efforts are premature and that matters pending before the Commission, relevant to the instant matter, require resolution prior to the Commission's acting on this FNPRM.

Nextel's Status Must Be Known

Attached hereto is Lausman's earlier filed opposition to Nextel Communications, Inc.'s request for waiver of the Commission's Rules to allow its ownership to include foreign participation on its board. As fully set out therein, Lausman's Opposition sets forth the factual and legal basis for Lausman's objections, including Lausman's direct

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interest in the matter. That matter is still pending before the Commission and must be resolved prior to the Commission's entertainment of the proposals contained within its FNPRM.

If successful, Lausman's Opposition would cause Nextel Communications, Inc. to be ineligible to act as a Commercial Mobile Radio Service provider, thus removing its interest in the instant proceeding as such interest might arise out of the provision of ESMR services, which, in accord with the Communications Act of 1934, as most recently amended, would be subject to CMRS treatment.

The removal of Nextel's eligibility would result in a landmark change in the SMR industry. Nextel is presently the licensee of thousands of channels, the suitor of companies holding thousands of additional channels, and the main proponent of the Commission's proposals. Its disqualification would have a significant impact on the outcome of this proceeding and might, in fact, change the outcome.

It is, therefore, of paramount importance that the Commission first resolve the status and, thus the functional identity, of the largest entity to be affected by the Commission's decision; prior to the Commission's engaging in further rule making. To do otherwise would be to undermine the premises upon which all comments shall be based and would undermine the Commission's ability to engage in reasoned decisionmaking.

The Proposals

Regardless of the Commission's necessary decision on Nextel's status and eligibility, Lausman herein opposes the Commission's proposals in all respects. The proposals regarding frequency swapping are unfair, inequitable, unworkable, and designed to abuse the rights earned by independent SMR operators. MTA based licensing would require such a restructuring of the marketplace, without concurrent benefit in delivery or quality of service, that it should be summarily rejected as wholly disruptive and without public benefit. Finally, the use of auction authority is incorrect for the distribution of a highly limited amount of spectrum which remains to be licensed, and for which there exists over 40,000 pending applications. In sum, the proposals are wholly without merit and should be rejected as little more than a thinly-veiled attempt to force greater consolidation on a market that presently suffers from the ills of previous consolidation, without concurrent benefit to the public.

Conclusion

For all the foregoing reasons, Kevin Lausman d/b/a Communications Service Center respectfully requests that the Commission delay action on the proposals contained within its above-captioned Further Notice of Proposed Rule Making until such time as it has received notice and comment on all of the issues that remain unaddressed and unresolved.

Respectfully submitted,
KEVIN LAUSMAN d/b/a
COMMUNICATIONS SERVICE CENTER

By

Robert H. Schwaninger, Jr.

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202/223-8837

Dated: 1/5/95

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
NEXTEL COMMUNICATIONS, INC.	)	
	)	FCC File No.
Commercial Mobile Radio Service Foreign Ownership Petition	)	
	)	

To: Chief, Private Radio Bureau

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MAR 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION

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Dated: March 11, 1994

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Exhibit I

SUMMARY OF THE FILING

Kevin Lausman (Lausman) respectfully requests that the Commission dismiss or deny the Commercial Mobile Radio Service Foreign Ownership Petition filed by Nextel Communications, Inc. (Nextel) Nextel has requested that the Commission "permit it to retain a foreign director on its Board of Directors".

Nextel misrepresented the nature of the interest in Nextel which is held by Matsushita Communication Industrial Co., representing that Matsushita owned a directorship. However, Nextel made a substantially different representation to the Securities and Exchange Commission as to the nature of Matsushita's interest.

Nextel was not candid with the Commission. While Nextel controls a large number of authorizations for commercial radio communications service stations, Nextel specified only 44 call signs with respect to which it requested waiver of Section 310(b) of the Communications Act.

Nextel is not eligible for the waiver which it requests. Nextel admitted that it has entered into an agreement with an additional Japanese corporation to provide it with the same interest which it has provided to Matsushita, thereby demonstrating that it intends to increase the extent of foreign ownership, in violation of Section 332(c)(6) of the Act, thus making Nextel ineligible.

There is no present situation for which the Commission could grant a waiver to Nextel. Subsequent to the cutoff date for transferring a foreign interest to a different alien, a citizen of Japan left Nextel's board of directors and was replaced by a different citizen of Japan. Since the seat on the board of directors which was held by one alien has been transferred to a different alien in an untimely manner, nothing remains for which the Commission could lawfully grant a waiver.

Nextel faces a high hurdle in requesting any waiver and was required to set forth reasons in its request which would justify a waiver. Nextel presented no reason, whatsoever, why a waiver should be granted.

The United States Trade Representative has determined that Japan has violated the 1989 Third Party Radio and Cellular Agreement and the President has taken steps under Section 301 of the Trade Act of 1988 concerning Japan's refusal to trade fairly with the United States in the field of telecommunications. Accordingly, to integrate its efforts with the foreign policy of the United States, the Commission should refuse to permit any citizen of Japan to hold a position as officer or director of a common carrier subject to Section 310(b) of the Communications Act.

For all the foregoing reasons, the Commission should dismiss or deny Nextel's Petition. Based on Nextel's misrepresentation of fact and lack of candor, and because Nextel is now in violation of Section 310(b) of the Communications Act and is not eligible to obtain a waiver, the Commission should revoke all of the licenses held or controlled by Nextel.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
NEXTEL COMMUNICATIONS, INC.	)	
	)	FCC File No.
Commercial Mobile Radio Service Foreign Ownership Petition	)	
	)	

To: Chief, Private Radio Bureau

OPPOSITION

Kevin Lausman (Lausman), by his attorneys, hereby opposes and respectfully requests that the Commission dismiss or deny the Commercial Mobile Radio Service Foreign Ownership Petition (the Petition) filed by Nextel Communications, Inc. (Nextel). In support of his position, Lausman shows the following.

Standing

Lausman competes directly with Nextel in the field of Specialized Mobile Radio System service in the Tampa-St. Petersburg-Clearwater, Florida, area. Accordingly, Lausman has standing to file the instant Opposition.[1]

---

[1] Although it is immaterial to any issue in the instant matter, in an abundance of caution, and to avoid even the appearance that Lausman is filing a strike pleading, Lausman hereby discloses that Nextel, acting by its subsidiary, Mobile Communications of Florida, Inc., has filed a legal action against him, seeking to force the sale to Nextel of SMR facilities in the Tampa-St. Petersburg-Clearwater area. Regardless of the existence or outcome of that legal action, Lausman expects to face competition from Nextel for the foreseeable future and it is the competition with Nextel which provides him standing in this matter and upon which Lausman bases the concerns which he raises in the instant Opposition.

On August 10, 1993, the Omnibus Budget Reconcilliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(c)(2)(B), *et seq.* (the Budget Act), became law. Section 332(c)(6) of the Communications Act of 1934, as amended by the Budget Act, 47 U.S.C. §332(c)(6), provides that the Commission may waive the application of Section 310(b) of the Communications Act

> to any foreign ownership that lawfully existed before May 24, 1993, of any provider of private land mobile radio service that will be treated as a common carrier as result of the enactment of the Omnibus Budget Reconcilliation Act of 1993, but only upon the following conditions:
>
> (A) the extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
>
> (B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b),

47 U.S.C. §332(c)(6).

Section 310(b) of the Communications Act provides, in relevant part, that no common carrier "license shall be granted to or held by — (3) any corporation of which any officer or director is an alien . . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license," 47 U.S.C. 301(b). Because Nextel has failed to comply with either Section 310(b) or Section 332(c)(6) of the Communications Act, and because Nextel has failed to comply with applicable Commission Rules, the Commission should dismiss or deny the waiver requested by Nextel, should determine that Nextel is in violation of Section 310(b)(3) of the Communications Act, and should order the revocation of all licenses held by Nextel and its various subsidiaries.

Nextel's Petition failed to request relief which it needed, and, instead, requested relief which the Commission has no authority to grant. Section 332(c)(6) authorizes the Commission to grant a waiver only to a "foreign ownership interest." Section 332(c)(6) does not provide any authority to the Commission to grant a waiver of Section 301(b)(3) of the Communications Act with respect to the prohibition on the licensing of a common carrier which has an alien officer or director. Having failed to request in a timely manner waiver of the foreign ownership which is enjoyed by Matsushita Communication Industrial Co. (Matsushita) in the shares of Nextel or of the right of Matsuhita to nominate a director to the Nextel board of directors (or of the foreign ownership interest enjoyed by any other person), Nextel is not eligible to receive a waiver of the foreign ownership restrictions of the Communications Act.

Under the familiar principle of statutory interpretation, *inclusio unis est exclusio alteria,* Sutherland's Statutory Construction §47.23 at 216 (1992), Congress' inclusion of a power in the Commission to waive a "foreign ownership interests" which would be prohibited by Section 310(b) of the Communications Act, Section 332(c)(6) must be interpreted to deprive the Commission of power to waive any prohibited non-ownership interest in a common carrier which is held by an alien and which might have lawfully existed prior to May 24, 1993. Therefore, Congress' enactment of Section 332(c)(6) with an express authority to grant a waiver only as to a foreign ownership interest prohibits the Commission from granting a waiver of the membership on Nextel's board of directors of Kennichi Kurokawa (Kurokawa), whom Nextel admits is a citizen of Japan.

While the Commission has, at times past, occasionally tolerated the existence of an alien director of a common carrier or broadcast licensee, no precedent is applicable to the instant matter. When the Commission has decided to permit an alien to be a director of a common carrier, it has done so with respect to a common carrier which was always fully subject to Title II of the Communications Act, and for which the existence of an alien officer or director was never lawful. In the instant matter, Congress considered the novel imposition of Section 310(b) prohibitions on situations which had been lawful prior to the enactment of the Budget Act. It decided to authorize the Commission to grant a waiver only as to a foreign ownership interest, but did not authorize the Commission to grant any waiver as to the existence of an alien officer or director. Since the Commission's authority to grant a waiver of a formerly lawful foreign ownership interest derives specifically from Section 332(c)(6) of the Communications Act, no precedent considering the Commission's authority to waive Section 310(b)(3) with respect to an alien director or officer is applicable, in any way whatsoever, to the instant matter.[2]

Nextel Misrepresented A Crucial Fact

Nextel's Petition misrepresented the nature of the interest in Nextel which is held by Matsushita. In its Petition, Nextel stated that "in 1992, in return for an equity investment, Matsushita received the right to designate one member of Nextel's nine person Board of Directors (the 'Matsushita Director')." However, at page three of the Form 10K/A2 which

[2] Because there is no applicable precedent, Section 0.332(a)(3) of the Commission's Rules appears to require the Chief, Private Radio Bureau, to refer the instant matter to the Commission *en banc* for disposition, 47 C.F.R. §0.332(a)(3).

Nextel filed with the Securities and Exchange Commission on August 11, 1993, Nextel stated that "the terms of that transaction provide, among other matters, that Matsushita is entitled, subject to certain conditions, to nominate one person for election to the Board of Directors for as long as Matsushita or its affiliates continue to own at least 50% of those 3,000,000 shares," (emphasis added), *accord*, Proxy Statement filed with the SEC by Nextel on August 23, 1993, pursuant to Section 14(a) of the Securities Exchange Act of 1934 at 3. While representing to this Commission that Matsushita had the power to "designate" one member of Nextel's board of directors, and while describing an instance in which it alleged that Matsushita had actually designated a replacement for a withdrawing board member, Nextel disclosed to the SEC that Matsushita's entitlement extended only so far, and "subject to certain conditions, [as] to nominate one person for election to the Board of Directors".[3][4]

By its misrepresentation of the nature of Matsushita's entitlement, Nextel intended to persuade the Commission that Matsushita owned the seat on the Nextel board of directors, when it had told the SEC that Matsushita's entitlement extended only to nominating a person who must

---

[3] To the extent that Nextel may have granted Matsushita "the right to designate one member" of Nextel's board, then Nextel may have not been candid with the SEC. However, that is a matter for the SEC to consider and need not detain this Commission.

[4] Because of the difficulty of one's being certain whether the SEC records are complete, Lausman provided Nextel with an opportunity to review a draft of the instant Opposition and to supplement or correct any factual material. However, Nextel did not respond to the opportunity. Accordingly, Nextel should be estopped from denying any statement of fact made herein.

stand for election, and then only subject to certain undisclosed conditions. On that misstatement of fact, Nextel based its entire attempt to have the Commission determine that Matsushita owned the directorship and to have the Commission waive Section 310(b) of the Communications Act with respect to Matsushita's alleged ownership of the directorship. In view of Nextel's lack of candor concerning the nature of the entitlement enjoyed by Matsushita, the Commission should dismiss or deny Nextel's Petition and should designate all licenses held by Nextel and its corporate affiliates for hearing to determine whether Nextel has the character qualifications required to be a Commission licensee.

While Nextel referred to "Matsushita's directorship interest", it is blackletter law of American corporations that "directors are not agents of the shareholders who elect them, but are sui generis. As persons in control of the property of others, directors are fiduciaries, with their duties running primarily to the corporation," H. Henn, Handbook of the Law of Corporations §207 (1970). Further, a director cannot contract away his right and duty to exercise his independence, because any contract where the director of a corporation limits his discretion and judgment is void as against public policy, Fletcher, Cyclopedia of Corporations §280 (1986). While it may come to as a rude shock to Matsushita that the "Matsushita director," Nextel Petition at 3, has a primary duty to a person other than Matsushita, Nextel knew or should have known that Matsushita owns no such thing as a "directorship interest" in Nextel. The simple fact is that Nextel has on its board a Mr. Kurokawa, a citizen of Japan, an alien, who may be loyal to Matsushita, but Matsushita owns neither Kurokawa, nor his vote in a Nextel board meeting, nor any guarantee that it can designate his reelection or his replacement by another

Matsushita Man. Knowing the truth, Nextel should have told the Commission the truth, but it did not.

Nextel Was Not Candid With The Commission

Not only did Nextel misrepresent a fact of decisional significance, Nextel was also not candid with the Commission. The Commission required Nextel's petition to "clearly specify the licensee's name, radio service, call sign(s), station address(es) or geographical location(s), and contact person with telephone number," First Report and Order in GN Docket No. 93-252 at para 12 (Released January 5, 1994 FCC 94-2) (First Report and Order). Rather than being fully candid as to the full extent of the license portfolio held by Nextel and by Nextel's wholly-owned subsidiaries, Nextel supplied the Commission with the call signs of only 44 stations. For none of the stations which it identified did Nextel comply with the Commission's requirement that it supply the station address and a contact person with a telephone number. For this reason, alone, Nextel's request is defective on its face and should be dismissed.

Not only did Nextel not supply the Commission with the required data which might have allowed the Commission to check the accuracy of Nextel's report, Nextel did not even identify the wholly-owned subsidiaries which hold licenses which are to become Commercial Mobile Service authorizations in 1996, thereby depriving the Commission of any opportunity to compile its own complete and reliable listing of the facilities controlled by Nextel. Nextel could easily have been candid with the Commission. Instead, referring only vaguely to un-named co-

conspirators, Nextel chose to try to mislead the Commission as to the extent of the license holdings which it controls.

Based on published reports and on Lausman's own knowledge of the Specialized Mobile Radio System market, Lausman believes that Nextel and its subsidiaries are among the three largest holders of SMR licenses in each of the Top 50 United States markets. However, the trivial quantity of license information supplied by Nextel would hardly permit the Commission to determine the true extent of Nextel's dominance of the SMR field in any American market. Since the extent of foreign interests in domestic American radio communication facilities is the core issue in the instant matter, it behooved Nextel to disclose to the Commission the full extent of the facilities for which waiver was requested.

Where one corporation is the sole owner of a subsidiary, it is obvious that the actions of the board of directors of the parent are fully effective as to the policy to be carried out by the subsidiary. Accordingly, not only should Nextel have correctly represented the nature of the presence on its board of a citizen of Japan, it should have disclosed the full extent of the radio facilities over which that alien would have the power of a corporate director.

In view of Nextel's willful lack of candor, the Commission should dismiss or deny Nextel's waiver request and take such other action as may appear to be appropriate to an instance of an egregious lack of candor. Alternatively, the Commission might choose to consider Nextel's request, but only as to those radio station facilities which Nextel identified by

call sign as being affected by the presence on its board of a citizen of Japan. As to all other stations controlled by Nextel, the Commission should hold that Nextel did not file a timely waiver request, and, therefore, no waiver will be granted with respect to those stations. Since no waiver can be granted with respect to those stations, the Commission should proceed pursuant to Section 310(b) of the Communications Act and revoke all of those licenses.

Nextel made no reference to whether it managed any radio communication facility for which neither Nextel nor any subsidiary of Nextel holds the license. In the absence of complete information concerning the extent to which Nextel conducts the day-to-day operations of domestic American commercial radio communication facilities, and, therefore, the full extent to which the presence of an alien director on Nextel's board would affect Commercial Mobile Service operations in the United States, Nextel failed to place the Commission in a position in which it could grant Nextel's request. Accordingly, the Commission should dismiss or deny Nextel's request.

Nextel Is Ineligible For The Requested Waiver

Lausman has shown that Matsushita does not own a directorship on the Nextel board. However, assuming, *arguendo*, that Matsushita's entitlement did include the right to impose its choice of director on Nextel, and that it is that foreign ownership interest for which Nextel has requested waiver, Nextel disclosed facts in its waiver request which deprive it of eligibility for the requested waiver. At page three, footnote four of its Petition, Nextel admitted that it has "executed a definitive agreement with Nippon Telephone and Telegraph Company ("NTT")

which, *inter alia*, will permit NTT to be represented by a director on Nextel's board later this year." Thereby, Nextel admitted that it has already agreed to sell to another alien an ownership interest in Nextel which is identical to the ownership interest which it claims exists in the alien Matsushita. Clearly, Nextel's arrangement with NTT would violate Condition (A) which Section 332(b)(6) imposes on the Commission's authority to grant waivers, because Nextel has admitted that it has already agreed to increase the extent of foreign ownership in Nextel above the extent which existed on May 24, 1993. In view of the fact that Nextel cannot comply with Condition (A) without breaching its contract with NTT, and in view of the fact that Nextel has declared its intention to violate Condition (A), Nextel is not eligible to request, and the Commission is not authorized to grant, any waiver to Nextel of Section 310(b) of the Communications Act.

Overlooking the limitation on the Commission's waiver authority which make waiver available only as to those foreign ownership interests which existed as of May 24, 1993, Nextel blithely attempted to finesse its executory agreement with NTT by saying that it would "take all steps necessary to comply with the foreign ownership restrictions of Section 310(b)(4) of the Act prior to" the time that it consummated its deal with NTT, *id.* Apart from the lack of authority in the Commission to waive Section 310(b)(4) as to any interest arising subsequent to May 24, 1993, Nextel's statement skipped over the equally significant effect of Section 310(b)(3) on its deal with NTT. Since there is nothing, whatsoever, that Nextel can do to obtain a waiver of the prohibition of its having any alien director (to say nothing of its planned increase in the number

of alien directors), the Commission should dismiss or deny Nextel's Petition because Nextel has admitted that it has no intention of complying with a condition which Congress established.[5]

In view of Nextel's admission that it has already agreed to provide NTT with essentially the same benefits as it has provided to Matsushita, Nextel failed to supply the Commission with nearly enough information to allow the Commission to grant Nextel's Petition. Although Kurokawa has as much power on the board as could be obtained by the votes of 11 percent (one-ninth) of Nextel's shares, and although a director who would act in the interest of NTT would raise that percentage to 22 percent (well over the one-fifth limit on foreign ownership), Nextel provided the Commission with no information which would allow the Commission to assess the actual extent of interests held by foreign nationals. Nextel did not supply the Commission with the number or percentage of shares which Matsushita bought which entitled it also to enjoy a seat on the Nextel board. Neither did Nextel supply the Commission with copies of the agreements between it and Matsushita and between it and NTT. If the Commission were to understand the instant matter fully, it would have to require Nextel to supply all such information and permit the public to scrutinize and comment on that information. Since Nextel failed to supply essential information concerning the true extent of foreign ownership and the extent to which the extent might be disproportionate to the extent of actual investment of aliens

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[5] Assuming, *arguendo*, that Nextel's characterization of Matsushita's entitlement was correct, and that Matsushita and NTT would have the absolute right to impose their choices for two members of a nine person board of directors, then those combined interests would effectively exceed the limitation on alien ownership of capital stock provided by 47 U.S.C. §310(b)(3), because Matsushita and Nextel would have greater power to select members of the board than the votes of one-fifth of the shareholders of capital stock.

in the corporation, the Commission should dismiss or deny Nextel's request, or require that it submit for public review such information as would allow the Commission to make a fully informed decision.

Although Lausman caused a diligent search to be made of the records of the SEC, no report was found disclosing either the nature of the arrangment which Nextel has with NTT or the date on which the arrangment was entered into by the parties. Since Nextel did not specifically request that the Commission waive its extension to NTT of the same entitlement which it has provided to Matsushita, Nextel appears not to take the position that the existence of the executory agreement prior to the filing of Nextel's Petition is sufficient to support a request for waiver as to the interest of NTT. If Nextel does not claim that the executory contract with NTT is sufficient to establish a present prohibited interest in NTT, then not only will Nextel be barred from requesting waiver at any later time, but the Commission will be faced with a problem, because another person requesting waiver of the prohibitions of Section 310(b) has taken the position that the timely existence of an executory contract was sufficient to avoid violating the conditions on waiver imposed by Section 332(c)(6) of the Communications Act.

At footnote 11 to its petition for waiver, MAP Mobile Communications, Inc. disclosed that it had entered into a contract or contracts to sell shares to two aliens prior to May 24, 1993, but that it did not receive their investments and did not issue shares to them prior to May 24. MAP's position is that the issuance of the share certificates did not violate the conditions on waiver because the transfer of funds and share certificates subsequent to May 24 were merely

"ministerial" acts. Although Nextel might have taken the same position as MAP, it does not appear that Nextel takes the position that the existence of its contract with NTT is sufficient to avoid violating the conditions. Since the two legal positions cannot be harmonized, the Commission should study both requests carefully to determine whether either is correct.

Subsequent to the filing of its Petition, on or about March 3, 1994, Nextel announced that it had entered into an agreement with MCI Communications Corporation (MCI), under which MCI is to acquire an interest in Nextel. Pursuant to Section 1.65 of the Commission's Rules, if not dismissing or denying Nextel's Petition on any of the bases set forth herein, the Commission should require Nextel to report to it whether any share, whatsoever, in MCI is held by an alien. If so, then Nextel's Petition would have to be denied beause the extent of foreign ownership in Nextel would increase above the extent which existed on May 24, 1993, *see*, 47 U.S.C. §332(c)(6)(A).

Nextel Failed To Comply With The Requirements For Waiver

The plain fact is that Nextel has no situation for which the Commission can grant a waiver. On May 24, 1993, Nextel had an alien director named Takashi Kawada (Kawada). On July 19, 1993, Kawada was no longer a member of Nextel's board, but had been replaced by Kurokawa. Since Section 332(b)(6) of the Communications Act does not permit the Commission to grant a waiver for any transfer of ownership occurring after May 24, 1993, *see*, First Report

include an affirmative showing that "grant of the waiver is otherwise in the public interest," 47 C.F.R. §22.19(a)(1)(i). Nextel's request met none of these essential requirements for any waiver of law. In essence, Nextel relied on nothing more than the existence of a situation of its own making, combined with a demonstrated intent to continue creating such situations after the time that it had notice of the consequences to itself of such situations. Where the public interest in protecting domestic American telecommunications against alien influence is the crucial factor for the Commission to consider, Nextel's failure to meet any of the well-established requirements for waiver should result in the dismissal or denial of Nextel's Petition.

Nextel did not claim a single reason why the Commission should grant the waiver which it requested. Nextel did not claim either that unique circumstances were involved which might distinguish it from any other of the persons requesting a waiver. To its credit, perhaps, Nextel did not claim that there would be any benefit to the public interest in having a citizen of Japan as a member of its board of directors.

The Commission's range of discretion in considering waiver requests is broad, and the Commission will be sustained unless denial of a waiver request is an abuse of discretion, WAIT Radio v. FCC, 459 F.2d 1203, 1207 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972). "If a waiver would violate the policy of the rule, it can only be justified by an affirmative showing of countervailing considerations," *id.* at 1207-1208. Given the arrogant and total absence of any countervailing consideration presented by Nextel's Petition, the Commission should feel secure in determining that no waiver was justified. The court in WAIT v. FCC, 418

and Order at para. 9,[6] the facts of the instant matter do not include any situation for which waiver could be granted.

Matsushita could just as easily have named Kevin Lausman, or any of more than 250 million citizens of the United States of America to replace Kawada when Kawada was preparing to resign. Midway to Nextel's possibly becoming a member of the American common carrier fleet, however, Matsushita torpedoed Nextel below the waterline by nominating a citizen of Japan to Nextel's board after May 24, 1993, thereby making Nextel ineligible to request any waiver of Section 310(b).

Section 90.151 of the Commission's Rules sets forth the requirements for a waiver of the Private Radio Services Rules. Rule Section 22.19 sets forth the requirements for waiver of the Public Mobile Services Rules. The rules applicable to both of the land mobile radio services establish three essential requirements for the grant of any waiver. First, the request must "set forth reasons in support thereof", 47 C.F.R. §90.151(a), or must include a "statement of reasons sufficient to justify a waiver," 47 C.F.R. §22.19(a)(1). Second, the request must include a "showing that unique circumstances are involved and that there is no reasonable alternative solution", 47 C.F.R. §90.151(a), *see, also*, 47 C.F.R. §22.19(a)(1)(ii). Third, the request must

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[6] The Commission stated that "we interpret this language to refer to the precise identities of persons or entities and not merely to preexisting levels of foreign ownership interests," First Report and Order at para. 9. Accordingly, even if there were deemed to be an "ownership interest" in a directorship, it was personal to the director and could not lawfully be transferred to another alien subsequent to May 24, 1993.

F.2d 1153 (D.C. Cir. 1969) required the Commission give a "hard look", *id.* at 1157, to a waiver request. The Commission should give a hard look to Nextel's Petition, then turn a hard eye to it, and then give it a hard boot, with a firm assurance that the Commission will be sustained.

Public Policy Would Be Thwarted By Grant Of Nextel's Petition

On February 15, 1994, the United States Trade Representative, Ambassador Michael Kantor, determined that "Japan has violated the 1989 Third Party Radio and Cellular Agreement by failing to provide comparable market access to Japan's cellular telephone and network equipment market. We have been pursuing access to this market since 1985. Three agreements and almost ten years later, U.S. cellular telephone systems remain effectively excluded from over half the Japanese markets," Statement dated February 15, 1994, a copy of which is attached hereto as Exhibit I. More recently, as a result of the refusal of Japan to trade fairly with the United States in the field of radio telecommunications, the President has revived his powers under Section 301 of the Trade Act of 1988, directing a study of possible actions against Japan under his "Super 301" authority.

The unfair competition which the Empire of Japan has imposed upon the United States of America in the field of telecommunications is of proportions unprecedented in any other field of international commerce. The extent to which Japan has closed its markets to American telecommunications products, while freely exploiting the American consumer's demand for

electronic devices, has been the subject of countless filings with the federal government by American manufacturers.

It was and is the clear intention of Congress to limit strictly control and influence over use of the radio spectrum by foreigners. It was to prevent the seduction and foreignication of the domestic American public mobile telecommunications business that Congress applied Section 310(b) of the Communications Act immediately to would-be future CMRS operators such as Nextel. To effect the will of Congress and to integrate its actions with the foreign policy of the United States as promulgated by the Office of the President, the Commission should act decisively against Nextel's request.

The Commission should recognize a trade war for what it is, whether declared or not. Like the Cold War, the continuing trade war of the Pacific Rim is a war, even when the cannon are silent. The War of the Pacific Rim has battles which are lost and won, and it has vicious, scheming aggressors and valiant defenders. The long, dark, terrifying, Cold War of attrition ultimately destroyed the Soviet Union and placed the United States in a perilous state of internal and external debt. In a war, each citizen must do his part. So long as Japan continues to discriminate against the import of American telecommunications equipment, so long as the Office of the President is willing to stand against the market predation of Imperial Japan, the Commission should do its part by refusing to allow any citizen of Japan to hold more than one-fifth of the capital stock of any common carrier, or to be an officer or director of any common