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

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act	)	GN. Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
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

TO: The Commission

PETITION FOR PARTIAL RECONSIDERATION

SMR WON, a trade association of 800 MHz SMR operators, by their attorneys and pursuant to Section 1.106 of the Commission's rules, submits this Petition for Partial Reconsideration of the Third Report & Order, FCC 94-212, released September 23, 1994 (hereinafter "Third Report"), in the above-referenced proceedings.

I. INTRODUCTION

SMR WON is a trade association comprised of more than ninety (90) member companies that are 800 MHz SMR operators. SMR WON was formed in September 1994 in response to this Third Report in order to represent the interests of SMR operators in smaller metropolitan markets and rural areas. Since the August 1994 adoption of the Third Report SMR WON has held numerous meetings with the Commission staff, Congressional offices, and Nextel in an effort to reach some compromise on the equitable sharing of the 800 MHz SMR band. All of SMR WON's members are directly

affected by this Order and face threatened injury as a result of the Commission's actions. Accordingly, SMR WON has standing on behalf of its members to seek reconsideration as requested herein. Panhandle Eastern Pipeline Co., 4 FCC Rcd. 8087, 8088 (1989). Many of SMR WON's members also participated in this proceeding by filing comments below.[1]

SMR WON seeks reconsideration of the following Commission actions in the Third Report:

- The FCC's proposal to conduct geographic "market overlay" auctions in lieu of spectrum auctions exceeds the Commission's auction authority under Section 309(j) of the Communications Act.
- By failing to establish a viable "relocation spectrum block" for incumbent SMR operators, the FCC's MTA licensing scheme is unfair and not capable of implementation.
- The failure to fully attribute all 800 MHz spectrum controlled by any entity will contribute to the monopolization of the 800 MHz SMR market.
- The Commission's "expansive view" of competition which includes all CMRS services is an abuse of discretion and ignores the impact of the proposed regulations on presently operating, discrete markets.
- These new regulations will have severe anticompetitive effects and create the monopolization of a discrete product market, namely, the 800 MHz SMR market.

Moreover, new information requires reconsideration. Since the adoption of the Third Report & Order on August 9, 1994, new facts have emerged. On October 27, 1994, the Department of

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[1] The Southeastern SMR Association, Idaho Communications, L.P., Teton Communications, Inc., South Carolina Communications, L.P., Advanced Electronic, East Texas Communications, L.P., and John Mitchell Company, all of which are SMR WON members, filed joint Reply Comments on July 11, 1994 in this proceeding.

Justice filed an anti-trust complaint against Nextel alleging the monopolization of the 800 MHz SMR market.[2] Also, OneComm's application for consent to transfer of control of OneComm to Nextel included the proposed transfer of thousands of unconstructed SMR channels in 16 Western states.[3] These new developments disclose a pattern of licensing procedure abuse and spectrum warehousing which dwarfs that of "application mill" speculators, and also disclose the concerted acquisition of spectrum leading to anticompetitive monopolization of licensed frequencies which will lessen competition. The actions challenged in this Petition, unless modified, will lead to the elimination of existing low-cost competition among SMR operators, inhibit the development of new technologies through the vertical integration of the largest SMR operator and the largest SMR equipment manufacturer, and result in a single entity monopolizing this market.

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[2] United States of America v. Motorola and Nextel Communications, Inc., Case No. 94-CV-02331 (D.D.C.) filed October 27, 1994.

[3] See, Application of OneComm Corporation and C-Call Corp. for Transfer of Control to Nextel Communications, Inc. filed August 12, 1994 (amended Nov. 3, 1994), DA 94-1087, 1256, File Nos. 903334-35.

II. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO CONDUCT GEOGRAPHIC AUCTIONS INSTEAD OF SPECTRUM AUCTIONS

Based solely on finding that "800 MHz SMR licensees compete or have the potential to compete with existing wide-area CMRS service providers",[4] the Commission has determined that "some form of wide-area licensing based on MTAs should be implemented for 800 MHz SMR service." Third Report and Order, GN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, ____ F.C.C. Rcd. ____ at ¶ 94. The FCC believes that the "upper 200" channels of the total 280 channels allocated to SMR should be designated for wide-area licensing, divided into four blocks of 50 channels. Id. at ¶ 103. Under this scheme, wide-area applicants would bid on any or all of the four blocks in each MTA. Id.

The FCC does not propose to auction vacant or "clear" spectrum; the MTA license would merely confer on the licensee the right to expand within an established geographic area, subject to the availability of vacant spectrum (i.e., "market overlay licenses"). Id. at ¶ 106. Further, the Commission has concluded that incumbent SMR systems would not be subject to mandatory

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[4] Third Report at ¶ 94. This conclusion is inconsistent with the Justice Department's later determination in United States v. Motorola and Nextel, supra, that SMR is a separate market which is not a substitute for cellular service. See Justice Department Competitive Impact Statement ("CIS") at 4-5.

relocation and would be afforded co-channel frequency protection.[5]

Section 309 (j) of the Communications Act authorizes the Commission to use competitive bidding procedures where:

> mutually exclusive applications are accepted for filing for an initial license or construction permit which will involve a use of the electromagnetic spectrum . . . .

47 U.S.C. § 309(j)(1) (emphasis added). The House Report elaborated that the statute "establishes procedures for licensing frequencies through a competitive bidding process." H. Rep. No. 103-111, at 246 (emphasis added)(hereinafter "House Report"). Congress passed a "limited grant of authority" which:

> would apply only when there are mutually exclusive applications for an initial license....Competitive bidding would not be permitted to be used...for a renewal or modification of the license.[6]

In this same legislation Congress provided underutilized United States government spectrum blocks for auctionable private licenses,[7] and this context explains Congress' intent - i.e., to make new spectrum blocks available to the public for initial licenses subject to competitive bidding, but not licenses already

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[5] In a further rulemaking, however, the FCC is seeking comment on "alternative mechanisms for encouraging relocation by incumbents." Id. at ¶ 106.

[6] House Report at 253. The references to "initial", "renewal" and "modification" are significant. Congress was stating its intent that it would only permit auctions to be used for the introduction of "initial" licenses" on vacant spectrum.

[7] Id. at 246.

issued, i.e., those to which "renewals" or "modifications" would apply.

Indeed, Congress stated its intent that this "limited grant of authority"[8] not be used to displace currently licensed services. Congress described the disruption caused when the Commission reallocated spectrum that had been utilized, on a secondary basis, by the Amateur Radio Service:

> ...because of the lack of alternative frequencies, the Commission was forced to take away these two mHz in return for giving the Service "primary" access to an adjacent three mHz band.[9]

Congress intended to avoid similar disruptions in other existing Service bands:

> Passage of this bill will alleviate the pressure to take more spectrum for the Amateur Service by providing frequencies for new technologies in other bands.[10]

Nowhere in the legislative history is there any statement by Congress that it intended the FCC to re-auction "virtually all of the spectrum (below 20 gHz) currently being utilized".[11] In fact, Congress knew from experience that frequency congestion caused disruption of licensed services. Congress on the one hand limited auction authority so as not to exacerbate disruption of existing services, and on the other hand was seeking to provide

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[8] Id. at 253.

[9] Id. at ¶ 250.

[10] Id. (emphasis added).

[11] Id. at 250.

new spectrum to meet the demand for new technologies and permit the awarding of additional "initial licenses."

> The lack of unassigned, usable spectrum available for commercial and non-Federal Government users has forced the Commission to postpone or forego spectrum assignments for many worthwhile uses and technologies, and is imposing unacceptable levels of congestion in many areas. In fact, the Committee record indicates that scarcity of spectrum has limited competition in many spectrum-dependent industries and has resulted in increased cost to American businesses and consumers.[12]

Nor is there any expression by Congress that it was permitted or intended the FCC to use this limited auction authority to award exclusive geographic territories, or exclusive rights to purchase existing licensees, where no substantial spectrum was available because it had already been licensed to existing services. The consistent references in the legislative history and the statute itself are to spectrum auctions, not "geographic exclusivity auctions."[13]

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[12] Id.

[13] A review of the House report reveals over forty (40) references to "spectrum", or "frequencies", e.g., "award licenses to use the electromagnetic spectrum..."; "...licensing frequencies..."; "...assigning spectrum to non-federal licensees..."; Radio frequency spectrum is a non-depletable natural resource and has finite boundaries."; ...substantial shortage of frequencies..."; "...build or operate a system using the spectrum..."; The FCC is responsible for the radio spectrum..." See, House Report generally. While there are references to the FCC's authority to "prescribe area designations and bandwidth assignment to promote equitable distribution of service among geographic areas...", this "equitable distribution" function is related to, and subsidiary to, the FCC's spectrum allocation authority.

A reading of the legislative history clearly debunks any theory that the FCC was given unlimited auction authority to re-license and reallocate any and all licenses, bands and services below 20 gHz which already have been licensed. However, that is the precedent the Commission is proposing to establish in this Third Report. Having ordered the relocation of a limited number of microwave users in the PCS proceeding[14], the FCC now believes it has established the precedent to re-auction a mature, licensed service, one dedicated to providing service to the public for over 20 years, including "an impressive record of providing life-saving emergency communications during natural disasters and accidents."[15]

Simply put, the FCC is holding a "geographic market" auction which has little or no spectrum attached. In fact, the Commission itself has been forced to admit that it is not inviting "initial licenses" for "spectrum", but franchises for geographic "wide-area" exclusive rights to squeeze out and buy out (on a supposedly "voluntary" basis) existing licensees:

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[14] Indeed, the FCC substantially rearranged the licensed bands in order to limit disruption of existing, licensed services. First Report & Order and Third Notice of Proposed Rulemaking, ET Docket No. 92-9, 7 FCC Rcd. 6886 (1992); Second Report & Order, ET Docket No. 92-9, 8 FCC Rcd. 6495 (1993).

[15] House Report at 250. Many of SMR WON's operators provide "backbone" services to police, ambulances, hospitals, doctors, nurses, and emergency rescue organizations. On short notice in 1992, Idaho Communications provided the primary communications support for the major forest firefighting efforts including National Guard and Army contingents in the rugged mountains of southern Idaho.

> We recognize that the large number of systems already authorized or operating in the band places significant limitations on our ability to provide MTA licensees with clear spectrum...[16]

Indeed, when the Commission initially reviewed the potential applicability of Section 309(j) to SMR services in the Second Report and Order in this docket, it stated that it did not intend to apply auctions to already licensed spectrum:

> [i]f multiple SMR initial applicants file for the same channels in the same location on the same day . . . we intend to use competitive bidding to select from among competing applications.[17]

The Commission's proposal to auction MTA overlay licenses is not authorized by Section 309(j).

III. THERE IS NO AVAILABLE RELOCATION SPECTRUM

Even if Congress had given the FCC authority to completely dislocate an existing service in order to create new auctionable spectrum, Congress would not have authorized the FCC to undertake such a project without identifying adequate, vacant spectrum suitable for the SMR industry.

In a separate proceeding to develop spectrum to encourage new communications technologies such as PCS, the FCC allocated frequencies to accommodate incumbent fixed microwave

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[16] Third Report at ¶ 106.

[17] Implementation of Sections 309(j) of the Communications Act - Competitive Bidding, "Second Report & Order", 9 FCC Rcd. 2348, [¶ 63] (1994).

licensees that were required to relocate.[18] The FCC recently affirmed its decision to adopt a mandatory relocation plan for incumbent 2 GHz microwave licensees.[19] In doing so, the FCC ensured that incumbents would be protected and recognized the concerns of Congress, particularly the Senate's concerns, regarding the relocation of existing 2 GHz licensees.[20] Those concerns, as expressed by Senator Hollings, involved the FCC's proposal:

> to downgrade the status of some of the existing users of these frequencies from primary to secondary after 10 to 15 years . . . While the FCC has proposed that these existing user could move their microwave facilities to other frequency bands, the FCC has not provided sufficient guarantee that the reliability of the communications services could be ensure in these new frequency bands. . . . [T]he utility can only be required to move if it is established that other frequencies are available.

138 Cong Rec. S10347 (July 27, 1992). Noting that the Senate amendment was not passed into law, "[n]evertheless, the regulatory framework that [the FCC] established addresses the concerns expressed during consideration of the FY 1993 Appropriations Bill." Id. at ¶ 22.

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[18] First Report & Order and Third Notice of Proposed Rulemaking, ET Docket No. 92-9, 7 FCC Rcd. 6886 (1992); Second Report & Order, ET Docket No. 92-9, 8 FCC Rcd. 6495 (1993).

[19] In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, FCC 94-303, ET Docket No. 92-9 (released December 2, 1994).

[20] Id. at ¶ 21 citing proposed amendments to the FY 1993 Appropriations Bill, H.R. Conf. Rep. No. 918, 102nd Cong. 2d. Sess. (1992).

The same concerns over massive service disruption raised by Senator Hollings apply here. While the FCC has proposed voluntary relocation in this proceeding, it has not identified any available spectrum to which incumbent 800 MHz SMR operators could relocate. This is because there is no vacant spectrum between 806 MHz and 866 MHz. Time and time again, in this docket,[21] in meetings with the staff, the FCC has been told that there is no spectrum to auction.[22] Indeed, the FCC has established "wait lists" for those seeking SMR licenses, and these "wait lists" now cover most of the country.[23] There is a 40,000 application backlog for this spectrum band, making any assertion of spectrum vacancy for "initial licenses" impossible.[24]

SMR WON would not even consider any wide-area auction proposal which did not, as a preliminary matter, clearly delineate a block of sufficient vacant spectrum suitable for SMR communications to which incumbent users would be relocated without cost. The Commission failed to identify such a block in this proceeding. In any event, SMR WON has serious reservations

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[21] See Reply Comments of Southeastern SMR Association, et. al., filed herein on July 11, 1994.

[22] Indeed, the attached maps of Nextel, the primary proponent of "wide-area" relicensing of this spectrum, show that there is no spectrum to auction - but only the "wide area" to auction. Attachment A.

[23] Private Radio systems Application Waiting List (released May 27, 1994).

[24] See, FCC News Release, "FCC and Industry to Speed Processing of 800 MHz Licenses", released November 22, 1994.

about any relocation process and its disruptive impact of service and customers.

In its Further Notice of Proposed Rule Making, the Commission has tentatively identified the "lower 80" block of SMR channels, and the 150-channel block General Category band, as potential locations for a relocation block. Nextel, which holds or would hold after consolidation most of the unconstructed spectrum in the "lower 80" SMR channels and other "intercategory sharing pool" bands, to date has advocated a "one-way" mandatory relocation, whereby the incumbent licensee would have to relocate, but only if the MTA applicant had sufficient frequencies available. The only potential MTA licensee having sufficient frequencies available is Nextel. Thus, under the Commission's proposed "voluntary relocation" plan briefly referenced in the Third Report[25], only one applicant, Nextel, would be capable of bidding in the FCC's proposed SMR wide area auction blocks. SMR WON will address these issues in more detail in the FNPRM comments on January 5.

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[25] Id. at ¶ 106. The absence of any significant regulatory program is indeed instructive. The Third Report, while professing to implement a new statutory scheme, is nothing more than a notice of inquiry. Nevertheless, because the impact of the proposed "wide-area" licensing scheme is so severe on small operators, SMR WON is constrained to protect its statutory and appellate rights to challenge this "bare bones" structure against fait accompli charges were it to merely comment in the FNPRM. The Third Report, as it affects SMR licensing policy, cannot possibly withstand appellate challenge as a reasoned analysis of the facts and thorough discussion of relevant considerations resulting in a comprehensive regulatory plan.

IV. THE EXISTING SMR MARKET IS A SEPARATE PRODUCT MARKET

The existing 800 MHz SMR market, especially outside the top urban markets, is presently characterized by multiple small operators which provide robust competition. There are four substantial equipment manufacturers: Motorola, E.F. Johnson, Ericcson GE and Uniden. The local nature of the 800 MHz market has fostered voluntary regional alliances to promote roaming. Significantly, this market provides a low-cost alternative to cellular service.

In analyzing the competition between cellular service and SMR service, the Justice Department found that the relevant product market "consists of trunked SMR service."[26] It found that "conventional dispatch service is not a substitute for trunked SMR because it affords lesser privacy and lower reliability." Id. The DOJ also found that "cellular telephone is not a substitute because it is significantly more expensive than SMR service" . . . Id.

In contrast, the Commission refused to recognize that SMR is a separate market. Its administratively convenient market definition permits the Commission to ignore actual market conditions and the severe anti-competitive effects of its present

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[26] Competitive Impact Statement at p.6. Justice included the 900 MHz and 220 MHz SMR band in this definition. However, outside the top 50 markets, 900 MHz is not licensed and 220 MHz is not a significant factor. Only 800 MHz SMR constitutes the vast majority of market use.

and proposed regulations and of private licensees' abuse of those regulations. Instead, the FCC chose:

> to take an expansive view of present condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered substantially similar.[27]

The ability of local 800 MHz SMR operators to expand their existing operations to meet growing demand has been virtually frozen with the substantially increased horizontal and vertical consolidation and integration of the 800 MHz SMR market, coupled with the abuse of the Commission's licensing processes which have lead to the substantial warehousing of 800 MHz spectrum. For example, the Justice Department's anti-trust complaint against Nextel and Motorola found that as a result of Nextel's proposed acquisition of Motorola's 800 MHz SMR systems, Nextel would control "virtually all of the frequencies currently used for SMR service in fifteen (15) of the largest cities in the United States."[28] Similarly, Justice's CIS found that the consolidation of Nextel's and Motorola's owned and managed 800 MHz SMR channels would result in:

> few, if any, alternatives available to SMR customers in [the fifteen largest cities], and the combined entity would have the ability to raise prices or reduce the quality or quantity of service."

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[27] Third Report at ¶ 14.

[28] Complaint at 2.

Id. at 10. Moreover, the CIS only analyzed the potential impact of the Nextel/Motorola merger. It did not analyze the impact on competition resulting from Nextel's acquisition of Dial Page and OneComm. As several SMR WON members pointed out to the Commission in comments filed in the Nextel/OneComm transfer proceeding,[29] that transfer would result in Nextel's control of ninety-six (96%) of all 800 MHz SMR channels in Washington State, eighty-seven (87%) of all 800 MHz SMR channels in Oregon, and seventy-three (73%) of all 800 MHz SMR channels in Idaho.

It is clear that the merger of the four largest SMR operators in the United States -- Nextel, Motorola, OneComm, and Dial Page -- will eliminate all existing competition among these four operators. It will also inhibit the introduction of new technologies by reducing the number of equipment manufacturers. The price for promoting the ability of a single wide-area SMR operator, Nextel, to compete with cellular providers cannot be the elimination of a low-priced, local SMR service and the demise of thousands of independent SMR operators. The failure of the Commission to analyze this effect of its regulations is an abuse of discretion, and must be reconsidered.

The spectrum auction legislation additionally requires the Commission to promote "economic opportunity and competition"

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[29] See, "Comments on Proposed Antitrust Final Judgement," filed on behalf of Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc, Earl's Distributing, Inc. and Earl's Wireless Communications, December 14, 1994, File Nos. 903334-35, appended hereto as Attachment B.

by "avoiding excessive concentration of licenses . . . ." 47 U.S.C. § 309(j)(3)(B). The House Report also addresses this issue. "If a single licensee dominates any particular service, or if it dominates a significant group of services, then the Commission should take that into account." H. Rept. at 254. Instead of promoting competition, the new MTA licensing scheme will codify Nextel's monopolization of the 800 MHz SMR frequency band, eliminate existing competition, and freeze local incumbents with insufficient amounts of spectrum to compete in the future. In this regard the Commission has failed to take into account existing market realities, and its decision to employ MTA overlay licensing is not based on a reasoned analysis of the record.

The statute also requires the Commission to promote the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(C). Again, the legislative history specifically directs the Commission "to adopt rules to prevent stockpiling or warehousing of spectrum by licensees or permittees." H.Rept. at 256. The MTA licensing structure adopted in the Third Report & Order preserves the status quo to a large degree, and ultimately awards those licensees that have engaged in such practices. The Commission has not properly implemented the Act which requires it to avoid market concentration. The Commission has conveniently adopted a market definition which allows it to ignore its statutory responsibilities.

For all these reasons, traditional SMR is not a CMRS service. The Justice Department's market conclusions that SMR is

not a substitute for cellular service is not only instructive, but persuasive authority. SMR should not be subject to CMRS classification.

V. The Commission Must Fully Attribute All 800 MHz Spectrum

In the Third Report, the Commission adopted Nextel's position that because SMR spectrum is not presently available in contiguous blocks, as is cellular and PCS spectrum, no more than 10 MHz of 800 MHz spectrum would be attributed to any entity, even if an entity controls more than 10 MHz. Id. at ¶ 275. Capping the maximum attributable 800 MHz spectrum will only promote the further monopolization of the separate 800 MHz SMR market. Only Nextel has the incentive to bid in any MTA license auctions under the Commission's current proposal. The only way to ensure "competitive" bidding is to limit any MTA licensee to a separate SMR cap and to not allow an "attribution maximum" of 10 MHz. An attribution maximum permits a licensee to hold 15 MHz or more of SMR spectrum in an MTA-sized market, thereby freezing the ability of local or regional incumbent licensees to expand their product or geographic markets, or compete effectively in the MTA market.[30]

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[30] For example, in a mid-sized SMR operation experiencing a 9% blocked/dropped call rate, the operator may be unable in 1995 to permit existing customers to expand the number of vehicles placed on the system as the existing customers experience growth. In such a circumstance, the customer is likely to take its entire business elsewhere so that all its vehicles can communicate with each other on one system. This is the very practical and immediate effect that overlicensing and frequency warehousing is having on the market in 1994 and 1995.

VI. CONCLUSION

In conclusion, the Commission's proposed auction is unauthorized and unlawful. Its expansive view of the market is inconsistent with the Justice Department's analysis and is not based on fact. The spectrum auction design is poorly conceived and substantial necessary prerequisites, such as identifying a suitable relocation band, have not been thought out. Accordingly, the proposal is not a reasoned decision taking into account all of the relevant facts and considerations.[31] It is unlawful, arbitrary and capricious, and an abuse of discretion.

Based on the foregoing, SMR WON respectfully requests that the Commission reconsider its decision as requested herein.

Respectfully submitted,

SMR WON

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Dated: December 21, 1994

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[31] See Aeronautical Radio Inc. v. F.C.C., 928 F.2d 428, 444-45 (D.C. Cir. 1991); Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

ATTACHMENT A

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

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

Date: December 14, 1994

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EXHIBITS

Exhibit A	Department of Justice Documents
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ATTACHMENTS TO DECLARATION OF WILLIAM HOLESWORTH

Attachment 1	Database exemplars by frequency
Attachment 2	Section 90.621(b)(2)(ii), Table (1) and (3)
Attachment 3	Database for Oregon Sorted by Date of Grant
Attachment 4	Database for Washington State Sorted by Date of Grant

SUMMARY OF ARGUMENT

Following the Nextel/OneComm merger, Nextel will control 91% of all licensed frequencies in Washington State, Oregon, and Idaho. Nextel would control ninety-six percent (96%) of all licensed 800 MHz SMR trunked frequencies in Washington State, eighty-seven percent (87%) of licensed frequencies in Oregon, and seventy-three percent (73%) of all 800 MHz SMR channels in Idaho. This concentration meets the classic definition of monopoly power. 800 MHz SMR is the only relevant SMR market in these and most of the other 13 Western states where this monopoly will occur.

Nextel's monopoly will enable it to reduce actual and potential competition, affect price and quality of service, and inhibit the development of alternative technologies. Independent systems no longer can expand; customer quality is falling, and employee layoffs and cessation of radio sales will occur in 1995. 1994 capital expansion plans already have been curtailed as a result of predatory practices by monopoly companies.

There is enough room and spectrum for every kind of mobile radio service provider, including independent operators, dispatch, low-powered digital, mobile telephone, "traditional" SMR, high-powered analogue and digital, and high-cost cellular-like and low-cost wide area operations. It would be inconsistent with the public interest for the FCC to approve monopoly mergers which will eliminate markets created, matured and encouraged by the Commission for over a quarter-century.

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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