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FEDERAL COMMUNICATIONS COMMISSION
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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

James A. Kay, Jr. (Kay), by his attorneys, hereby submits his Comments in the above-captioned matter. Kay opposes the adoption of the proposals contained within the FNPRM. Insofar as Kay's Reply Comments to the matter from which this FNPRM was derived are relevant, those Reply Comments are hereby incorporated herein, see, attached.

Kay would like to voice his opposition to the Commission plan to divide the country along Metropolitan Trading Area lines and auction 200 of the currently-allotted SMR frequencies to the winning bidder. It is Kay's belief that such a

plan is impractical and unworkable, and if attempted, would injure the already established SMR industry.

Respectfully submitted,
JAMES A. KAY, JR.

By _____
Kathleen A. Kaercher

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Dated: January 5, 1995

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

To: The Commission

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JUL 1 1 1994

REPLY COMMENTS

JAMES A. KAY, JR.

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Dated: July 11, 1994

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SUMMARY OF THE FILING

James A. Kay, Jr. operates Specialized Mobile Radio Systems in the Los Angeles, California, area, in direct competition with Nextel Communications, Inc. Nextel's proposal would impose severe harm on its competitors, with no compensating benefit to the public interest. Nextel failed to offer adequate compensation for a variety of costs and losses which Nextel would cause to Kay and to his end users.

When the Commission granted Nextel a rule waiver to permit it to undertake construction of an ESMR system, it took into account the technical and business concerns of Nextel and other existing SMR operators and balanced the factors so that Nextel could construct a system and existing competitors could continue to compete effectively. However, since Nextel's system does not work, the solution proposed by Nextel is to shift the balance by shafting the flexibility and competitiveness of all other SMR operators.

If Nextel foresaw that it could not share spectrum with existing operators, then it created its own mess and should be left to clean it up by itself. If Nextel failed to see what many competent engineers saw, that is, that its proposed system could not be made to work in accord with the Commission's Rules and the terms and conditions of its waiver, then the only reasonable conclusion is that Nextel lacks the technical qualifications to be a Commission licensee.

Nextel did not show that its current service is similar to the service of any Domestic Public Cellular Radio Telecommunications Service system. There is no evidence that the SMR

service provided by Nextel will ever be competitive with any Cellular system. Nextel's Commercial Mobile Radio Service competitors are other SMR operators. Therefore, Nextel is not entitled to any relief for it to establish regulatory parity with its actual competitors.

To avoid the anti-competitve abuses which appear to have been imposed on the public by some Cellular operators the Commission needs to adopt rules which assure that at least three ESMR systems can be authorized on any frequencies which it may reallocate for ESMR service. If the Commission were to reallocate the 200 old frequencies to ESMR-only use, it should place a cap of 67 of those frequencies on the initial authorization of an ESMR licensee, thereby assuring that three competitors can develop in each market.

The Commission need not rush to judgment. The time has not yet come that Nextel has reached the end of its five year construction period. Until that time, the Commission will not be in a position to determine whether Nextel's service becomes substantially similar to Cellular service, and, therefore, whether Nextel either is entitled to or requires any relief.

Nextel has the freedom to solve its own problems. All Nextel needs to do is to buy out the interests of those existing SMR operators which the FCC determined in granting Nextel's waiver request were entitled to protection. If I can't do that, then Nextel will simply have failed to meet the terms of its grant of rule waiver and is entitled to no relief.

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

To: The Commission

REPLY COMMENTS

James A. Kay, Jr. (Kay), by his attorneys, hereby files his Reply Comments in the above captioned matter. In support of his position, Kay shows the following.

Fleet Call, Inc., the forerunner of Nextel Communications, Inc. (Nextel) had a big idea; build the biggest Specialized Mobile Radio System ever. However, like so many big ideas, it had a hole in it, through which the entire idea appears to be flowing away. Nextel now admits that its Enhanced SMR (ESMR) system cannot be made to operate as proposed and authorized and attempted. Nextel has been blown up by its own bomb. If it cannot put itself together, Nextel should be permitted to come down to earth in pieces. Rather than permitting Nextel to bomb its competitors, the Commission should leave Nextel where it found it, with still two more years to complete the construction of its system and make it work as currently authorized and advertised.

James Kay Has A Direct Interest In Opposing The Nextel Scheme

James Kay is an operator of SMR-Trunked and SMR-Conventional systems in the Los Angeles, California, area. Kay provides traditional SMR service to thousands of end user units. Kay believes that, following Nextel and Nextel's collaborator, Motorola, Inc., he is the third largest licensee of exclusive use 800 MHz band channels in the Los Angeles area. Kay has chosen not to sell his systems to Nextel, but, instead, to continue to provide traditional SMR service to his well satisfied customers. Nextel's scheme would cause unnecessary and destructive disruption in Kay's service to and relations with his customers and would impose costs on them which Nextel did not propose to pay. Therefore, to avoid permitting Nextel to thrust the cost of its own problems onto innocent members of the end user public, the Commission should dismiss or deny the suggestion made in Nextel's comments.

Kay may, at some point, decide to join with other independent SMR operators to create an ESMR system to compete with Nextel in the Los Angeles area. However, the reallocation of frequencies suggested by Nextel would preclude Kay and other SMR operators from developing a new wide area system to compete with Nextel. Accordingly, Kay is strongly opposed to Nextel's scheme to hoard all ESMR frequencies for itself.

The Historical Background Requires Denial Of Nextel's Suggestion

In 1990, Fleet Call, Inc., proposed the operation of an ESMRs in six ESMR Geographic Areas (EGA).[1] In elaborate detail, Nextel explained the technical protections which it required for it to provide the proposed service. The Commission explained that Fleet Call had proposed that "new co-channel systems would not be permitted in the EGA or buffer zone, however, Fleet Call considers this restriction essential to the stable RF environment that it needs to 'fine tune' and refine its system to meet changing demand," Memorandum Opinion and Order (MO&O) in File No. LMK-90036, 6 FCC Rcd. 1533 at para. 9, recon. denied, 6 FCC Rcd. 6989 (1991). With respect to what Fleet Call purported to be its bottom line technical demand, the Commission determined that

> providing Fleet Call blanket protection from new co-channel licensees is not necessary to the implementation of its proposal. Our analysis shows that the current operating environment in these markets already provides Fleet Call with much of the protection it requires from new applicants. That is, the co-channel protection that is afforded all SMR licensees in these areas, including Fleet Call, essentially precludes the assignment of new stations. We therefore see no reason to place a formal restriction against new co-channel applications in Fleet Call's intended service areas,

id. at para. 17. As to existing stations, Nextel was on notice as to their presence and could fully assess their effect on Nextel's plans, and Nextel requested no extraordinary relief from existing stations.

At paragraph 13 of its MO&O, the Commission set the standard for its authorization of the proposed Fleet Call ESMR system with respect to existing, traditional SMR stations, stating

[1] The areas were centered on New York, Chicago, Los Angeles, San Francisco, Houston, and Miami.

that "we acknowledge the need to preserve for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our rules and the flexibility they too require to operate competitively and effectively." The footnote to paragraph 13 cites National Association of Business and Educational Radio, Inc. as having been among those who supported Fleet Call's "proposal on condition that other licensees in the markets retain their protection from prohibited interference and their flexibility to operate competitively," *id.* at n. 35. In the topic sentence of its Summary, the Commission observed that "Fleet Call proposes to build an ambitious private land mobile radio system that promises improved spectrum efficiency without requiring additional spectrum," *id.* at para. 36. (emphasis added) The Commission further summarized that its rules "and the degree of protection afforded its existing stations, already provide Fleet Call with the protection necessary to proceed with its business plans," *id.*

From the Commission's first determination that Fleet Call could go ahead with its proposed ESMR system, Nextel has been fully aware of the terms and conditions under which the Commission granted a waiver of Rule Section 90.631, allowing Fleet Call five years within which to construct its ESMR system. Nextel was on notice that it was the Commission's determination that the interest of Nextel required and the interest of the public warranted granting Nextel only relief from Rule Section 90.631 and that the Commission's Rules already provided Nextel with the degree of technical protection which its business plans required. Were the Commission in error in its determination, Nextel had two lawful, reasonable choices. Those choices were to succeed on appeal or not to proceed with its proposed system. Since, however, Nextel did not succeed in appealing the Commission's action, and since Nextel did proceed with

its proposed system, Nextel must, as a matter of law, be taken as having accepted the basis of the Commission's action and the terms and conditions on its authority which are inherent in the Commission's determination that the waiver would be sufficient for Nextel's needs, and would provide adequate protection for the interests of other persons.

Nextel's Problem Is Of Its Own Making

Having either failed totally to recognize a patently obvious problem in the design of its system, or having decided to attempt to leverage a recognized technical problem into a demand for further favor, Nextel now comes before the Commission seeking relief from nothing but its own foolishness. It should have been inescapably clear to Nextel and to Motorola, Inc. that since 1) a digital receiver requires broadly tuned "front-end" and intermediate frequency sections, and since 2) cellular-like mobile transmitters operate at a large power disadvantage compared to traditional 800 MHz band mobile units, Nextel might not be able to operate a commercially acceptable ESMR system under the conditions which the Commission authorized Nextel to proceed. The broad tuning which a digital receiver must have means that it is exceptionally vulnerable to adjacent channel interference.[2] The power level discrepancy of seven watts maximum ERP for cellular-like mobile units,[3] when compared to the 30 to 35 watt power

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[2] It is possible that a satisfactory receiver could be designed and built, but that the equipment which Nextel selected does not, in fact, provide satisfactory performance.

[3] Customer preferences for inefficient on-glass antennas and the growing customer preference for handheld portable units leads to doubt that the maximum permissible cellular mobile unit ERP is actually achieved in practice.

of traditional 800 MHz band mobile units, and particularly when compared to traditional 800 MHz directionalized band control stations which may operate with a much higher effective radiated power, is the reverse of the desired-to-undesired signal ratio which the Commission has established as the 800 MHz band standard. Having recognized that, as Nextel admits at page ten of its comments, it has truly unshared use of only two channels in the San Francisco area, no one but Nextel should be made to suffer from Nextel's decision to go forward with its proposed system. If Nextel has a problem, then, at this point, it is entirely of Nextel's own making and no one but Nextel should bear any part of the cost of relieving Nextel's own problem.

Nextel was not forthcoming with whether Nextel recognized the problem on which it now bases its demand for relief prior to the time that it commenced construction of its ESMR system. If so, then Nextel should bear all of the risk of its adventure and is not entitled, three years later, to place any burden on the public whatsoever to relieve it of its mis-adventure. If Nextel was not aware of the problem before it began construction, then the Commission should designate for hearing the issue of whether Nextel has the requisite technical qualifications to be a Commission licensee.[4]

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[4] It is, of course, entirely possible that the radio equipment vendor which Nextel selected either failed to have sufficient engineering expertise to appreciate the problem, or failed to disclose the problem to Nextel. In either case, that is a matter entirely between Nextel and its equipment vendor and need not detain the Commission.

The basic flaw in Nextel's argument is that "the overlap of licenses on these frequencies creates operational and licensing inefficiencies for Nextel or any ESMR operator vis a vis competing CMRS providers," Nextel comments at 10. Nextel indulges in the entirely unproved assumption that its competitor is the two systems in each market which are authorized in the Domestic Public Cellular Telecommunications Radio Service. While it is possible that Nextel may someday pose a competitive challenge to Cellular operators, at present it is authorized to operate as a competitor with other Specialized Mobile Radio Systems, many of which must share use of the channels for which they are authorized. Kay is authorized for a large number of channels on which he does not enjoy exclusive use. The significance of this fact is that Kay and Nextel are SMR competitors, and are in exactly the same position as one another with respect to the fact that they must share some channels with other licensees. Since Nextel's regulatory position is the same as that of the other SMR operators with which it competes, Nextel is not entitled to any special consideration by the Commission.

While Nextel is authorized to provide dispatch service to its customers, Cellular operators are not authorized to provide such service. Because the Commission's current channel loading rules in the six Nextel ESMR areas force an SMR operator to maintain a substantial number of dispatch customers to be able to renew their licenses or obtain additional channels, Nextel must, necessarily, be seen as primarily in competition with SMR operators.[5] Nextel's suggestion that

[5] To the extent that the date of grant of Nextel's ESMR licenses are relevant to this matter, review of the Commission's files will show that most were granted prior to July 1993, and, therefore, those stations must meet loading requirements on their fifth anniversary.

it competes with the Cellular service is wholly speculative and must remain so until such time as Nextel can demonstrate that it has migrated a substantial number of customers from the Cellular service to its system. At such time as Nextel can show that a substantial number or percentage of persons who are currently Cellular subscribers has found its service substantially similar to Cellular service, and have, therefore, chosen to leave Cellular service and subscribe to Nextel's ESMR service, the Commission may desire to visit the question of whether the public interest requires that Nextel's ESMR service be deemed to be substantially similar to Cellular service. However, not even Nextel suggests that it has yet swiped even a single customer from Cellular service.

Taking the factually correct view that Nextel competes primarily with other SMRs, Nextel has absolute regulatory parity with most of its SMR competitors. As to those with which it does not have absolute parity, Nextel has the clear advantage.[6] Since Nextel's primary competitors are other SMRs, and since Nextel already enjoys regulatory parity with its known competitors, there is no basis in law for the Commission to regulate Nextel as if it were a Cellular operator.

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[6] Nextel may actually have a regulatory advantage over many of its SMR competitors. For example, Nextel has been permitted to aggregate far more frequencies than its SMR competitors. Nextel's 800 MHz band systems are authorized for twice the channel bandwidth as its 900 MHz band competitors. In contrast to private carrier operators in the bands below 800 MHz, Nextel can obtain express authorization to trunk channels together. Nextel did not, however, suggest that it should lose any of these regulatory advantages over any of its existing competitors.

To the extent that Nextel's authorization for an ESMR system is different in any way from other SMRs, it is only in that Nextel has been granted a waiver of the normal one-year construction period. For its [E]SMR system, Nextel enjoys a construction period which will terminate on March 14, 1996. In all other ways, Nextel is simply an SMR operator and is governed by all of the same rules as all other SMRs. Nextel's waiver did not make Nextel a Cellular operator, a semi-Cellular licensee, or even a pseudo-Cellular operator; the waiver simply gives Nextel five years to construct a technically unique SMR system to compete with all other SMR operators in its authorized service areas.

What Nextel is suggesting at footnote 12 to its comments is not clear. Nextel 's footnote 12 states that "coupled with long term cellular customer contracts and permissive bundling regulations, the Commission would be undercutting its competitive marketplace goal for the wireless industry if it fails to make these regulatory changes for ESMR licensees." Nextel appears to be saying that it hasn't a chance of winning any customers away from Cellular systems because they are locked into long term contracts and because Cellular customers are firmly attracted to their current carriers by bundled deals. If that interpretation is correct, then none of the relief which Nextel requests would be effective to solve its problem. If, on the other hand, Nextel is merely complaining that competition with Cellular systems might be difficult, nothing in the Commission's Rules would appear to prevent Nextel from following the same marketing strategies as the Cellular operators, and nothing which Nextel suggested would have any effect, whatsoever, on the strategy which it attributed to Cellular operators.

The Law Does Not Compel The Relief Which Nextel Requests

There is no requirement, whatsoever, that the Commission revise its licensing procedures or frequency allocations to make ESMR regulation more like Cellular regulation, or vice-versa. Section 6002(d)(3)(B) of the Omnibus Budget Reconcilliation Act of 1993 provides that the Commission shall make such revisions and terminations in its regulations "as may be necessary and practical to assure that licensees in [of CMRS stations in the Private Radio Service] are subjected to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." Nextel has not demonstrated that the services which it provides as an ESMR operator are substantially similar to the services provided by Cellular operators. Even were the Commission to determine that Nextel's ESMR service is substantially similar to the service of DPCRTS operators, that would not mean that the Commission was required to reallocate frequencies solely to ESMR use. The Commission could provide full technical regulatory parity between ESMRs and Cellular operators by expanding the bandwidth of ESMR systems to match that of Cellular systems and requiring an ESMR operator to pay adjacent channel licensees for the adjusted technical bandwidth upon which the ESMR system encroached.

Nextel's Request Is Clearly Anti-Competitive In Origin And Nature

Nextel failed to explain to the Commission that there is no way in which Nextel could possibly change the frequencies of all existing SMR systems in the band above 861 MHz (the "old frequencies") and also fulfill the Commission's objective of preserving "for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our

rules and the flexibility they too require to operate competitively and effectively," MO&O at para. 13. Nextel suggested that the Commission reallocate the 200 old frequencies to EMSR use, and that it allow ESMR operators to change the operating frequencies of existing SMR systems to frequencies other than the old frequencies. What Nextel failed to point out, however, is that such a move would preclude existing licensees in that band from using those frequencies to become ESMRs themselves, thereby impairing existing licensees' flexibility to operate competitively and effectively. What Nextel wants, clearly, is to use its ESMR authorization as a weapon to preclude existing licensees from exercising the flexibility to compete with it in the ESMR field.

Nextel would divest each existing licensee of its old frequencies, and then would have the Commission determine that since the existing licensee did not have an ESMR application on file on or before August 10, 1994, the displaced licensee would be forever precluded from using its currently authorized old frequencies for ESMR operation. *See,* Nextel comments at 16-17. At the same time that Nextel suggested that "it is highly doubtful that any market can economically support more than one ESMR, particularly given the onset of digital cellular, the creation of PCS and the coming implementation of satellite-based wireless telecommunications systems," Nextel comments at 16, Nextel would have the Commission take steps to assure that Nextel did not have to suffer ESMR competition from existing licensees of the old frequencies. Such blantant efforts to use the Commission's processes for anti-competitive ends should not be countenanced by the Commission.

As Nextel pointed out at footnote 30 of its comments, the Commission "has found that the cellular market is not competitive at this time." As the Commission will recall, it took several years for the Commission to move from its initial proposal that there be only one Cellular licensee in each market and that that licensee would be the local wireline telephone company to a recognition that competition required at least two competitors. Nearly a decade passed between the Commission's initial proposal for Cellular systems and the licensing of the first system. After a decade of Cellular service, the Commission has come to recognize that two competitors are not enough in advanced technical systems to provide a competitive marketplace. Based on its experience in the Cellular field, the Commission should find that if the public is to have any potential for enjoying the benefits of ESMR operation, then the Commission needs to assure that there will be the potential for at least three ESMR systems in each market. Accordingly, were the Commission to adopt Fleet Call's suggestion, it should place a cap on the maximum number of old frequencies which will be licensed to any ESMR operator at 66 (one-third of the 200 old frequencies).[7] As the Commission has recognized in its Notice of Proposed Rule Making in PR Docket No. 93-144, _____ FCC Rcd. _____ (FCC 93-257 Released June 3, 1993), a minimum of 42 frequencies are required to construct a wide area system, *id.* at note 40. Providing each of three ESMR operators in a market with 66 frequencies should be more than sufficient for each to construct and operate a system.

[7] The first ESMR licensee in a market would be entitled to the odd, 67th channel.

The Cost Would Not Be In The Public Interest

The costs of changing the frequencies of existing SMR stations would far exceed the simplistic treatment which Nextel afforded to the process. Some older mobile units not capable of changing from old frequencies to frequencies outside of the old frequency band, and the ESMR operator would have to be willing to replace each of those mobile units. Even where the frequency of equipment can be changed, the burden on SMR operators and their customers would be far more extensive than Nextel implied.

Only the Motorola brand trunking system allows mobile unit frequencies to be changed without requiring the mobile unit to have the "hands-on" attention of a radio technician. In the case of Kay's L-T-R® trunked systems, many end user mobile units would have to be removed from a customer vehicle and disassembled, and the frequency determining elements removed and exchanged for different elements. The new frequency determining elements, whether they be programable read-only memory circuits or crystal oscillator components, must be manufactured specifically for each operating frequency. In other instances, Kay can reprogram the mobile unit's operating frequencies by the use of a special computer device. In any event, except for Motorola brand units, each customer mobile unit must be brought into the SMR operator's shop for the frequencies to be changed. As the Commission's records reflect, the effort would involve the disruption of the business affairs of tens of thousands of SMR customers, at a cost of hundreds of thousands of worker hours, to allow Nextel to change the frequencies of more than one million SMR end user units to other frequencies.

The loss of productive working time to the traditional SMR end user customers would be staggering and the cost in terms of money would be incalculable. The extreme cost to American businesses which rely on their SMR service is obvious, but Nextel did not suggest how it would compensate the end users for the disruption of their business activities to accomodate Nextel.

If as Nextel, perhaps inadvertently, suggests, the ESMR concept has only an interim commercial viability, until such time as it can be overtaken by digital cellular, the creation of PCS and the coming implementation of satellite-based wireless telecommunications systems, then there is every reason for the Commission to move cautiously, if at all. This would not be the first time that the Commission had seen a communications technology which had only an interim utility. For example, the rise during the late 1970s and early 1980s of Subscription Television service on Television Broadcast channels served an interim niche market of persons who desired something different from typical commercial broadcast fare, but whose homes had not yet been reached by cable. However, all of those stations passed from subscription service as rapidly as they had come into existence when the developing cable systems provided services with which they could no longer compete. If as Nextel seems to hint, ESMR service will be viable only until such time as even newer technologies, which are already well inside the regulatory horizon, devour its customer base by providing even more and better service, then the Commission would be ill advised to disrupt the well established and reliable traditional SMR service in any way.

Nextel's Proposal Violates The Terms And Conditions Of Its Waiver Grant

Were the Commission to grant Nextel's petition, it could reasonably do so only if the Commission could be sure that sufficient SMR Category channels in the band 856-860 MHz (the "new frequencies") were available for Nextel to replace existing licensees' channels with new frequencies. The reason for this requirement is that the Commission has proposed to authorize operation of wide area SMR systems only on frequencies in the SMR Category, NPRM in PR Docket No. 93-144 at para. 7. Therefore, "to preserve the flexibility of existing licensees to compete" with Nextel in the wide area SMR field, the Commission needs to be sure that, in every market, every old frequency from which an existing licensee would be displaced would be replaced with an SMR Category frequency so that all existing licensees will continue to have the flexibility to compete with Nextel in the ESMR field. If the Commission cannot make the factual finding that all existing, traditional SMRs currently operating on old frequencies can be accommodated on new SMR Category channels, then Nextel's suggestion must fail because it would destroy the basis on which the Commission granted authority for Nextel to proceed with construction of an ESMR system. Along with destruction of the basis would come the destruction of the existing, traditional SMR operators, because they would be precluded from competing in the new wide area technologies.

The Matter Is Not Ripe

This matter is not ripe for consideration. Nextel has lofted a request for a major frequency reallocation in the midst of an unrelated rule making proceeding. A suggestion of the magnitude of Nextel's requires that the Commission 1) consider whether the suggestion justifies

the initiation of a rule making proceeding, and, if it determines that the suggestion should be seriously considered, 2) give the public full notice of the proposal in the Federal Register, and 3) give the public a full opportunity to file initial comments and reply comments.

Nextel has admitted that it has an alien member of its board of directors. Accordingly, Nextel is not eligible to be the licensee of any ESMR system and has no standing to request the relief suggested by its comments. Until such time as the Commission determines in the matter of Nextel's Foreign Ownership Waiver Petition whether Nextel should be granted a waiver and whether Nextel has the qualifications to be a Commission licensee, Nextel's suggestion is wholly premature.

There is no urgency to Nextel's request. Not until August 10, 1996, would any ESMR operator become a Commercial Mobile Radio Service provider entitled to regulatory parity with any common carrier service, *see,* Section 6002(c)(2)(B) of the Omnibus Budget Reconcilliation Act of 1993. Therefore, plenty of time remains for the Commission to conduct notice and comment rule making in full accord with the Administrative Procedure Act before any ESMR operator becomes entitled to regulatory parity with any other CMRS operator.

The public interest would be well served by deliberateness, rather than speed, in the instant matter. Nextel has until March 14, 1996, to complete construction of its ESMR system. Between that time and August 10, 1996, the Commission can assess the state of Nextel's progress and, based on the facts as they exist at that time, determine whether any amendments

to the Commission's Rules are warranted. Since there is ample time for the Commission to determine whether Nextel succeeds in reaching its initial benchmark, and therefore whether any further support of Nextel is justified, the public interest will be best served by the Commission's deferring any action on Nextel's suggestion until after March 14, 1996.

Section 6002(d)(3)(B) of the Budget Act provides that the Commission shall make appropriate modifications or terminations "in the regulations that will . . . apply to a service that was a private land mobile service and that becomes a commercial mobile service." (emphasis added) The import of the use of the word "becomes" in Section 6002(d)(3)(B) of the Budget Act is that until such time as Nextel actually becomes a CMRS operator, on August 10, 1996, the Commission has no authority to take any steps to grant any of the relief requested by Nextel. The Commission has no authority under Section 6002(d)(3)(B) to adversely affect the authority which it has granted to existing, traditional SMR operators for the purpose of favoring Nextel until August 10, 1996, at which time, if it still exists, Nextel becomes a CMRS operator.

Nextel Needs No Help

Nextel holds in its own hands the remedy for the problem which it has raised. It can take the cap off its pen and apply it to the documents in its checkbook and buy out the interests of all persons with which it says that it cannot successfully share the spectrum. Nextel appears to have invested a large amount of money acquiring frequency assets. If it has run out of money before it was able to buy enough, that is unfortunate, but nothing in the Communications Act provides for the relief of the extremely wealthy simply because they have reached the ends of

their resources before carrying their hopes to fruition. Nextel does not require the Commission's assistance for it to go into the marketplace and pay the owner's price for whatever it wants to buy. If Nextel fails to offer enough money to meet the price set by existing, traditional SMR operators who are actually providing service to more than one million actually existing end users, then Nextel will be no worse off than anyone else who wasn't able to assemble the resources necessary to progress a grandiose, but technically flawed, idea. If Nextel fails, the public will continue to be able to enjoy all of the SMR service which it currently enjoys. As Nextel acknowledged, digital Cellular, PCS, and land mobile satellite services are rapidly approaching the time that they can meet any demand which may be pent up within the communications service market. If Nextel fails, no one but Nextel should be held to blame and no one but Nextel should be allowed to suffer in an effort to salvage Nextel.

Conclusion

For all the foregoing reasons, James Kay respectfully requests that the Commission dismiss or deny the suggestion offered by Nextel's comments.

Respectfully submitted,
JAMES A. KAY, JR.

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