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

Reply Comments Of
<u>DCL ASSOCIATES, INC.</u>

I. BACKGROUND

DCL Associates, Inc. ("DCL"), a management consulting firm engaged in the management of cellular and specialized mobile radio properties, filed initial comments in the above proceeding and now seeks to reply to positions taken by various other commenting parties. DCL's cellular clients currently service over 5,000 mobile customers and its SMR clients are currently licensed on approximately 1,700 YX SMR channels, spanning 64 cities and with the ability to service a population of over 11 million with advanced wireless communications services. DCL's SMR client base represents many of America's minority groups (i.e. women, hispanics, and entrepreneurs).

II. DCL SUPPORTS POSITIONS TAKEN BY PCIA

In its review of a draft of the PCIA Reply Comments, DCL is in complete support of the positions taken therein. Specifically, DCL would like to highlight its agreement with certain key issues which were outlined in the draft PCIA Reply Comments, as provided to DCL:

(A) <u>The SMR auction proceeding has turned into an attempt to demonstrate the Commmission's ability to raise money, without consideration of: (1) the impact on the hundreds of small businesses and thousands of SMR customers which its proposals will harm; or, (2) the legalities of its actions.</u> As proposed by the Commission, the SMR wide area auction rules will benefit only Nextel, and its numerous affiliates. The Commission's proposed SMR auctions are also contrary to the congressional intent for auctions. Congress never intended that the Commission auction spectrum which was already occupied by an industry serving an important function - the provision of cost-efficient dispatch service to industries of America. Such legislative constraints are simply being ignored as the Commission pushes onward toward raising revenues. By virtue of its SMR auction proposal, as well as its informal "freeze" on the processing of SMR applications, the Commission has taken an aggressively antagonistic stance toward the SMR industry and now threatens its very existence.

(B) <u>With the existence of two cellular carriers in each market and the auctioning of six additional broadband PCS licenses in each market, there simply is no need for an additional one to four cellular-like competitiors to be thrust onto, and to displace, the, dispatch industry</u>. In fact, at least one wireless industry analyst, Jerry Lucas of TeleStrategies Inc., believes that "there is room probably for one more (wireless) company that can be profitable.... The other ones will have to redefine the market" with various types of niche services. Thus, while the PCS industry ponders which one or two of six new licensees will become truly profitable in any given market, and, conversely, which four or five licensees will be marginally profitable (or totally unprofitable) the FCC is attempting to create a much unneeded <u>one to four additional</u> "cellular-type" services (totalling as many as 12 cellular type services) per market at the expense of the very useful, and profitable, dispatch industry.

(C) Mandatory relocation of existing SMR licensees, as well as all those to be licensed vis-a-vis the current SMR application backlog, would devastate the SMR industry as we know it today and throw it, and thousands of dispatch customers, into turmoil, resulting in tremendous economic losses to current SMR customers and licensees. Given the existing dispatch roaming networks, thousands of dispatch users over a multi-state region would need to be reprogrammed in order to accomodate the retuning of just one of the systems in the network. Further, retuning would require the reprogramming of SMR units on multiple systems, some of which may require earlier retuning than others, and would be most inconvenient to many customers who require multiple reprogramming events before all systems which the customer uses are reprogrammed. Further, new wide area licenseees who employ Nextel/Motorola technology will not be able to offer the same cost-efficient SMR service which is offered today and "must pursuade customers who spend only about $20 a month to spend as much as three times times that sum.." (see Exhibit 1, WSJ article, 1/3/95). Clearly, mandatory relocation benfits only Nextel (and its affiliates), and penalizes all other SMR licensees and/or future licensees, as well as SMR industry customers. The Commission should not consider new policies which will benefit one entity, while laying waste to hundreds of other SMR business entities.

(D) Contiguous spectrum is not needed in order to operate wide area digital or analogue SMR systems. When Nextel, then Fleet Call, requested its original wide area waiver, it specifically represented to the Commission that it "no longer needs any restrictions on the ability of either present or future adjacent channel licensees to modify or move their transmitting facilities...all interference concerns of adjacent channel and second-adjacent channel licensees should be resolved". Now that the Nextel/Motorola

MIRS technology is underperforming and has proven to be inferior as a voice transmission service, Nextel seems to have forgotten its earlier representations (i.e. that its digital SMR technology did not require contiguous channels) and is lobbying the Commission to auction MTA blocks of contiguous spectrum, for which Nextel will likely be the only bidder, in most MTAs. The contiguous spectrum requested by Nextel, again, is not needed for the provision of digital or analogue wide area SMR service, but is preferred (not required) in order to utilize spread spectrum services which Nextel hopes to deploy in five to seven years! Note that, even spread spectrum technologies can transmit information to its subscriber units by skipping over non-contiguous frequencies, and, thus, do not require contiguous spectrum.

Because Nextel's original business plan and technology has faltered, it is now asking the Commission to auction off large blocks of spectrum which may facilitate Nextel's implementation of other futuristic technologies, while eliminating all entrepreneurial competition and, essentially, destroying the existing SMR industry. And, of course, given the current channel position enjoyed by Nextel in most MTAs, Nextel knows that it will have little, if any, competition in bidding for all the contiguous spectrum it desires, should the Commission move forward with SMR auctions. Particularly in light of Nextel's recent financial troubles, Nextel would not likely lobby for SMR auctions if it did not believe that SMR auction prices paid would be nominal. In fact, Nextel defines "wide area SMR" systems so narrowly in its original comments filed in this proceeding that, according to the Nextel definition, Nextel (or its affiliates) would be the only applicant eligible to bid in nearly all proposed MTA SMR auctions. Contiguous spectrum is not required for Nextel's MIRS technology, nor is it required for Nextel's planned spread spectrum technology. The requested blocks of contiguous spectrum would, however, enable Nextel to acquire huge amounts of spectrum at uncompetitive prices and, thus, to dominate the SMR industry while eliminating virtually all competition.

(E) <u>A maximum size block of 10 SMR channels should be licensed in a reasonably sized geographic area while eliminating the entire auction process</u>. While avoiding time-consuming and unprofitable SMR auctions, the Commission should accept applications from existing licensees to convert existing "local" licenses into wide area licenses. Thus, SMR licensees would be permited to modify "local" licenses in order to offer wide area services, if desired. **Though the PCIA proposal discusses converting "existing operations into wide area operations", DCL's discussions with PCIA revealed that the term "operations" <u>is intended</u> to include all SMR licensees, whether in operation, under construction, or in construction planning stages.**

Secondly, any areas or frequencies not assigned to existing licensees in this first license modification stage could be assigned to applicants for entirely new licenses. The above proposal would protect the rights of incumbent licensees (and those to be licenses vis-a-vis the application backlog) and ensure the very existence of the current SMR industry, as well as provide a forum by which SMR licensees, who desire to do so, might provide wide area service.

The use of the smaller blocks of ten channels will enable hundreds of small SMR entrepreneurs to continue to flourish and provide a much needed and cost-efficient niche service to businesses throughout the country, while allowing the eight cellular/PCS licensees to determine which three or four will survive. Again, any auctioning of SMR spectrum would eliminate small business from the SMR industry (even with bidding credits, entrepreneur blocks or other attempted regulatory preferences) and result in the conversion of SMR spectrum to a higher priced service targeted toward a totally different consumer market segment. In erroneously deciding that all mobile services are alike, the Commission has abdicated the responsibility imposed on it by the Communications Act to ensure that spectrum is available for purposes that we believe are socially worthy. The Commission must recognize the distinct needs of different mobile communications services and ensure that spectrum is dedicated to meet society's need for inexpensive two-way mobile communications services.

(F) SMR channel blocks should be assigned on either the MSA/RSA concept or on the BEA ("Basic Economic Area") concept. The SMR industry is one comprised of hundreds of small entrepreneurs. In order for entrepreneurs to survive and flourish, service areas must be small enough for entrepreneurs to service. Like the cellular industry, roaming and other cooperative agreements will enable MSA or BEA SMR licensees to interconnect nationwide. MTA licensed areas will only serve to "cut out" the entrepreneur and ensure industry dominance by Nextel and its affiliates.

(G) Congress intended auctions to be imposed on new services, not reconfigurations of existing services. Auctions should not be applied to the heavily occupied 851 to 866 Mhz SMR band. Further, should an auction be held, there exists no relocation pools, as recommended by Nextel, because no unused pool of channels exists on which to place relocated incumbent licensees. As a simple, but practical, matter, the Nextel plan to relocate SMR licensees will not work, but, contrarily, will result in a bureaucratic nightmare of conflicts of interests, arbitrations, and protracted litigations and appeals, ad infinitum.

III. OTHER ISSUES WHICH MUST BE CONSIDERED IN THIS PROCEEDING

(A) Russ Miller Rental notes on page 14 of its Initial Comments that "If the Commission should decide to re-allocate the upper 200 channels as contiguous spectrum, either as 1 block or 4, then there should be some provision to do the same on the lower 80 channels, or they will become second class spectrum". DCL agrees with the above and adds that whatever licensing mechanisms the Commission adopts to facilitate the provision of wide area SMR service should be adopted on all 280 commercial 800 Mhz SMR channels. First and foremost, many existing or future wide area SMR licensees own or manage channels on both the "upper 200", as well as the "lower 80" channels. Should the Commission make an arbitrary distinction between the uses and functionality of these two channel groups, many wide area licensees will find themselves with unusable channels and operational obstacles which will render their wide area business plans difficult to deploy. Secondly, if the PCIA wide area licensing proposal is adopted, then individual licensees should be permitted to determine whether to utilize their channels for a wide area or local service, regardless of whether they control "upper 200" or "lower 80" channels. The SMR industry itself should operate freely to determine the optimal uses of its channels, whether local or wide area service makes the most business sense for any given license, and which channels it desires to employ for either type of service.

(B) Motorola Inc. notes on page 20 of its Initial Comments that "incumbents should be permitted to establish new 'fill in' stations so long as their authorized 40 dBu contour is not extended beyond existing limits". Indeed, DCL believes that flexible site placement should be permitted by all SMR licensees, whether they are classified as "wide area" licensees or "local" licensees. In order to permit the SMR industry to grow and evolve in its most efficient technological manner, all licensees must be granted maximum flexilibity in terms of site placement and whether to deploy low or high powered sites.

(C) Dru Jenkinson, Inc./Jana Green, Inc./Shelly Curttright, Inc. note on page 10 of their consolidated Initial Comments that "The Commission mus afford licenses granted pursuant to the Pending Applications (i.e. those SMR applications filed prior to August 9th ,1994) the same incumbency protections proposed for the licenses granted prior to the August 9th, 1994 date". DCL supports the above position and notes that retroactive changes in SMR licensing rules, which would effectively destroy investments made in reliance upon the rules in effect at the time that "backlog" applications were filed, are prohibited by general principles of administrative law. Further, the courts have held that retroactivity in formal rulemaking proceedings is inherently suspect. Nothing in either the Communications Act or the Administrative Procedure Act would support the formulation of wide area rules which would strip the rights granted to licenses stemming from the current SMR application backlog.

(D) Dial Call notes on page 9 of its Initial Comments that "Dial Call recommends the Commission, as part of its determination of the rights for continued operation of incumbent licensees', permit those licensees to construct and implement their networks under previously granted extended implementation authorizations". DCL supports Dial Call's position regarding extended implementation authorizations and adds that, not only should existing extended implementation schedules be upheld, but their specific provisions (regarding construction timing, licenses and channels included) must override any new policies or rule makings. Again, retroactive rule changes will further disrupt the evolution of the SMR industry and advantage only Nextel, while discriminatorily injuring other entrepreneurs who have built, and continue to build, this useful and cost-efficient industry. Nextel has already utilized four years since its original wide area waiver in order to carefully plan and begin construction of its wide area licenses. Other wide area licensees require that their extended implementation authorizations are also upheld in order to complete the same time-consuming planning and construction tasks which Nextel has so carefully undertaken. Any reduction or elimination of extended implementation periods would cause irreparable economic damage to recipients, eliminate much needed industry competition, and further ensure the dominance by one company of an entire industry.

(E) As part of the FCC's effort to provide competition to cellular, and based upon representations made to the FCC by Nextel, the FCC has been laying the foundation for Nextel's business by granting Nextel waiver upon waiver of traditional SMR regulations since the late 1980s. However, today, it is clear that Nextel cannot compete with cellular. For years, Nextel has promised the FCC that it would build a third nationwide cellular service. Nextel's Morgan O'Brien once proclaimed that "Our Nextel system is a replacement for the national telephone infrastructure" (see Exhibit 1, WSJ article, 1/3/95). Now, with its myriad technical problems and poor voice transmission quaility, "Nextel has all but abandoned ambitions to become a cellular titan...It will get back to basics, jazzing up the dispatch services" (see Exhibit 1, WSJ article, 1/3/95). Even AMTA's president, Alan Shark, was quoted as saying that Nextel "would have been better off not shooting for the moon and comparing themselves with the cellular industry in the first place". Today, in an apparently contradictable manner, Nextel's O'Brien maintains that Nextel "has always aimed its new cellular features at the mobile work force now using dispatch" (see Exhibit 1, WSJ article, 1/3/95).

Having admitted publicly that it cannot compete with cellular, Nextel now asks the Commission for a block of 200 SMR channels in order to provide a form of jazzed up dispatch services. Just as Nextel oversold itself to the FCC in previous years, Nextel is overselling itself to the FCC today. Why would Nextel request 200 SMR channels in order to provide a form of jazzed up dispatch service? **The clear answer is that Nextel desires vast amounts of contiguous spectrum, which it alone can purchase at nominal prices, in order to monopolize the SMR industry, eliminate competition, and warehouse vast quantities of spectrum which will have tremendous value, someday, to the ultimate buyer of the financially troubled Nextel.**

WHEREFORE, pursuant to the above, DCL Associates, Inc. beseeches the Commission to reject the proposal to auction SMR channels (benefitting only Nextel and its affiliates and resulting in insignificant auction fees to the Treasury) and to preserve the vital SMR industry, while allowing it to flexibly adapt to new technologies and opportunities, by adopting the suggestions contained herein.

Respectfully submitted,

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EXHIBIT 1
Wall Stree Journal Article 1/3/95

(*"For Nextel, '94 Was Best of Times and Worst of Times"*)

For Nextel, '94 Was Best of Times and Worst of Times

Shares Soared on Promise of Cellular Network, Then the Bubble Burst

By GAUTAM NAIK
Staff Reporter of THE WALL STREET JOURNAL

Morgan E. O'Brien sometimes indulges in an unlikely pastime, a plunge on a roller coaster. The recent fortunes of his company, **Nextel Communications Inc.**, may have given him his most dizzying ride yet.

Tiny, brash Nextel rose to prominence in the past year by using an ever-soaring stock price to acquire legions of radio-dispatch licenses, tapping Wall Street's hunger for wireless plays by tirelessly promoting itself as a someday rival of cellular giants.

But Nextel shares have plunged about 70% from their 52-week high, wiping out $2.5 billion in market value in the past nine months. The company has failed to find a backer since **MCI Communications** Corp. bailed out of a planned $1.36 billion investment in August. Technical glitches continue to snarl its new phone service in California. Lacking cash, Nextel has also shelved plans to bid for federal licenses to provide new "personal communications services."

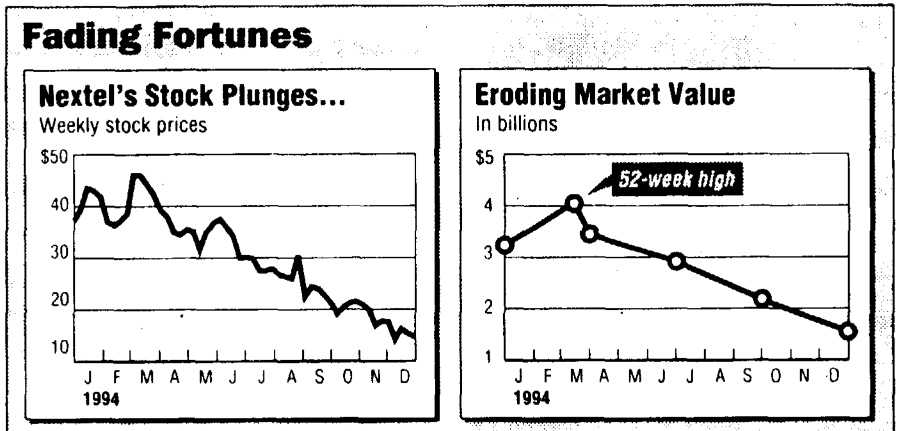
Company Lowers Sights

Now Nextel has all but abandoned ambitions to become a cellular titan any time soon. It will get back to basics, jazzing up the dispatch services, which will provide $200 million in annual revenue when all of its transactions close. The company will also have a captive base of 750,000 old-line dispatch customers, including taxi drivers, contractors and plumbers.

Nextel must persuade customers who spend only about $20 a month to spend as much as three times that sum to get a new array of fancier features, such as wireless messaging and cellular phone service. That would help Nextel close an $800 million gap in funding a $2.5 billion overhaul of its dispatch systems. The company, which has annual cash flow of $29 million, is binding some 400 systems into a national wireless network, and in three years will face $150 million in annual interest payments on $1.7 billion in junk-bond debt.

Customers for Nextel's new offerings may not be there. Most of its current customers "aren't interested in the bells and whistles," contends Robert Janssen, president of San Diego, Calif., dispatcher Cardiff Mobile Communications Inc. His clients lease only five to 10 radios and pay monthly fees of $12 to $14 a unit. "They are primarily price-motivated," he says. And many big corporations already run their own networks.

Nextel won't find the $800 million it needs from the equity and debt markets. And its major patron **Motorola** Corp. may be running out of patience. Motorola, which intends to equip the network, has already offered $685 million in vendor financing, after agreeing last summer to sell all of its dispatch systems to Nextel for stock valued at $1.7 billion. Since then the value of Motorola's Nextel stake has fallen by about $800 million, and Motorola's pact with Nextel leaves it no escape clause.



Sources: Baseline, Company reports

Wall Street fell in love with Nextel as the little-known dispatch company gathered up hundreds of scratchy systems at cheap prices and tried to multiply their value by turning them into a new national phone system.

This compelling vision was largely propagated by Nextel and its underwriters at **Merrill Lynch** & Co. Nextel's Mr. O'Brien, fair-haired and silver-tongued, unabashedly proclaimed, "Our Nextel system is a replacement for the national telephone infrastructure." A late 1993 forecast by Merrill Lynch analyst Linda Runyon suggested that Nextel could sign up more than 400,000 new wireless customers in 1995 alone and possibly triple that in four years. Nextel today has 15,000 digital subscribers.

Such hype inflated Nextel's stock price even as the company floated millions of new shares to fund its buying binge, and led to the stock's crash when it became painfully clear that the cellular ambitions had been oversold. At the stock's 52-week high of $46.75 in March, nine Wall Street analysts had healthy "buy" recommendations on Nextel; even by June, when the stock had fallen by more than one-third, eight analysts were still pushing a "buy."

"Every analyst was so positive on Nextel. They were dead wrong," says Scott Vergin, former fund manager of Lutheran Brotherhood Fund, which acquired 250,000 Nextel shares at $40 a share and finally sold at about $30, resulting in a loss of $2.5 million. "It's been very humbling," says Stephanie Comfort, a Morgan Stanley & Co. analyst who has maintained a "buy" rating on Nextel from the moment it went public three years ago through the stock's rise and plunge.

Mr. O'Brien counters that Nextel had never portrayed itself as the next cellular giant pursuing "glove-compartment" consumers. Instead, it has always aimed its new cellular features at "the mobile work force" now using dispatch. As for the national digital network, hardly useful to a local plumber, Mr. O'Brien now says it would lure corporate accounts.

Those assertions stun some analysts. "Morgan O'Brien oversold Nextel, he drove way beyond his headlights," says Jan Klein of Dean Witter Reynolds Inc., who initiated coverage of Nextel on Dec. 22 with a "sell" rating. Another analyst privately asserts, "Nextel was never described as a big corporate-fleet kind of company. That's disingenuous."

If Nextel's cellular dreams are fading, what is its value as a pure dispatcher? Morgan Stanley's Ms. Comfort estimates $6 to $7 a share. With the stock in the $14 range, investors seem to be placing a premium of more than $7 a share on Nextel's cellular prospects. At Nextel's peak, the premium was almost $40 a share.

Beloved by Short Sellers

Even the smaller premium could be risky. In a Dec. 27 letter to investors, Nextel disclosed that its Motorola system is taking "much longer than expected." Nextel has the largest short position of all Nasdaq stocks, suggesting investor bearishness. By mid-December, investors had sold some 12 million Nextel shares short, up almost two million shares in a month.

As a pure dispatch player, "there's no question Nextel would be the premier state-of-the-art company in the nation," says Frederick Moran of Salomon Brothers, a consistent bear on Nextel. Few observers, however, believe Mr. O'Brien will be content in the backwaters of the dispatch market. Nextel says it has just turned on its digital networks in Chicago and New York.

But Alan Shark, president of the American Mobile Telecommunications Association, a dispatch industry group that Nextel belongs to, says Nextel "would have been better off not shooting for the moon and comparing themselves with the cellular industry in the first place."

Wall Street Journal January 3, 1995 p. 14