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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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| In the Matter of | ) | |
| | ) | |
| Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band | ) | PR Docket No. 93-144<br>RM-8117, RM-8030<br>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

Pro-Tec Mobile Communications, Inc. (Pro-Tec), hereby submits Comments on reply in the above captioned rule making and respectfully requests that the Commission reject the proposals put forth within this proceeding as unnecessary, unworkable, and contrary to law. In support Pro-Tec states the following.

### The Interpretation of Regulatory Parity by Supporters Of the Proposals Is Without Merit

Within its comments, Nextel Communications, Inc. ("Nextel") has attempted to piece together a legal justification or qualification for the proposals, based on an interpretation of the language contained within the Omnibus Reconciliation Act of 1993 ("Budget Act") and portions of subsequent statements (usually dicta) made by

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the Commission. That Nextel's argument cannot withstand scrutiny has been amply demonstrated within this proceeding by a number of commenting parties, see, e.g. Comments by Triangle Communications, Inc.; Applied Technology, Inc. and SMR Won. However, in support of those commenters who have noted the faulty legal analysis proffered by Nextel and others, the Commission is respectfully requested to take note of the following:

> The adoption of proposals which have the effect of mandating the auction of spectrum which is presently authorized for use by licensed operators is not supported in any authority granted by Congress to the Federal Communications Commission. Since adoption of the proposals would result in parties bidding on spectrum which would be obtained via forced reallocation, without concurrent rule making to create and establish an alternative allocation for affected licensees which might create or identify "fully comparable alternative frequencies" (a step that was judiciously taken in the earlier PCS proceeding), there can be no logical argument made that the proposals in this proceeding are equal to any earlier actions taken by the Commission or that adoption of these proposals will result in regulatory parity.

As further evidence of the flawed legal analysis which has been employed to justify adoption of the proposals, the Commission should also recognize and apply the following facts.

> The Budget Act requires that all changes in the Commission's Rules and policies must arise following a finding that such changes are both necessary and practical. Although the commenting parties within this proceeding have argued vociferously on the subject of whether such proposed changes are necessary, there can be little doubt that these changes are not practical. The radical changes proposed would throw the industry into chaos, create a chilling effect on the operations by all remaining analog dispatch carriers, require massive change-outs in equipment, chill competition in the delivery of new technologies by manufacturers and new services by competing entities, and create a huge relicensing job for the Commission. No party has suggested that any other outcome is reasonably expected. Accordingly, the Commission is not positioned to find that adoption of the proposals is practical.

If the Commission requires additional proof of the impracticality of its proposals, it need only consider the realities of auctioning MTA-based licenses. As

many commenters have stated, the Commission may reasonably expect that in most cases these auctions will draw a single bidder, Nextel. It stretches credulity to suggest that a single-bidder auction is practical. Nextel, within its comments, does not suggest that any other outcome is likely. To the contrary, its comments sound in words of entitlement, suggesting that auctions are its second choice to an expedited grant of authority for 200-channel blocks in the top 50 markets by virtue of its presence in the market. One is drawn toward confidence, but Nextel's arguments suggest something much more and somewhat offensive in its audacity.

It is clear, therefore, that the legal basis for these proposals does not parallel the language within the Budget Act and its resulting effect on the Communications Act. If the foregoing is not sufficiently convincing to the Commission, perhaps an additional point would be illustrative.

> Within its comments, Nextel points to the millions of persons served by the SMR industry in the provision of dispatch services. Nextel is correct that the SMR industry has been quite successful in meeting the ever increasing demand for dispatch services. What Nextel does not reconcile is its request that the Commission provide regulatory parity between SMR operations and cellular or PCS operations, which are precluded from providing these services. More directly, Nextel has failed to demonstrate that "substantially similar services" exist between

SMR, cellular and PCS which might justify its request for radical changes in the Commission's Rules. Absent a clear showing of similarity, Nextel and the Commission are not positioned to employ the language contained within the Budget Act.[1]

For the foregoing reasons, it is clear that the Commission does not have evidence that the criteria for the proposed actions exist in accord with law. The contrary is quite evident and should control the Commission's further actions.

## The Real Reasons For Abandoning The Proposals

Perhaps the best reason for abandoning the proposals is that the effect of adoption is the devastation of an industry which has served the public well. Analog SMR dispatch services has been one of the most successful, vital service providers which has ever been conceived by the Commission. It has provided countless opportunities for investors, operators, and entrepreneurs. There can be no rational or equitable basis for rewarding those persons whose efforts have created the value in the spectrum with a forced removal of the spectrum. Such suggestions are inappropriate and, frankly, wrong.

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[1] To overcome this obvious hole in its argument, Nextel claims that "substantially similar services" should be interpreted in the broadest possible terms to include all land mobile services. Such an interpretation is contrary to the organization of the Communications Act, the Commission's long regulatory history, and the manner in which Congress designed the Budget Act.

The regulation of an industry requires examination of many factors such as the economic impact, the fostering of technological advances, the competitive impact and much more. In addition, however, it also requires that the agency employ fundamental fairness in its decisions to avoid bias or favoritism between competing entities. This element of the Commission's analysis has long existed and should be fully present within its deliberations regarding this proceeding. Pro-Tec contends that adoption of the proposals cannot be found to meet any test of fundamental fairness and for this reason alone, the proposals should be summarily rejected.

## Conclusion

For the reasons stated herein, Pro-Tec respectfully requests that the Commission reject the proposals put forth in this proceeding.

Respectfully submitted,
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By

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Dated: March 1, 1995

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I hereby certify that on this first day of March, 1995, I served a copy of the foregoing Reply Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

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