block. Licensees B/C "step into the shoes" of the incumbent that it relocated, thus becoming an incumbent operator in Licensee A's block, subject to all of the incumbent rights and obligations available thereto.

The rights of the incumbent licensee would be determined, in part, by the actions of Licensee A. If Licensee A had provided timely relocation notice to the original incumbent, Licensee B/C, upon stepping into the incumbent's shoes, would be subject to potential relocation within the voluntary/mandatory negotiation time periods. If Licensee A had not provided the incumbent with timely relocation notice, then Licensee B/C would never be subject to relocation. The Commission should clarify that relocation notice by one EA licensee serves as notice to the incumbent that it could be relocated out of any EA license block on which that particular SMR system is operating -- even those not licensed to the EA licensee providing notice. This is the only logical interpretation of the Commission's rules that (1) all incumbents must be provided relocation notice within 90 days, and (2) an incumbent's entire system must be relocated. If an EA licensee's notice covers only those channels within the EA licensee's block, any other EA licensee could easily block relocation efforts by not providing notice and thereby providing the incumbent a defense to the relocation of part of its system (and, therefore, the entire system).26/

26/ Nextel also asks the Commission to clarify its 90-day notice rule to permit waivers of the requirement where the (continued...)

This process ensures that Licensee A cannot hold up or block the relocation of an incumbent out of any other EA licensee's block, and, at the same time, Licensee A is not forced to participate in a relocation it will not or cannot effectuate. Further, Licensee A would retain the status quo since there is still an incumbent on its channels, and Licensees B/C have been allowed to clear their spectrum blocks.

Under this approach, if Licensee A subsequently decides to retune its incumbents, it would be responsible for paying all of the costs necessary to do so, including the fact that remaining incumbents can demand system-wide retuning.

2. Definition of System for Retuning Purposes

The Commission should carefully define "system" for purposes of determining what part of an incumbent's SMR holdings are subject to retuning by a given EA licensee or group of licensees. The definition should ensure that legitimate, fully constructed, interoperated multi-site systems are replicated with comparable facilities, while preventing incumbents from stringing together historically separate, unrelated systems or entering into sham roaming agreements in an effort to block EA licensees' relocation efforts or increase their costs.

26/(...continued)
Commission's licensing database was not accurate, thereby preventing an EA licensee from providing proper notice. If an incumbent licensee is not accurately reflected in the database, it cannot be provided a timely relocation notice. Further, proof of an attempt to notify at the address provided in the database should serve as proper notice, *i.e.*, where the incumbent licensee has moved and has not provided the new address to the Commission, the EA licensee should not be required to track the incumbent.

Accordingly, Nextel submits that, for relocation purposes, a "system" should be defined as a base station or stations and those mobiles that regularly operate on those stations. A base station would be considered located in the EA specified by its coordinates, notwithstanding the fact that its service area may include adjacent geographic EAs. An EA licensee would meet its part of the obligation to relocate an incumbent's "entire system" if it arranges to retune/relocate all base stations located in its EA and reprogram all mobile units that regularly operate on those base stations.

The relocation/retuning of base stations located in an adjacent EA would be the responsibility of the adjacent EA licensee or licensees. If an incumbent can demonstrate that a group of base stations regularly operate as part of an integrated system (through billing records, mobile programming records or other reliable evidence) it can require that all such base stations and affiliated mobiles be retuned regardless of EA boundaries, with the affected EAs cost sharing, as discussed above.

3. Relocation Costs

Nextel agrees that the EA licensee/relocator's responsibility should be limited only to the actual cost of relocation or those premium payments which that EA licensee negotiated. No EA licensee relocator should be required to contribute to a premium payment negotiated by another EA licensee. Each EA licensee, sharing in the cost of relocation, should be required to contribute pro rata

according to the number of channels the incumbent operated in its licensed area.

"Actual costs," however, may or may not include each of the "relocation costs" included in the Commission's proposal.27/ In listing all of the potential costs incurred by the EA licensee, the Commission did not explicitly include the cost of retuning existing equipment in situations where the relocation may require nothing more than retuning. In that case, neither new equipment nor change of location is required. Given the broad range of relocation possibilities, the Commission should include "retuning costs" as part of "relocation costs," recognizing that each of the costs on the list will not necessarily be encountered in every case.

4. Alternative Dispute Resolution

Nextel supports the use of Alternative Dispute Resolution ("ADR") for resolving cost-sharing disputes. The use of an independent third party -- potentially including industry trade associations -- is the most efficient and effective method for resolving disputes without over-burdening the Commission's resources. However, it is essential that all parties to the dispute agree on the particular ADR entity employed for their dispute, that all ADR decisions be appealable to the Commission, and that all ADR costs be resolved by the third party as part of the process. Nextel also supports ADR to resolve disagreements concerning comparable facilities, as discussed below.

27/ December 15 Order at para. 272.

B. Comparable Facilities

Nextel supports the Commission's tentative conclusion that "comparable facilities" should provide "the same level of service as the incumbent's existing facilities."28/ The Commission states that this same level of service will be achieved when the relocated system (1) provides the same number of channels with the same bandwidth;29/ (2) includes the incumbent's entire system; and (3) has the same 40 dBu contour as the incumbent's original system. The Commission should also explicitly provide that the licensee has the authority to modify its system within its 22 dBu contour after the relocation/retuning is complete. Moreover, the Commission should clarify that a relocated system must comply with the co-channel separation requirements of Section 90.621 of the Commission's Rules.

This clarification of the proposed rule will not only ensure that the incumbent is provided the required comparable facilities, but it also will provide the Commission a better definition of "good faith" by more explicitly delineating the requirements of "comparable" since, according to the Commission's proposal, a "good faith" offer is one that would replace the incumbent's facilities

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28/ *Id.* at para. 283. The EA licensee must pay for the facilities needed to replicate -- but not improve or enhance the incumbent system. Depending on the channels available, this could include changes in height and/or power, combiners, transmitters and antenna make, model or configuration needed to provide the same 40 dBu contour.

29/ Nextel does not believe that any channel outside of the 806-821 and 851-866 MHz spectrum can be deemed to be "comparable" for purposes of mandatory relocation/retuning of licensees out of the upper 200 SMR channels.

with "comparable facilities."30/ A "good faith" offer, therefore, can be one that does not offer the incumbent an upgraded system, any new equipment, or a new location as long as the "level of service" is comparable.

To facilitate the relocation process, and thereby speed the delivery of new, competitive services, the Commission should use ADR to resolve disputes over "comparability" and "good faith" just as it has proposed for the resolution of cost sharing issues. Using ADR will reduce the ability of parties to "drag their feet" and prolong the negotiations. Nextel urges the Commission to require the use of an arbitrator if no agreement has been reached within six months after a good faith relocation offer has been made to an incumbent during the mandatory negotiation period.

Moreover, it is in the public interest to achieve rapid clearing of incumbents from the EA blocks to permit EA licensees exclusive use of contiguous spectrum. It is equally in the public interest to minimize the time during which incumbents will experience uncertainty concerning relocation/retuning and to complete relocation negotiations as soon as practicable thereby minimizing business plan disruption. Accordingly, the Commission should reduce the mandatory negotiation period from two years to one year. The relocation process for SMRs will be far less complicated than that faced by PCS licensees and microwave incumbents. A two-year window for relocation negotiations provides parties an opportunity to delay the introduction of new services.

30/ *Id.* at para. 286.

A one-year voluntary negotiation period, followed by a one-year mandatory negotiation period with required ADR at the end of six months, would hasten the transition to regulatory parity among all CMRS providers.

C. Partitioning and Disaggregation Are Important To Ensuring The Most Flexible Use Of The SMR Spectrum

The Commission's proposal to permit partitioning and disaggregation of the upper 200 channel SMR licenses is an important step towards assuring flexibility for SMR operators. Flexibility should, in turn, encourage a broader range of SMR participants as well as a broader range of SMR services offered by those participants. Thus, Nextel supports the Commission's proposals to permit partitioning and disaggregation of EA block SMR licenses.

Partitioning and sublicensing can, on the other hand, increase the difficulty and administrative complexity of the Commission's monitoring and enforcement of EA licensee construction and coverage requirements. The Commission should require that the original EA licensee remain the licensee, *i.e.*, the EA auction winner would remain legally responsible for meeting the construction and coverage requirements throughout the EA, until after those requirements have been fulfilled. This would permit disaggregation and partitioning before or after the auction under various contractual arrangements, partnerships, joint ventures or consortia, but not the partial assignment or transfer of control of

EA licenses until the construction/coverage requirements are met.31/

If any participant on the EA license causes the overall EA to fall short of the coverage requirements, the entire EA license should revert to the Commission -- just as in the case of a non-dissaggregated or unpartitioned EA license. Attempting to enforce buildout requirements on a piecemeal basis would complicate the Commission's processes, further burdening the Commission's resources and resulting in a new SMR licensing morass.

V. CONCLUSION

The Commission's December 15 Order makes significant strides toward providing SMRs the congressionally mandated regulatory parity required by OBRA '93. Prospectively, SMRs will be licensed on a geographic-area basis and, to the extent possible, on contiguous channels. However, SMRs will continue to be at a spectrum disadvantage vis-a-vis cellular and most PCS licensees -- a fact exacerbated by the Commission's proposal to limit the geographic-area licensing of the lower 80 and 150 channels to small businesses only. This set-aside is not only unjustified in light of past industry practices, but it also will unnecessarily inhibit the flexibility of SMR operators, and thereby, their competitiveness within the CMRS marketplace.

The proposed unprecedented set-aside of more than half of all SMR spectrum will thwart the Commission's goal of achieving

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31/ In contrast, assignment or transfer of entire unconstructed EA licenses would remain permissible, as discussed in para. 233 of the December 15 Order.

regulatory parity for SMRs vis-a-vis their CMRS competitors. The Commission expressly stated that this proceeding is intended to further "the Congressionally mandated goal of regulatory symmetry between 800 MHz SMR licensees and other competing providers of [CMRS]."32/ Restricting some SMR providers from more than half of the available spectrum is a contradiction to this goal, and will significantly harm SMRs' ability to compete in the CMRS marketplace.

Respectfully submitted,

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32/ December 15 Order at para. 2.

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 15th day of February 1996, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery or first-class mail, postage prepaid to the following:

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