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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

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To: The Commission

NEXTEL COMMUNICATIONS, INC.
REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

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Dated: May 14, 1996

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I. INTRODUCTION

Pursuant to Section 1.429(g) of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits this Reply to the Oppositions to Petitions For Reconsideration ("Opposition") filed in the above-referenced proceeding.1/ Those Oppositions were filed in response to the March 18, 1996 Petitions For Reconsideration filed herein.

II. BACKGROUND

1/ Oppositions were filed by the Personal Communications Industry Association ("PCIA"), Duke Power Company ("Duke Power"), the Industrial Telecommunications Association ("ITA") and Small Business in Telecommunications ("SBT"). SBT styled its April 15 pleading as "Comments," but given the date of filing (after the filing of Petitions For Reconsideration) and its attack on Nextel's Petition for Reconsideration, Nextel is responding to the SBT "Comments" as an "Opposition" filed pursuant to Section 1.429(f).

On December 15, 1995, the Commission adopted its First Report and Order, Eighth Report and Order, and Second Further Notice Of Proposed Rule Making (collectively, the "First R&O") in this proceeding.2/ Since the Commission first released its Further Notice Of Proposed Rule Making in November 1994, numerous parties have had multiple opportunities to provide comments,3/ including an additional opportunity to comment after the Wireless Telecommunications Bureau held an unprecedented industry-wide meeting to discuss its proposed rules.

Despite the 100-plus participants in this proceeding, however, only 22 petitions for reconsideration were filed. Those were followed by only five Oppositions. The majority of these petitioners, moreover, did not challenge the Commission's decision to license the top 200 SMR channels on a geographic basis using auctions.4/ Only four petitioners, each represented by the Law Firm of Brown and Schwaninger and presumably being represented by them again as part of SBT,5/ sought reconsideration of the

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2/ FCC 95-501, released December 15, 1995.

3/ Over 70 comments and 40 reply comments were filed in response to the FNPRM which proposed to license the upper 200 channels on a geographic area basis.

4/ Four petitions sought reconsideration of the Commission's decision to reallocate the 150 General Category channels to the SMR category prospectively, one sought review of the Commission's emission mask rules, and three focused on the decision to require a public interest justification for continued extended implementation authority.

5/ SBT describes itself as a "non-profit trade association of small businesses serving the telecommunications marketplace." Petition of SBT at p. 2. It states that it is a new association

(continued...)

Commission's decision to auction the upper channels and require mandatory relocation of incumbents.6/ The Southern Company ("Southern"), a large utility company dependant upon SMR usage of Industrial/Land Transportation frequencies, also opposed the Commission's use of auctions for SMR licensing.7/

On the other hand, numerous SMR providers heretofore opposed to the use of auctions to select among mutually exclusive applications for the top 200 channels did not challenge that conclusion in the First R&O. They support the First R&O's licensing decisions as part of an overall Industry Consensus

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5/(...continued)
and could not have participated in the proceeding previously. SBT's counsel, however, Brown and Schwaninger, has been quite active throughout this proceeding -- filing pleadings on behalf of numerous clients, and even on its own behalf. *See* Comments of Brown and Schwaninger, filed June 20, 1994, in GN Docket No. 93-252. Presumably, SBT's members have been individually participating in the proceeding, but because SBT's counsel did not provide a list of participants nor an organization representative or address, it is not clear who, if anyone, is actually participating in this group of "small businesses" other than Brown and Schwaninger.

6/ *See* Fresno Mobile Radio, Inc.; Banks Tower Communications, Ltd.; Pro-Tec Mobile Communications, Inc.; and Supreme Radio Communications, Inc. SBT relies heavily on these four "sister" petitions to support its arguments. Beyond these petitions, not a single SMR operator challenged the new licensing process established in the First R&O. Thus SBT, via Brown and Schwaninger, cites itself as its basis for asserting that there is wide-spread "interest" in reconsidering these aspects of the First R&O.

7/ Southern is transitioning into a telecommunications service provider. *See* Application of Southern Information Holding Company, Inc. for Determination of Status As An Exempt Telecommunications Company, filed April 16, 1996. This is one of six such applications filed by subsidiaries of Southern, each seeking Commission approval for Southern's subsidiaries to provide telecommunications and information services pursuant to the recent amendment of the Public Utility Holding Company Act of 1935.

Proposal, proffered by SMR WON, the American Mobile Telecommunications Association ("AMTA"), and Nextel, for licensing the lower 230 SMR channels.8/ The Industry Consensus Proposal would permit lower channel incumbents to negotiate among themselves to obtain Economic Area ("EA") based licenses, thereby avoiding mutually exclusive applications and the need to hold auctions.

Of the five Oppositions, only two question the Commission's authority to auction the upper 200 SMR channels.9/ Therefore, Nextel files this Reply to respond to those Oppositions and, in particular, to the inaccuracies in SBT's Opposition.10/

III. DISCUSSION

A. The Commission Did Not Receive A "Vast Number" Of Petitions Seeking Reconsideration Of The First R&O

8/ *See* Petition of PCIA at p. , wherein PCIA states that it would support the First R&O if the Commission accepts the Industry Consensus Proposal. *See also* Petition of AMTA; and Comments of Nextel, Comments of SMR WON, and Comments of AMTA, filed in PR Docket No. 93-144, on February 15, 1996, in response to the Commission's Second Further Notice of Proposed Rule Making in this docket. *See also* Joint Reply Comments of SMR WON, AMTA and Nextel, filed March 1, 1996.

9/ *See* Oppositions of SBT and PCIA, the latter of which is conditional opposition since PCIA has agreed to withdraw its reconsideration request if the Commission adopts the Industry Consensus Proposal.

10/ Nextel has filed numerous pleadings in the past year responding to similar misrepresentations by SBT's counsel, who appear to have made a cottage industry of drumming up opposition to the Commission's actions in this proceeding. This suddenly-created organization, SBT, appears to be Brown and Schwaninger's most recent attempt to find a client on whose behalf it could file another irresponsible, unsubstantiated pleading. *See, e.g.*, Motion, filed November 13, 1995, in PR Docket No. 93-144, which was actually directed at the Department of Justice and the Federal Trade Commission, but also late-filed in the Commission's proceeding. *See also* Motion to Defer Action, filed December 4, 1995, in PR Docket No. 93-144.

SBT claims that a "chorus of petitioners" challenge the Commission's First R&O decisions, resulting in a "vast number of parties seeking reconsideration of the Commission's Order."11/ As Nextel discussed in its own Opposition, some 20 petitioners -- compared to the hundreds of participants in this proceeding -- hardly ranks as "numerous" and, to the contrary, evidences growing support for the First R&O.12/ In fact, SBT could cite to only four petitions as support for its claim of "vast" opposition.13/

A review of these four petitions reveals that only two actually challenged the Commission's auction decisions, and one of them is, essentially, SBT itself -- Banks Tower Communications, Ltd., *et al.* ("Banks") -- a company that is presumably a member of SBT since it is represented by the SBT's counsel.

Two of the other opponents cited by SBT are (a) PCIA, and (b) Entergy Services, Inc. ("Entergy"). First, as PCIA itself stated, it "would be willing to forego its request for reconsideration" if "the Commission adopts the [Industry Consensus Proposal]" on the licensing of the lower channels.14/ Second, Entergy's Petition

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11/ Opposition of SBT at p. 3.

12/ The fact that only 20 Petitions For Reconsideration were filed by the more than 100 participants in the proceeding evidences growing support for the Commission's decision; certainly not continued or growing opposition.

13/ Opposition of SBT at p. 3, fn. 6.

14/ *See* Petition of PCIA at p. 17. As AMTA pointed out in its Petition for Reconsideration, the Industry Consensus Proposal would, when coupled with the First R&O, "reasonably balance[] the interests of various segments of the diverse [SMR] service industry." Petition of AMTA at p. 1.

reveals no opposition to the Commission's decision to auction licenses for "EA-wide authority, [sic] to operate 800 MHz systems."15/ In fact, Entergy's Petition only addresses the Commission's decision to reallocate the 150 General Category channels to prospective SMR licensing.16/

The fact is the record on reconsideration evidences no "chorus" of opposition to the First R&O. The SMR industry is in significant agreement that the Commission's upper 200-channel auction/licensing decisions, when coupled with the Industry Consensus Proposal described above, are in the public interest. SBT's request, moreover, that the Commission "set aside its Order" and commence a new rule making proceeding is an irresponsible attempt to create further work for its counsel by dragging out this proceeding and revisiting previously-resolved issues.17/

B. The First R&O Provides Opportunities For Small Businesses.

15/ *See* Opposition of SBT at pp. 2-3.

16/ *See* Petition of Entergy.

17/ Opposition of SBT at p. 6. SBT argues that the wide-area licensing adopted in the First R&O will result in a single licensee dominating a single service. Opposition of SBT at p. 11. Not only is this inaccurate, but it is also irrelevant. The Commission has already concluded that the SMR service is not the relevant product market for evaluating competition; rather, SMR is just one competitor in the overall CMRS marketplace. The Commission has repeatedly found that all CMRS services are competitive or potentially competitive, and therefore the relevant product market for assessing the competitive impact of its decisions is the overall CMRS marketplace. *See, e.g.*, Third Report and Order, 9 FCC Rcd 7988 (1994) at paras. 22-79; Applications of Nextel Communications, Inc., for Transfer of Control of OneComm Corporation, N.A. and C-Call Corp., 10 FCC Rcd 10450 (1995) at para. 28; Applications of Motorola, Inc. For Consent To Assign 800 MHz Licenses To Nextel Communications, Inc., 10 FCC Rcd 7783 (1995) at para. 18.

In contrast to the claims of SBT, the Commission's SMR licensing rules provide a number of opportunities for small businesses. First, in the upper 200 channels, the Commission created a 20-channel block to increase the potential for small business participation in the upper channel auctions.18/ Second, the Commission's rules provide avenues for small businesses to enter into partnerships, consortia or other arrangements to bid on any of the upper blocks, including the larger ones.19/ Third, to further assist small businesses, the Commission is providing them installment payment plans, although Nextel believes such plans are not in the public interest.20/ In addition, the Industry Consensus Proposal would enable small businesses to not only maintain their existing systems but to negotiate with other small businesses to create an EA-wide system, thus providing them new

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18/ First R&O at para. 37.

19/ *Id.*

20/ *Id.* at para. 248. Although Nextel asked the Commission to reconsider permitting installment payments for small businesses, Nextel did not -- as asserted by SBT -- oppose the use of bidding credits in its Petition; in fact, Nextel's Petition does not even refer to the presence or absence of bidding credits in the upper 200-channel auction. *See* Petition of Nextel at p. 8.

Nextel opposes the use of installment payment plans because, as experience has shown in the C-Block PCS auction, they encourage participants to bid astronomical amounts of money and engage in speculation and warehousing. Immediate investment in the license encourages technological innovation, system development and diverse service offerings.

opportunities to expand and enhance their telecommunications services.21/

C. SBT's Claims Are Irresponsible, Insupportable And Inaccurate

SBT makes other claims that are simply inaccurate. For example, SBT claims that auctions will not achieve the Commission's goal of reducing its administrative licensing burdens.22/ The Commission's auction experiences during that last year demonstrate that competitive bidding is an efficient method for assigning licenses. Moreover, wide-area SMR licensing is far more efficient than continued site-by-site licensing which had so depleted the Commission's resources that applications were backed up for two years awaiting processing.

Finally, SBT provides a list of Nextel's positions that SBT claims are "wholly at odds with the majority of the commenting parties."23/ Yet, of the four oppositions that were filed, one

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21/ SBT's failure to embrace the Industry Consensus Proposal is puzzling given that it would provide concrete means for the Commission to minimize the incidence of mutually exclusive applications and the need to use auctions -- the very steps which SBT asserts, albeit wrongly, that the Commission ignored in adopting wide-area licensing for the upper 200 channels. Further, it would help bring finality to the Commission's restructuring of the 800 MHz SMR service -- a now more than two-year old process which Brown and Schwaninger delights in feasting upon.

22/ Opposition of SBT at p. 8. In fact, SBT argues, the auction process will actually increase the Commission's administrative burden. *Id.*, *citing* Petition For Reconsideration of Fresno Mobile Radio, Inc., *et al.*, presumably one of SBT's own petitions since it was filed by the same law firm and Fresno did not file an Opposition of its own.

23/ Opposition of SBT at p. 17, citing to Nextel's positions that (i) relocation notice to one incumbent licensee in an EA should be deemed sufficient for notice to all licensees in that EA;

(continued...)

actually supports many of Nextel's positions.24/ PCIA's Opposition expressly agrees with Nextel (1) that the pre-auction settlement process be limited to incumbents;25/ (2) that the Commission eliminate the $.02/MHz/pop minimum bid increment rule;26/ (3) that EA licensees be required to fully cooperate in the relocation/retuning process;27/ and (4) that the EA licensee be responsible only for providing notice to incumbents as they are listed in the Commission's database.28/

IV. CONCLUSION

SBT's Opposition is a shameless attempt to conjure up opposition to the First R&O when, in reality, it enjoys significant industry support. The Commission created an extensive record in this proceeding, provided parties with more than the required

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23/(...continued)
(ii) the period for mandatory relocation negotiations be reduced; (iii) EA licensees be permitted to comment on the licensing of incumbent operators seeking geographic licenses; and (iv) emission mask requirements apply only at the border of the EA.

24/ *See* Opposition of PCIA. In ITA's Opposition, ITA responds to Nextel's request for a shorter relocation/retuning negotiation period by seeking a two-year voluntary, one-year mandatory period like the one established in PCS. This, however, is at odds with the Commission's recent proposal in WT Docket No. 95-157 where the Commission proposes to shorten the voluntary period and thereby ensure that all parties are at the negotiating table in a timely fashion. *See* First Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 95-157, FCC 96-196, at para. 95.

25/ Opposition of PCIA at p. 4.

26/ *Id.* at p. 5.

27/ *Id.*

28/ *Id.*

opportunities to comment, properly considered all of these comments, justified each of its decisions, and arrived at new SMR licensing rules that will enhance the ability of SMR operators to compete in the telecommunications marketplace. Accordingly, the Commission should dismiss SBT's Opposition and affirm its licensing policies in the First R&O.

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Dated: May 14, 1996

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 14th day of May 1996, I caused a copy of the attached Reply to Opposition to Petitions for Reconsideration of Nextel Communications, Inc. to be served by hand delivery or first-class mail, postage prepaid to the following:

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