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

FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

In the Matter of)	
)	
Amendment of Part 90 of the)	
Commission's Rules to Facilitate)	PR Docket No. 93-144
Future Development of SMR Systems)	RM-8117, RM-8030
in the 800 MHz Frequency Band)	RM-8029
)	
Implementation of Sections 3(n))	
and 332 of the Communications Act)	GN Docket No. <u>93-252</u>
)	
Regulatory Treatment of Mobile)	
Services)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	

To: The Commission

OPPOSITION OF NEXTEL COMMUNICATIONS, INC. TO
PETITIONS FOR RECONSIDERATION OF THE
SECOND REPORT AND ORDER

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Dated: October 9, 1997

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I. INTRODUCTION

Pursuant to Section 1.429(f) of the Rules of the Federal Communications Commission ("Commission"), 1/ Nextel Communications, Inc. ("Nextel") respectfully submits this Opposition to the Petitions for Reconsideration ("Petitions") filed in response to the Second Report and Order ("Second R&O") in the above captioned proceeding. 2/

The Second R&O established licensing and auction rules for the lower 80 Specialized Mobile Radio ("SMR") category channels and the 150 General Category channels, and it established the rights and obligations of incumbent SMR licensees and Economic Area ("EA")

1/ 47 C.F.R. Section 1.429(f).

2/ Second Report and Order, FCC 97-223, released July 10, 1997.

licensees after the completion of the EA licensing auctions. Additionally, the Second R&O established specific rules for retuning incumbent SMR operators out of the top 200 SMR channels, including the extent to which retuning costs must be reimbursed by the retuning EA licensee.

Seven Petitions seek reconsideration of a variety of decisions in the Second R&O.^{3/} Nextel, the Nation's largest provider of SMR services and an active participant in this proceeding since its inception in 1993, generally supports the Commission's Second R&O. Nextel, therefore, opposes the Petitions, as discussed herein, and respectfully requests that the Commission move forward expeditiously to auction the lower 80 SMR and the 150 General Category channels.

II. DISCUSSION

A. The General Category Channels

Although Nextel disagrees with the Commission's reversal of its previous decision to prospectively assign the 150 General Category channels for SMR use only,^{4/} Nextel supports the Commission's decision to assign General Category EA licenses

^{3/} Petitions were filed by the American Mobile Telecommunications Association ("AMTA"); the Personal Communications Industry Association ("PCIA"); Small Business in Telecommunications ("SBT"); Entergy Services, Inc. and Delmarva Power ("Entergy/Delmarva"); the Industrial Telecommunications Association, Inc. ("ITA"); the Automobile Club of Southern California ("Auto Club"); and Genesee Business Radio Systems, Inc. ("Genesee").

^{4/} Memorandum Opinion and Order, 12 FCC Rcd 9972 (1997) ("MO&O") at para. 101.

through competitive bidding. Despite arguments to the contrary,^{5/} the Commission is well within its statutory authority to select among mutually exclusive applications for initial EA licenses on the 150 General Category channels through competitive bidding. Section 309(j)(2)(A) of the Communications Act of 1934, as amended,^{6/} provides for the assignment of licenses through competitive bidding if "the principal use of such spectrum will involve, or is reasonably likely to involve[] the licensee receiving compensation from subscribers. . . ." (emphasis added).^{7/}

The Commission's records indicate that the overwhelming majority of existing site specific licenses for use of the General Category channels have been assigned to commercial operators;^{8/} thus, it is reasonable to conclude that the "principal use" of the General Category channels "is reasonably likely to involve[] the licensee receiving compensation from subscribers."^{9/} Where there are mutually exclusive applications for General Category channels, the Commission is authorized to assign them through auctions.

^{5/} Petitions of ITA at pp. 4-6; Auto Club at pp. 7-9; SBT at p. 15.

^{6/} 47 U.S.C. Sections 151 *et seq.*

^{7/} 47 U.S.C. Section 309(j)(2)(A).

^{8/} First Report and Order, 11 FCC Rcd 1463 (1995) at para. 137; Memorandum Opinion and Order, 12 FCC Rcd 9972 (1997) at para. 97 ("three times as many SMR licensees in the General Category as any other type of Part 90 service.").

^{9/} The Commission concluded in its order establishing general auction rules that the "principal use" of a spectrum band is "for-profit" (for purposes of authority to assign licenses using competitive bidding) if a majority of the uses would be for-profit. See Second Report and Order, 9 FCC Rcd 2348, 2354 (1994).

B. Modification of Incumbent Systems

The Second R&O provides incumbent SMR operators on the lower 80 SMR channels significant operational flexibility by permitting system modifications within the incumbent's 18 dBu signal strength contour "as long as they obtain the consent of all affected parties."^{10/} ITA's proposal to use a frequency coordinator's authorization in lieu of the consent of affected incumbents is without justification.^{11/} Obtaining the consent of co-channel licensees that may be adversely impacted by the 18 dBu modification standard is necessary to protect against harmful interference, and it strikes a fair balance between incumbent flexibility and incumbent protection.

Nextel likewise opposes ITA's proposal to foreclose EA licensees from challenging an incumbent's system modifications.^{12/} Requiring EA licensees to tolerate harmful interference without recourse to Commission processes would undercut fairness and viability of the competitive bidding process established by Congress in the Omnibus Budget Reconciliation Act of 1993^{13/} and recently affirmed in the Balanced Budget Act of 1997.^{14/} EA licensees will have bid on and accepted licenses

^{10/} Second R&O at para. 67.

^{11/} See Petition of ITA at p. 3.

^{12/} Petition of ITA at p. 4.

^{13/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(b), 107 Stat. 312, 392 (1993).

^{14/} The Balanced Budget Act of 1997, Pub. Law 105-33, 111 Stat. 251 (August 5, 1997).

based on the obligation to protect incumbent systems within their existing specified contours. ITA's proposal would expand the rights of the incumbent by mandating greater co-channel protection from an EA licensee than incumbents are currently entitled to from other incumbent licensees. There is no rational legal or public policy basis to devalue EA licenses by requiring such licensees to provide greater protection to incumbents and not have the right to challenge incumbent system modifications that may exceed the specified flexibility or cause harmful interference in a given situation.

With regard to calculating an incumbent's 18 dBu contour for purposes of incumbent modifications, Nextel opposes PCIA's proposal that the Commission base the contour on the incumbent's maximum power and actual HAAT rather than the incumbent's actual power and originally licensed HAAT.^{15/} Likewise, Nextel opposes AMTA's proposal that the Lower 230 channel incumbents be entitled to protection based on the station's maximum power and licensed height.^{16/} Both suggestions are unjustified departures from long-standing Commission policy that would improperly deny EA licensees access to spectrum.^{17/}

^{15/} Petition of PCIA at p. 20.

^{16/} Petition of AMTA at p. 6.

^{17/} Nextel supports AMTA's request that the Commission clarify the co-channel interference protection rules governing an overlap of an incumbent's 18 dBu interference contour with the EA licensee's 36 dBu service contour. See Petition of AMTA at p. 6.

C. Bidding Rules

Nextel supports the bidding rules established in the Second R&O. The rules, patterned after existing auction rules which experience has proven successful -- and modified where experience has proven them unworkable -- are rational, balanced and provide for an efficient and effective auction process. Petitions seeking changes to those rules should be dismissed.

The Commission's upfront payment rules have been used in every spectrum auction conducted by the Commission since 1994. PCIA's proposal to adjust the rules and limit bidders' flexibility in bidding on particular licenses is not in the public interest.^{18/} AMTA's claim that the Commission should reinstate installment payments likewise ignores the lessons learned from previous auctions.^{19/} The fiasco created by the use of installment payments in the C-block Personal Communications Services ("PCS") auction provides ample evidence that installment payments create an incentive to bid irresponsibly, encourage speculation and can result in spectrum warehousing. Immediate investment in the license encourages technological innovation, system development and diverse service offerings.

By eliminating installment payments for the lower 80 SMR channels and the 150 General Category channels, the Commission is not abdicating its responsibilities under Section 309(j) of the Communications Act because small businesses are entitled to

^{18/} See Petition of PCIA at p. 16.

^{19/} See Petition of AMTA at pp. 10-13.

significant bidding credits in the lower channel auction.^{20/} These bidding credits will place smaller businesses on a level playing field with larger companies by enabling them to obtain licenses at significantly reduced prices. Unlike installment payments, however, that price must be paid immediately and in full, thereby discouraging the irrational decision making promoted by installment payment plans.^{21/}

D. Miscellaneous Issues

Nextel opposes Entergy/Delmarva's request that incumbents, transitioning site-by-site licenses into geographic area licenses, be permitted to include white space and unconstructed stations in their protected geographic areas.^{22/} This would be at odds with the concept of geographic area auctions which grant EA licensees the right to existing white space and to channels that later become available through, among other things, an incumbent's failure to timely construct. Entergy/Delmarva's proposals seek to deny EA licensees their geographic area licensing rights and to award incumbents authority well beyond that conferred by existing licenses and protected through compliance with the Commission's

^{20/} Second R&O at para. 277.

^{21/} SBT's claim that the Commission cannot change bidding rules through the release of Public Notices is out of place in this proceeding. Petition of SBT at p. 17. The Commission has issued no Public Notices relating to the lower channel bidding rules. Therefore, the issue is beyond the scope of this proceeding. See 47 C.F.R. Section 1.429(b).

^{22/} Petition of Entergy/Delmarva at p. 5.

long-standing requirements for timely construction and operation of SMR stations.23/

With regard to retuning incumbents out of the upper 200 SMR channels, the Commission has established a reasonable process closely patterned on the PCS microwave relocation process initially proposed by PCIA. Petitions seeking to change this process are unjustified. Eliminating the five-year cap on an EA licensee's duty to reimburse recurring expenses is unreasonable.24/ Nextel supports a three-year limitation on repayment of such recurring expenses. Any payments beyond a three-year period would be purely speculative and beyond the realm of the Commission's cost reimbursement parameters.25/

PCIA's request for more specific rules regarding the retuning notice provided by EA licensees intending to relocate an incumbent are redundant, unnecessary and not the subject of this proceeding. The Commission established the retuning notice requirement in its First Report and Order in December 1995.26/ The Commission recently resolved requests for reconsideration of the First Report and Order, and more specifically, of the retuning notice

23/ See Sections 90. of the Commission's Rules.

24/ Petition of Genesee at p. 4.

25/ Additionally, there is no support for PCIA's proposal that EA licensees be required to make progress payments to the retuned incumbent. See Petition of PCIA at p. 9. This issue should be left to the parties to negotiate in good faith.

26/ See n. 8 *supra*.

issue.^{27/} PCIA's request for reconsideration, therefore, is repetitive and should be dismissed. The Commission's rules governing the notice requirement ensure that the incumbent will know in a timely manner whether or not the EA licensee intends to retune its system.^{28/}

SBT's suggestion that incumbents be permitted to unilaterally cut off retuning negotiations after a given time period is curious.^{29/} Under the Commission's rules, parties have two years to establish a retuning plan -- one year of voluntary negotiations, and one year of mandatory negotiations. Therefore, at the end of the mandatory negotiation period (the end of year two), the incumbent can unilaterally terminate discussions if the EA licensee(s) does not exercise its mandatory retuning rights. Nextel fully supports SBT's suggestion that this two-year time period is too lengthy, and would join SBT in seeking a shorter retuning negotiation time frame.

Finally, Nextel supports PCIA's proposal to limit the lower 80 SMR channel auction to incumbents.^{30/} Such a limitation would ensure that incumbents have an opportunity to bid on licenses that could affect their existing operations it could significantly

^{27/} See MO&O, *supra*. at n. 4, at paras. 55-58.

^{28/} Nextel reiterates herein the importance of holding EA licensees responsible for providing notice only to those incumbents properly listed on the Commission's database. EA licensees cannot be held responsible for changes of incumbents' addresses not reflected in the database or other delays in database updates.

^{29/} Petition of SBT at p. 19.

^{30/} Petition of PCIA at p. 3.

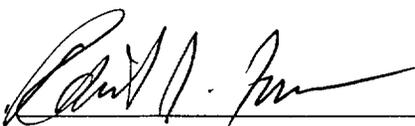
decrease the potential for speculation and manipulation of the auction process by ensuring that bidders are sincere in their participation.

III. CONCLUSION

The Commission's Second R&O established reasonable rules for the prospective licensing of the lower 80 SMR channels and the 150 General Category channels. Nextel, therefore, opposes the Petitions to the extent discussed herein and respectfully requests that the Commission move forward expeditiously to license all SMR channels and General Category channels on a geographic area basis.

Respectfully submitted,

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By  _____

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Dated: October 9, 1997

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 9th day of October, 1997, I caused a copy of Opposition of Nextel Communications, Inc. to be served hand delivery or first-class mail, postage prepaid to the following:

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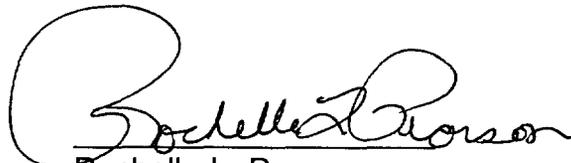
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