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FEDERAL COMMUNICATIONS COMMISSION
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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 RM-8029
Implementation of Sections 3(n) and 322 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	)	PR Docket No. 93-253

To: The Commission

REPLY

Small Business in Telecommunications (SBT) hereby replies to Nextel Communications, Inc.'s Opposition to Petitions For Reconsideration to the Commission's Second Report and Order ("SR&O") in this proceeding, released July 10, 1997, ("Opposition").

The Commission's Authority Is Still At Issue

At page 2 of its Opposition, Nextel attempts to demonstrate the Commission's authority to employ competitive bidding by taking an intentionally myopic view of the applicable statutes. Nextel's use of 47 U.S.C. §309(j)(2)(A) does nothing to answer the objections of the petitioners, including those objections regarding avoidance of mutual exclusivity clearly articulated within 47 U.S.C. §309(j); protection of public safety uses of the spectrum;[1] protected uses of the

[1] See, Petition For Reconsideration of The Automobile Club of Southern California at Pages 2-3.

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spectrum by private entities in accord with 47 U.S.C. §332; and limitations on use of competitive bidding to include dissemination of licenses among designated entities. Instead, Nextel has attempted to employ the Commission's conclusory language, rather than the agency's underlying statutory authority and limitations thereon, to explain the bases for the Commission's use of competitive bidding authority. It is apparent that Nextel's argument is a grab at straws which should be rejected.

The issues arising out of the Commission's proposed use of competitive bidding authority have simmered and festered throughout this proceeding. Questions abound from all corners of the industry which demand a thorough review and response from the agency. Nextel's attempt to sweep under the rug these issues by use of the word "principally" plucked from Title 47 overly simplifies the matter and does not evidence an appreciation of the totality of the Commission's mandate and the express limitations placed on that authority by Congress. SBT hereby supports the comments of the Industrial Telecommunications Association ("ITA") questioning the Commission's proposed use of competitive bidding authority for these purposes, including ITA's characterization of the use and needs of private radio users of General Category channels at paragraphs 9-12 of ITA's petition.

Further, SBT also notes Congress' interpretation of 47 U.S.C. §309(j)(6)(E), contained within the House and Senate Budget Conferees report in the newly adopted Budget

Reconciliation Report.[2] The conferees have confirmed SBT's and others' interpretation of the agency's competitive bidding authority, setting forth within the report that the agency is to employ competitive bidding authority as a non-exclusive remedy for mutual exclusivity. Certainly one cannot argue that the Commission is empowered to create the very problem for which Congress established a non-exclusive remedy. Nor may the Commission lawfully ignore other remedies for mutual exclusivity. Yet, despite the overwhelming evidence to the contrary, Nextel charges blithely along claiming that the Commission's only threshold duty to its use of competitive bidding authority is whether it concludes that some or most of the spectrum might be employed for commercial purposes. It is apparent that much more is needed.

Modification Without Consent

Nextel's posture is obviously disingenuous in its desire to foreclose incumbent operators from expanding their service contours without the EA licensee's (i.e. Nextel's) consent. Nextel's claims cannot be reconciled with its past history of filing thousands of applications for ESMR licenses without performing the engineering necessary to justify short spaced systems in accord with Section 90.621 of the Commission's Rules; without seeking consent from affected existing licensees; and without providing a basis for a waiver of the Commission's Rules to justify its questionable standard operating procedure. A review of the Commission's data base would quickly demonstrate the cavalier approach Nextel has taken to its required protection of existing licensed systems. Yet, within its Opposition, Nextel suddenly is attempting to create

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[2] See, Conference Report, 1997 Budget Reconciliation Act, Title III -- Communication and Spectrum Allocation Provisions, Section 3002(a) cited at ITA Petition For Clarification and Reconsideration at para. 16.

a veto power for itself that it has steadfastly denied for others. SBT hereby requests that the Commission strike that portion of Nextel's Opposition at its Section B, as fully inconsistent with Nextel's past practices, thereby estopping Nextel from taking a position in this proceeding which it apparently does not believe should be applied to all similarly situated persons. The truth of this matter is clear. Nextel wishes to restrain competitive and operational opportunities for all, for the benefit of one.

Bidding Rules

SBT will not reiterate its vehement opposition to the bidding rules, insofar as those rules create an unauthorized delegation of authority to the Wireless Telecommunications Bureau. SBT has fully set forth the basis for its objection in its Petition For Reconsideration and in associated pleadings within this proceeding related to the upper 200 SMR channels. Nothing stated within Nextel's Opposition relieves the Commission of this fatal flaw within its rule making, therefore, Nextel's Opposition is, at best, moot. Nor does Nextel's comment at Footnote 21 of its Opposition erase the problem with a rhetorical sweep of the pen. The SR&O contains an unlawful delegation of authority within its decisions. That the Wireless Telecommunications Bureau has not yet acted on that delegation does not render the unlawful delegation lawful, nor make proper the Commission's action. Accordingly, the matter is fully ripe for reconsideration and is clearly within the scope of this proceeding.

Regarding the Commission's proposed elimination of installment payments, SBT joins AMTA and others in objecting to the Commission's proposal. The use of installment payments

was the best vehicle for enabling small business to participate in competitive bidding. There is no evidence to support Nextel's contention that an additional 10% worth of bidding credits will have the same effect or provide the same avenue of equitable relief for small business. Nor is there any evidence which supports a claim that additional bidding credits in lieu of installment payments will allow the Commission to reach its mandated goal of disseminating licenses among designated entities. Nextel's pointing to the Commission's problems with PCS Block C licensees is, at best, a red herring. There is no evidence to suggest that given a totally different set of rules, auction procedures, attribution guidelines, quality and quantity of unencumbered spectrum, and more, that the Commission will again suffer the same problems. The Commission may logically conclude that the agency does not serve well as a creditor, but the agency's inability to function in this capacity does not justify denying this necessary benefit to small business.

Additionally, SBT respectfully requests that the Commission take official notice of Nextel's claim at Page 6 of its Opposition, wherein Nextel states, "[i]mmediate investment in the license encourages technological innovation, system development and diverse service offerings." SBT requests that the Commission take Nextel at its word and withdraw all grants of extended implementation to Nextel as contrary to Nextel's own edict. If Nextel is to be believed, then Nextel is arguing against five-year build outs of ESMR systems, since such scheduling does not provide for "immediate investment" in licenses. Nextel has thrived on the Commission's not demanding immediate investment. Now it states that its advantages were and are bad public policy. So be it.

SBT hereby requests that the Commission cooperate with Nextel in determining all facilities which Nextel has not constructed and made operational during normal construction periods (i.e. made an immediate investment in the licenses) and assist Nextel in turning back to the Commission all licenses for unconstructed facilities.[3] This action would go much further in decreasing the rampant speculation in licenses that has been visited on the Commission, than any elimination of installment payments.

Retuning Issues

SBT notes Nextel's mischaracterization of its position regarding the length of negotiations for retuning incumbent systems. SBT's earlier comments were intended to promote finality in the process wherein the EA licensee had failed to perform under a retuning agreement, but additional time might exist for migration in accord with the Commission's Rules. SBT seeks to eliminate the uncertainty that exists during the two-year retuning phase following auction. Therefore, if an incumbent is held to the duty to reasonably participate in such activity, then EA licensees must reasonably perform in an expeditious manner in meeting their obligations, or forfeit the right to impose retuning on incumbents. In essence, defaulting EA licensees would

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[3] SBT hereby assists the Commission in its commencement of this process, and in furtherance of Nextel's stated position regarding good public policy, by attaching hereto Brown and Schwaninger's Petition For Special Relief, (FCC File No. LMK-90036) filed with the Commission on February 28, 1996, which SBT respectfully urges the Commission to take up immediately. During the pendency of said petition, SBT is not aware of a single instance wherein the Commission has demanded from Nextel any construction information arising out of the expiration of Nextel's extended implementation authority. It appears, therefore, that given Nextel's statements made within its Opposition, the Commission's duty to avoid the creation of unjust enrichment among participants in the 800 MHz auction, and to assure the benefits of "immediate investment" in licenses, such action by the agency is wholly proper and supported even by the subject of such examination.

not be afforded a second chance to impose retuning on incumbents. Although SBT recognizes that such matters might be handled by contract between incumbents and EA licensees, SBT believes that the matter would be best clarified by the agency to avoid specious claims by EA licensees.

SBT joins PCIA in its comments at Section B of its Petition For Partial Reconsideration and Clarification, seeking more equitable terms for retuning of incumbent systems to include payments to customers for lost use of radios and associated vehicles.[4] SBT and its members have long sought compensation for customers. Such compensation is necessary to avoid undue hardship on hundreds of thousands of affected persons and businesses, and to assure that adversely affected customers do not fault their incumbent carrier for the disruption in service. To do otherwise would be to create an unjust enrichment of EA licensees, like Nextel, and would unfairly burden incumbent operators and the public they serve.

SBT notes that the Commission's decision to make transparent the retuning to the "fullest extent possible"[5] appears to include such an obligation. Yet, SBT urges that such retuning must be economically neutral or transparent for end users. Toward that end, SBT supports PCIA's request for clarification of this point and urges the Commission to protect end users from the

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[4] Throughout this proceeding, the Commission has been urged to articulate a decision on this matter. Numerous commenting parties have requested again and again the Commission's recognition of this problem. To date, the Commission has either ignored or avoided the subject of customer compensation. SBT joins with PCIA to, once again, request that the Commission consider the rights of end users which will be adversely affected by retuning.

[5] SR&O at para. 89.

cost which will be borne of down time, delay, and participation in an activity which provides no cognizable benefit to affected end users. Accordingly, the Commission should reject Nextel's suggested contrary conclusions.

Conclusion

SBT urges the Commission to scrutinize the petitions filed by various parties in an effort to assure that the Commission's decisions conform to law, equity and the practical realities of the marketplace. Once that task is accomplished, the Commission should be properly position to summarily reject Nextel's Opposition *en toto* and adopt those recommendations suggested herein.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By_____
Robert H. Schwaninger, Jr.

Dated: 10/14/97

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
FLEET CALL, INC.	)	
	)	FCC File No. LMK-90036
	)	
For Waiver and Other Relief	)	
To Permit Creation of Enhanced	)	
Specialized Mobile Radio Systems	)	
in Six Markets	)	

To: The Commission

PETITION FOR SPECIAL RELIEF

Dennis C. Brown and Robert H. Schwaninger, Jr. d/b/a Brown and Schwaninger, on behalf of numerous clients who operate Specialized Mobile Radio Systems, respectfully request special relief in the above captioned matter. In support of our position, we show the following.

On March 14, 1991, the Commission granted to Fleet Call, Inc. (Fleet Call)[1] a waiver of Section 90.631 of the Commission's Rules, 47 C.F.R. §90.631, stating that the Commission would grant a waiver of this rule section to "provide Fleet Call five years to construct any stations that would be part of its digital networks. As usual, the five year period will begin on the date of issue of any license associated with the networks," 6 FCC Rcd. 1533, 1535 (1991). The Commission declined to grant other rule waivers which had been requested by Fleet Call.

[1] We believe that Fleet Call is now known as Nextel Communications, Inc. However, for continuity of expression, we shall refer to the enitity herein as "Fleet Call".

On December 15, 1995, the Commission adopted its First Report in Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making concerning amendment of its rules to provide for the licensing of geographically based wide area SMR systems in the 800 MHz band, _____ FCC Rcd. _____ (1995) (FCC 95-501) (FRO). In the FRO, the Commission considered a collection of issues concerning the future licensing of wide area systems, particularly on the Upper 200 SMR Category channels. The Commission's resolution of the issues in that proceeding make it necessary for the Commission to take expeditious action to assure full and fair competition in the field and to avoid unjust enrichment of any person.

Among the actions which the Commission took were the following:

1) Requiring an Economic Area (EA) licensee to place in operation at least 50 percent of its authorized channels in at least one location in the EA, 47 U.S.C. §90.685(d); and

2) Requiring an EA licensee to provide service to at least two-thirds of the population of the EA, 47 U.S.C. §90.685(c).

These actions will necessitate an EA licensee's relocating incumbent licensees to other channels, and the Commission adopted a mechanism by which such frequency relocation is to be accomplished. Consequently, a person which already holds licenses for channels which it can use to relocate incumbent licensees would enjoy a substantial advantage — perhaps a dispositive advantage — over other applicants for a channel block. It should be clear that any licensee which holds a warehouse of idle channels which it had not yet constructed and placed in operation, or on which it was not currently operating, would have a distinct and unfair competitive advantage over an applicant which had not hoarded fallow channels.

The Commission "conclude[d] that the availablity of extended implementation authority in the 800 MHz SMR service is no longer necessary" and that it was necessary "to accelerate the termination date of existing implementation periods so that EA licensees will not be unnecessarily hampered in their efforts to comply with the construction requirements associated with their authorizations," FRO at para. 110. The Commission decided that "if a licensee's extended implementation authority showing is approved by the Bureau, such licensee will be afforded a construction period of two years or the remainder of its current extended implementation period, whichever is shorter," FRO at para. 112. Based on the Commission's experience since 1991, and its determination that no more than two years should be required to complete construction of a wide area network, it would appear that Fleet Call has already enjoyed two and one half times the period of time which the Commission has found to be necessary to complete the construction of a wide area network. To avoid the potential for Fleet Call not only to have an unfair advantage in the process of competing for an EA license, but to terminate the potential for Fleet Call to obstruct the development of any competitor which wins an EA license, the Commission should take immediate action to terminate Fleet Call's extended implementation rule waiver on the fifth anniversary of the grant of the initial license for a station associated with the Fleet Call networks.

Shortly after the release of the Commission's 1991 action in the above captioned matter, Fleet Call obtained its initial license for a station associated with the networks and the five year extended construction period began running. The Commission should review its records to determine the date on which the first license was issued to Fleet Call for a station associated

with the wide area networks. Then, it should require Fleet Call to submit a statement certifying as to the construction and placing in operation of each channel for which it or any successor or corporate parent, subsidiary or sister holds a license granted under the rule waiver and a statement that each channel has not been out of service for a period in excess of 90 days. The Commission should require Fleet Call, consistent with Fleet Call's own proposal, 6 FCC Rcd. at 1533, to identify each channel on which it is currently providing "a minimum of six digital channels from each existing 25 kHz wide 800 MHz analog voice channel," "employing frequency reuse throughout the system," operating "through a centralized switching facility providing seamless 'hand off' of communications on mobile units moving throughout the service area", *id.* Upon receipt of Fleet Call's statement, the Commission should hold to have cancelled automatically the license for any channel which Fleet Call did not construct to the full extent of its spectrum efficiency enhancement proposal within five years of the grant of the first station license for the networks. The Commission should also hold to have cancelled automatically the license for any channel which has been out of service for a period in excess of 90 days , *see*, 47 C.F.R. §90.631(f).

A substantial part of the Commission's success in administering the SMR spectrum above 800 MHz can be attributed to a strict application of its rules and an avoidance of opportunities for time consuming and delaying litigation. To reach the point of assigning EA licenses at the earliest possible time, the Commission should strictly construe its grant of waiver to Fleet Call and should take immediate action to protect the public interest.

Fleet Call can be expect to argue over the meaning of the Commission's determination to "provide Fleet Call five years to construct any stations that would be part of its digital networks. As usual, the five year period will begin on the date of issue of any license associated with the networks," *id.* at 1535. Fleet Call can be expected to suggest that the Commission should be understood as having intended to grant a new and separate waiver for each and every station authorized subsequent to March 14, 1991, and that Fleet Call should be allowed an indefinite period of time to complete construction of its networks, terminating only five years after the Commission grants the final license for the networks. Such a position would, however, be entirely unreasonable and would provide neither Fleet Call, the Commission, nor the public with any certainty, whatsoever. Such a position would, unreasonably, provide Fleet Call with ten years or more, rather than five years, of time within which to construct the enhanced SMR networks which formed the basis of its rule waiver request.

We believe that when the Commission stated that the five year extended construction period would begin "on the date of issue of any license associated with the networks," the Commission meant "the first license associated with the networks". Rather clearly, the Commission did not state that the five year waiver for Fleet Call to construct its networks would begin again and again and again on the date of issue of <u>each</u> license subsequently granted to Fleet Call. Nor did the Commission state that it would grant multiple waivers, one for each station, *ad infinitum*. Instead, the Commission stated that it would "provide Fleet Call five years to construct any stations", making the all Fleet Call stations part of one group which for which one five year waiver was being provided.

The waiver granted to Fleet Call can be properly interpreted only by reference to what Fleet Call had requested. At 6 FCC Rcd. 1534, the Commission explained that "Fleet Call requests that we issue for each of its six markets a single system-wide license that will authorize construction and operation of multiple, low-power base stations." Clearly, Fleet Call was requesting only one, one-time, extension of the normal construction period to five years, and not an interminably rolling rule waiver, renewed with the issuance of each license after the first for the enhanced networks. Fleet Call would not be entitled to claim that the Commission granted extension authority in excess of that which Fleet Call had requested. Accordingly, the Commission should hold that Fleet Call was granted only a single five year extension of the construction period for all of its networks and should take appropriate action to cancel unconstructed and non-operating authorizations.

At the time of the grant of the waiver to Fleet Call, the waiver was unique[2] and carried with it a public trust for Fleet Call to make full use of the special authority granted to it to construct and operate a highly efficient, enhanced, digital network. To be sure that Fleet Call has fulfilled its public trust, the Commission should fully and expeditiously review Fleet Call's performance under the waiver.

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[2] Subsequent to the grant of waiver to Fleet Call, the Commission granted similar waivers to other licensees. The Commission should apply similar policies to all similarly situated persons and promptly review the extent of their construction immediately upon the close of their waiver periods.

Allowing Fleet Call to hold unconstructed authorizations beyond the five year period which commenced with the grant of the first license for its networks would impose severe adverse effects on the public interest. The Commission has determined that it will select among mutually exclusive applications for EA licenses by conducting an auction. Congress has set forth at Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §309(j), certain objectives which the Commission shall seek to promote. Among those objectives are "promoting economic opportunity and competition and assuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants," 47 U.S.C. §309(j)(3)(B), and "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award use of that resource," 47 U.S.C. §309(j)(3)(C). To promote the objectives mandated by Congress, the Commission should take immediate action to assure that Fleet Call does not continue to hold any unconstructed SMR authorization beyond March 14, 1996.

Review of the Commission's records will demonstrate that Fleet Call and its corporate relatives hold authorizations for a dominant number of channels in many areas, both urban and rural. If Fleet Call is permitted to continue to hold unconstructed authorizations up to the time of auction or beyond, an excessive concentration of wide area licenses will surely occur because, in many EAs, few other persons would be able to bid for or construct EA systems.

The Commission is charged with the duty of adopting methods to avoid unjust enrichment in the awarding of spectrum resources. If the Commission does not cancel all unconstructed Fleet Call authorizations, two things would surely occur. First, Fleet Call would be unjustly enriched as against all other bidders, because Fleet Call would not have to bid for sufficient spectrum to assure its ability to relocate incumbent licensees, while other applicants would have to bid for sufficient spectrum.

More significantly for the public interest, if Fleet Call were permitted to hold any unconstructed authorization at the time of bidding, its absentee incumbency would chill the competitve market for spectrum. If others were discouraged from bidding because Fleet Call was permitted to hoard unconstructed channels, then bids would not reach a market clearing price and Fleet Call would be unjustly enriched as against the public's value in spectrum. To the extent that Fleet Call held an authorization for an unconstructed channel among the Lower 80 channels, Fleet Call would be unjustly enriched and the amount of recovery which the public would be unjustly diminished at the time that the Commission conducts an auction for those channels, as well. To assure that the public receives a full and fair portion of the value of the public spectrum resource made available for commercial use in the 800 MHz SMR band, the Commission should avoid unjust enrichment of a specific entity by promptly cancelling the authorization for any channel on which Fleet Call has not constructed the proposed enhanced system on or before March 14, 1996.

Fleet Call can be expected to argue that recovering unconstructed or disused channels would cause harm to Fleet Call. However, as the Commission has repeatedly recognized, antitrust policy protects competition, not particular competitors. Clearly, if Fleet Call were to go into a competitive auction with a stock of unconstructed channels, competition would be impaired, not only because those channels were not being put to any useful public purpose, but because the extent of competition at auction would be unfairly diminished. If the Commission's choice is between one competitor's suffering or the public interest's suffering, the Commission's obligation is to protect the public interest from competitive harm.

Conclusion

For all the foregoing reasons, on behalf of our SMR operating clients, we respectfully request the special relief described herein.

Respectfully submitted,

By

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Dated: February 28, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-eighth day of February, 1996, I served the foregoing Petition for Special Relief on the following person by placing a copy in the United States Mail, first-class postage prepaid:

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Dennis C. Brown

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I, hereby certify that on this 14th day of October, 1997, I served a copy of this Reply to Opposition of Nextel Communications, Inc. via first-class mail, postage prepaid to the following:

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