

DOCKET FILE COPY ORIGINAL

RECEIVED

NOV 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE 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	)	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. 93-252
)	
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 THE SUPPLEMENT TO PETITIONS FOR RECONSIDERATION OF
SMALL BUSINESS IN TELECOMMUNICATIONS**

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Vice President and
Chief Regulatory Officer

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

Nextel Communications, Inc.
1450 G. Street, N.W.
Suite 425
Washington, D.C. 20005
202-296-8111

Dated: November 10, 1997

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

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. 93-252
)	
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 THE SUPPLEMENT TO PETITIONS FOR RECONSIDERATION OF
SMALL BUSINESS IN TELECOMMUNICATIONS**

Pursuant to Section 1.45(a) of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") submits this Opposition to the Supplement To Petitions For Reconsideration ("Supplement") and Motion for Leave to File ("Motion") of Small Business in Telecommunications, seeking further reconsideration of the Commission's Second Report and Order and Memorandum Opinion and Order in the above-referenced proceeding.1/

1/ Second Report and Order, FCC 97-223, 12 FCC Rcd ___ (1997); Memorandum Opinion and Order, 12 FCC Rcd 9972 (1997) (hereinafter collectively "July Orders"). Nextel has participated in this proceeding since its inception, and has submitted an Opposition to a number of timely petitions for reconsideration filed in response to the July Orders. See Opposition to Petitions For Reconsideration, in PR Docket No. 93-144, filed October 9, 1997.

Small Business In Telecommunications ("SBT"), in its continuing attempts to obstruct the geographic licensing of Specialized Mobile Radio ("SMR") systems (and the increased competition that will result therefrom), has submitted a pleading so lacking in merit that it either (a) impliedly accuses the Commission of misrepresentation or (b) discloses serious inadequacies on the part of its legal counsel. SBT, through its counsel Brown and Schwaninger, claims that the Commission's July Orders are "a nullity" because the Commission failed to have the Small Business Administration ("SBA") approve its "small business" definitions for the Upper and Lower Channel SMR auctions.^{2/} SBT posits this argument despite the Commission's statement in Appendix D to the Second Report that "*The Small Business Administration has approved these [small business] definitions for 800 MHz SMR services.*^{3/}

Given the Commission's express statement of compliance, Brown and Schwaninger's Supplement is a fraud. There is no basis whatsoever for SBT's assertion that the SBA's approval (or the lack thereof) was "not a matter which appeared within the [July Orders]" or was an issue that "could not have been reasonably known" at the

^{2/} Supplement at p. 2.

^{3/} Appendix D, Final Regulatory Flexibility Analysis, Second Report and Order and Memorandum Opinion and Order, attached to the Second Report and Order, *supra*. fn. 1. As SBT's legal counsel challenging the small business provisions of the Orders, Brown and Schwaninger, at a minimum, are responsible for completely reviewing the decision that they are challenging. Their failure to take such measures evidences a failure to fulfill their ethical duties to both their client and, pursuant to Section 1.24 of the Rules, to the Commission.

time SBT filed petitions for reconsideration of the July Orders, thereby justifying this late-filed Supplement.^{4/} Brown and Schwaninger, as legal advisor to a small business advocacy group, had an obligation to familiarize itself (for the benefit of its clients) with the statutes, rules and regulations affecting small businesses. Had it done so, Brown and Schwaninger would have been familiar with the longstanding provisions of the Small Business Administration Act,^{5/} and could have at least made this meritless assertion in a timely-filed petition for reconsideration.

Brown and Schwaninger readily admit ignorance of provisions in the Small Business Administration Act, and then seek untimely reconsideration of a Commission decision asserting failure to comply with the SBA's requirement. Routine legal research would have uncovered the provision upon which SBT bases its claims, and a complete review of the July Orders would have disclosed the Commission's compliance therewith.^{6/} There is no legally-supportable justification for SBT's failure to file a relevant timely pleading.^{7/}

^{4/} Motion at p. 1.

^{5/} Section 632 of the Small Business Administration Act was enacted by Congress on October 18, 1986.

^{6/} The fact that Brown and Schwaninger choose to rely on "federal agency sources which are deemed reliable" rather than the United States Code and basic legal research practices does not justify its "discovery" and late-filed "Supplement."

^{7/} If SBT (or its counsel) was aware of the Commission's statement confirming SBA approval of the definitions, then Nextel can only interpret the "Supplement" as an accusation by Brown and Schwaninger that the Commission has falsely misrepresented the facts.

The instant Supplement is only the latest in Brown and Schwaninger's nearly three-year-long mockery of administrative and judicial practice, procedures and standards relating to the licensing of 800 MHz SMR systems. Sometimes representing clients, and other times on their own behalf, Brown and Schwaninger have filed "Special" petitions, "Emergency" petitions and other motions, apparently relishing the obstructionist's role and tirelessly performing it. Nextel will not reiterate those offenses here, as reference to prior discussions is sufficient.^{8/} As the Commission has previously stated, "[a]n agency is not powerless to prevent an abuse of its processes."^{9/}

The Commission recently took note of Brown and Schwaninger's abusive tactics in a pleading the Commission filed at the United States Circuit Court Of Appeals for the D.C. Circuit ("D.C. Circuit"). Having been denied a stay of the Upper Channel Auction

^{8/} See, e.g., Motion to Defer Action, filed November 4, 1995, in PR Docket 93-144, seeking reconsideration of rules that had not yet been adopted by the Commission; Motions to the Department of Justice and the Federal Trade Commission, filed November 13, 1995, relating to PR Docket No. 93-144; Petition for Special Relief, filed February 28, 1996, seeking reconsideration of the Commission's 1991 decision granting the Fleet Call Waiver Order, See In Re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991), recon. den. 6 FCC Rcd 6989 (1991).; and Petition for Special Relief, filed June 25, 1996, relating to numerous, unspecified Nextel license grants.

^{9/} In Re Applications of William P. Johnson and Hollis B. Johnson, D/B/A/ Radio Carrollton, Carrollton, Georgia, 69 FCC 2d 1139 (1978) at para. 22. Discussing whether a party may have filed a "strike" petition against a pending license application, the Commission stated that "outright misrepresentations . . . [are] relevant . . . to abuse of process evaluation . . ." *Id.* at para. 26.

by the D.C. Circuit, Brown and Schwaninger waited until twelve days before the start of the auction to file a second request, and attempt a stay via its "Emergency Petition for an Extraordinary Writ."^{10/} As the Commission noted in its Opposition thereto, Brown and Schwaninger's Petition offered "no justification, and there is no justification, for . . . filing a second request to delay the scheduled auction at this late date based on facts that Nevada Wireless easily could have presented to the Court in its earlier stay motion."^{11/} The Commission should initiate disciplinary proceedings against Brown and Schwaninger for its reckless, unprofessional conduct and its unfounded allegations in this proceeding, as well as for its continued abuse of the Commission's processes.

III. CONCLUSION

SBT's Supplement raises issues that easily could have been addressed in a timely fashion. Moreover, the issue is one that blatantly ignores express Commission statements in the July Orders,

^{10/} Emergency Petition for an Extraordinary Writ, filed by Nevada Wireless on October 16, 1997, in Case No. 97-1641.

^{11/} Opposition to Emergency Petition for an Extraordinary Writ, filed at the D.C. Circuit by the Commission on October 21, 1997, in Case No. 97-1641.

and is therefore, utterly lacking in merit. For these reasons, the Commission should deny the Motion and dismiss the Supplement.

Respectfully submitted,



Robert S. Foosaner
Vice President and
Chief Regulatory Officer

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

Nextel Communications, Inc.
1450 G. Street, N.W.
Suite 425
Washington, D.C. 20005
202-296-8111

Dated: November 10, 1997

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 10th day of November, 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:

Ari Fitzgerald
Legal Advisor to Chairman Kennard
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Jane Mago
Legal Advisor to Commissioner Powell
Federal Communications Commission
Suite 844
1919 M Street, NW
Washington, D.C. 20554

David R. Siddall
Legal Advisor to Commissioner Ness
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, D.C. 20554

Daniel Armstrong
Office of General Counsel
Federal Communications Commission
Room 602
1919 M Street, NW
Washington, D.C. 20554

Roberta Cook
Office of General Counsel
Federal Communications Commission
Room 602
1919 M Street, NW
Washington, D.C. 20554

Michelle Walters
Office of General Counsel
Federal Communications Commission
Room 602
1919 M Street, NW
Washington, D.C. 20554

Sheldon M. Guttman
Office of General Counsel
Federal Communications Commission
Room 614
1919 M Street, NW
Washington, D.C. 20554

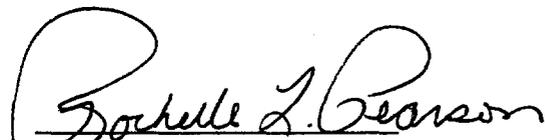
Daniel Phythyon, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002-F
2025 M Street, NW
Washington, D.C. 20554

Rosalind K. Allen, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, NW
Washington, D.C. 20554

Daniel Furth, Chief
Commercial Wireless Division
Federal Communications Commission
Room 24
2100 M Street, NW
Washington, D.C. 20554

Kathleen O'Brien Ham
Chief of Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5322
2025 M Street, NW
Washington, D.C. 20554

Robert H. Schwaninger
Brown & Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006


Rochelle L. Pearson