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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 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

MOTION TO STRIKE SCANDALOUS MATERIAL

Its General Counsel
Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: November 18, 1997

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SUMMARY

Small Business in Telecommunications hereby moves the Commission to strike the Opposition Of Nextel Communications, Inc. To The Supplement To Petitions For Reconsideration Of Small Business In Telecommunications ("Opposition"), filed within this proceeding on November 10, 1997 and attached hereto. Movant further requests that the Commission censure the authors of the Opposition, as having engaged in the use of the Commission's processes to defame, humiliate, embarrass and call into disrepute the persons of SBT and its legal counsel, Brown and Schwaninger, in violation of 47 C.F.R. §1.52.

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Small Business In Telecommunications (SBT) is an association of persons and businesses, who provide goods and services throughout the United States. It has an eleven-member board which meets regularly, holds seminars for its members at various locations around the Country,

and has been a regular commenter within this proceeding and others. Its officers have participated in panel discussions, *ad hoc* committees on areas related to promotion of small business interests, and have appeared before numerous members of Congress.

The Commission has recognized SBT's contributions in the past and has relied on SBT's comments in assisting the Commission's appreciation of matters which have an impact on small business. Most recently, SBT joined with others to encourage the Commission to delay the LMDS auction to provide additional time for small business participants. SBT appreciates the Commission's acceptance of its comments and hopes to continue to help guide the Commission toward the adoption of rules which are more "small business friendly."

As a portion of that effort, SBT has invited representatives of the Commission to speak before its membership, to share information and to continue a growing dialogue that is assisting both regulators and regulatees in understanding the needs of each. Representatives of the Wireless Telecommunications Bureau, the Compliance and Information Bureau, the Office of Engineering and Technology, and more have shared the Commission's vision and plans with SBT's membership and have reported that they too have learned much from the questions and comments of SBT's membership.

Recently, SBT opened a working relationship with the United States Small Business Administration and its Office of Advocacy. Chief Counsel, Jere Glover, spoke at an SBT seminar on the need to assure vigilance in the application of the Regulatory Flexibility Act

within rule makings. This new relationship with the SBA is, in part, responsible for SBT's filing of a Supplement to its earlier filed Petitions For Reconsideration to the agency's Memorandum Opinion and Order and the Second Report and Order within this proceeding. Despite the language contained within the Commission's Orders, including that sentence at Appendix D to the Second Report and Order cited by Nextel within its Opposition, SBT was informed in October 1997 by two members of the SBA staff and two members of the Commission's staff that the size standards adopted by the Commission had not received necessary approval from the SBA prior to the adoption of the Commission's Orders.

As reported within its Supplement, SBT was not then able to produce a document which proved that the necessary SBA approval had not been obtained in a timely manner. Such documents would have been interagency correspondence and memoranda that are exempt from disclosure under the Freedom of Information Act. However, SBT's counsel received verbal confirmation from these independent sources which were deemed highly reliable and who were in a position to know the facts and circumstances regarding this matter. SBT's counsel thanked each federal employee who provided such information regarding the status of the Commission's efforts in obtaining SBA approval and tried to work in a cooperative atmosphere with each. Nextel's specious claims to the contrary, it was SBT's intent to protect its members from the adverse effects which might arise out of reliance upon size standards which were not fully authorized and approved in accord with statute. SBT was joined in its concern by the SBA staff, each of whom were concerned that a small business participant in the auction, acting in reliance

on the size standards and bidding credits afforded on the basis of those size standards might later be successfully challenged as to the use of those same bidding credits.

SBT's Supplement was brought in good faith, relying on information which was presented to SBT through counsel via the independent acts of federal employees who were motivated by a desire to assure the Commission's compliance with law. In fact, SBT was encouraged by federal employees to monitor closely the status of the Commission's efforts in obtaining SBA approval.

SBT here presents the documentary evidence that demonstrates fully that its earlier Supplement was correct. Attached hereto is a copy of the approval granted by the SBA to the Commission for its size standards. The document is dated October 27, 1997, clearly after the effective date of the Commission's Orders and after the filing of SBT's Supplement. There can be no doubt, therefore, that each claim made within SBT's Supplement is correct. The attached copy of the SBA approval did not come into SBT's possession until November 12, 1997. Had this document come into SBT's possession at an earlier time, SBT would have presented it to the Commission.

SBT argued within its Supplement that the Commission was obligated to receive SBA approval prior to the issuance of its Orders. SBT's arguments shall not be reiterated herein, since the primary focus of this document is not to point out what has already been offered by SBT in good faith, nor to belabor the Commission's error in reporting within its Orders that

such approval had been obtained prior to issuance of those Orders. Instead, SBT respectfully requests that the Commission turn its attention to the unfortunate language within Nextel's Opposition, including the nature and tenor of Nextel's argument.

Nextel's Defamatory Statements

It should be noted in the first instance that there existed no need for Nextel's Opposition. If, as Nextel claimed, the Commission had received the necessary approval from the SBA prior to the issuance of the agency's Orders, the Commission would be fully aware of this fact. Nextel was not required to report facts to the Commission that, according to Nextel, the agency already knew. Nor was Nextel mentioned within the Supplement. Its participation in the proceeding and the auction were simply irrelevant to the matters discussed within the Supplement. The focus of the Supplement was simply the Commission's failure to obtain the approval prior to the issuance of its Orders and the effect that a belated approval might have on the lawfulness of the auction. Nothing more.

Turning to the language within the Opposition, SBT notes with dismay that Nextel has chosen to attack and defame SBT and its counsel. There can be no doubt that Nextel's Opposition was calculated to embarrass, humiliate and call into disrepute both SBT and its counsel. No other possible interpretation exists. As evidence of Nextel's malicious intent, the Commission may begin its examination of Nextel's comments at Page 2 of its Opposition and continue its examination clear through to the end of the document, which is rife with scandlous claims, suggestions, and unfortunate choices of words.

In defense of Nextel's unsupported allegations, SBT never stated or implied that the Commission had committed a misrepresentation. Claiming that an agency has intentionally deceived the public would be a serious and harsh allegation. SBT did not make that allegation and Nextel's claim that such an allegation was made, even impliedly, was simply irresponsible.[1]

The true nature, however, of Nextel's Opposition is perhaps better shown in its comment that accuses undersigned counsel of "serious inadequacies." As shown above, Brown and Schwaninger was steadfast in its duty to put forth a full record in good faith reliance upon the statements made by federal employees whose integrity was never in question. Accordingly, counsel acted in furtherance of its duty to SBT, to the United States Small Business Administration, and the Commission. For counsel to have failed or refused to forward SBT's position would have been unethical and, impliedly, a lack of faith in the testimony provided by federal employees.

Were Nextel's initial comments at the first full paragraph of Page 2 of its Opposition the end of its meritless attack, SBT and the Commission might simply excuse the irresponsible nature of Nextel's comments as a portion of the histrionics which can occur in a heated moment. A trifle over the top, but perhaps barely within the boundaries of proper representation. But Nextel did not stop there. For the remainder of its pleading is so filled with vitriol and bile that it fully crosses the threshold of unethical behavior that is not appropriate before the agency.

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[1] Equally irresponsible was Nextel's comments at its Opposition at Footnote 7 wherein Nextel stated that SBT's Supplement can only be interpreted as "an accusation by Brown and Schwaninger that the Commission had falsely misrepresented the facts."

At footnote 3 of its Opposition, Nextel accused Brown and Schwaninger of "a failure to fulfill their ethical duties to both their client and, pursuant to Section 1.24 of the Rules, to the Commission." This accusation is clearly intended to cause SBT to call into doubt the quality of its counsel's representation and to question counsel's actions before the agency. This statement has been made in a calculated fashion with the specific intent to embarrass SBT and its counsel, and to call into question the credibility of SBT before the agency. It is wrong and cannot be tolerated by all persons who rely on others to act professionally and responsibly.

The making of fraudulent claims to the agency is a crime and the making of intentional fraudulent statements to the Commission would subject an attorney to serious consequences, including criminal penalties. Nextel's statement that Brown and Schwaninger committed such an act is, thus, defamation of the clearest kind. For the Commission to tolerate such defamation would be to open a Pandora's Box of evil that would result in the most heinous of accusations being accepted as rhetorical posturing. Nextel's claim cannot be viewed as hyperbole or colorful speech. It was neither necessary nor helpful. It was simply a direct attack, without basis or fact, calculated to accuse SBT and its counsel of having acted with a specific intent to place facts before the agency which SBT and counsel knew to be untrue.

The use of the word "fraud" has a very specific meaning. Nextel accused SBT's counsel of wilful, intentional and malicious deceit. Fraud means something other than being incorrect or even misrepresenting a fact. For example, the Commission was incorrect in its statement that it had received SBA approval on or before July 10, 1997. Would Nextel, now that it has the

facts before it, claim that the agency had perpetrated a fraud? SBT doubts that Nextel would make such a claim. Not due to a determination of whether the agency had misstated the fact, but rather because Nextel is not intent on embarrassing and humiliating the agency. That intent has been reserved solely for SBT's counsel and for SBT.

Nextel directed its defamation at SBT's counsel, referring to the Supplement as "Brown and Schwaninger's". Yet, if SBT's counsel had engaged in fraudulent acts the agency would have been justified in imputing the fraud to SBT and its members. Therefore, SBT is properly positioned to request that the agency take those actions which are necessary and justified to prevent a repetition of these unfortunate circumstances.

SBT does not take lightly Nextel's less than subtle references to Brown and Schwaninger as "legal advisor to a small business advocacy group... ." Although SBT cannot discern with absolute clarity the purpose behind Nextel's strange characterization, the comment appears to call into question the credibility of SBT and its counsel. If, by Nextel's comment, it intends to impugn the legitimacy of SBT or the role of its counsel, then SBT strongly urges the Commission to take appropriate action against the authors. The Commission's own staff has witnessed the existence, size and nature of SBT at its seminars held in Dallas, St. Louis and Washington, D.C. Nothing more need be shown to demonstrate with clarity that SBT is a legitimate and substantial association and that the actions of its counsel are in conformance with the association's by-laws and duties to its members.

It is no secret that SBT's counsel has evidenced a parallel vision of the need to represent zealously small business and a desire to assure that the Commission's decisions are in accord with that vision. It was Brown and Schwaninger's pedigree of commitment to the interests of small business that made Brown and Schwaninger's selection as SBT's General Counsel appropriate. For, despite Nextel's aversions to the ongoing efforts of Brown and Schwaninger, the Commission is invited to review the prior submissions of SBT's legal counsel.[2] Each was based on law and fact and good cause existed for the filing of each document.

SBT makes no direct comment to the nature of Nevada Wireless' requests before the United States Court of Appeals, except to point out that Nextel's characterization of Nevada Wireless's Motion For Emergency Writ is at odds with a member of the Court, Judge Silberman, who would have granted the requested relief. Standing alone, the judge's position evidences that the Motion and Brown and Schwaninger's participation as counsel to Nevada Wireless, was neither frivolous nor an abuse of process.

Finally, Nextel gets to the true reason for filing its Opposition. At Page 5 of its Opposition, Nextel requests that the Commission commence diciplinary proceedings against

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[2] Nextel's gratutious use of the word "mockery" is wholly irresponsible. A zealous effort to employ on behalf of one's clients the fora and procedures of administrative agencies and departments of government do not, absent frivolity, evidence an abuse of process. That counsel has employed every reasonable opportunity and fora to oppose the Commission's intended auction of the 800 MHz radio spectrum is certainly not inappropriate or the basis for any sanctions. Instead, it evidences a too rare commitment to the interests of one's clients and a willingness to take those actions which are prudent and necessary to state and, when necessary, restate the case of those clients.

Brown and Schwaninger. Is it not clear, therefore, what Nextel's true intent was in filing its Opposition? Nextel wishes to separate from SBT the services of its legal counsel. Nextel wishes to remove an adversary from the fray. Nextel wishes the Commission to take those actions which would prevent a full hearing of differing opinions before the agency. In sum, Nextel wishes to silence its most visible critic. Such a use of the Commission's processes is clearly an abuse.

The Commission's processes are not to be used for defamation, to launch *ad hominem* attacks, to bring unfounded accusations of criminal behavior, to drive a wedge between counsel and client, and to employ false claims to gain an advantage before the agency. Nextel's Opposition is of the foulest kind and cannot be allowed to be let stand.

Nextel Was Provided An Opportunity To Correct The Record

On November 12, 1997, Nextel's Vice President and Chief Regulatory Officer, Robert Foosaner, was contacted by telephone by undersigned counsel. Within that conversation, counsel explained to Mr. Foosaner that the Opposition was factually incorrect and brought in error. Mr. Schwaninger requested that Mr. Foosaner withdraw the Opposition. Mr. Foosaner declined. On that same date, the attached letter was sent to Nextel, demanding that the Opposition be immediately withdrawn. No response to the letter was received.

By the telephone conversation and the subsequent correspondence, Nextel was provided an opportunity to correct the record by withdrawal of its scandalous allegations. It declined to do so, even following receipt of a copy of the SBA correspondence which demonstrated clearly that the facts were as stated in the Supplement.

Now the Commission has had placed before it by Nextel a Supplement to its Opposition.[3] The Commission will search in vain for any withdrawal of Nextel's previous claims and accusations. The agency will not find any attempt to correct the record or make right that which was wrong with Nextel's Opposition. Instead, Nextel has now placed before the agency an additional claim, that Brown and Schwaninger violated the *ex parte* rules. This accusation is as specious[4] and malicious as those that went before within Nextel's now supplemented Opposition. In is clear, therefore, that Nextel has chosen exacerbation of its intentional injury over mitigation of the damages it has sought to inflict.

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[3] It is with some irony that SBT notes that Nextel's Supplement evidences every procedural defect that Nextel claimed to exist in SBT's Supplement, *i.e.* that it is unsupported by the Commission's Rules and untimely filed. The difference is, however, that SBT filed a Motion To Accept Untimely Filed Petition, thereby respectfully requesting leave to file its Supplement. In accord with Nextel's claims regarding SBT's Supplement, Nextel's Supplement should be summarily dismissed.

[4] Brown and Schwaninger's contacts with those members of the Commission's staff did not include the merits of any issue arising within this proceeding and were entirely about the status of the agency's attempt to obtain required SBA approval.

SBT and its counsel have provided Nextel with an opportunity to mitigate the harm caused by its Opposition. Nextel has chosen, instead, to accept the consequences of its own actions without remorse.

Requested Commission Action

Under the circumstances, SBT has no choice but to respectfully request that the Commission (i) strike in its entirety Nextel's Opposition and (ii) take necessary disciplinary action, in accord with Section 1.24 of the Commission's Rules, against the persons of Robert Foosaner, Lawrence R. Krevor and Laura L. Holloway, the authors of Nextel's Opposition. The requested disciplinary action is appropriate in view of the contents of the Opposition, which falsely alleges criminal activity on behalf of SBT and SBT's counsel. SBT is offended greatly by the statements made within Nextel's Opposition and can determine no justification for Nextel's having made same, except an intent to defame, humiliate, embarrass, and call into disrepute SBT and its counsel. No other purpose was served or could have been served by Nextel's Opposition and its refusal to withdraw it willingly from the Commission's records.

The Opposition was unethical, unfounded, and inappropriate. It evidences a lack of responsibility to the tenets of law and good taste and was totally lacking in professionalism. The scandalous nature of the document calls for swift and appropriate action on the part of the Commission to assure that future abuses of this nature are not visited upon the Commission's processes. Accordingly, SBT respectfully requests that the responsible parties within Nextel be censured. Given a chance to recant their statements, make appropriate apologies, and to mitigate

the intentional harm upon SBT and its counsel, Nextel has refused and, thus, has earned no compassion from any.

Conclusion

For the foregoing reasons, SBT requests that Nextel's Opposition be stricken in its entirety and given no weight, and that Robert Foosaner, Lawrence Krevor and Laura Holloway be censured by the Commission. Further, SBT requests expedited processing of the instant Motion as the continued existance of Nextel's Opposition and Supplement thereto within the agency's files will serve to extend the injury sustained by SBT and its counsel.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By _____
Robert H. Schwaninger, Jr.

Dated: November 18, 1997

Its General Counsel
Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

October 27, 1997

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
5th Floor
Washington, D.C. 20554

Re: Approval of Small Business Size Standard – Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services

Dear Mr. Phythyon:

This letter is in response to your request of May 8, 1997, that the Small Business Administration (SBA) approve small business size standards for use in issuing licenses for various services. Your letter requests approval of size standards for a number of kinds of service licenses. There has been further communication between our agencies, and our respective staffs have also discussed your request in recent meetings. Based upon the information provided SBA, I hereby approve your request with respect to the size standards in connection with licenses for 800 MHz Specialized Mobile Radio (SMR) Services. We will respond in the near future with respect to the size standards for the other kinds of licensed services contained in your May request.

The SBA size standard applicable to SMR services is 1500 employees as established for Standard Industrial Classification code 4812, Radiotelephone Communications. The SBA agrees with the position of the Commission that alternative size standards should be developed for licensing individual SMR services. The SBA's size standard applies to an entire industry, while SMR services is a small segment of the industry possessing different characteristics from the industry as a whole.

The size standards requested by the Commission for the 800 MHz SMR services are $15 million for a small business and $3 million for a very small business. These same size standards were approved by the SBA in 1996 for 900 MHz SMR services. Although differences exist between these two SMR services, they are similar in many ways, and the overall costs to build out an awarded license are about equal. SBA agrees with the Commission that the same size standards for these two services are appropriate.

As pointed out in your request, build-out costs for both the 800 MHz and 900 MHz SMR services are significantly less than for narrowband and broadband

personal communications services (PCS). (The SBA approved $40 million size standards for narrowband in1995 and for the PCS C Block in 1994.) Build-out costs for both 800 MHz SMR and 900 MHz SMR services remain at a level where small businesses; defined as you have requested, may reasonably be expected to have the capability to finance and construct a viable system.

We also base our approval of these size standards on the fact that the proportion of small and very small business bidders relying on these definitions for both the 800 MHz and 900 MHz SMR services auctions appears similar. You advised us that more than 80 percent of the registered bidders for the upcoming 800 MHz SMR auction are small or very small businesses. Similarly, the completed 900 MHz SMR services auction resulted in 78 percent of the bidders and 75 percent of the winning bidders being small or very small businesses. These size standards permitted 25 percent of awarded licenses to go to small or very small businesses.

Finally, we understand the Commission received no comments in response to its proposed rule objecting to the adoption of the $3 million and $15 million size standards for the 800 MHz SMR services licenses. This suggests an acceptance of the size standards by those companies expected to participate in the 800 MHz SMR auction.

We note that the Commission's rules on affiliation for 800 MHz SMR size purposes are the same as those we approved for the 900 MHz SMR. The only substantial difference between both of these affiliation rules and the SBA's is the addition of special categories for small and very small business consortiums. A small or very small business consortium is defined by the Commission as a "...conglomerate organization *formed as a joint venture* [emphasis added] between or among mutually-independent business firms, each of which individually satisfies the definition of..." a small or very small business. SBA has recently proposed a rule which would liberalize our affiliation rules and enhance the ability of small business to joint venture together in order to bid on large government procurements. We support the Commission's effort to similarly broaden the opportunities for small businesses to obtain licenses for these SMR services. We note, however, that your rule as written does not clearly exempt consortiums from the affiliation rule pertaining to joint ventures, and suggest you amend your rule appropriately.

We are pleased to assist you in this process, and are happy to work with you and the Commission to assist small businesses. If you have any questions on this matter or need additional information concerning size standards, please contact Gary Jackson, Assistant Administrator for Size Standards, at (202) 205-6618.

Sincerely,

Aida Alvarez
Administrator

CERTIFICATE OF SERVICE

I, Zubaidah M. Haamid, hereby certify that on this 18th day of November, 1997, I served a copy of this Motion to Strike Scandalous Material to be sent 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. Guttmann
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
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 S. Foosaner
Vice President and
Chief Regulatory Officer
Nextel Communications, Inc.
1450 G Street, NW
Suite 425
Washington, D.C. 20005

*served by first-class mail, postage prepaid

Zubaidah M. Haamid