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

Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc. v. FCC*	)))))	DA 99-974 PR Docket No. 93-144

To: Chief, Wireless Telecommunications Bureau

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Pursuant to the Omnibus Budget Reconciliation Act of 1993, the Federal Communications Commission ("Commission") is required to provide -- to the extent necessary and practical -- regulatory parity among all Commercial Mobile Radio Services ("CMRS"). In Fresno Mobile Radio, Inc. *et al.* v. FCC, the United States Court of Appeals for the District of Columbia Circuit ("Court") found that the Commission had not provided such regulatory parity for certain Specialized Mobile Radio ("SMR") providers with extended implementation authorizations, and had failed to justify or explain this regulatory disparity. Accordingly, the Court remanded this issue to the Commission.

As the Court found, the Commission, in continuing to impose site-by-site construction requirements on wide-area SMRs that did not obtain Economic Area ("EA") licenses in the Commission's Upper 200 channel SMR auction, did not provide regulatory parity among all wide-area SMRs. While EA licensees are required to construct systems sufficient to cover one-third of the population of their coverage area within three years and two-thirds within five years, those wide-area SMRs without EA licenses are required to construct and operate their systems on a site-by-site basis or lose any unconstructed authorization. The Court found that these differing construction requirements created an advantage since an EA licensee "will never have to provide service to more than two-thirds of its market, while a wide-area incumbent offering the same service will be required to cover its entire service area within two years."

Nextel respectfully submits that the record does not support the Commission's disparate treatment of wide-area and EA SMR licensees. As providers of substantially similar services, constructing and operating similar -- if not identical -- systems to EA SMR licensees, wide-area SMR licensees are entitled to regulatory construction parity with those EA SMR licensees, as well as providers of cellular and Personal Communications Services ("PCS"). Continued application of site-by-site construction rules for wide-area SMRs results in operational impediments and economic burdens that are not otherwise imposed on EA SMR, cellular or PCS licensees.

Thus, the Commission should (a) establish the geographic area of the wide-area SMR as the "areas covered by their licenses," *i.e.*, the areas covered by their wide-area grants as rejustified by the Commission in its 1997 Rejustification Order, and (b) apply the one-third in three years and two-thirds in five years population coverage construction requirements applicable to EA licensees. Establishing the geographic area for measuring construction as the area covered by the wide-area operator's rejustified wide-area licenses is consistent with the EA construction requirement. Moreover, it permits licensees to continue construction and operation based on the boundaries by which they have designed their systems.

The three-year and five-year time periods, moreover, should start with the effective date of the Commission's decision herein, thereby providing licensees the same time period initially provided

EA licensees. Starting the construction time period with the date of this order does not risk spectrum warehousing, given the competitiveness of the CMRS marketplace. As the Court observed, a competitive marketplace is sufficient incentive for licensees to rapidly construct systems and deploy services. Failure to do so could result in an inability to compete.

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To: Chief, Wireless Telecommunications Bureau

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to the May 21, 1999 Public Notice of the Federal Communications Commission ("Commission"),1/ Nextel Communications, Inc. ("Nextel") respectfully submits these comments supporting new construction requirements for 800 MHz wide-area Specialized Mobile Radio ("SMR") licensees similar to those required of 800 MHz Economic Area ("EA") SMR licensees.2/ Establishing similar buildout requirements for wide-area licensees and EA licensees will provide regulatory parity among all SMR providers offering Commercial Mobile Radio Services ("CMRS"), thereby allowing

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1/ Public Notice, "Wireless Telecommunications Bureau Seeks Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, DA 99-974, released May 21, 1999 ("Public Notice"). The Bureau subsequently extended the comment and reply comment date. *See* DA 99-1168, released June 15, 1999.

2/ Throughout these comments, the term "wide-area licensee" or "wide-area SMR" refers to those licensees with extended implementation authority as granted by the Commission in its SMR extended implementation rejustification orders. *See* Order, 13 FCC Rcd 1533 (1997), *recon.*, 12 FCC Rcd 18,349 (1997)(hereinafter collectively "Rejustification Order"). "EA licensee" or "EA SMR licensee" refers to an SMR licensee that obtained a geographically-defined EA license in the Commission's Upper 200 channel auction.

"economic forces -- not regulation -- to shape the development of the CMRS market."3/ Providing such regulatory parity would satisfy the concerns of the United States Court of Appeals for the D.C. Circuit ("Court") in *Fresno Mobile Radio, Inc., et al., v. F.C.C. ("Fresno")*.4/

II. BACKGROUND

In 1993, Congress adopted the Omnibus Budget Reconciliation Act ("OBRA '93") which required, among other things, that the Commission "modify its rules, to the extent 'necessary and practical,'" to ensure that substantially similar wireless services would be "subject to 'comparable' technical requirements."5/ After concluding that all cellular, Personal Communications Services ("PCS") and wide-area SMR services are "substantially similar" because they fulfill the same consumer demand to communicate while on the move,6/ the Commission established SMR geographic area licensing on an EA basis, via competitive bidding. This was intended to provide wide-area SMRs licensing parity -- to the extent practicable -- with their CMRS competitors.7/ EA SMR

3/ Third Report and Order, 9 FCC Rcd 7988 at para. 29 (1994)("Third Report and Order").

4/ Fresno Mobile Radio, Inc. v. F.C.C., 165 F.3d 965 (D.C. Cir. Feb. 5, 1999)("Fresno").

5/ *Id.* at para. 80; Pub. L. No. 103-66, Section 6002(d)(3)(B), 107 Stat. 312 (1993).

6/ Third Report and Order at paras. 42, 43 and 58.

7/ *See* First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking ("First Report and Order"), 11 FCC Rcd 1463 (1995).

licenses are subject to construction requirements that provide them three years to cover one-third and five years to cover two-thirds of the population of their licensed EA -- comparable to the construction requirements applicable to Major Trading Area and Basic Trading Area PCS licensees. Wide-area SMR licensees that have not obtained EA licenses,8/ on the other hand, continue to be subject to site-by-site licensing requirements, which require them to construct every channel at every site within their licensed service areas.

Initially, wide-area licensees were granted five years to build out their SMR systems, instead of the then-standard one year for traditional trunked SMR systems. However, in May 1997, the Commission accelerated the construction termination date to two years or the remainder of the initial five year construction period, whichever was shorter, for those wide-area licensees that rejustified their existing extended implementation grants by demonstrating actual construction.9/ The Commission found that rejustification was necessary because the continuation of wide-area construction deadlines "would impinge upon the construction requirements imposed on EA licensees."10/ The result of this

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8/ Wide-area SMR licensees may be operating on any combination of 800 MHz channels, including Upper 200 SMR channels for which they did not obtain the EA license, the Lower 80 SMR channels, the 150 General Category channels -- neither of which has been subject to auction on an EA basis at this time -- and/or Business and Industrial/Land Transportation channels via intercategory sharing.

9/ First Report and Order, *supra*. fn. 7, at paras. 111-112.

10/ *Id*. at para. 110.

decision is that EA licensees have the three and five year population coverage requirements beginning from the date of the EA license grant, *i.e.*, no earlier than June 1998 for Nextel's EA licenses, while wide-area SMR licensees continue to be subject to site-by-site, channel-by-channel construction rules with the construction period truncated, in most cases, to May 20, 1999.

Thus, as the Court concluded in *Fresno*, wide-area licensees continue to be held to a much more stringent construction standard than their competitors. As the Court explained: "An EA licensee will never have to provide service to more than two-thirds of its market, while a wide-area incumbent offering the same service will be required to cover its entire service area within two years."11/ These construction requirements, the Court concluded, provide EA licensees "a permanent advantage over incumbent SMR licensees. . ."12/ In light of this "permanent advantage" for EA licensees and the Commission's failure to adequately explain the disparate treatment, the Court remanded this matter to the Commission for reconsideration.13/

11/ Fresno at 969.

12/ *Id.*

13/ Despite recent statements by the Commission that it has completed the 800 MHz SMR auction process, it has not yet conducted the lower channel 800 MHz SMR auction despite adopting auction rules more than two years ago. *See, e.g.*, Fourth Report on CMRS Competition, FCC 99-136, released June 24, 1999 at page 5 (". . . the completion of the 800 MHz SMR and 220 MHz auctions . . . have led to a restructuring of the dispatch sector.") Thus, the unequal treatment of wide-area and EA licensees is further exacerbated by the Commission's failure to complete EA licensing for the lower 80 SMR and the 150 General Category channels. When the Commission

(continued...)

Accordingly, on April 15, 1999, the Commission suspended all construction timelines for wide-area SMRs pending the outcome of this proceeding.14/ This preserves the *status quo* by staying the May 20, 1999 construction deadlines for many wide-area SMR licensees. On May 21, 1999, the Commission released the above-referenced Public Notice seeking comment on the appropriate construction requirements for wide-area SMRs pursuant to the Court's remand.

Nextel respectfully submits that the record does not support the Commission's disparate treatment of wide-area and EA SMR licensees. Accordingly, the Commission should establish construction requirements for wide-area licensees similar to those imposed on EA licensees.

III. DISCUSSION

A. Substantially Similar Services

The Commission concluded in the Third Report and Order in GN Docket No. 93-252 that wide-area SMR services are substantially

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13/(...continued)
truncated extended implementation construction periods, it expected to complete the EA licensing process prior to the end of the truncated construction periods, thereby giving existing licensees the opportunity to decide whether to construct pursuant to their existing wide-area grants or pursuant to EA licenses obtained at auction. The Commission's failure to award EA licenses on the lower channels has further complicated SMR licensing and system implementation, and exacerbated the difficulties of transitioning from site-by-site to EA SMR licensing.

14/ Public Notice, "Wireless Telecommunications Bureau Temporarily Suspends Construction Timetable for Wide Area 800 MHz SMR Licensees Due To Court Remand," DA 99-698, released April 15, 1999.

similar to cellular and PCS services.15/ As providers of substantially similar services, wide-area SMR licensees were entitled to regulatory parity with cellular and PCS providers; thus, the Commission established geographic area licensing with population-based construction requirements for those wide-area SMR licensees that obtained EA licenses at auction. However, as the Court found, wide-area SMRs that did not obtain EA licenses also compete with cellular, PCS and EA licensees, and therefore, to the extent practical, are entitled to regulatory parity with other CMRS licensees.

Wide-area SMR licensees are similar to EA licensees in that both are providing commercial services, building similar, if not identical, systems and competing with cellular and PCS providers. Nextel, for example, is both an EA licensee and a wide-area SMR licensee, holding numerous wide-area grants covering channels on the Lower 80 SMR channels, the 150 General Category channels, and 800 MHz Business and Industrial/Land Transportation ("B/ILT") channels via intercategory sharing.16/ Whether constructing Upper 200 SMR channels pursuant to an EA license or constructing other 800 MHz channels pursuant to its pre-existing wide-area grants, Nextel is building the very same digital iDEN network and

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15/ *See* fn. 3 *supra*.

16/ The Wireless Telecommunications Bureau suspended acceptance of SMR intercategory sharing applications for B/ILT channels on April 5, 1995. *See* Order, 10 FCC Rcd 7350 (1995). *See also* First Report and Order, *supra*. at fn. 7, at paras. 141-142.

providing state-of-the-art wireless telecommunications services to the public.17/

Nextel's wide-area networks, moreover, are dynamic, integrated systems that are configured using multiple low-power, low-site "cells" which can hand-off calls as the user moves throughout the system. The dynamic and complex nature of these systems means that a particular channel may or may not be employed at a particular site at a particular time depending on varying propagation characteristics, system demand, marketplace forces and operational concerns. Thus, measuring the construction of such a complex wide-area SMR system on a site-by-site basis not only fails to fulfill Congress' regulatory parity mandate, but also is inconsistent with the real-world operating parameters of these systems. Site-by-site channel construction rules may have been necessary to ensure efficient and effective spectrum use and to guard against spectrum warehousing in the pre-CMRS analog, site-by-site SMR licensing environment; they no longer accurately measure a wide-area licensee's use of the spectrum, given today's complex, technically advanced systems and the competitive wireless marketplace.

In fact, rather than promoting effective and efficient spectrum use, requiring a wide-area licensee to construct and operate every licensed channel at every licensed site can result in intra-system interference and prevent efficient frequency re-use, thus further exacerbating the regulatory disparity between EA SMR

17/ Although Nextel is constructing a nationwide iDEN system, Nextel also continues to provide analog SMR services in some markets.

licensees and wide-area licensees. For example, a wide-area licensee with multiple co-channel site-specific licenses comprising its service area is required by the Commission's site-by-site construction requirements to construct at each of its specified locations -- without regard for the interoperability and integrated nature of the system. Failure to fully construct a particular site under the site-by-site construction rules therefore, can result in the loss of the unconstructed channel(s), thereby eliminating co-channel protection for the already-operating site and diminishing the licensee's contiguous service area. Thus, the site-by-site rules force construction of a site even where it is unnecessary to achieve sufficient coverage in the area, and where it could, in fact, cause harmful interference to the licensee's existing, operating sites due to their nearby location.

Given that wide-area licensees generally are competing for the same consumer and that they too construct complex wide-area SMR systems, the construction of such networks -- whether pursuant to a wide-area grant or an EA license -- should be subject to the same regulatory construction standards. This would eliminate the operational impediments and economic burdens currently imposed on wide-area licensees, thereby allowing all wide-area SMRs to construct and operate their systems pursuant to reasonable, rational and common sense rules that provide a level regulatory playing field with other CMRS providers. As similarly situated competitors in the CMRS marketplace, wide-area SMR licensees are entitled to construction parity to ensure, as the Court stated,

that one set of licensees (*i.e.*, EA licensees) is not afforded a permanent regulatory advantage over another.18/

B. Revised Wide-Area SMR Construction Requirements

Given that EA SMR licensees and wide-area SMR licensees are similarly situated competitors in the CMRS marketplace, it contravenes OBRA '93 for the Commission to continue measuring wide-area SMR licensees' construction on a site-by-site, frequency-by-frequency basis. As a result, the Commission must provide wide-area SMR licensees the same construction requirements currently imposed on EA licensees: cover one-third after three years and two-thirds after five years of the "population in the areas covered by their licenses."19/ The Commission can effectuate these construction requirements by (a) establishing the wide-area licensee's geographic area as the "areas covered by their licenses,"20/ *i.e.*, the areas covered by their wide-area grants as rejustified by the Commission in its 1997 Rejustification Order,21/ and (b) applying the one-third in three years and two-thirds in five years population coverage requirements.

Establishing the geographic area for measuring construction as the area covered by the wide-area operator's rejustified wide-area licenses is consistent with the EA construction requirement applying to the geographic area for which the EA SMR licensee was

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18/ *Fresno* at 969.

19/ *Id.*

20/ *Id.*

21/ *See* fn. 2 *supra*.

authorized. Both standards would require the licensee to fulfill the population coverage requirements within the service area for which it was licensed by the Commission, *i.e.*, the area covered by the wide-area SMR grant. Additionally, using the geographic area for which they have already been licensed would provide wide-area SMR licensees continuity as they transition from site-by-site to population-based coverage requirements, permitting them to continue construction and operation based on the boundaries by which they have designed their systems. Overlaying wide-area SMRs' existing licensed areas with an EA or some other geographic area for purposes of measuring construction -- an alternative proposed in the Public Notice -- would employ new geographic boundaries wholly unrelated to the licensed service area. This would be arbitrary and capricious, and wholly unsupported by the record in this proceeding.

Measuring the wide-area licensee's buildout should begin with the effective date of the order in this proceeding. From that date, wide-area SMR licensees would have three years to cover one-third and five years to cover two-thirds of the population of their licensed service area. This timetable would provide wide-area SMRs with the same time period initially provided EA licensees, thus providing parity among all wide-area SMRs, whether licensed pursuant to wide-area grants or EAs. Additionally, the timeframe ensures that wide-area SMRs have sufficient time to construct, and does not risk spectrum warehousing as these wide-area SMR providers are vigorously competing with EA SMR licensees, cellular providers

and PCS operators. As the Court stated, spectrum warehousing concerns are not heightened simply because a licensee did not purchase its license at auction.22/ In a competitive marketplace, the licensee must rapidly construct and operate systems, and deploy its services in order to effectively compete.

IV. CONCLUSION

In *Fresno*, the Court found that wide-area SMR licensees had not been provided regulatory construction parity with their similarly situated competitors, EA SMR, cellular and PCS licensees. Nothing in the record justifies treating wide-area SMRs differently than their competitors in the construction and operation of their systems. Accordingly, the Commission should fulfill its OBRA '93 regulatory parity mandate by providing wide-area SMRs the same

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22/ *Fresno* at p. 969.

construction requirements imposed on EA SMR licensees, as discussed herein.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

By, _____

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CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 12th day of July 1999, caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

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