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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)
)
Implementation of Section 309(j) and)
337 of the Communications Act of 1934)
as Amended)
)
Promotion of Spectrum Efficient)
Technologies on Certain Part 90)
Frequencies)
)
Establishment of Public Service)
Radio Pool in the Private Mobile)
Frequencies Below 800 MHz)

WT Docket No. 99-87

RM-9332

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.
Robert S. Foosaner
Vice President and
Chief Regulatory Officer

Lawrence R. Krevor
Senior Director - Government Affairs

Laura L. Holloway
Director - Government Affairs

Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191
703-433-4141

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SUMMARY

In the 1997 Balanced Budget Act ("1997 Budget Act"), Congress required that all non-public safety spectrum, including Private Land Mobile Radio Services ("PLMRS") frequencies, be licensed through competitive bidding. Implicit in this mandate is the elimination of outmoded and artificial licensing restrictions -- specifically, limited licensing eligibility -- that would prevent all interested applicants from participating in auctions. Distinguishing between "private" and commercial users in today's marketplace, wherein spectrum is a finite public resource in significant demand, is arbitrary, economically meaningless and does not serve the public interest. Continuing to give away this valuable finite resource to some of America's largest corporate organizations, at the expense of the American taxpayer, is unjustified corporate welfare that also does not serve the public interest and should be brought to an end.

On the contrary, the movement of the Federal Communications Commission ("Commission") towards reliance on flexibility, competition and marketplace forces has been an enormous success in establishing a vibrantly competitive wireless marketplace. This proceeding offers the Commission an opportunity to continue these pro-competitive successes and ensure, as required by the 1997 Budget Act, that the current Private Land Mobile Radio Service ("PLMRS") spectrum is licensed to those who will use it most efficiently in the public interest. Thus, the Commission must eliminate its statutorily-superseded private spectrum licensing restrictions and license all non-public safety spectrum (*i.e.*, all

channels not set aside for governmental or quasi-governmental, non-commercial, non-profit use to protect the safety of life, health or property) through competitive bidding. By doing so, the Commission will fulfill its Congressional mandate to adopt licensing rules consistent with the realities of today's competitive telecommunications marketplace and deregulatory environment.

The Commenters herein have failed to justify their self-serving attempts to continue the Commission's policy of spectrum give-aways for a limited set of users. First, the attempts of numerous commenters to define their own particular spectrum use as a "public safety service" exempt from the Commission's auction authority fail because the proposed definitions are inconsistent, so broadly-defined as to be absurd, and in most cases, nonsensical. The disarray and divergence among the commenters' proposed definitions is evidence enough that the Commission cannot draw an arbitrary line or create a "moving target" of non-auctionable "private" for-profit public safety users.

Second, some commenters inaccurately assert that spectrum set-asides are essential because commercial providers do not offer services to meet their "unique" communications needs. The record demonstrates that commercial providers currently provide services to numerous private users. In today's competitive wireless marketplace, competitors will aggressively compete for, and make necessary accommodations for, the business of industrial or business users that might previously have needed private internal systems.

Third, while the Commission is obligated to avoid mutually exclusive license applications where possible, it cannot avoid such mutual exclusivity on the PLMRS channels at issue here. There is a significant excess demand for PLMRS spectrum -- not only are currently eligible parties demanding additional assignments, but parties the Commission excludes today from PLMRS licensing also desire access to these channels. As Dr. Gregory Rosston notes in the attached White Paper, there can be no spectrum shortages -- such as the one existing in the PLMRS band -- unless there is mutual exclusivity. Thus, this spectrum is highly valued, and there are mutually exclusive demands for its use.

Moreover, because mutual exclusivity is only one of the public interest considerations involved in assigning PLMRS spectrum, the Commission cannot ignore the numerous public interest benefits of auctioning these channels to all interested parties, leaving them free to provide services regulated as Commercial Mobile Radio Services, Private Mobile Radio Services or a combination thereof, in response to marketplace demand. Auctioning spectrum to all interested parties, without artificial eligibility restrictions, significantly enhances administrative efficiency, provides incentives for increased economic efficiencies and, by permitting the realization of the true value of the spectrum, enhances the overall value of spectrum for all license-holders. In totality, this will foster the introduction of new and innovative services to the public and enhanced competition -- a significant benefit to the American consumer.

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits these Reply Comments on the Notice of Proposed Rulemaking in the above-referenced docket.^{1/}

Nearly 100 parties filed Comments on the Commission's proposal to implement its broadened auction authority pursuant to the Balanced Budget Act of 1997 ("1997 Budget Act").^{2/} In its Comments, Nextel asserted that the 1997 Budget Act requires that all non-public safety spectrum, including Private Land Mobile Radio Services ("PLMRS") frequencies, be licensed through competitive

^{1/} Notice Of Proposed Rulemaking, FCC 99-52, released March 25, 1999 ("Notice"). On September 10, 1999, the Commission released an Order extending the Reply Comment date to September 30, 1999. Order, DA 99-1861, released September 10, 1999.

^{2/} Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) ("Budget Act").

bidding. Implicit in this mandate is the elimination of outmoded and artificial licensing restrictions -- specifically, limited licensing eligibility -- that would prevent all interested applicants from participating in auctions. The economic and public policy benefits of choosing mutually exclusive applicants through competitive bidding will not be realized unless all interested applicants are free to participate.

Nextel responds herein to the Comments of utility companies, Fortune 500 corporations, and smaller businesses that promote continued Commission subsidization of their for-profit enterprises at a significant cost to the American taxpayer. The 1997 Budget Act requires that the Commission cease subsidizing with free spectrum an increasingly contrived class of "private" users operating for-profit businesses. These businesses should pay for spectrum or spectrum-based services, just as they pay for any other resource or input necessary to a for-profit enterprise.

As explained in the attached White Paper prepared by Dr. Gregory Rosston (hereinafter "Rosston Paper"),^{3/} continuation of the current PLMRS licensing process deprives taxpayers of their return on the use of this finite public resource. Dr. Rosston points out the marketplace inefficiencies and opportunity costs

^{3/} Dr. Rosston is a Research Fellow at the Stanford Institute for Economic Policy Research and a Visiting Lecturer in Economics at Stanford University. Prior to joining Stanford, Dr. Rosston served as Deputy Chief Economist of the Federal Communications Commission where he assisted in designing and implementing the Commission's first-ever spectrum auctions. He has written several articles on telecommunications competition, implementation of the Telecommunications Act of 1996, and spectrum auctions and policy.

created by limiting spectrum flexibility and prohibiting auctions on the PLMRS channels. Giving spectrum away to an artificially limited set of users creates significant opportunity costs since this finite resource is not being put to its highest and best use. Moreover, consumers are deprived of the more efficient, state-of-the-art telecommunications services that would be provided on this spectrum if the Commission did not place artificial constraints on its use.

The increasing competitiveness of the wireless marketplace, as a result of Congressional and Commission actions since 1993, provides ample evidence that auctions and flexible spectrum use encourage efficiencies and provide consumers new and enhanced services at lower prices. Dr. Rosston highlights the numerous benefits that consumers have enjoyed, e.g., increased choice, new and enhanced service alternatives, and decreasing prices, as a result of the Commission's flexible spectrum policies and increased spectrum efficiencies. Spectrum is a finite public resource that is in great demand and has significant economic value. Continuing to arbitrarily delineate between "private users" and "commercial users," thus artificially limiting the spectrum's usefulness, and then giving the spectrum away for free, is not in the public interest.

The 1997 Budget Act requires that the Commission remedy these inefficiencies by assigning *all* non-public safety licenses via competitive bidding -- i.e., licenses used for private internal operations or commercial operations on the 800 MHz Business and

Industrial Land Transportation ("B/ILT") channels, 900 MHz B/ILT channels, and the trunked channels below 800 MHz. Implicit in this mandate is the Congressional recognition that those efficiencies will only be achieved if all potential users -- whether commercial or private -- are eligible to bid for licenses to put this spectrum to its highest and best use. By eliminating the licensing distinction between non-public safety "private" users and "commercial" users, and then assigning the spectrum via competitive bidding to the party that values it the most, the Commission will fulfill the Congressional mandate in the 1997 Budget Act and adopt licensing rules consistent with the realities of today's competitive telecommunications marketplace and deregulatory environment.^{4/}

The 1997 Budget Act provided that the Commission "shall grant the license or permit to a qualified applicant through a system of competitive bidding" unless the license or permit is

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by *not-for-profit organizations* that --

^{4/} As discussed further herein, there exists today mutually exclusive demand for all of the PLMRS channels. Nextel, for one, has indicated its interest in applying for these licenses. Private licensees have demonstrated a continued interest in these PLMRS channels. Still other private licensees have demonstrated their interest in assigning these channels to commercial providers. Therefore, with the existence of mutually exclusive **demand** for the spectrum, the Commission cannot "avoid" mutually exclusive **applications** pursuant to Section 309(j)(6)(E) unless it merely prohibits all but one of the applicants from participating, thereby distorting the marketplace.

(i) are used to protect the safety of life, health or property; and

(ii) are not made commercially available to the public[.]"5/

As discussed below and in Nextel's initial comments, this provision exempts from licensing by competitive bidding only public safety radio services -- a term defined in the Commission's Rules to encompass radio systems traditionally operated by governmental and quasi-governmental non-profit agencies for the sole purpose of ensuring the safety of life, health and property; in other words, radio services used by police, fire, rescue, disaster response and similar non-commercial entities.6/ This is a narrow exemption from the 1997 Budget Act's mandate that all non-public safety spectrum -- whether previously licensed for internal use systems or carrier offerings to third parties -- be licensed prospectively through competitive bidding to assure that it is available to the applicant that will put it to its most efficient and highest use.

Below, Nextel debunks the efforts of various commenters to perpetuate spectrum subsidies for for-profit businesses. These commenters see this proceeding as a line-drawing exercise and plead for the Commission to interpret the public safety exemption broadly enough to include any radio use which can, in some circumstances, enhance a user's safety. Taken to their logical conclusion, these arguments would encompass every use of a cellular phone carried by a businessman, delivery person, messenger or "soccer mom."

5/ Budget Act, Section 3002(a)(1) (emphasis added).

6/ 47 C.F.R. Section 90.20.

Accordingly, the Commission should reject attempts to embroil it in subsidy-perpetuating line drawing, articulate the limited scope of the public safety exemption, and adopt unrestricted licensing eligibility and competitive bidding in the subject spectrum bands.

II. DISCUSSION

A. **Many Commenters Promote Their Self Interests at the Expense of the Public Interest**

Nextel recognizes that few commenters supported auctions for PLMRS frequencies; however, Nextel is one of only a few commenters that does not have a vested interest in the continued "hand-out" of private spectrum to profit-making entities, without regard for the 1997 Budget Act's requirements, and the economic and administrative inefficiencies of the current assignment process. Among those opposing auctions of PLMRS frequencies are the manufacturers of PLMRS handsets and systems,^{7/} the users of freely-assigned private frequencies,^{8/} and the associations representing the interests of these same parties.^{9/}

1. The Commenters Attempt to Crowd Themselves Into Inconsistent, Broadly-Defined, and In Many Cases, Nonsensical Definitions of "Public Safety" In Pursuing Exemption from Auctions

The starting place for many commenters' opposition to PLMRS auctions is an attempt to define their own particular spectrum use

^{7/} See, e.g., Comments of Motorola, Inc.; Kenwood Communications Corp. ("Kenwood").

^{8/} See, e.g., Comments of Boeing Company ("Boeing"); Ford Communications, Inc.; The Lubrizol Corporation; Mark IV Industries.

^{9/} See, e.g., Comments of Industrial Telecommunications Association ("ITA"); Personal Communications Industry Association ("PCIA"); MRFAC, Inc. ("MRFAC"); and United Telecom Council.

as a "public safety service" exempt from the Commission's auction authority. As Dr. Rosston states, these arguments are "classic examples of attempts to overturn the public good for private gain."10/ These often inconsistent attempts for inclusion within the "public safety" realm of services demonstrate the folly of drawing the "public safety" line to include spectrum used by for-profit businesses. Not only does it contradict the 1997 Budget Act, which limits the exemption to not-for-profit entities, but it also would result in "artificial distinctions" that are "economically meaningless."11/

For example, Boeing, the self-described "world's largest manufacturer of commercial aircraft and a leading space and defense contractor. . . ,"12/ argues that its spectrum assignments must continue to be made free of charge because it uses the spectrum to "protect the safety of life, health and property, and enhance the productivity of its manufacturing operations."13/ This public subsidy of its business, Boeing boldly continues, is "intrinsically woven into the fabric of the American economy" and promotes the competitiveness of American businesses in international markets.14/ Thus, in Boeing's view, "[p]urely private users"

10/ Rosston Paper at p. 23.

11/ *Id.* at p. 26.

12/ Boeing at p. 2.

13/ *Id.* at p. 3.

14/ *Id.* Whatever its value is in the international trade arena, Boeing's argument is a non-starter in this proceeding.
(continued...)

are entitled to free spectrum to use in for-profit pursuits while for-profit wireless carriers, such as Nextel, should have to pay fair market value for comparable spectrum. Boeing, however, shows little support for exempting from auction any other PLMRS users, e.g., community repeaters, non-interconnected Private Mobile Radio Services ("PMRS") providers.^{15/}

Like Boeing, other private users and their representative associations attempt to characterize their own particular radio uses as "public safety" to avoid having to pay market prices for spectrum resources. They contend that using spectrum to, among other things, protect plant workers and pizza delivery drivers,^{16/} provide speedy and efficient highway toll booth operations,^{17/} and promote efficient internal plant operations must be exempt from auctions as "public safety" services.^{18/}

^{14/}(...continued)

Commercial wireless providers such as Nextel could make the same assertions regarding their competitiveness in the global marketplace. Certainly, Nextel's competitiveness vis-a-vis wireless providers in Europe, for example, would be enhanced if Nextel were not required to pay hundreds of millions of dollars for spectrum at Commission auctions.

^{15/} See Comments of Boeing at pp. 13-14. Moreover, Boeing proposes an unworkable bureaucratic nightmare in asking the Commission to investigate the "varying degrees" of existing private users. In contrast to the streamlined efficiencies of auctions, Boeing proposes that the Commission evaluate every existing licensee and its use to eliminate the "commercialization" of PLMRS spectrum.

^{16/} Comments of PCIA at p. 6.

^{17/} See, e.g., Comments of New Jersey Highway Authority; New York State Thruway Authority; South Jersey Transportation Authority; U.S. Department of Transportation.

^{18/} See, e.g., Comments of Boeing, Ford.

The Industrial Telecommunications Association ("ITA") and the Personal Communications Industry Association ("PCIA") promote such broad definitions of auction-exempt "public safety" services that they would encompass virtually all uses of wireless communications, including uses currently provided by commercial providers such as Nextel, AT&T Wireless Services or any other Commercial Mobile Radio Services ("CMRS") provider.^{19/}

This line of argument is transparent. To the same extent that a PLMRS wireless phone protects a pizza delivery driver, a cellular or Personal Communications Service ("PCS") phone serves the same purpose for that same pizza delivery driver. Just as a private wireless phone can alert Boeing plant officials to an emergency situation on the plant floor, a Nextel iDEN phone can immediately - - with the touch of a single button -- alert a general contractor to an emergency at a construction site. Moreover, Nextel's commercial wireless service can immediately alert an entire team of safety personnel -- again, with the touch of a single button -- to an emergency, for example, at their manufacturing plant. Everyday in the United States, 98,000 commercial wireless users dial "911" or another emergency number from their wireless phones. More than 35 million commercial wireless users make such calls every year. Thus, the PLMRS services cited by these commenters are no more "public safety" than the plethora of commercial services available in today's marketplace.

^{19/} Of course, the broad "public safety" definitions promoted by ITA, PCIA and MRFAC also serve to perpetuate the continuation of their profitable spectrum coordination business.

Some commenters even attempt to sweep into the definition of "public safety" operators providing services on PLMRS channels to third parties for a profit, *i.e.*, community repeaters.^{20/} These third party providers offer service to a limited subset of users, typically private businesses that choose not to invest in their own private internal communications systems. They are in fact commercial providers. Including these commercial third party communications providers within the "public safety" competitive bidding exemption would enlarge the exemption beyond all limits of reasonableness. The mere fact that these commercial providers freely choose to limit the availability of their services to a subset of the public at large does not justify providing them free spectrum -- particularly when other commercial providers of substitutable services, including those safeguarding life and health, are required to obtain their spectrum at a price.

MRFAC's comments illuminate again the arbitrariness of any distinction between PLMRS "public safety" and "non-public safety" services. MRFAC would expressly **exclude** from the public safety definition all PLMRS users other than private, internal systems.^{21/} In other words, MRFAC would subject to auctions private carriers, *e.g.*, non-interconnected PMRS providers, community repeaters and not-for-profit shared systems -- the very

^{20/} Comments of ITA at p. 10; Kay Communications, Inc. at p. 1; and Ray's Radio Shop. *But see* Comments of MRFAC at p. 3, opposing the inclusion of community repeaters as "public safety" services.

^{21/} Comments of MRFAC at p. 3.

same users that ITA would categorize as "public safety" services. Further, the public safety and private user communities cannot even agree on the proper line of demarcation between auctionable and non-auctionable services as some **support** the creation of a new non-auctionable "Public Service Pool,"22/ and others **oppose** the creation of a separate pool.23/

Thus, the comments cited herein evidence the disarray among PLMRS licensees and their representatives as to the scope of "public safety services" that should be exempt from licensing using auctions, as well as the wholesale absence of any public interest or economic justification for their diverse conclusions. They aptly demonstrate the complexities inherent in adopting a sliding scale "public safety" definition, rather than simply drawing the line between traditional, existing "public safety" services and all other PLMRS services. Thus, rather than create a "public safety" definition that is so broad as to be absurd, the Commission should strictly limit "public safety" to those government services traditionally designated as such, and license all other currently PLMRS frequencies using competitive bidding with unrestricted eligibility. In this way, license holders would be free to provide services regulated as CMRS, PMRS or a combination thereof, in response to marketplace demand.

22/ See, e.g., Comments of UTC at pp. 26-27; APCO at p. 7.

23/ See, e.g., Comments of PCIA at pp. 18-19; Ford at p. 2.

2. The Commenters Erroneously Assert that Commercial Providers Cannot Fulfill their Communications Needs

A number of commenters attempt to justify exclusion from spectrum auctions by asserting that commercial providers cannot meet their "unique" communications needs; therefore, they assert they must have set-aside, subsidized spectrum.^{24/} While this may have been true at the time the Commission first began allocating spectrum for "private" use (as far back as 1945), it is no longer true in today's competitive, growing wireless marketplace.

First, a number of commenters admit that commercial providers can and are fulfilling private users' needs today, *i.e.*, community repeaters.^{25/} Additionally, CellNet, a commercial provider of wireless services to utility companies, noted that "increasingly both governmental and non-governmental entities out-source important functions to private companies that can provide the same services more efficiently than the organizations could provide themselves in-house."^{26/} CellNet's wireless meter reading service is just one specific example of such out-sourcing.

Second, an increasing number of large non-public safety organizations are substituting Nextel's iDEN service for their now outmoded internal communications systems, thereby obtaining higher

^{24/} See, e.g., Comments of PCIA at pp. 8-9; ITA at p. 15; Central and South West Services ("CSW") at p. 3.; American Petroleum Institute at para. 14.

^{25/} See Comments of ITA, PCIA and Rays Radio Shop.

^{26/} Comments of CellNet at p. 12.

quality, more efficient communications services and enhancing workplace safety. Nextel has accommodated several customers' desires for service in "campus"-type settings by installing Bi-Directional Amplifiers and other special equipment to provide in-building coverage throughout the customer's operating environment. For example, at Rockefeller Center in New York City, Nextel worked with NBC to provide coverage throughout the building so that NBC would not have to build its own private system. Similarly, at the General Motors ("GM") Tech Center in Troy, Michigan, Nextel is in the process of adding cell sites so that GM will not have to build a private system at that location.

In the Washington, D.C. area, Nextel has met the special communications and security needs of the United States Senate, the Ronald Reagan Building and International Trade Center ("Reagan Building") and the John F. Kennedy Center for the Performing Arts ("Kennedy Center"). Rather than relying on private internal use frequencies and constructing and operating their own systems, these entities have chosen to subscribe to Nextel's services, and Nextel agreed to make special system accommodations to meet their needs. At the United States Senate, for example, Nextel's iDEN system is specially designed to provide service in the underground Senate subway system, as well as throughout the Senate office buildings. Similarly, to meet the internal communications needs of the Kennedy Center, Nextel installed system infrastructure that would provide service for garage attendants in the below-ground garage, for traffic control and security personnel on the surrounding grounds

and streets, and for stage personnel, ushers, food service employees, guides, and maintenance crews throughout the Kennedy Center.

At the Reagan Building, Nextel provides the primary communications system for building operations and security staff. Not only has Nextel provided communications coverage throughout the 3.1 million square foot office building, but it also fulfilled the system design requirements of the Office of the Executive to accommodate the high security needs at the special building entrance reserved for the President of the United States. Nextel also provided communications services for the April 1999 NATO 50th Anniversary Summit at the Reagan Building. Nextel provided wireless telecommunications services to participants and organizers, providing the integrated communications features necessary to enhance security, travel logistics and event planning for the thousands of Summit dignitaries and participants.27/

Nextel, in other words, has successfully accommodated the needs of many entities that would typically employ "private" communications systems. This is further proof that, in a competitive marketplace, wireless carriers will compete for this business.28/ In stark contrast to the commercial wireless

27/ See News Release, "Nextel to Provide Integrated Wireless Communications Services For Historic NATO 50th Anniversary Summit," released April 15, 1999, at www.nextel.com.

28/ In addition, Nextel provides its iDEN services to thousands of governmental and non-governmental public safety-oriented users. Local governments, fire departments, police departments, federal law enforcement agencies, and numerous other
(continued...)

marketplace that existed in 1945 and thereafter, today's marketplace consists of a number of commercial providers, offering a wide array of services. These commercial operators will compete strenuously and make the system accommodations necessary to get the business of previously private communications users.^{29/} Thus, the evidence does not support excluding private internal use systems from licensing through competitive bidding since the needs of private users can be met by commercial providers.

B. Avoiding Mutual Exclusivity

Numerous commenters opposing the auction of PLMRS frequencies rely on Section 309(j)(6)(E) of the Communications Act, which states that the Commission is not relieved of its obligation to "avoid mutual exclusivity in application, and licensing proceedings[.]"^{30/} Because current PLMRS assignment rules provide for assigning shared spectrum via frequency coordinators, these commenters assert that the Commission cannot change the licensing rules -- despite the public interest advantages of a new licensing process -- and thereby "create" mutual exclusivity. These arguments, however, ignore the fact that avoiding mutual

^{28/}(...continued)
public safety organizations subscribe to Nextel's services throughout the country.

^{29/} For example, if a former private licensee is interested in placing 30, 50 or 100 subscriber units on a commercial provider's system, competing wireless providers will have significant incentive to fulfill that potential customer's unique needs and provide them service.

^{30/} Comments of Boeing at p. 4; ITA at pp. 3-6; PCIA at pp. 2-3; Kenwood at paras. 2-4; Cellnet at pp. 6-8.

exclusivity is only one of the public interest considerations involved in assigning spectrum -- even PLMRS spectrum under the 1997 Budget Act's amendments.

As a number of parties have informed the Commission,^{31/} there is a significant excess demand for PLMRS spectrum. Not only are currently eligible parties demanding additional assignments, but parties the Commission excludes from PLMRS licensing also desire access to these channels.^{32/} As Dr. Rosston notes, there can be no spectrum shortages -- such as the one existing in the PLMRS band -- unless there is mutual exclusivity.^{33/} Thus, this spectrum is highly valued, and there are mutually exclusive demands for its use. Under these conditions, giving it away to an artificially limited subset of applicants is not in the public interest.

Dr. Rosston also points out that the current PLMRS licensing system does not "avoid" mutual exclusivity, as some assert; rather, it "prohibits" it by simply disallowing spectrum applications that would create mutual exclusivity.^{34/} To the extent a frequency coordinator cannot "make room" for more than one applicant, at least one of those parties loses, and the system of first-come,

^{31/} See, e.g., In the Matter of Nextel Communications, Inc. Requests for Waiver of 47 C.F.R. Sections 90.617(c) and 90.619(b), Order, DA 99-1404, released July 21, 1999 ("Nextel Waiver Order") at paras. 27-28; see also Comments of MRFAC at p. 9.

^{32/} See, e.g., Nextel Waiver Order; Comments of Chadmoore Wireless Group at pp. 3-4.

^{33/} Rosston Paper at p. 18.

^{34/} See Rosston Paper at Section VII, pp. 17-19.

first-served licensing is perpetuated at the expense of efficient spectrum use. The fact is, as the record herein demonstrates, there is mutually exclusive demand for the subject spectrum.^{35/} Nextel, other commercial users and private users seek licenses to use the very same channels at the very same locations. Avoiding mutually exclusivity on these channels is impossible -- except via artificial regulatory impediments (e.g., eligibility limitations) that keep spectrum out of the hands of users that value it the most.

As even Boeing agrees in its Comments, the 1997 Budget Act expanded the Commission's auction authority to use competitive bidding "to resolve instances of mutual exclusivity that cannot otherwise be avoided and are not otherwise exempt."^{36/} Because mutually exclusivity cannot be avoided in this instance and all non-public safety service licenses shall be selected by competitive bidding, as discussed above, the Commission must license future applicants for the current PLMRS channels through competitive bidding.

Dr. Rosston and Commission precedent (*i.e.*, changes to the 800 MHz SMR licensing process) have demonstrated that frequency sharing, coordination and first-come, first-served licensing are outdated, full of administrative and economic inefficiencies, and create enormous economic, as well as public interest, opportunity costs. Thus, the Commission should not elevate mutual exclusivity

^{35/} See Nextel Waiver Order, *supra*.

^{36/} Comments of Boeing at p. 6.

considerations above the greater public benefits gained with an efficient, effective and pro-competitive licensing process. Congress did not require such action in the 1997 Budget Act, and the public interest is not served by it.

C. Auctions Are in the Public Interest

As ITA recognizes in its Comments, "auctions are a simple licensing mechanism -- once the auction is complete, funds received, and the license is issued, the Commission is, for the most part, through with associated administrative matters."^{37/} These administrative efficiencies are well-documented in changes to the 800 MHz SMR licensing process. Before auctions, the Commission was saddled with tens of thousands of backlogged site-by-site applications -- some of which remain unsettled years later.

In addition to providing administrative efficiencies for the Commission, licensing using auctions promotes important economic and technical efficiencies.^{38/} For example, CSW expressly states that it is not using the most efficient available technology on its PLMRS licenses.^{39/} Kenwood Communications Corporation ("Kenwood") similarly admits that existing PLMRS licensees are not using the most efficient available technology and asks that the Commission not force licensees -- operating on spectrum obtained

^{37/} Comments of ITA at p. 6.

^{38/} See Rosston Paper at pp. 7-10; 16-17.

^{39/} Comments of CSW at p. 2 ("CSW is very concerned by suggestions in the Notice that . . . it might be forced to change frequencies or reengineer its system to employ narrowband equipment.")

for free -- to use narrowband, *i.e.*, more efficient, technologies.40/

Existing PLMRS licensees, as Dr. Rosston explains, have little incentive to use their spectrum efficiently.41/ As long as spectrum is assigned free of charge, pursuant to licensing rules that artificially exclude numerous potential applicants in significant need of additional spectrum (*i.e.*, commercial providers), there is no rational economic justification for these licensees to implement more efficient technologies. It is for this very reason that the Commission has been forced through a nearly ten-year refarming docket to mandate more efficient spectrum use on the channels below 512 MHz.42/ By auctioning this spectrum for any non-public safety use, whether commercial or private, the Commission can ensure that all spectrum will be used for the most efficient economic purposes, therefore providing the greatest benefits to the national economy.43/

In its Reply Comments filed September 16, 1999, Small Business in Telecommunications ("SBT") claims that the United States Court of Appeals for the D.C. Circuit concluded that auctions alone do not encourage licensees to more rapidly construct their systems, or

40/ Comments of Kenwood at para. 9.

41/ See Rosston Paper at pp. 26-27.

42/ See Second Report and Order, 12 FCC Rcd 14307 (1997).

43/ These pro-competitive, pro-consumer benefits -- which have been demonstrated in the CMRS marketplace -- expressly contradict Boeing's assertion that providing flexibility on the PLMRS channels "would benefit only commercial wireless service providers." Comments of Boeing at p. 6.

as used in this context, put the spectrum to more efficient use.^{44/} SBT, however, ignores the caveat the D.C. Circuit placed on its finding -- that this holds true only "absent some institutional constraint imposed upon [] licensees by the Commission..."^{45/} In the case of PLMRS licensing today, there is an artificial Commission constraint, i.e., eligibility limitations, that precludes numerous prospective licensees from putting the spectrum to its highest and best use.

Some commenters claim that, as PLMRS licensees, they cannot compete with commercial providers at a spectrum auction.^{46/} For example, a commenter on behalf of Conoco states that auctions would create a hardship for private licensees because they might have "to pay higher rates for this service."^{47/} This supports the public interest conclusions Nextel advocates, i.e., that PLMRS licensees receiving spectrum free of charge do not necessarily place the highest value on this spectrum and that their resultant inefficient use is imposing an enormous opportunity cost on the economy. If these licensees placed the highest economic value on this spectrum, there is no doubt that many of them could compete in an auction with commercial wireless providers. As Nextel noted in its Comments, among the companies holding PLMRS licenses are Ford, Wal-

^{44/} Reply Comments of SBT at p. 10, citing *Fresno Mobile Radio, et al. v. FCC*, 165 F.3d 965 (D.C.Cir. 1999) ("*Fresno*").

^{45/} *Fresno* at p. 969.

^{46/} See, e.g., Comments of Boeing at p. 6.

^{47/} Comments of David Land, P.E., submitted to the Commission via e-mail ("*Land Comments*").