

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

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In the Matter of)
)
Implementation of Sections 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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

REPLY COMMENTS OF
BLOOSTON, MORDKOFKY, JACKSON & DICKENS

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SUMMARY

The industry's consensus in this proceeding is that the Commission should not implement auctions and wide-area licensing for shared, private radio spectrum. Nearly all of the commenting parties emphasized the Commission's obligation under the Act to avoid mutual exclusivity in licensing proceedings, as well as its obligation to consider the special characteristics and operational needs of the private radio community which dictate that the Commission preserve the existing licensing scheme. The comments also demonstrated that the introduction of auctions and wide-area licensing in the private radio services would lead to a devastating loss of spectrum for private internal use, create administrative delays and expense for licensees and applicants, and needlessly cause economic harm to hundreds of thousands of private radio uses who have invested in technology pursuant to the Commission's existing rules.

Based on the industry's comments, the Commission should not sell its licensing duties to commercial band managers. Commercial band managers will be motivated by profit and will not likely serve the needs and interests of the private radio industry. Moreover, the adoption of a band manager proposal would result in an impermissible abdication of the Commission's licensing duties, which may constitute a violation of the Communications Act.

The record also demonstrates that the Commission should not grant Nextel's waiver request. The grant of Nextel's waiver request would lead to further commercial infringement of the private radio spectrum, harming the public interest and the private radio industry.

Finally, the Commission should reject proposals to implement spectrum lease fees. The Commission is not authorized to impose spectrum lease fees, and such fees would amount to an unreasonable financial burden for many small and medium-size businesses which rely on private radio services to manage their day-to-day operations, and to ensure the safety of personnel, consumers and the general public.

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TO: The Commission

**REPLY COMMENTS OF
BLOOSTON, MORDKOFKY, JACKSON & DICKENS**

The law firm of Blooston, Mordkofsky, Jackson & Dickens (“BMJ&D”), on behalf of its clients listed in Attachment A hereto, and pursuant to Section 1.415 of the Commission’s Rules, hereby replies to comments filed in response to the Commission’s Notice of Proposed Rulemaking in the above-referenced proceeding.¹

I. The Record Shows that the Commission Should Not Implement Competitive Bidding and Wide-Area Licensing for Shared Private Radio Spectrum

¹ In the Matter of Implementation of Sections 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, *Notice of Proposed Rulemaking*, FCC 99-52 (rel. March 25, 1999) (“NPRM”).

The record developed by the Commission in this proceeding, through comments filed by over eighty parties representing thousands of private radio licensees, demonstrates overwhelming support for the proposition that implementation of the Commission's wide-area licensing proposal (and the attendant auctions) is adverse to the public interest. Only Nextel Communications, Inc. ("Nextel"), and the American Mobile Telecommunications Association, Inc. ("AMTA") expressed support for auctions and geographic licensing in the private radio services. All other parties have adamantly opposed the Commission's proposed auction scheme, and have urged the Commission to retain the existing licensing scheme for private radio spectrum.

A. The Commission Must Avoid Mutual Exclusivity

In its comments, BMJ&D demonstrated that Congress' 1997 revisions to Section 309(j) of the Communications Act of 1934 (the "Communications Act" or "Act") did not alter or eliminate fundamental restrictions on the Commission's auction authority which dictate that the Commission preserve the existing shared-use licensing scheme.² The vast majority of commenters supported this position.³ Their comments emphasized that under Section 309(j)(6)(E) of the Act, the Commission is obligated "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in

² See Comments of BMJ&D, at 4-12.

³ See, e.g., Comments of SCANA Corporation ("SCANA"), at 5-13; Comments of Entergy Services, Inc. ("Entergy"), at 4-11; Comments of Union Electric Company d/b/a Ameren UE ("Union") and the Central Illinois Public Service Company d/b/a Ameren CIPS ("CIPS"), at 4-11; Comments of Cinergy Corporation ("Cinergy"), at 4-11; Comments of the Commonwealth Edison Company ("ComEd"), at 5-14; Comments of the USMSS, Inc. ("USMSS"), at 2-4, and Comments of Forest Industries Telecommunications ("FIT"), at 3-4.

order to avoid mutual exclusivity in application and licensing proceedings.”⁴ Indeed, if the Commission introduced auctions in the private radio services, it would be ignoring this provision of law by artificially creating mutual exclusivity when it does not normally exist in the private radio bands. Nextel therefore has no basis to claim that “the 1997 Budget Act requires the Commission to assign *all* non-public safety licenses... via competitive bidding.”⁵ The express language of Section 309(j), and its legislative history, unequivocally establish that the Commission is obligated to preserve the shared use licensing methodology in the private internal radio services.

B. The Commission’s Existing Licensing Methodology Promotes the Efficient Use of the Private Radio Spectrum

BMJ&D and numerous other commenting parties have urged the Commission to retain the existing frequency-by-frequency, site-by-site licensing method for private radio frequencies, demonstrating that auctions and geographic licensing are entirely inappropriate for private radio services.⁶ As the record overwhelmingly shows, the

⁴ 47 U.S.C. § 309(j)(6)(E).

⁵ Comments of Nextel, at 3.

⁶ *See, e.g.*, Comments of BMJ&D, at 10-11; Comments of CellNet Data Systems, Inc. (“CellNet”), at 8 (“the private wireless bands are not well suited to the Commission’s tentative proposal of employing geographic licensing.”); Comments of the Land Mobile Communications Council (“LMCC”), at 3 (“first-come, first-serve application processing, coupled with a frequency coordination system, has worked well over the decades because it recognizes that different business and public safety users utilize land mobile radios in different ways.”); Comments of Kenwood Communications Corporation (“Kenwood”), at para. 4 (“the process of ‘first-come, first-served’ application processing, on a coordinated basis, through dynamic database consultation...has served to maximize the use of shared channels and allows ‘customized’ licensing tailored to the specific needs of PMRS or public safety users.”).

special characteristics and operational needs of the private radio community mandate the use of a site-by-site licensing method. Private radio systems are inherently designed for the service of small or distinct geographic areas. To require that private users build out systems for a geographic area which exceeds their operational needs would be imprudent, leading to the inefficient use of spectrum. It would also be imprudent to convert the shared private radio channels to exclusive licensing, when the shared licensing system is a far more spectrally efficient system. The existing shared use licensing procedure, which “allows multiple users with different coverage areas and capacity requirements to use the same frequencies effectively”⁷ promotes the “efficient and intensive use of the electromagnetic spectrum”⁸ and thus should not be abandoned in favor of an auction program which cannot easily accommodate a wide variety of applicants and incumbents with different coverage and operational requirements.

C. The Proposed Auction Scheme is Adverse to the Public Interest

In its comments, BMJ&D demonstrated that wide-area licensing and competitive bidding in the private radio services would lead to a devastating loss of spectrum for private internal use, create administrative delays and expense for licensees and applicants, and needlessly cause economic harm to hundreds of thousands of private radio users who have invested in technology pursuant to the Commission’s existing rules.⁹ The record fully supports this view.¹⁰ Nextel nonetheless claims that “auctions

⁷ *NPRM*, at para. 14.

⁸ 47 U.S.C. § 309(j)(3)(D).

⁹ *See Comments of BMJ&D*, at 12-16.

are in the public interest.”¹¹ Specifically, Nextel claims that the introduction of auctions in the private radio services would (1) put an end to the Commission’s “corporate welfare”¹² policy which benefits Fortune 500 companies; (2) “reduce administrative burdens”¹³ and (3) provide incentives “to implement spectrally-efficient technologies that will maximize the spectrum’s capacity and usefulness”¹⁴ Commenters in this proceeding have demonstrated, however, that the implementation of auctions for shared, private radio spectrum would seriously stunt the growth and innovation of small and medium-size businesses which make indispensable contributions to the United States economy, create substantial administrative delays and burdens, and undermine the Commission’s “refarming” initiative which is designed to promote the efficient use of the private radio spectrum.

¹⁰ See, e.g., Comments of FIT, at 6 (“even if private land mobile communications could, somehow, be accommodated by some sort of auctionable licensing scheme, at this point, conversion or relocation of the existing one million plus licensed stations would be highly disruptive, hugely costly, and simply impractical.”); Comments of Trimble Navigation Limited (“Trimble”), at 6 (“the grant of exclusive use of bands that are currently designated for shared use would place in jeopardy the operations of all current users of those bands except for those of the winning bidder... the adoption of geographic licensing or some other new licensing plan for PLMRS at this time would be purposeless and counter-productive.”); Comments of the Personal Communications Industry Association (“PCIA”), at 4 (“implementation of any drastic changes in licensing methodology for already allocated spectrum would have a devastating impact on existing users.”).

¹¹ Comments of Nextel, at 9.

¹² Id., at 4.

¹³ Id., at 11.

¹⁴ Id., at 9.

In its comments, Nextel claims that the current licensing process, which makes private radio spectrum available to small and large businesses at almost no cost, amounts to a “corporate welfare” program for Fortune 500 companies. Nextel fails to recognize, however, that an overwhelming portion of the 1,000,000 licensed private radio stations are operated by small and medium-size businesses which have been able to acquire private radio licenses only because they face no serious financial obstacles under the Commission’s current licensing scheme. Experience has shown that small and medium-size businesses do not fare well in an auction setting, including the 800 MHz auction which Nextel was able to dominate. Their lack of success in an auction setting is understandable, since an auction can require applicants to devote a significant amount of time, man-power and financial resources to prepare applications, review and analyze bidding data, and consult with attorneys and engineers at every turn. If the Commission were to implement auctions to accommodate only a few entities, most notably Nextel (which has already demonstrated its ability to monopolize the market), small and medium-size businesses around the country would be forced to contract with Nextel for inadequate service at an inflated price. This concentration of licenses would ultimately harm the public, as small and medium-size businesses would be forced to manage without private radio, and operate less efficiently, or pay the inflated price and pass the additional expense down to consumers. Indeed, this outcome, which contravenes policies designed to protect small businesses, would more accurately represent a “corporate welfare” program, except in this case the only entity which could benefit is Nextel. These higher costs for businesses relying on radio would be reflected as higher costs to consumers for a broad range of products and services.

Implementing auctions for shared spectrum would require the Commission to devote substantial administrative resources to minimize the disruption in the private radio marketplace, imposing unnecessary costs on private radio users. As noted in BMJ&D's comments, the private radio bands are heavily congested by existing users, each with rights and interests that must be honored. To ensure that the auction winner does not infringe upon these rights and interests, the Commission would have to take steps to protect incumbents from interference. This protection cannot be achieved without administrative delay or expense. In essence, as the Industrial Telecommunications Association, Inc. ("ITA"), the Council of Independent Communications Suppliers ("CICS"), the Taxicab & Livery Communications Council ("TLCC"), and the Telephone Maintenance Frequency Advisory Committee ("TELFAC") stated in their jointly filed comments, the implementation of the Commission's auction proposal would present "a logistical nightmare."¹⁵ Cinergy, among others, correctly concluded that geographic licensing and auctions would lead to "wasted resources and inefficient use of spectrum."¹⁶ Given the administrative difficulties, and the inevitable disputes and controversies which will arise as a result of auctions, Nextel clearly has no basis to claim that the Commission's proposal will "reduce administrative burdens."

Nextel's claim that there are no incentives to implement spectrally-efficient technologies in the private radio bands also lacks merit. The Commission, through its "refarming" initiative, has adopted extensive rule changes which will provide the private radio industry "with a regulatory framework that promotes efficient use of spectrum,

¹⁵ Joint Comments of ITA, et al., at 16.

¹⁶ Comments of Cinergy, at 10.

increases technical flexibility, enhances the deployment of new technologies, and promotes the competitive and robust marketplace for product development.”¹⁷ These rule changes reflect the Commission’s sound reasoning, careful analysis, and full consideration of hundreds of comments and petitions. While it may be true that the implementation of these rule changes has been slow, frustrated by the medical telemetry issue, it will not be long before the industry begins migration to narrowband technologies. The Commission will soon be licensing high power operations on the 12.5 kHz offset channels, making it necessary for low power users and primary channel users to migrate to narrowband equipment to avoid interference. Moreover, there will eventually be very little 25 kHz equipment available, due to changes in equipment approval requirements. Since the conversion to spectrally efficient equipment in private radio bands is moving forward, the implementation of auctions for private radio spectrum, after years of planning and analysis, is unnecessary and extremely unfair to the private radio industry. As ITA and others stated in their joint comments, “to even discuss such a major change to the private land mobile landscape (i.e., geographic licensing) would serve to mitigate progress that is underway. After all, this industry has spent the last six years patiently awaiting the end of the refarming proceeding – an end that is clearly in sight. It would be patently unjust to undo all that this industry has patiently accomplished during the past six years and damaging to all this industry may achieve in

¹⁷ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-235, PR Docket No. 92-257, *Memorandum Opinion and Order*, 11 FCC Rcd 17676 (1996).

the future.”¹⁸ In any case, if the Commission is concerned about the industry’s slow migration to narrowband equipment, it can work with the industry to establish reasonable deadlines for this migration.

II. The Commission Should Not Facilitate Further Commercialization of Private Radio Spectrum

A. The Commission Should Not Sell its Licensing Authority to Commercial Band Managers

In the *NPRM*, the Commission invited comment on whether the public interest would be served by creating a new class of licensee called a “Band Manager”.¹⁹ As described by the Commission, the holder of a band manager license would be authorized to sublicense portions of its license to various users for a length of time not to exceed the expiration of the initial license term, and it would be held solely responsible for ensuring that these users comply with the Commission’s rules. The Commission further noted that the “Band Manager may be akin to a commercial licensee that offers capacity on its system, via resale for example, to an end user that is not directly licensed by the Commission.”²⁰ Based on the industry’s comments in response to this inquiry, the Commission should abandon its band manager proposal.

The comments reflect a keen awareness of the fact that commercial band managers will be motivated by profit, not the public interest, and will have little interest in fulfilling the special needs and interests of private internal radio users at a reasonable

¹⁸ Comments of ITA, et. al, at 17.

¹⁹ See *NPRM*, at para. 88.

²⁰ Id., at para. 89.

cost.²¹ The Boeing Company (“Boeing”), for example, accurately observed that the creation of band manager licenses “will only serve to further deplete the available spectrum for private wireless users, and force such users to pay market fees plus profit margins for the use of spectrum necessary to meet their critical communications needs.”²² Small Business in Telecommunications (“SBT”) similarly noted that “[t]he ultimate effect of the licensing scheme will be a boon to band managers and an economic disaster for local users, particularly small users that lack the resources to pay high costs initially or pursuant to a secondary auction. In essence, control of the spectrum for the purposes of market entry or future growth would be limited to those entities with the deepest pockets or the best relationship with the band manager.”²³ Indeed, as the record demonstrates, the adoption of a band manager scheme would inevitably deprive private radio users of spectrum, forcing hundreds of thousands of businesses to pay for inadequate service at an inflated cost, or to operate less efficiently without the benefits of private internal radio service. The Commission must avoid this outcome, consistent with its obligation to promote the public interest “by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including

²¹ See, e.g., Comments of the United Telecom Council (“UTC”), at 40 (“this untried concept could be disastrous for those entities that require access to spectrum to meet critical internal operational needs.”); Comments of the North Texas Communications Council (“NTCC”), at 20, and Comments of PCIA, at 30 (“A band manager should not be a pseudonym for a carrier”); Comments of Ray’s Radio Shop, Inc., at 6 (“there would be no assurances and no guarantees that a Band Manager would be responsive to the public interest dictates inherent in the Communications Act.”).

²² Comments of Boeing, at 11.

²³ Comments of SBT, at 18.

small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”²⁴ Since the adoption of a band manager scheme would create a “boon” for a limited number of commercial entities at the expense of hundreds of thousands of private internal radio users, the public interest clearly would not be served.

Moreover, as noted in numerous comments, the adoption of the band manager proposal would result in an impermissible abdication of the Commission’s licensing duties, and provide an excessive consolidation of control over future uses of the spectrum within a private entity.²⁵ In Title III of the Communications Act, Congress entrusted the Commission with exclusive authority “over all channels of radio transmission”²⁶ and indicated that the use of such channels must be pursuant to licenses granted by the Commission.²⁷ The Commission’s proposal to sell its licensing authority to commercial band managers is inconsistent with these provisions and the policy objectives underlying them. As noted in comments by ComEd, “[t]he overreaching purpose of Title III is to ensure that a disinterested arm of the government with expertise in the associated issues administers the radio spectrum. The very idea of selling off the oversight of private radio services is antithetical to this important policy and very likely constitutes a violation of

²⁴ 47 U.S.C. § 309(j)(3)(B).

²⁵ See, e.g., Comments of SBT, at 19-21; Comments of Wisconsin Public Service Corporation, at 2.; Comments of Kenwood, at para. 8; Comments of SCANA, at 26; Comments of Entergy, at 24; Joint Comments Union and CIPS, at 24; Comments of Cinergy at 25; Comments of ComEd, at 27.

²⁶ 47 U.S.C. § 301.

²⁷ Id.

the Communications Act.”²⁸ In light of the adverse impact on the private radio industry and the public interest, and considering the fact that Congress has not granted authority to the Commission to privatize its functions, the Commission should abandon its band manager proposal.

B. The Commission Should Deny Nextel’s Waiver Requests

The Commission, in a *Public Notice* released July 21, 1999, incorporated the Nextel Waiver Record into this docket and invited comment on whether it should amend Sections 90.617(c) and 90.619(b)(7)(iii) of its rules to allow the use of private radio channels in a commercial Specialized Mobile Radio (“SMR”) system.²⁹

Commenters have demonstrated that the grant of Nextel’s waiver request would harm the public interest by facilitating the commercialization of spectrum originally intended to serve the needs of private internal radio users.³⁰ As the record shows, the

²⁸ Comments of ComEd, at 27; *See also* Comments of SCANA, at 26; Comments of Entergy, at 24; Joint Comments Union and CIPS, at 24; Comments of Cinergy, at 25.

²⁹ Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into WT Docket No. 99-87, *Public Notice*, DA 99-1431 (rel. July 21, 1999).

³⁰ *See, e.g.*, Comments of the American Automobile Association (“AAA”), at 12-13 (“the licensing of the increasingly crowded PMRS frequencies for commercial SMR use would not serve the public interest, particularly given the severely limited spectrum available for PMRS and the differences in licensing spectrum for PMRS use (predominantly site-by-site licensing) versus commercial SMR use (predominantly geographic area licensing through spectrum auctions).” Comments of Boeing, at 12 (“there is no justification in the Balanced Budget Act amendments of 1997 to lead the Commission to the conclusion that it should amend its licensing rules in any band to allow the incorporation of PMRS channels into a commercial system”); Joint Comments of ITA, et. al, at 23 (“allowing commercial use of private land mobile frequencies would set a dangerous precedent, giving commercial providers virtually unfettered access to licenses allocated for another service – licenses for which they are ineligible under

grant of Nextel's request would have broad implications, leading to a critical shortage of spectrum for private internal radio use. The conversion of private spectrum for commercial use would force businesses throughout the United States to contract with commercial service providers for service at an unreasonable cost, if such service is available at all. Commercial dispatch users have complained about Nextel's draconian methods of creating spectrum efficiencies in the 800 MHz band, and the unreasonable costs which Nextel has imposed for the use of its commercial system. It appears that Nextel, in converting the traditional SMR systems in the 800 MHz to a wide-area commercial network, has forced private radio users to replace their spectrally efficient radios with higher cost equipment, and has imposed a cost for the use of its commercial system which is up to four times greater than before.³¹ This cost would be even greater for most internal private radio users, who have established their own networks because it was less costly and more efficient than hiring the cheaper, basic dispatch services which Nextel has replaced. Clearly, amending the licensing rules to accommodate Nextel, which already enjoys a dominant position in the commercial dispatch market, at the expense of hundreds of thousands of private internal radio users would not serve the

current Commission rules and policies. This could potentially restrict the already limited availability of business licenses for legitimate private wireless applicants.”).

³¹ The Commission has recognized that, despite a 50 percent increase in demand for dispatch services, Nextel “converted systems used for analog dispatch service to higher priced digital mobile telephony services.” Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fourth Report*, FCC 99-136 (rel. June 24, 1999), at p. 7. Indeed, as Nextel converts 800 and 900 MHz spectrum to its hybrid cellular/digital dispatch operation, it ceases to provide basic, inexpensive dispatch service. See, e.g., *Nextel to Turn Off S.D. Analog Network*, *Wireless Week*, May 24, 1999, at pp. 1, 3 (Attachment B).

public interest.³² Unable to pay the unreasonable costs imposed by Nextel, many businesses will be left with no alternative but to do without the benefits of private radio. Without private radio service, these businesses will not be able to manage their businesses as efficiently, and will be less capable of developing and deploying “new technologies, products, or services for the benefit of the public.”³³ Moreover, without effective use of private radio systems, they will be less capable of protecting the safety of workers, consumers, and the public in general.

Nextel, AMTA, and others who support the commercialization of the private radio frequencies believe that businesses which need and value private radio service can receive such service from commercial service providers. Commercial service providers do not, however, have an economic incentive to provide the *customized* service which private internal radio users require.³⁴ Companies like Western Atlas International, Inc. (“Western Atlas”) and IMC Agrico Company (“IMC Agrico”), for example, have unique requirements that commercial providers would not be able to satisfy. Western Atlas relies on radio signals to synchronize the operations of giant seismic sensors which must

³² It must be noted that there is a need for additional 800 MHz and 900 MHz spectrum by existing SMR operators because Nextel has converted the spectrum to cellular-type service. This spectrum could come from the licenses held by the bankrupt Geotek, Inc.

³³ 47 U.S.C. § 309(j)(3)(A).

³⁴ The Wireless Telecommunications Bureau (“WTB”) has acknowledged that “[p]rivate systems serve a great variety of communication needs that *common carriers and other commercial service providers historically have not been able or willing to fulfill.*” and that “[p]rivate users represent a ‘thin and unique market’ that commercial providers have little incentive to invest in to serve; there is usually not enough of a return involved to justify the capital investment to serve one or a few private customers.” Wireless Telecommunications Bureau, *Private Land Mobile Radio Services: Background*, at 7-8 (December 18, 1996).

create vibrations on the earth's surface with precise timing in order to locate underground oil and mineral deposits. IMC Agrico utilizes low-power radios to control giant 200 horsepower pumps and related pipelines used for gathering and transporting phosphate rock used in the fertilizer manufacturing process. The phosphate rock is embedded in soil which is mined and mixed with water, and the resulting slurry is transported over several miles of pipeline to the IMC processing plant, where the phosphate rock is extracted and the soil is returned to the mining site so that it can be environmentally restored. The radios are vital to this operation, by allowing control of the flow of water to the mining site, control of the flow of slurry, and monitoring of pipeline pressure at each segment, to prevent a potentially deadly explosion or an environmental catastrophe. Experience has shown that commercial communications providers will not see a profit motive in dedicating their spectrum to such specialized radio operations. These types of specialized needs spawned the creation of the current Private Radio allocation years ago, and these needs must be met today and in the future. An effective mineral strike or mining operation may generate little profit for a commercial provider, but can mean millions of dollars for the United States economy.

It must be emphasized that businesses need private spectrum, not more commercial services. The Commission has already allocated a significant amount of spectrum for commercial mobile wireless services, to the extent that there now appears to be a glut of commercial mobile wireless licenses.³⁵ For example, the Commission has

³⁵ The reduction in the value of PCS licenses since the first C-Block auction is an indication that there is a glut of wireless services in the market. Wall Street's reevaluation of PCS spectrum value, prompted by a growing awareness of the intense competition among wireless providers, was among the factors that led many original C-

allocated 120 MHz of spectrum to broadband Personal Communications Service (“PCS”),³⁶ 50 MHz to cellular,³⁷ and approximately 19 MHz of spectrum is available for use by SMRs.³⁸ In addition to the 120 MHz of spectrum allocated for broadband PCS services, the Commission has designated 100 MHz of spectrum in the 1.85 – 2.20 GHz band for emerging technologies, including advanced digital cellular and PCS services,³⁹ and has initiated a plan to allocate additional spectrum to support “third generation” communications systems.⁴⁰ The Commission has also indicated that there will be 36 MHz of spectrum available for commercial services as a result of the movement from

Block bidders to declare bankruptcy. *See, e.g.,* Tam Harbert, *Into Thin Air; the FCC's Spectrum Auctions Prove Failures*, *Electronic Bus.*, Feb. 1998, at 42; Jeffrey Silva, *Many People, Motives to Blame for C-Block Auction Debacle*, *Radio Comm. Rep.*, Oct. 6, 1997, at 16.

³⁶ See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 4957, 4963, 4970-71 (rel. June 13, 1994).

³⁷ See Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems: Amendment of Parts 2. 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Band for Private Land Mobile User; Amendment of Parts 2. 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, *Report and Order*, GEN Docket No. 84-1231, 2 FCC Rcd 1825 (rel. September 26, 1986).

³⁸ See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Annual Report*, FCC 97-75, 12 FCC Rcd 11266, 11309 (rel. March 25, 1997).

³⁹ See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rulemaking*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

⁴⁰ See Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, *Public Notice*, 3 FCC Rcd 16221 (August 26, 1998).

analog to digital television broadcasting.⁴¹ Moreover, the Commission has just licensed numerous systems in the 220 MHz band for the express purpose of promoting dispatch service.⁴² Allowing further commercial infringement of the private radio spectrum will interfere with the ability of these start-up licensees to attract capital and gain the market share needed to sustain their operations, and will reduce the value of commercial mobile radio licenses already assigned. Considering the results of the PCS C-Block auction, which ended in numerous bankruptcies, and the fall in value of PCS spectrum following that auction, there is a real question as to whether the market can support all the existing commercial providers. There is, however, a demonstrable shortage of private spectrum, and businesses throughout the country have a compelling need for this spectrum.⁴³ Businesses which can benefit from the wide-area coverage and telephone-like service provided by commercial carriers can avail themselves of such services, and thus there is no need to turn private radio spectrum into commercial spectrum. To ensure the survival of the private radio industry, it is imperative that the Commission deny Nextel's waiver request and preserve private radio frequencies for use by qualified, private internal radio users.

⁴¹ See Service Rules for the 746-764 and 776-794 MHz Bands, and Revision to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, FCC 99-97, WT Docket No. 99-168 (rel. June 3, 1999).

⁴² See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Report and Order*, PR Docket 89-5526 FCC Rcd 2356 (1991).

⁴³ See LMCC Petition, at 10 (citing a report by the National Telecommunications and Information Administration which found that "while there was a wide-spread need for additional spectrum across nearly all wireless services, the most critical need was for the land mobile services.").

III. The Commission Should Not Introduce Lease Fees for the Use of Private Radio Spectrum

Some commenters have recommended that the Commission impose spectrum lease fees for the use of private spectrum, in lieu of auctions. Ignoring the fact that the Commission has recently adopted extensive rule changes which are designed to promote the efficient use of spectrum, these commenters argue that spectrum fees will encourage greater spectrum efficiency.⁴⁴ The Commission, however, does not have statutory authority to implement spectrum lease fees. Section 309(j)(3)(C) of the Act further restricts the Commission's ability to impose spectrum lease fees on private radio users. Under this provision, the Commission may consider the recovery of spectrum value only when the spectrum in question is used for *commercial* purposes, which does not apply in the case of private internal radio operations. Aside from these issues, the Commission should recognize that the adoption of spectrum lease fees, particularly if they are tied to the so-called "market value", may prevent small and medium-size businesses from using private radio services. These businesses use private radio systems to manage and coordinate their day-to-day operations, and to ensure the safety of personnel, consumers and the general public. Unlike commercial service providers, these users do not generate revenue from the use of spectrum, and therefore they may not be able to incorporate spectrum lease fees into their budgets. Introducing this financial burden could potentially stunt the growth and innovation of many businesses which currently rely on the use of private radio, and threaten public safety. Since the Commission is obligated, under Section 309(j)(3) of the Act, to promote innovation, competition, and the dissemination

⁴⁴ See, e.g., Comments of Intel Global Corporation, at 6; Comments of Boeing, at 7.

of licenses among a wide variety of applicants, including small businesses, the Commission should reject any proposal recommending the adoption of spectrum lease fees.

IV. Conclusion

As the record in this proceeding demonstrates, and as explained in greater detail in BMJ&D's initial comments, the Commission's proposal to implement competitive bidding and wide-area licensing for shared private radio spectrum is inconsistent with the Commission's auction authority, unworkable, and adverse to the public interest. To ensure the survival of the private radio industry, and to promote Congress' public interest objectives, BMJ&D urges the Commission to abandon its proposed auction scheme and retain its well-reasoned, site-based licensing process. Moreover, to avoid further commercial infringement of the private radio spectrum, the Commission should abandon its band manager proposal, and deny Nextel's waiver request. Finally, to promote innovation, competition, and the dissemination of licenses among a wide variety of applicants, including small businesses, the Commission should adhere to its statutory authority and reject any proposal recommending the implementation of spectrum lease fees.

Respectfully submitted,


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ATTACHMENT A

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Caprock Communications
Citizens Telephone Company
Clarkson Construction Co./Total Risk Mgt.
Cross Timbers Oil Company
Electronic Specialties
First Communications
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
IMC Agrico Co.
Instant Signal & Alarm Co, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilcom
Mobilephone of Humboldt, Inc.
Mobile Communications Service of Miami
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Penasco Valley Telephone
Platte Valley Communications of Kearney, Inc.
Pond Branch Telephone Company, Inc.
Sanborn Telephone Company
Supreme Security Systems, Inc.
Teletouch Communications, Inc.
TXU Communications Telephone Company
UBTA Communications
Webster-Calhoun Cooperative Telephone Association
Western Atlas International, Inc.
Wilkinsburg-Penn Joint Water Authority
W.T. Services, Inc.
XIT Rural Telephone
Zirkelbach Refrigeration, Inc.

ATTACHMENT B

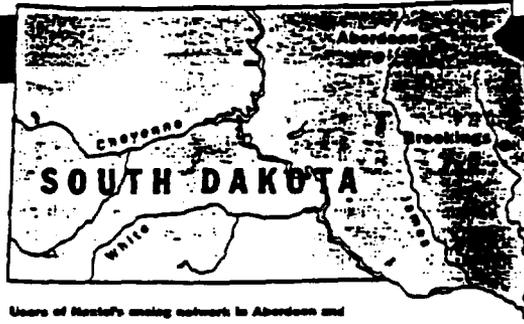
NEWS

Nextel from page 1

Many in the industry question why Nextel should be allowed to tap into private spectrum—as well as previously off-limits spectrum in the 900 MHz band—when it cannot support its existing infrastructure and customers. In Ab-

erdeen and Brookings, S.D., for example, Nextel informed customers this month that it will terminate analog dispatch radio or telephone interconnect service Aug. 1.

"Due to reduced customer(s), it is no longer economically feasible to continue operating this sys-



Users of Nextel's analog network in Aberdeen and Brookings received termination of service notices this month.

Nextel To Turn Off S.D. Analog Network

By Caron Carlson

WASHINGTON—Nextel Communications Inc. will shut down analog dispatch service in at least two regions of South Dakota this summer and possibly leave the spectrum there fallow, all the while awaiting FCC waivers to secure more spectrum—this time from private radio.

In the coming weeks, the FCC is expected to decide whether to give Nextel the prerogative—historically the purview of the government—to determine whether spectrum allocated for private systems can be used commercially. While FCC rules prohibit this use, Nextel last fall asked for waivers to acquire 54 private radio licenses and either incorporate them into its nationwide network or use them to relocate licensees the company displaced in the 1997 specialized mobile radio auction.

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tem," Nextel said in service termination notices May 5. Two-way radios used in these markets will become obsolete on the network, and the notices do not offer customers alternative service options. When Nextel pushes customers off its system, competing operators would like to accommodate them but frequently cannot because of spectrum constraints.

The pending waiver requests—the latest in a long history of rule waivers sought and obtained by Nextel—are particularly irksome to business advocates who have watched the traditional dispatch industry dwindle as Nextel gradually amassed the lion's share of BIXI MHz SMR spectrum from smaller operators. Some spectrum acquired by the industry giant—including frequencies won at auction—remains unused while other operators are forced to turn away customers for lack of spectrum.

To fight the erosion of the all-too-constrained private radio spectrum base, the Personal Communications Industry Association and Industrial Telecommunications Association are speaking with a united voice. They suggested that the commission grant Nextel its waivers on the condition that the frequencies be used only to relocate private wireless and small private carrier licenses. Five other organizations also representing private wireless users oppose unconditional grant of the waiver requests.

Nextel did not respond to questions about the waiver requests or service termination in South Dakota markets.

Private wireless and small operators have long criticized the commission for "regulation by waiver" in the dispatch radio industry. Many complain that if the current waiver issue is merely the latest step in a broader effort to move private users onto commercial systems, the FCC should act by changing the rules rather than repeatedly bending them.

Converting spectrum for use on its nationwide digital SMR network, Nextel has reduced the number of dispatch suppliers and service options overall. The conversion often means customers lose the value of the investment made in radios, and they are then charged rates by Nextel that are generally higher than those charged by traditional dispatch operators. According to The Strategic Group, last year Nextel dropped 173,000 basic dispatch subscribers from its service. □

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