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June 29, 2000

RECEIVED  
JUN 29 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Magalie Roman Salas, Esquire  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation  
WT Docket No. 97-82

Dear Ms. Salas:

On Wednesday, June 28, 2000, Robert S. Foosaner, Vice President and Chief Regulatory Officer for Nextel Communications, Inc. ("Nextel"), and Leonard J. Kennedy, counsel for Nextel, met with Clint Odom, Legal Advisor to Chairman Kennard, regarding the above-referenced proceeding.

During the meeting, they discussed the proposals to remove the designated entity set-aside for the PCS auction scheduled to commence on November 29, 2000, consistent with the comments filed by Nextel in the above-referenced proceeding on June 22. A copy of the Nextel comments, the Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules filed by Nextel Communications, Inc. on January 31, 2000, and the handouts entitled "Nextel PCS Block Reauction," "Nextel PCS Block Reauction – Bulk Bid," "Nextel PCS Block Reauction – July 26," and a chart entitled "Potential Major Carrier Spectrum Holdings Under PCS Reauction," that were given out at the meeting are attached hereto.

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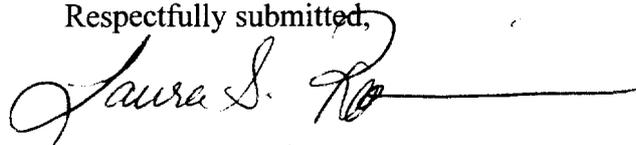
Magalie Roman Salas, Esq.

June 29, 2000

Page 2

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and a copy is being provided to Mr. Odom. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laura S. Roecklein", followed by a long horizontal line extending to the right.

Laura S. Roecklein

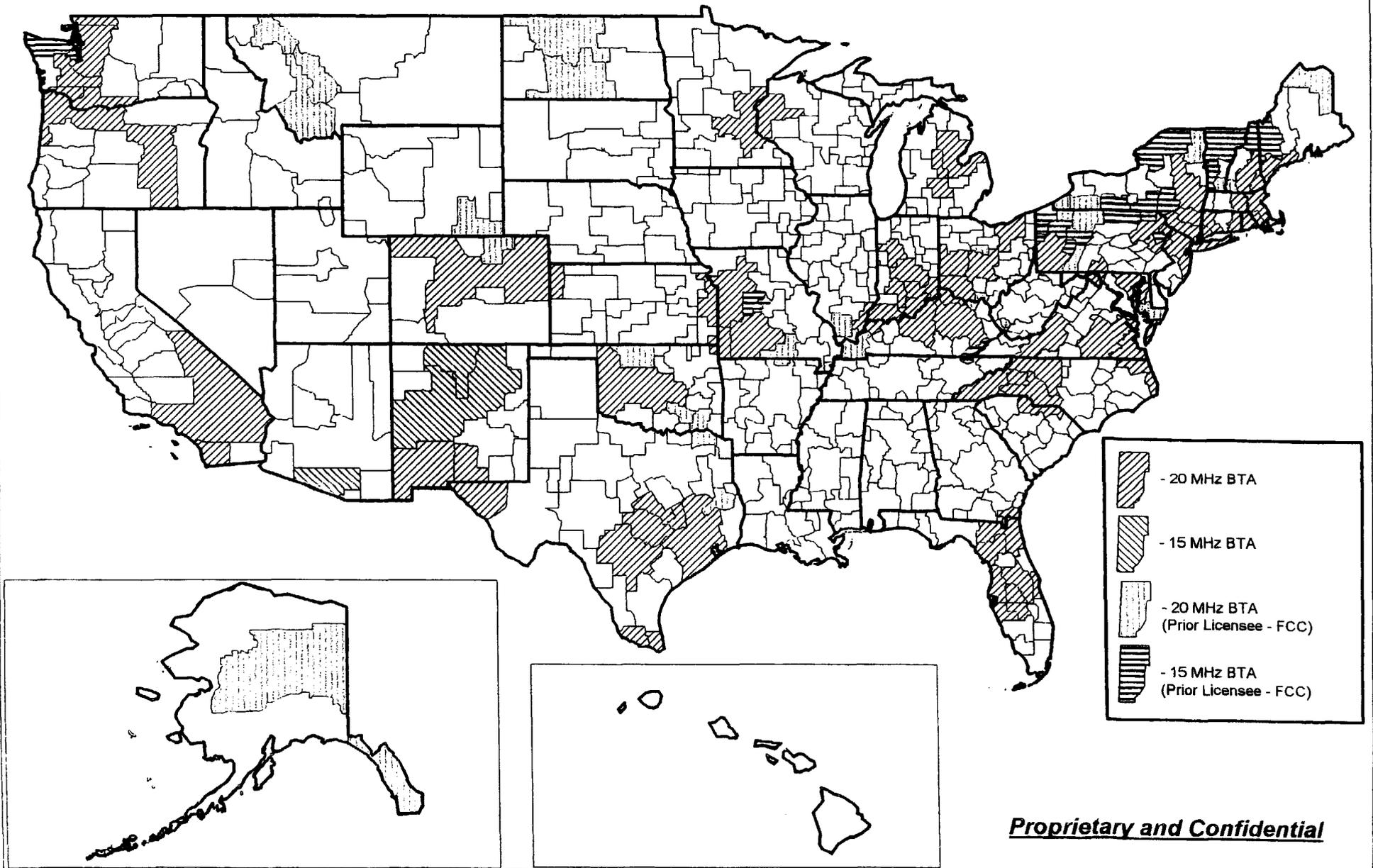
cc: Clint Odom

POTENTIAL MAJOR CARRIER SPECTRUM HOLDINGS UNDER PCS REAUCTION

BTA/ Market Name	AT&T Wireless	Bell Atlantic/Vodafone/ Airtouch/GTE	BellSouth	SBC Comm.	Sprint PCS	VoiceStream/OmniPoint/ Aerial	US West
	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz
New York, NY	35 65 55 45	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	40 70 60 50	0 30 20 10
Los Angeles, CA	35 65 55 45	35 65 55 45	0 30 20 10	30 60 50 40	30 60 50 40	10 40 30 20	0 30 20 10
Boston, MA	30 60 50 40	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	20 50 40 30	0 30 20 10
Washington, DC	30 60 50 40	35 65 55 45	0 30 20 10	25 55 45 35	30 60 50 40	20 50 40 30	0 30 20 10
Houston, TX	35 65 55 45	55 85 75 65	0 30 20 10	0 30 20 10	10 40 30 20	30 60 50 40	0 30 20 10
Cleveland, OH	30 60 50 40	25 55 45 35	0 30 20 10	30 60 50 40	10 40 30 20	10 40 30 20	0 30 20 10
Minneapolis, MN	35 65 55 45	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	30 60 50 40	10 40 30 20
Seattle, WA	35 65 55 45	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	20 50 40 30	0 30 20 10
Pittsburgh, PA	35 65 55 45	25 55 45 35	0 30 20 10	10 40 30 20	30 60 50 40	30 60 50 40	0 30 20 10
San Diego, CA	10 40 30 20	60 90 80 70	0 30 20 10	30 60 50 40	30 60 50 40	0 30 20 10	0 30 20 10
Baltimore, MD	30 60 50 40	45 75 65 55	0 30 20 10	25 55 45 35	30 60 50 40	10 40 30 20	0 30 20 10
Tampa, FL	25 55 45 35	55 85 75 65	10 40 30 20	0 30 20 10	10 40 30 20	30 60 50 40	0 30 20 10
Denver, CO	35 65 55 45	25 65 45 35	0 30 20 10	0 30 20 10	30 60 50 40	30 60 50 40	10 40 30 20
Cincinnati, OH	30 60 50 40	55 85 75 65	0 30 20 10	25 55 45 35	10 40 30 20	10 40 30 20	0 30 20 10
Kansas City, MO	35 65 55 45	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	30 60 50 40	0 30 20 10
Portland, OR	35 65 55 45	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	30 60 50 40	10 40 30 20
Charlotte, NC	30 60 50 40	25 55 45 35	30 60 50 40	0 30 20 10	30 60 50 40	0 30 20 10	0 30 20 10
Norfolk, VA	30 60 50 40	55 85 75 65	0 30 20 10	0 30 20 10	10 40 30 20	20 50 40 30	0 30 20 10
San Antonio, TX	35 65 55 45	30 60 50 40	0 30 20 10	25 55 45 35	10 40 30 20	20 50 40 30	0 30 20 10
Providence, RI	30 60 50 40	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	20 50 40 30	0 30 20 10
Columbus, OH	30 60 50 40	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	0 30 20 10	0 30 20 10
Louisville, KY	30 60 50 40	25 55 45 35	25 55 45 35	0 30 20 10	20 50 40 30	0 30 20 10	0 30 20 10
Indianapolis, IN	10 40 30 20	25 55 45 35	25 55 45 35	30 60 50 40	30 60 50 40	10 40 30 20	0 30 20 10
Oklahoma City, OK	35 65 55 45	0 30 20 10	0 30 20 10	25 55 45 35	30 60 50 40	30 60 50 40	0 30 20 10
Orlando, FL	35 65 55 45	30 60 50 40	25 55 45 35	0 30 20 10	30 60 50 40	0 30 20 10	0 30 20 10
Greensboro, NC	30 60 50 40	25 55 45 35	30 60 50 40	0 30 20 10	10 40 30 20	0 30 20 10	0 30 20 10
Dayton, OH	30 60 50 40	55 85 75 65	0 30 20 10	25 55 45 35	10 40 30 20	10 40 30 20	0 30 20 10
Jacksonville, FL	25 55 45 35	55 85 75 65	25 55 45 35	0 30 20 10	10 40 30 20	0 30 20 10	0 30 20 10
Richmond, VA	30 60 50 40	55 85 75 65	25 55 45 35	0 30 20 10	10 40 30 20	10 40 30 20	0 30 20 10
Albany, NY	10 40 30 20	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	30 60 50 40	0 30 20 10

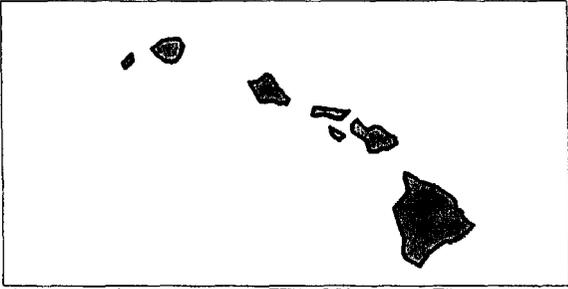
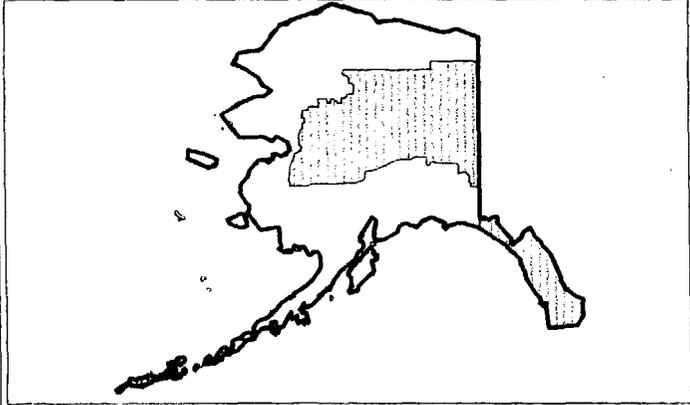
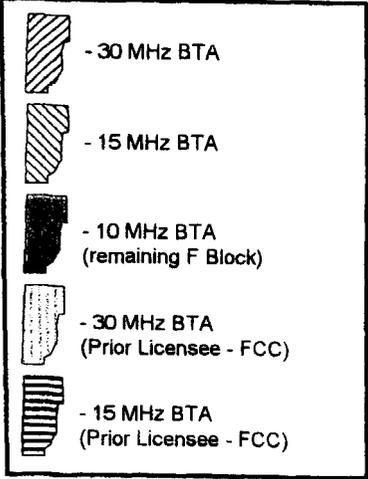
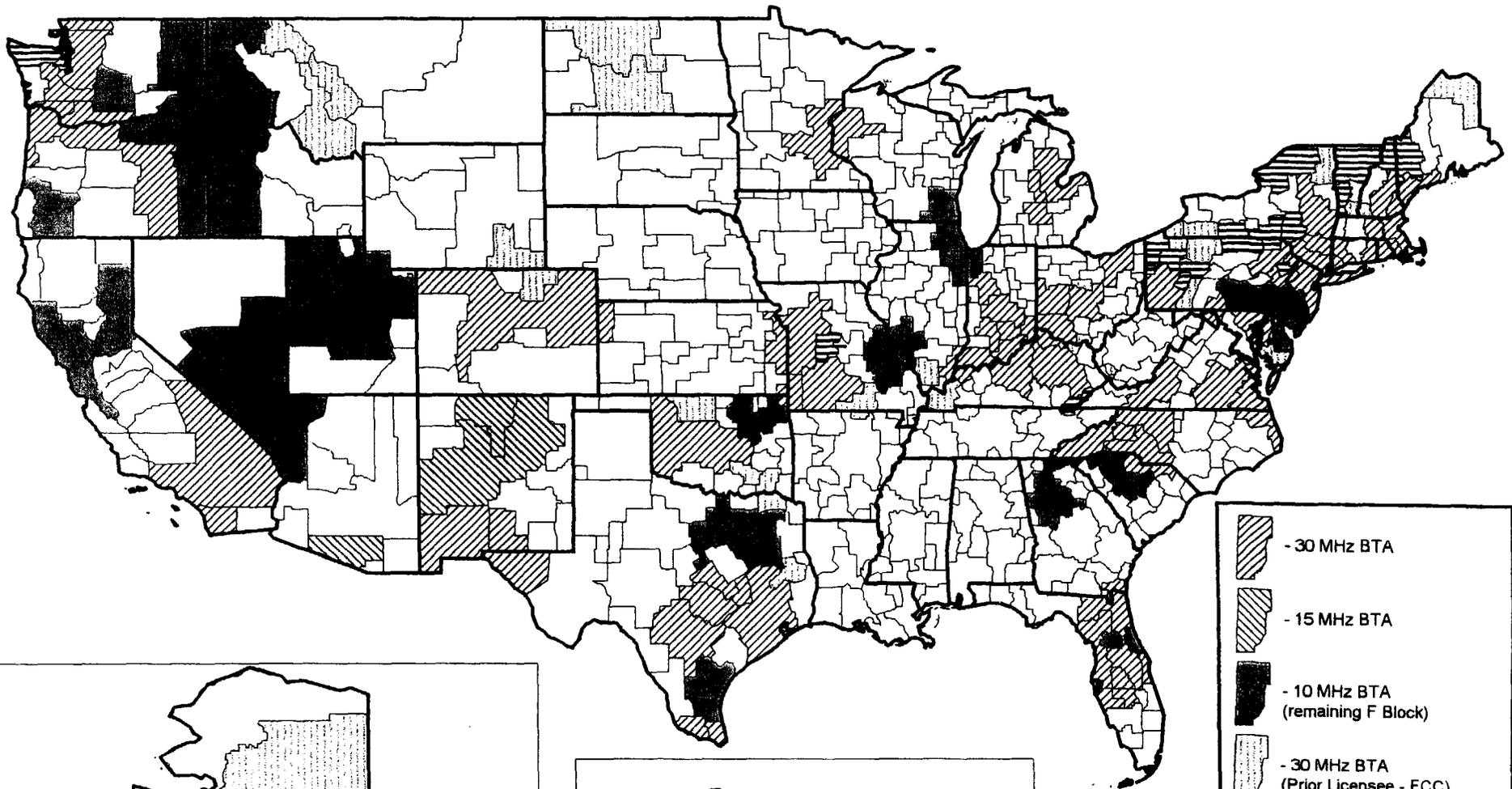
BTA/ Market Name	AT&T Wireless	Bell Atlantic/Vodafone/ Airtouch/GTE	BellSouth	SBC Comm.	Sprint PCS	VoiceStream/OmniPoint/ Aerial	US West
	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz	Current/FCC/Bulk Bid/10 MHz
New Haven, CT	20 50 40 30	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	30 60 50 40	0 30 20 10
Austin, TX	35 65 55 45	55 85 75 65	0 30 20 10	0 30 20 10	30 60 50 40	10 40 30 20	0 30 20 10
Lexington, KY	30 60 50 40	25 55 45 35	25 55 45 35	0 30 20 10	30 60 50 40	0 30 20 10	0 30 20 10
Worcester, MA	30 60 50 40	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	20 50 40 30	0 30 20 10
Albuquerque, NM	30 45 45 40	50 65 65 60	0 15 15 10	0 15 15 10	10 25 25 20	30 45 45 40	10 25 25 20
Allentown, PA	35 65 55 45	25 55 45 35	0 30 20 10	10 40 30 20	30 60 50 40	30 60 50 40	0 30 20 10
Scranton, PA	20 50 40 30	0 30 20 10	0 30 20 10	0 30 20 10	30 60 50 40	30 60 50 40	0 30 20 10
Tucson, AZ	30 45 45 40	50 65 65 60	0 15 15 10	0 15 15 10	30 45 45 40	20 35 35 30	10 25 25 20
El Paso, TX	30 60 50 40	50 80 70 60	0 30 20 10	0 30 20 10	20 50 40 30	30 60 50 40	0 30 20 10
Saginaw-Bay, Mi	30 60 50 40	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	10 40 30 20	0 30 20 10
Roanoke, VA	30 60 50 40	30 60 50 40	0 30 20 10	0 30 20 10	10 40 30 20	0 30 20 10	0 30 20 10
Manchester, NH	30 60 50 40	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	20 50 40 30	0 30 20 10
Springfield, MO	55 85 75 65	0 30 20 10	0 30 20 10	10 40 30 20	30 60 50 40	10 40 30 20	0 30 20 10
Sarasota, FL	25 55 45 35	55 85 75 65	10 40 30 20	0 30 20 10	10 40 30 20	30 60 50 40	0 30 20 10
Asheville, NC	30 60 50 40	25 55 45 35	30 60 50 40	0 30 20 10	10 40 30 20	0 30 20 10	0 30 20 10
Evansville, IN	30 60 50 40	25 55 45 35	25 55 45 35	0 30 20 10	30 60 50 40	0 30 20 10	0 30 20 10
Lansing, Mi	30 60 50 40	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	20 50 40 30	0 30 20 10
Portland, ME	55 85 75 65	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	10 40 30 20	0 30 20 10
Poughkeepsie, NY	20 50 40 30	25 55 45 35	0 30 20 10	0 30 20 10	30 60 50 40	30 60 50 40	0 30 20 10
McAllen, TX	10 40 30 20	30 60 50 40	0 30 20 10	25 55 45 35	30 60 50 40	10 40 30 20	0 30 20 10
Lakeland, FL	25 55 45 35	55 85 75 65	10 40 30 20	0 30 20 10	10 40 30 20	30 60 50 40	0 30 20 10
Melbourne, FL	35 65 55 45	30 60 50 40	25 55 45 35	0 30 20 10	10 40 30 20	30 60 50 40	0 30 20 10
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New London, CT	20 50 40 30	25 55 45 35	0 30 20 10	25 55 45 35	30 60 50 40	30 60 50 40	0 30 20 10
Binghamton, NY	45 60 60 55	25 40 40 35	0 15 15 10	0 15 15 10	30 45 45 40	30 45 45 40	0 15 15 10
Hagerstown, MD	30 60 50 40	0 30 20 10	0 30 20 10	0 30 20 10	30 60 50 40	10 40 30 20	0 30 20 10
Elmira, NY	45 60 60 55	25 40 40 35	0 15 15 10	0 15 15 10	30 45 45 40	30 45 45 40	0 15 15 10
Watertown, NY	20 35 35 30	0 15 15 10	0 15 15 10	0 15 15 10	30 45 45 40	30 45 45 40	0 15 15 10
Hickory, NC	30 60 50 40	25 55 45 35	30 60 50 40	0 30 20 10	10 40 30 20	0 30 20 10	0 30 20 10
Temple, TX	35 65 55 45	30 60 50 40	0 30 20 10	10 40 30 20	30 60 50 40	10 40 30 20	0 30 20 10

# Nextel PCS Block Reaction Bulk Bid



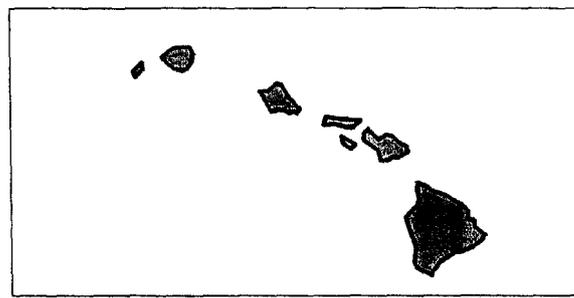
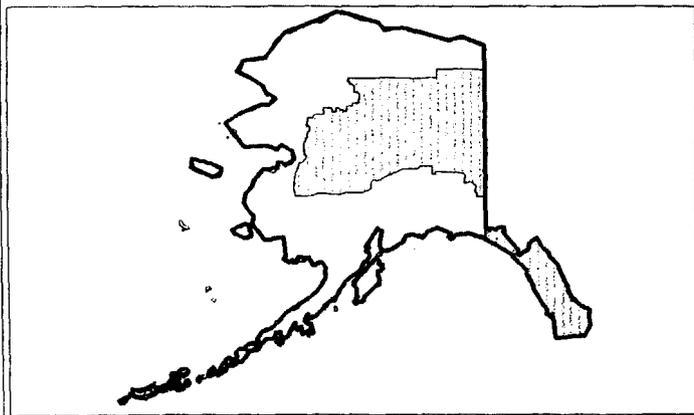
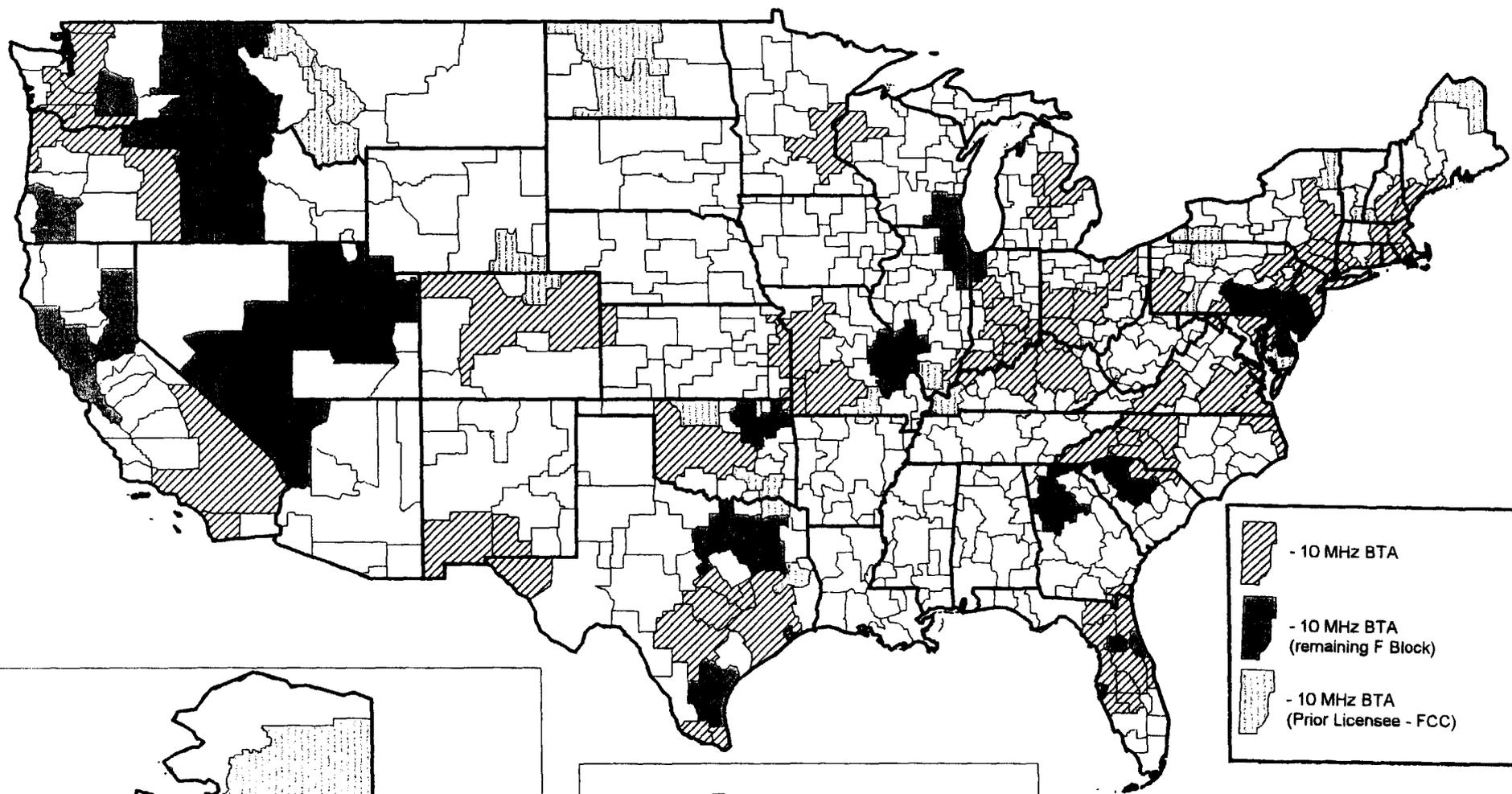
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# Nextel PCS Block Reauction



***Proprietary and Confidential***

# Nextel PCS Block Reauction July 26th



***Proprietary and Confidential***

COPY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
 )  
Amendment of the Commission's Rules )  
Regarding Installment Payment Financing )  
for Personal Communications Services (PCS) )  
Licenses )  
 )

WT Docket No. 97-82

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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Its Attorneys

June 22, 2000

## SUMMARY

Section 309(j) of the Communications Act requires that the Federal Communications Commission (the "Commission") develop Personal Communications Services ("PCS") auction rules that will bring the benefits of competition and new wireless services to *all* Americans. In 1994, the Commission determined that a set-aside of certain PCS licenses for small businesses (the C and F Block licenses) was necessary to carry out Section 309(j)'s mandate; *i.e.*, encouraging broad participation in the PCS auctions by small entrepreneurs that might otherwise be unable to bid successfully against large, well-funded companies.

Given, however, the hard lessons of the past five years of C Block licensee failures, and the competitive evolution of the wireless marketplace during that time, it is now evident that continuing to set aside the C and F block PCS licenses for small businesses in the upcoming PCS reauction will disserve the public interest. Despite the efforts of a few small businesses that have built out viable commercial networks, the C Block has been riddled with the bankruptcies of firms that did not have the financial ability to acquire this spectrum or to build and operate competitive wireless communications systems, particularly in metropolitan areas.

It will not be any easier in the future. Since the initial C Block auctions, incumbent cellular, other PCS licensees and Specialized Mobile Radio carriers have vastly expanded the geographic coverage, capacity and quality of their networks. These competitors have spent billions of dollars to build systems, establish their brand identity and launch service. With five intensely-competitive Commercial Mobile Radio Service ("CMRS") providers in most markets, it will be nearly impossible for an entity meeting the small business asset and revenue caps to obtain financing both for spectrum acquisition and the immense cost of building systems competitive with the coverage and services of incumbent providers.

Nextel commends the Commission for recognizing in the *Further Notice* the realities of the contemporary CMRS marketplace and proposing open bidding eligibility for some of the reauctoned C Block licenses. The Commission's tentative decision to maintain a small business set aside of one C Block license in markets above 2.5 million POPs (the proposed Tier 1), and two licenses in markets below 2.5 million POPs (the proposed Tier 2), recognizes that small businesses, as a result of the very factors that qualify them as small, are ill-suited to obtain, build out and operate capital-intensive CMRS systems.

The Commission's proposal does not, however, go far enough. Based on its own experience in building a nationwide CMRS network, Nextel has analyzed the costs a new entrant would incur to build and operate a 10 MHz CMRS system competitive with incumbent CMRS services. Given the cost of acquiring spectrum, and the even greater capital expenses required to enter the market with a competitive product *vis-à-vis* "mature" CMRS incumbents, few, if any, small businesses will be successful. Thus, continuing to set aside the C and F Block licenses for small businesses is unlikely to achieve the Commission's policy goals of assuring broader small business participation in the CMRS marketplace. On the contrary, it will lead to more bankruptcies and a lost opportunity to promote competition and the expeditious development of advanced wireless communications services such as the third generation services being developed in Europe.

Notwithstanding the above, if the Commission decides to maintain a small business set-aside, it should be limited to no more than a 10 MHz license in markets of under one million POPs – where true small businesses will have the greatest (albeit a limited) chance of market success.

Further, if any set-aside is maintained, it must be fine-tuned to avoid providing unintended and unjustified benefits to carriers that no longer need or truly qualify for a special bidding advantage. Specifically, the Commission must eliminate its “grandfathering” exception to the small business rules that allows participants in the initial C Block auctions to bid in the reauction *regardless* of their current size. The Commission time and again has stated that the C and F Block set-aside was intended to benefit small business that, according to the Commission, could not successfully compete with large entities in open auctions to acquire PCS spectrum. Given this, it makes no sense to grandfather the formerly small businesses that have grown or merged to many times beyond the Commission’s small business set-aside qualifications. Simply stated, they are no longer in need of this advantage and no longer qualify for it.

The Commission must also review its rules on reporting “total assets” for purposes of determining whether an entity qualifies under the “entrepreneur block” \$500 million asset cap, and must require applicants to report total assets as of the “short form” filing deadline. Finally, a once-qualified small business should not be grandfathered if, in total, it has undergone ownership changes of greater than 20 percent since its original license was issued.

If a set-aside is maintained without these changes, the Commission will be conducting an auction in which some multi-billion dollar entities participate as small businesses, while others are barred. Permitting some multi-billion dollar corporate “elephants” to participate in auctions intended for corporate “mice,” through misapplication of the Commission’s grandfathering policies, would make a mockery of the designated entity rules and would deny true small businesses any real opportunity to obtain set-aside licenses. Maintaining any grandfathering exception is contrary to the public interest, inconsistent with Congress’ objectives under Section

309(j), and is irrational, arbitrary and capricious. Accordingly, the Commission's grandfathering provisions for the C and F Block reauction must be eliminated.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	
Amendment of the Commission's Rules	)	
Regarding Installment Payment Financing	)	WT Docket No. 97-82
for Personal Communications Services (PCS)	)	
Licenses	)	
	)	

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> Nextel supports the Federal Communications Commission's ("Commission") tentative proposals to encourage broader participation in the reauction of the long-fallow C and F Block personal communication service ("PCS") spectrum and urges the Commission to take bold steps to ensure that this spectrum is put to its highest and best use. As the Commission finalizes the reauction rules, its overriding obligation, under Section 309(j) of the Communications Act of 1934, as amended, is to advance the development and competitiveness of wireless communications services. Nextel urges the Commission to take a comprehensive look at the developing wireless marketplace and make targeted rule changes that enhance competition.<sup>2</sup>

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<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Further Notice of Proposed Rulemaking*, WT Docket 97-82, FCC 00-197 (rel. June 7, 2000) ("*Further Notice*").

<sup>2</sup> See In the Matter of Reauction of Certain C and F Block Broadband PCS Licenses, *Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules*, filed by Nextel Communications, Inc. (Jan. 31, 2000) at 3-10. ("Nextel Petition"). Nextel requests that the Nextel Petition and associated pleadings be incorporated into this docket and considered by the  
*continued...*

## I. INTRODUCTION

The licenses that are the subject of this proceeding are available for reauction because of the failure of the Commission's well-intentioned attempts to carry out the policy objectives of Section 309(j) by reserving the 1.9 GHz C and F Block PCS licenses for entities that qualify as "entrepreneurs" or "small businesses." While this "set-aside" may have been justified when it was adopted in 1994, by the time the licenses were actually auctioned in late 1995 and early 1996, the wireless market had changed sufficiently so that it was no longer economically viable for small businesses to acquire licenses on a small market or "niche" service basis – as the Commission had contemplated in adopting the set-aside. Reacting to these developments, C Block "small businesses" such as NextWave Personal Communications, Inc. ("NextWave") bid on and won C Block licenses on a massive nationwide scale, only to declare bankruptcy on the same massive scale less than two years later.<sup>3</sup> Accordingly, since the C Block auction closed

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...continued

Commission when making decisions in this proceeding. *See, e.g.*, In the Matter of Petition of Nextel Communications, Inc. for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules, DA 00-191, *Reply Comments of Nextel Communications, Inc.* (Mar. 1, 2000) ("Nextel Reply"); In the Matter of AT&T Wireless Services, Inc. and BellSouth Corporation Petitions for Waiver and Expedited Action and Bell Atlantic Mobile, Inc. Petition for Limited Forbearance from the CMRS Spectrum Cap Limits, DA 00-318, *Comments on Petitions for Waiver of, or Forbearance from, Spectrum Cap Limits*, filed by Nextel Communications, Inc. (Mar. 3, 2000) ("Nextel Spectrum Cap Comments"); and In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Comments On and Opposition To Petition for Reconsideration*, filed by Nextel Communications, Inc. (Apr. 17, 2000) ("Nextel Opposition").

<sup>3</sup> *See, e.g.*, *In re Pocket Communications, Inc. and DCR PCS, Inc.*, Nos. 97-5-4105-ESD and 97-5-4106-ESD (Bankr. D. Md. filed Mar. 31, 1997); *In re GWI PCS1, Inc. et al.*, No. 3:97-39676-SAF-11 (Bankr. N.D. Tex. filed Oct. 10, 1997); *In re NextWave Personal Communications, Inc.*, No. 98-B-21529 (Bankr. S.D.N.Y. filed June 8, 1998); *In re Magnacom Wireless, L.L.C.*, No. 98-39048 (Bankr. W.D. Wash. filed Oct. 28, 1998); *In re NextWave Communicators PCS*

continued...

over four years ago, many C Block licenses in major market areas have languished unused, contrary to the prompt service and deployment mandates of Section 309(j).

The Commission subsequently recovered many of these licenses and announced its intent to reacquire them beginning July 26, 2000.<sup>4</sup> In January of this year, Nextel requested that the Commission open the C and F Block reacquire to all interested parties so as to best ensure that this long fallow spectrum is promptly put to use.<sup>5</sup> Detailing the significant changes that have occurred in the wireless industry since the C and F Block set-asides were adopted in 1994, Nextel demonstrated that the Commission's original vision for small business participation in the CMRS marketplace is no longer valid.<sup>6</sup> Nextel is pleased, therefore, that in the *Further Notice* the Commission has correctly concluded that expanding C Block bidding eligibility will best serve the public interest. In fact, the Commission should completely eliminate its proposed entrepreneur's block set-aside. Continuation of the set-aside will not guarantee successful entry of small businesses into commercial mobile radio service ("CMRS") service. On the contrary, it is likely to spawn additional future bankruptcies rather than increased competition.

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...continued

*Limited Partnership*, No. 98-47996 (Bankr. S.D.N.Y. filed Nov. 5, 1998); *In re Kansas Personal Communications Services, Ltd.*, No. 99-21747 (Bankr. Kan. filed July 19, 1999); *In re Airadigm Communications, Inc. d/b/a Wireless Communication PCS d/b/a Einstein PCS*, No. 99-33500 (Bankr. W.D. Wis. filed July 28, 1999); *In re Personal Communications Network, Inc.*, No. 99-20207 (Bankr. E.D.N.Y. filed Aug. 6, 1999).

<sup>4</sup> See Auction of C and F Block Broadband PCS Licenses; *Public Notice*; DA 00-49 (released Jan. 12, 2000). The *Further Notice* was released concurrent with a Public Notice that changed the auction start date to November 29, 2000.

<sup>5</sup> See Nextel Petition.

<sup>6</sup> Nextel Petition at 3-10.

If, however, the Commission decides to maintain a set-aside, it should be limited to a single 10 MHz license in Basic Trading Areas (“BTAs”) with populations at or below one million persons. This approach would preserve the set-aside where it has some small chance of achieving its intended public policy goals, while fostering increased competition and facilitating the ability of wireless providers to offer third generation (“3G”) and other advanced services comparable to those being developed by wireless carriers in Europe today.

If the Commission reserves any of this PCS spectrum under a set-aside, that set-aside must be available only to true small businesses and not entities that have outgrown the Commission’s original definition of “small.” For this reason, the Commission must eliminate its “grandfathering” exception to the C Block auction eligibility rules. If, however, the grandfathering policy is maintained, the Commission must ensure that it does not permit this unjustified windfall to extend to large, well-funded companies that should not qualify to bid on spectrum reserved for small businesses or entrepreneurs. Maintaining the grandfathering exception would eliminate any opportunity for true small businesses in the set-aside auction,<sup>7</sup> and instead would provide competitive advantages to companies that have grown far beyond the size of the small business revenue and asset caps through exploiting large loopholes in the current eligibility rules.

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<sup>7</sup> See Letter from John DeFeo, President and Chief Executive Officer, U.S. AirWaves, to William Kennard, Chairman, Federal Communications Commission (May 22, 2000) (explaining how U.S. AirWaves lost the opportunity to acquire PCS licenses in the original C Block auction because NextWave inflated its bids beyond economically justifiable limits).

## II. THERE IS NO LEGAL OR PUBLIC POLICY JUSTIFICATION FOR MAINTAINING SET-ASIDES

The *Further Notice* proposes to reconfigure available 30 MHz C Block BTA licenses into three discrete 10 MHz licenses, thus increasing the number of available C Block licenses from 88 to 264. The *Further Notice* also proposes to “tier” BTA markets and allow open bidding on two of the three new 10 MHz C Block licenses in those BTAs with a population of 2.5 million persons or more. In BTAs with less than 2.5 million persons, the Commission would permit open bidding on only one of the three 10 MHz C Block licenses.<sup>8</sup>

Nextel commends the Commission’s recognition that at least some of the C Block spectrum should be open to all bidders. However, by continuing *any* set-aside, the Commission is ignoring the inherent inconsistencies of a regulatory system that encourages a company with less than \$500 million in assets to embark on a business plan for which the upfront investment for spectrum, network capital expenditures and other start-up costs is greater than its ability to pay. This investment is required of the entity prior to selling a single product to any customer. Further, this small business, after spending hundreds of millions of dollars on spectrum and potentially hundreds of millions of additional dollars on infrastructure and deployment, would have to compete with at least five mature wireless providers with established brands in the fiercely competitive wireless telecommunications market.

Thus, there is no legal, policy, factual, or financial justification for setting aside the CMRS spectrum for “small businesses” since *true* small businesses – by definition – do not have and cannot attract the financial prerequisites to acquire, construct, and deploy a competitive

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<sup>8</sup> *Further Notice* at ¶¶ 28-30.

wireless telecommunications system in almost any BTA in the U.S. The upfront financial investment, as explained in greater detail below, simply requires more funding than a true designated entity can reasonably be expected to achieve. Yet, the Commission's proposal largely ignores this reality.

**A. The C Block Spectrum Should Be Open to All Qualified Bidders**

Inexplicably, the Commission proposes to continue a C Block set-aside in 174 of the 264 reconfigured licenses by reserving 10 MHz for qualifying small business entities in BTA markets with over 2.5 million POPs and 20 MHz in markets with populations under 2.5 million.<sup>9</sup> Under the Commission's proposal, nearly 66% of the reauctioned licenses would be reserved exclusively for small businesses despite the fact that small business entry will be more expensive and difficult today than it was five years ago for the initial C Block licensees. As demonstrated below, the proposal is not in the public interest. While small businesses should be encouraged through the use of bidding credits to bid on all licenses, a continued set aside would make ill-use of this spectrum.

**(1) The C Block Legacy Shows Small Businesses Are Ill-Suited to Obtain and Build Major Markets.**

The history of the C Block firmly establishes that entry into the CMRS marketplace at 1.9 GHz requires more capital than designated entities, restricted by the Commission's ownership and size qualifications, can reasonably expect to obtain. It is little wonder that NextWave, with

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<sup>9</sup> The proposed Tier 1 markets would include nine very large metropolitan areas ranging in size from over 18 million POPs in New York City to approximately 2.5 million POPs in the Pittsburgh, Pennsylvania BTA. Using the Commission's proposed threshold, the Tier 2 markets where 20 MHz would be set-aside would begin with the San Diego BTA, a market with an official population of 2.49 million, ranging down to the Logan, West Virginia BTA, with a population of approximately 43,000.

its designated entity-qualified limited assets, its limited operating experience, and facing increasingly aggressive competition, was unable to attract the billions of dollars of financing that was required to execute, build out and operate in major markets. Similarly, other small businesses – also restrained by the Commission’s designated entity rules – were unable to fulfill their commitments to the Commission and to the public. Nothing in the record suggests that true small businesses entering the market in 2000 or beyond will fare any better than nearly all of the designated entities that attempted to enter the marketplace in 1996-97. On the contrary, the record demonstrates that small businesses today will face even greater challenges – financially and competitively.<sup>10</sup> Thus, setting aside 10 MHz in any major market harms the public interest by artificially restricting the use of valuable spectrum resources.

Throughout this proceeding Nextel has advanced numerous factual and policy reasons that dictate opening all of the available spectrum for re-auction, eliminating the set-aside for small businesses, and using this opportunity to serve long-ignored rural communities.<sup>11</sup> Indeed, setting aside spectrum for entities that cannot perform or satisfy the principal statutory objective of the Budget Act – introducing additional competition – violates the Commission’s statutory

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<sup>10</sup> The initial C and F Block licensees were at least on the same general footing as the non-designated entity PCS licensees in having to compete as start-ups with the incumbent cellular operators. Now, however, due to the rapid buildout of A and B Block PCS and specialized mobile radio (“SMR”) incumbents, the circumstances are dramatically different. New set-aside licensees have little hope of garnering the financial and technical resources to match increasingly mature existing operations.

<sup>11</sup> See Nextel Petition at 11-16; Nextel Reply at 11-18. Nextel has, however, supported the continued use of small business bidding credits in lieu of the set-aside.

mandate.<sup>12</sup> The record irrefutably establishes that licenses in major metropolitan areas, as well as even medium size areas, are ill-suited to successful development by small businesses.<sup>13</sup>

The Los Angeles BTA provides a telling example. As the sixth or seventh player in the Los Angeles CMRS market, a new entrant offering “copy-cat” cellular service would be unable to achieve significant market share. A new entrant would therefore likely construct and deploy a third generation high-speed data and voice system (WCDMA).<sup>14</sup> To cover adequately the Los Angeles BTA, it would have to construct approximately 2,000 cell sites prior to launching service. In today’s market, unlike the cellular duopoly market of the 1980s, this small business new entrant cannot launch service before its coverage is comparable to that of its competitors,

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<sup>12</sup> While the courts generally defer to the Commission’s predictive judgment when establishing policy, in the present case, the Commission does not need to rely on predictive judgment. Indeed, the Commission has plain evidence that the set-aside does not advance competition in the CMRS marketplace. Thus, the Commission is foreclosed from continuing its set-aside of C and F Block spectrum for small businesses. *See, e.g., International Ladies’ Garment Workers Union v. Donovan*, 722 F.2d 795, 821-822 n.56 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) (“[T]here is no indication in [Supreme Court cases reviewing FCC decisions] that agencies can ignore important factors in making predictions, or can reach judgments that are irrational given the relevant evidence in the record.”)

<sup>13</sup> *See* John Sullivan, *The FCC Gets One Right with Spectrum Auction Revisions*, WIRELESS INSIDER, June 12, 2000, at 5 (“I still don’t think anyone that can pass C-Block eligibility requirements is going to be able to compete against the big boys in Tier 1 markets. That means that one of the new 10 MHz C-Block licenses in Tier 1 markets will be problematic. Either it will remain economically dead, or it will end up outside the normal channels, in the hands of some kind of specialized operator not competing directly with the voice giants.”).

<sup>14</sup> Nextel is making this assumption based on the changes and developments occurring in the global wireless industry. As the number of competitors increases and the technology continues to improve, a new entrant, offering nothing more than a digital cellular service – similar to the service that has now been available for five or more years and is being offered by a number of other parties – cannot distinguish itself. If a sixth or seventh entrant in the market cannot provide a differentiated product, or one that provides services competitive with those of the incumbents, the new entrant cannot attract a sufficient market share to support its enormous infrastructure and spectrum investment.

thus the need to construct some 2,000 cell sites prior to signing up even one customer. This number would have to increase to nearly 3,000 by 2009 to provide sufficient capacity for the carrier's subscriber base, assuming the carrier captured about 2 million subscribers.<sup>15</sup>

Such a network would require funding of approximately \$2.1 billion (mostly network capital expenditures), not counting the cost of acquiring the spectrum, before the carrier's operations become cash flow positive, which would occur at the earliest in 2007. Using the average cost of spectrum in the recently-completed spectrum auction in the United Kingdom of \$120 per POP, a 10 MHz license in the Los Angeles BTA would cost this small business approximately \$600 million.

Thus, to do nothing more than turn on the system, this new entrant, with total assets of \$500 million or less, would have to spend approximately \$2.7 billion. Even if this new entrant could generate profits from the business, it is highly unlikely that these profits would produce enough cash to fund even the interest payments on this \$2.7 billion – approximately \$390 million per year – much less make the principal repayment. This conclusion is highlighted in Exhibit 1, which estimates that the Net Present Value (“NPV”) of the 2001-2009 cash flows of this business opportunity in the Los Angeles BTA is a large negative number – *negative* \$300 million

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<sup>15</sup> See Declaration of Michael T. Sicoli attached as Exhibit 1. This subscriber number assumes total wireless market penetration of 77% in 2009 and a corresponding market share for this new entrant of 15% – an arguably aggressive carrier market share, given that this new entrant will be growing its customer base (beginning in the 2002-2003 timeframe) at a time when the rate of overall wireless growth will be slowing.

– indicating an extremely poor business proposition even before factoring in spectrum costs.<sup>16</sup>

Including spectrum costs, the NPV becomes *negative* \$900 million.

The investment required to build out a market, moreover, is not automatically reduced simply because the population of the market is lower: due to the propagation characteristics of 1.9 GHz spectrum and the requirements for providing high data rates, the geography of the metropolitan area has a significantly greater impact on the build-out cost than does population in most markets. Therefore, even analyzing a BTA smaller than Los Angeles, Nextel has concluded that market entry, in most cases, is financially prohibitive for a true small business. For example, construction of a 3G high-speed data network in Norfolk, Virginia, would require funding of approximately \$550 million before the carrier's operations become cash flow positive.<sup>17</sup> Adding in spectrum costs at \$120 per POP, the new entrant's total upfront investment would be approximately \$620 million. Interest alone on the debt to fund this investment would be approximately \$90 million per year. Similarly, a 10 MHz system with voice and high-speed data in the San Diego BTA would require funding of up to \$725 million in addition to spectrum costs, which based on the U.K. model, would be an additional \$100 million. The realities of

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<sup>16</sup> While Nextel's market analysis indicates that new market entrants will have negative cash flows if they attempt to be a new competitor in a particular BTA, established carriers, either carriers that already have a license in the market in question or that have established systems elsewhere, will have a very different set of cost and revenue figures. For these established carriers the value of the licenses is not negative, even at spectrum acquisition costs of \$120 per POP.

<sup>17</sup> Declaration of Michael T. Sicoli.

today's wireless telecommunications marketplace make small business entry cost prohibitive in most markets, and a set-aside block of spectrum is therefore not in the public interest.<sup>18</sup>

Given the ownership and financial restrictions the Commission has placed on companies seeking to qualify as designated entities, restrictions not shared by their competitors, these entities will be faced with difficult, if not impossible, hurdles to finance their start-up operations through equity – the manner in which most start-up companies get their businesses off the ground. Add to that their limited assets and lack of operating history, and these potential new entrant designated entities also will find it difficult, if not impossible, to convince lenders (particularly large lenders prohibited by the Commission's rules from exercising control over the entity) to provide the hundreds of millions of dollars – even billions in some cases – needed to construct and operate their systems. To the extent that a small business was able to secure financing in these amounts, the cost of that financing would be prohibitive, leaving the new entrant with no ability to earn a positive rate of return on its business. This conclusion is demonstrated in Exhibit 1, as the Net Present Value of the 2001-2009 cash flows for each of the three example markets (Los Angeles, Norfolk and San Diego) is negative, indicating that the return on these opportunities would not exceed the cost of capital.<sup>19</sup>

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<sup>18</sup> Some might argue that if a set-aside is maintained, small businesses will be able to cost effectively obtain licenses because they will limit their bids to per POP prices at which their businesses can be viable. Because, however, spectrum costs amount to ten percent or less of the total costs facing a new market entrant, lower prices in a designated entity-only auction will not be sufficient to change the economics of small business new market entry.

<sup>19</sup> Indeed, the only financial "out" for these companies would be to sell the licenses to an established carrier as soon as possible once the designated entity restrictions have ended. While this would enrich the small businesses who are able to obtain and "flip" licenses in this manner, it would do nothing to enhance competition long term.

**(2) If Any Set-Aside Is Maintained, It Must Be Limited to Markets Below One Million POPs.**

To the extent the Commission nonetheless believes a set-aside is required by Section 309(j), despite strong arguments to the contrary, it should be strictly limited. While any population number chosen will be somewhat arbitrary, Nextel believes this set-aside should be limited to a single 10 MHz license in only those markets at or below one million POPs.<sup>20</sup> Nextel's analysis demonstrates that, in a vast majority of the BTAs, a 10 MHz license at 1.9 GHz, constructed to accommodate the requirements for providing high data rates in third generation technologies, will provide the capacity necessary to serve any number of customers associated with a reasonable per-carrier market share.<sup>21</sup> For example, in Norfolk, the network constructed and placed in operation in 2003 will provide sufficient capacity to serve the carrier's

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<sup>20</sup> The arbitrariness of any population figure chosen to distinguish "Tier 1" from "Tier 2" licenses is underscored by the fact that the population figures that are being used for this auction are over 10 years old. Major population shifts have occurred over the past decade and if a population cut-off number is chosen, many markets will be placed in the wrong Tier if stale data is used. To illustrate, attached as Exhibit 2 is a comparison of the population figures being used in this reauction and 1999 estimated population figures. As the chart shows, a number of markets, such as San Diego, will be in the wrong Tier if the proposals in the *Further Notice* are adopted. In addition, as Nextel has already explained, any artificial cut-off will prevent bidders from aggregating adjacent market areas, contrary to economies of scope and scale and against the best interests of consumers. *See, e.g.*, Nextel Comments at n. 6 (explaining how if SBC's 700,000 cut-off is adopted, adjacent markets in the New York area will not be available to some bidders).

<sup>21</sup> The combination of a high-speed data system and the propagation characteristics of 1.9 GHz spectrum results in small cell site coverage areas, that leads to the construction of additional (smaller) cell sites. While this requires a greater capital expenditure up front, the system will have significant capacity, thus eliminating the need to construct "capacity" sites later.