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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 99-168
	)	
Carriage of the Transmission of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television	)	MM Docket No. 00-83
	)	

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.[1] Nextel supports the Federal Communications Commission's ("Commission") initiative to facilitate the band-clearing process and to advance the realization of commercial wireless operations in the 700 MHz band. As the Commission recognizes, the 700 MHz band potentially can be used for fixed broadband services and a variety of third generation wireless services.[2] The ability of new 700

[1] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99- 168; Carriage of the Transmission of Digital Television Broadcast Stations, CS Docket No. 98-120; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-83, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) ("*Further Notice*").

[2] *Further Notice* at ¶ 81.

MHz licensees to make early use of the spectrum they purchase at auction is of critical importance both to the parties interested in pursuing new commercial wireless opportunities and to the public interest in the United States not falling behind in the worldwide wireless market for advanced wireless services.

I. INTRODUCTION

Appropriately recognizing the importance of the 700 MHz spectrum to multiple interested parties, the Commission commenced this *Further Notice* to explore options to facilitate band-clearing of incumbent television broadcasters. Like other potential auction participants, Nextel is reviewing the issue of broadcast television incumbency and how the presence of broadcasters in the 700 MHz band impacts the relative value of this spectrum.

Nextel has a unique perspective on the challenges of rolling out service on encumbered spectrum. Nextel's entire operating history is against the backdrop of inter-operating with traditional SMR incumbents and negotiating in the secondary market to clear SMR spectrum for the introduction or growth of Nextel's iDEN operations. In fact, prior to the advent of the Commission's auctions of wide-area geographic licensing for SMR spectrum, all the band-clearing activity Nextel engaged in depended entirely upon striking deals to purchase the licenses of or to relocate 800 MHz SMR incumbents. Since the Commission initiated wide-area geographic SMR licensing, some of the SMR bands are subject to mandatory relocation frameworks while others are not. The relevant aspect of this is that Nextel has extensive experience in negotiating relocation of incumbent operators under frameworks that have regulatory deadlines and mandatory aspects, as well as negotiating relocation outside of any framework but the marketplace.

Nextel's experience has parallels in the Commission's emerging spectrum management policies. For example, in its November 1999 *Spectrum Policy Statement*, the Commission

acknowledged spectrum-clearing as an important mechanism to meet the increasing demand for spectrum:

> "[a]n important near-term step in meeting demand is the reallocation [of spectrum]. . . . To increase the amount of spectrum that is available, we plan to develop and encourage the implementation of market-oriented strategies for clearing encumbered spectrum. . . . One way to speed the clearing of spectrum is to provide incentives for existing users to relocate, either to different frequencies in another part of the spectrum or to a non-radio based transmission medium such as wire or fiber optic cable."[3]

The Commission's stated preference for market-based solutions, including voluntary spectrum relocation agreements, is rationally based on the notion that parties active in the market are in a better position to strike deals that are superior to governmentally-imposed, "one size fits all" solutions.

It is evident that the Commission is unable at this time to mandate any incumbent broadcaster participation in early 700 MHz relocation efforts. Nextel takes no position at this time on whether mandatory participation is desirable, however, there is a direct linkage between mandatory broadcaster participation in relocation and mandatory cost-sharing among new 700 MHz licensees. Without Commission rules that act as a backstop to discourage unreasonable behavior, there appears to be little or no public interest benefit in expending Commission resources to implement band-clearing or cost sharing rules that might have the effect of requiring some new 700 MHz licensees to pay for other 700 MHz licensees' mistakes or poor bargaining. Instead, Nextel believes that given the relatively small number of affected broadcasters and 700 MHz auction winners, post-auction negotiations among incumbent broadcasters, auction winners and, potentially,

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[3] Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868, ¶ 14 (1999) ("*Spectrum Policy Statement*").

broadcasters lower in the band, will likely produce voluntary omnibus agreements and voluntary cost-sharing arrangements.[4]

Thus, rather than expend time and resources to implement rules that will have little effect on the band-clearing process, the Commission should adopt a workable agenda that will govern incumbent relocation at the time relocation becomes mandatory. Such a framework would assist all parties by notifying them of the rules of the road at the stage where mandatory relocation can occur.

II. THE NEED FOR COST SHARING RULES

The *Further Notice* observes correctly that the early relocation of a broadcaster by a single new 700 MHz licensee often may have broader benefits, namely that other 700 MHz licensees (in the same and possibly in adjacent markets) could benefit from the elimination of the need to protect the incumbent broadcaster from harmful interference.[5] While the Commission tentatively concludes that market forces rather than cost-sharing rules would generate more fruitful and productive relationships among the prospective licensees and incumbent broadcasters, the *Further Notice* nonetheless requests comment on whether cost-sharing rules would be useful or necessary to assist in clearing the 700 MHz band.[6]

Because, in the present case, there are benefits external to any single new licensee, it is reasonable to believe that new licensees will be motivated to work together to achieve early

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[4] In this regard, the Commission should promote the most expeditious clearing of commercial broadcasters possible whenever such operations are incompatible with 700 MHz public safety services. The Commission has repeatedly recognized the importance of protecting future 700 MHz public safety operations throughout this proceeding. *See generally* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000). Voluntary band clearing should be encouraged to accommodate public safety in the 700 MHz band.

[5] *Further Notice* at ¶ 83.

[6] *Id.* at ¶¶ 82-82.

incumbent relocation where possible. Indeed, unlike several other situations where the Commission has intervened by creating mandatory negotiation and compensation frameworks, there is the prospect that both broadcasters as well as new 700 MHz licensees will have appropriate incentives to enter into cost-sharing arrangements without the need for rules.

For instance, as the *Further Notice* correctly points out, there are substantial differences between the point-to-point microwave relocation that occurred in deploying Personal Communications Services ("PCS") at 1.9 GHz, and the prospective relocation of channel 59-69 (700 MHz) broadcasters to other channel assignments, that may reduce the need for Commission intervention in broadcaster relocation cost sharing.[7] For one, PCS licensing took place in stages over several years and as a result, the earlier licensed PCS operators had to initiate relocation negotiations without knowing who the later entering PCS licensees would be and whether they would be willing to shoulder a portion of the microwave relocation costs. Literally hundreds of microwave operations required relocation, including a large number of public safety microwave licensees.

The 700 MHz band, on the other hand, will have far fewer affected parties. It is anticipated that all non-Guard Band 700 MHz licensees will be licensed at the same time. The number of new licensees will be no larger, and may be significantly smaller, than twelve. Similarly, the parties that must consent to early relocation, the UHF broadcasters on channels 59-69, are mostly organized into ownership groups that each control a number of television licenses. Thus, the total number of parties negotiating for early relocation will be relatively small.

[7] *Id.* at ¶ 83.

Moreover, unlike microwave licensees, broadcast licensees will not be subjected to mandatory relocation in the short run. The Commission cannot ignore the statutory framework that governs broadcaster relocations, although the Commission appropriately has indicated the standards it intends to apply to voluntary, early relocation requests.[8] Thus, because no broadcaster will be subject to mandatory relocation at any time before 2007, any agreement for early relocation would be voluntary. Accordingly, the deals will be unique to each broadcaster's situation, with some involving simple relocation, some involving the cessation of analog broadcast service pending transition to digital service, and others involving three-way swaps.

Under these circumstances, there is little utility in the Commission creating a cost sharing formula for relocation at this time. Because the variables are endless, inherently subjective and unique to each voluntary relocation situation, it would be difficult to develop fair cost-sharing rules.[9] Instead, the public interest would be better served by the Commission focusing its attention now on adopting a framework that will govern later mandatory relocation of broadcasters. Parties can then negotiate voluntarily with an understanding of the alternatives to not reaching voluntary arrangements.

III. PROPOSALS FOR VOLUNTARY BAND-CLEARING MECHANISMS

The *Further Notice* seeks comment on whether there are other mechanisms, particularly market-based solutions, that could be implemented to facilitate voluntary band-clearing. In

[8] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476, at ¶ 145 (2000) ("*First Report and Order*").

[9] Indeed, such rules might create a disadvantage for those licensees that believe another licensee has paid excessively to achieve early relocation of a broadcaster.

particular, the *Further Notice* asks whether the use of three-way agreements[10] and secondary spectrum auctions[11] would assist the Commission's efforts to clear the 700 MHz band.[12]

A. Three Way Agreements

The *Further Notice* states that "three-way voluntary relocation agreements could facilitate clearing in the 700 MHz band by providing a replacement (relocation) channel for incumbent broadcasters on Channels 59-69."[13] Nextel agrees that three-way agreements are one possible method of advancing early relocation.

Because, however, these three-way agreements would be voluntary: "In general, we are seeking comment on *voluntary* three-way agreements. . ."[14] the Commission should not seek to define their scope. Other than announcing its standards for review of early relocation requests, the Commission should not intrude in voluntary negotiations between market participants. Such interference would be contrary to the Commission's stated preference to "encourage[] [where possible] market forces and the business judgment of companies to dictate the formation of business relationships."[15] Moreover, it is important that all parties to the negotiations have reasonable

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[10] Pursuant to three-way clearing agreements, television incumbents on Channels 69-69 would be permitted to relocate to lower band TV channels that, in turn, would be voluntarily cleared by the lower band television incumbents. Pursuant to such agreements, the lower band broadcasters would give up one of their two channel allotments (either analog or digital), to which the Channel 69-69 incumbents would then move their operations.

[11] In a secondary auction, competitive bidding is used to determine the price paid by 700 MHz licensees to broadcast incumbents who agree to clear their channels in the 700 MHz band. This type of auction could be organized and conducted on a private basis or could be conducted by the Commission.

[12] *Further Notice* at ¶¶ 87-103.

[13] *Further Notice* at ¶ 87.

[14] *Id.* at ¶ 89.

[15] *See, e.g.*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act —

continued...

certainty that, in the event a three-way agreement is reached, the agreement can in fact be implemented. Without such certainty, the parties have no incentive to invest the time and the resources necessary to negotiate an agreement that may never be implemented.

B. Secondary Auctions

The *Further Notice* also requests comment on the use of secondary auctions to help clear the 700 MHz band and whether the Commission has the legal authority to conduct secondary auctions. In particular, the *Further Notice* asks whether Section 309(j) of the Act, which specifies that the Commission has the authority to conduct auctions for "initial" licenses, extends to a Commission-sponsored auction for 700 MHz band-clearing purposes.[16]

Pursuant to Section 309(j) of the Act, "[i]f mutually exclusive applications are accepted for filing for any *initial* license . . . then the Commission shall have the authority . . . to grant such license or permit to a qualified applicant through the use of a system of competitive bidding."[17] The Commission itself has stated that pursuant to Section 309(j) and the Balanced Budget Act of 1997, it is required to assign *initial* licenses by competitive bidding whenever mutually exclusive applications are accepted for filing, with only very limited exceptions.[18]

...continued

Competitive Bidding, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, at ¶ 33 (1999) ("For example, we have expressed our preference for allowing market forces to encourage voluntary agreements between broadband PCS licensees and rural telephone companies to accomplish partitioning.").

[16] *Further Notice* at ¶ 100.

[17] 47 U.S.C. § 309(j) (emphasis added).

[18] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Narrowband PCS, Second Report and Order and Second Further Notice Of Proposed Rule Making*, GEN Docket No. 90-314; ET Docket No. 92-100; PP Docket No. 93-253, FCC 00-159, n. 6 (rel. May 18, 2000).

Under a plain reading of the statute, it appears that a secondary, clearing-rights auction in conjunction with the auction of 700 MHz spectrum is not part of the Commission's auction authority.[19] Indeed, the Commission's auction authority appears to be contingent entirely upon the existence of an *initial* license for which mutually exclusive applications are filed.

Here, the initial licenses will be auctioned with the express condition that broadcast operations are to be protected from interference for the full statutory period failing early, voluntary relocation.[20] Consequently, unless the initial license application for the 700 MHz auction can somehow be deemed to include spectrum that is by statute excluded from the auction, it is difficult to envision how the Commission has the authority to conduct a clearing-rights auction.

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[19] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). ("If the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Saadeh v. Farouki*, 323 U.S. App. D.C. 239, 107 F.3d 52, 57 (D.C. Cir. 1997) ("If the language is plain on its face, courts do not ordinarily resort to legislative history.").

[20] *See First Report and Order,* 15 FCC Rcd at ¶ 145 (2000) ("Congress [] has directed us to auction the 36 MHz of spectrum for commercial use six years before the relocation deadline for incumbent broadcasters in this spectrum, while adopting interference limits and other technical restrictions necessary to protect full-service analog television service during the transition to DTV.").

IV. CONCLUSION

The Commission has posed a series of important questions that bear on the likelihood of early deployment of new wireless services in the 700 MHz band. As a potential auction applicant, Nextel agrees that the Commission should spend time now to fashion a framework that facilitates early deployment of new wireless services.

Respectfully submitted,

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