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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030, RM-8029
	)	
Implementation of Section 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding	)	PP Docket No. 93-253

To: Chief, Wireless Telecommunications Bureau

PETITION FOR EXPEDITED DECLARATORY RULING

Nextel Communications, Inc. ("Nextel"), by its attorneys and pursuant to Section 1.2 of the Commission's Rules (47 CFR. § 1.2) hereby files this Petition for Declaratory Ruling ("Petition") in the above-captioned proceeding to provide greater certainty in the relocation process between Economic Area ("EA") licensees and incumbents in the upper-200 SMR channel 800 MHz band.[1] Bureau action will facilitate completing negotiated relocation of incumbents for as many licenses as possible, thereby minimizing the number of incumbents subject to involuntary relocation. Because the mandatory negotiation period is currently scheduled to end after December 4, 2000, Nextel requests expedited consideration of this Petition.

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[1] Nextel License Acquisition Corp. ("NLAC"), a subsidiary of Nextel, acquired 475 EA licenses in Auction No. 16 for the upper-200 SMR channels of the 800 MHz band. Certain of the granted licenses have been transferred via pro-forma assignment from NLAC to another Nextel affiliate, Nextel WIP Corp. In addition, NLAC has since acquired other EA licenses. Nextel is conducting relocation negotiations for both NLAC and Nextel WIP Corp.

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As an EA licensee in the above-referenced proceeding, Nextel seeks the Bureau's assistance in securing basic, non-proprietary technical information from a small number of "holdout" incumbents. This basic technical information is necessary to enable an EA licensee to prepare a comprehensive "good faith" offer of relocation.[2] Section 90.699 of the Commission's Rules, 47 CFR § 90.699, conditions an EA licensee's right to request involuntary relocation of an incumbent on making a "good faith" relocation offer. Thus, providing the basic system technical information necessary for an EA license to make a good faith offer is part of an incumbent's legal obligation as a Commission licensee pursuant to the mandatory negotiation requirement of 47 CFR §90.699(b)(2).

Nextel therefore requests the Bureau to order incumbents, pursuant to their obligation to negotiate in good faith, to provide an EA licensee with the basic, non-proprietary technical data set forth at Appendix A. The Bureau should make clear that an incumbent's failure to provide this data when requested or to otherwise fail to negotiate in "good faith" may result in license revocation proceedings against the incumbent.

I. BACKGROUND

EA licensees purchased geographic licenses on Channel Blocks A, B or C in Auction No. 16 ("Auction") for the "upper-200" SMR channels of the 800 MHz band. Pursuant to Section 90.699 of the Commission's Rules, 47 CFR §90.699, EA licensees have the right to relocate incumbents in

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[2] Because of the lack of cooperation from "holdout" incumbents, Nextel has been forced to make some good faith offers based solely on public information, which is incomplete. These non-cooperating holdouts have failed to respond and/or accept these offers.

their respective channel block.[3] To facilitate rapid development of wide-area systems, the Commission adopted a requirement that incumbents and EA licensees *must* negotiate in *good faith* during a one-year *mandatory negotiation* period, which began on December 4, 1999. [4]

The vast majority of incumbents have cooperated with EA licensees, such as Nextel, to achieve agreements pursuant to the Commission's rules. To date, Nextel has already successfully reached agreements with **87%** of those incumbents in its EAs that Nextel has identified as necessary to clear the upper-200 channels. In addition, Nextel has made good faith offers of relocation to nearly all of the remaining incumbents that Nextel has so identified.

However, a very small minority of incumbents have refused to cooperate. Some incumbents have refused to respond to repeated written requests for basic technical data, such as the number of mobile units they serve, the kind of equipment they use, control channels, combiner scheme and similar basic information that enables an EA licensee to tailor its "good faith" offer to assure compliance with Section 90.699 of the Rules, 47 CFR § 90.699. Others have proffered excuses for not providing Nextel with their systems parameters.[5]

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[3] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *First Report and Order*, 11 FCC Rcd 1463 (December 15, 1995) and *Second Report and Order*, 12 FCC Rcd 19078 (July 10, 1997).

[4] This followed a one-year voluntary negotiation period which commenced December 4, 1998. *See, Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band*, 13 FCC Rcd 23381 (December 4, 1998).

[5] In one common ploy, the incumbent, sometimes through counsel, asks Nextel to demonstrate that it has sufficient channels to provide comparable spectrum for relocation. In such situations, Nextel has provided lists of its available replacement channels in the relevant location (e.g., the list may include 50 to 100 separate potential replacement channels for each incumbent channel), the incumbent still refuses to provide the data, sometimes with a terse statement that none of the listed channels would be suitable, but without explaining the technical or engineering basis for such a conclusion.

A small number of incumbents have explicitly taken the position that there is no requirement under the Commission's rules or policies for them to provide any technical data upon the EA licensee's request. Some of them assert that the EA licensee must first negotiate a complex and lengthy binding written contract of relocation before they will even consider providing any system technical data. This is akin to asking a building contractor to sign an agreement to renovate a home without first disclosing to the contractor any information about the existing structure itself. Compounding the problem, these incumbents have refused to consider Alternative Dispute Resolution to resolve any disagreements concerning "comparable facilities" or "retuning costs".

To tailor an optimum good faith offer, an EA licensee must have certain technical data about an incumbent's system(s), e.g., system protocol, actual transmitter height, combiner scheme, number of portables/mobiles, etc., as set forth in Appendix A. For example, a system designed to work for one manufacturer's equipment will not work with other types of equipment. Likewise, without knowledge of a licensee's combiner scheme, it is largely guesswork to select *specific* channels from the many channels that may be available as replacements. Without actual knowledge of the number of mobiles or portables on a system, costs of retuning the mobile and portable units cannot be determined.

Such data is not of a competitive proprietary nature. For example, it is not necessary to know the identity of an incumbent's customers, or the amount being charged by an incumbent to those customers. While the Commission's public database lists some information about an incumbent's licenses, it does not provide sufficient information to perform the four-factor comparability analysis set forth in 47 CFR §90.699, other than in a rough manner. A relocation plan based solely on publicly available information in the Commission's database would

necessarily result in very general plan, based essentially on number of channels and location.[6] The basic technical data set forth in Appendix A is needed to develop a concrete and actionable relocation plan that selects the appropriate channels and equipment to work with an incumbent's system(s). Pursuant to its obligation to negotiate in *good faith*, an incumbent licensee should be required to provide the appropriate EA licensees basic technical data upon request so that the EA licensee can make a comprehensive good faith relocation offer.[7]

II. THE INCUMBENT HAS AN OBLIGATION TO PROVIDE BASIC TECHNICAL DATA TO THE EA LICENSEE WHEN SO REQUESTED.

The Commission has determined that it is in the public interest to move rapidly to wide-area licensing in the upper-200 800 MHz band. The Commission expects both incumbents and EA licensees, to negotiate in good faith during the mandatory negotiation period in order to carry out the Commission's goals.[8] Upwards of 98% of incumbents are following this requirement. Allowing an incumbent to avoid the mandatory good faith negotiation process would frustrate implementation of the Commission's public interest determination and, as the Commission recently explained, "would be fundamentally inconsistent with our decision to clear incumbents

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[6] If this is all that is necessary for a good faith offer, the Commission should state so in response to this Petition. As discussed above, Nextel has attempted to more precisely tailor its relocation offers to incumbents.

[7] We note that the Commission has the authority pursuant to 47 USC § 308 (b) to request the Appendix A information from an incumbent licensee for the purpose of facilitating involuntary relocation. Nextel is making the instant request for a Declaratory Ruling in hopes of facilitating negotiated relocations.

[8] Section 90.699 (b)(2) requires that during the mandatory negotiation period, "both the EA licensee and the incumbent must negotiate in 'good faith.'"

from the upper 200 channel blocks so that EA licensees can implement their wide area systems."[9]

Commission precedent clearly establishes that common law principles should be applied in interpreting the good faith negotiation requirement, and that as part of this requirement an incumbent must share information needed to facilitate relocation. This good faith negotiation requirement was utilized to accomplish the relocation of incumbents in the microwave bands to "comparable spectrum" in order to facilitate Personal Communications Services ("PCS") operations. [10] The Commission's rules applicable to microwave facilities specifically provide that, "Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process." 47 CFR §101.73. Likewise, this exchange of information is necessary in any "good faith" 800 MHz relocation negotiations and the vast majority of incumbents have recognized their obligation to provide basic technical data upon request.

The microwave precedent serves as guidance in defining good faith negotiation requirements for other relocation proceedings. For example, a good faith negotiation

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[9] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act – Competitive Bidding," *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 17556, para. 41 (October 8, 1999) ("Second Reconsideration Order").

[10] "[W]ith respect to mandatory negotiations, we will (1) consider common law principles when interpreting the obligation to negotiate in good faith, (2) require the parties to share pertinent information, (3) place the burden on the party alleging bad faith to provide the Commission with cost estimates for comparable facilities, and (4) consider the following factors when evaluating claims of failure to negotiate in good faith: efforts to obtain estimates of the actual cost of relocating the incumbent to comparable facilities, whether either party has withheld information relevant to relocation, ..." Amendment of Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8828 (April 30, 1996).

requirement was imposed to accomplish the coordination of spectrum in the 2 GHz band for mobile satellite services ("MSS"). The Commission established that the same standards applicable to microwave incumbents in the PCS rulemaking would serve as guidance in interpreting the *good faith* obligation for other services, such as MSS.[11] In a recent order, the Commission specifically cited to the microwave relocation rule (47 CFR §101.73) for purposes of good faith negotiations to accomplish band clearing for MSS, stating, "Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process."[12]

These same fundamental principles apply for the purpose of interpreting the good faith negotiation obligation for 800 MHz relocations under 47 CFR §90.699 (b)(2). With regard to exchanging information, although an incumbent licensee is not required to disclose "competitively sensitive" information,[13] the incumbent is required under 47 CFR §90.699 (b)(2) to provide information needed to facilitate preparation by the EA licensee and discussion by the parties of a good faith relocation proposal. Failure by the incumbent to disclose the information needed by the EA licensee to prepare a plan for and to carry out relocation would frustrate the Commission's public policy determination to move rapidly to wide-area licensing in the 800

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[11] In the Matter of The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band," *Notice of Proposed Rulemaking*, 14 FCC Rcd 4843, 4846, n80 (March 25, 1999), *Report and Order*, ___ FCC Rcd ___, FCC 00-302 (August 25, 2000).

[12] In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, ___ FCC Rcd ___, FCC 00-233 at para. 38 (July 3, 2000).

[13] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act – Competitive Bidding," *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, para. 54 (July 10, 1997) ("Reconsideration Order").

MHz band. Therefore, the Commission should explicitly rule that failure by an upper-200 800 MHz incumbent to provide basic technical information requested by an EA licensee seeking to develop a good faith relocation proposal constitutes breach of the incumbent's obligation to negotiate in "good faith".[14]

III. THE COMMISSION SHOULD DECLARE THAT AN INCUMBENT LICENSEE THAT FAILS TO NEGOTIATE IN GOOD FAITH WILL BE SUBJECT TO LICENSE REVOCATION

An EA licensee loses its right to relocate the incumbent if it fails to negotiate in good faith with the incumbent.[15] This is a severe sanction for the EA licensee, in effect revoking its right to operate in that portion of the spectrum purchased at auction but covered by the incumbent. Similarly, equivalently severe sanctions must apply to incumbents that fail to negotiate in "good faith" or to provide the system-specific information that "good faith" negotiations require. Indeed, as the Commission recently made clear in the context of band clearing for MSS operations, **"Our goal is to ensure good faith negotiations by imposing sanctions which will outweigh any benefit a party may try to achieve through bad faith."**[16]

In order to encourage incumbents to fulfill their obligation to negotiate in good faith, and to facilitate the Commission's 800 MHz spectrum clearing policy, the Commission should declare that it intends to implement revocation proceedings against licensees that ignore or defy the Commission's mandate to negotiate in good faith during the mandatory negotiation period.

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[14] In addition to providing this information, an incumbent should be required to respond to any follow-up questions from an EA licensee reasonably related to the listed information.

[15] 47 CFR §90.699(b)(2).

[16] In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, __ FCC Rcd __ , FCC 00-233 at para. 47 (July 3, 2000) (emphasis added).

Specifically, this sanction should be imposed on those incumbents that fail to provide basic system-specific technical data, such as that listed in Appendix A, when specifically requested by an EA licensee.

Under Section 312 (a) of the Communications Act, (47 U.S.C. § 312 (a)) the Commission has the authority to revoke a license for willful violation of any rule of the Commission. Failure to provide basic technical data is a willful violation of an incumbent's obligation to negotiate in good faith under Section 90.699(b)(2) of the Rules, 47 C.F.R. §90.699(b)(2). These licensees are intentionally thwarting the Commission's goal of assuring wide-area commercial service to the public in the 800 MHz band and speculating for a greater payout through such bad faith. Unless the Commission acts decisively, these uncooperative incumbents will be rewarded for their actions, frustrating the clear public interest benefits of allowing for the creation of contiguous spectrum in the Upper 200 band and sending the wrong signal for future auctions where band clearing will be necessary and to the overwhelming number of incumbents that have cooperated in the current process.[17]

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[17] At the very least, an incumbent's failure to provide technical data needed to develop a relocation plan should create a strong presumption that a plan developed by the EA licensee based only on publicly available information meets the four-factor comparability test of 47 CFR §90.699. The Commission previously stated that, "for purposes of the mandatory negotiation period, an offer by an EA licensee to replace an incumbent's system with comparable facilities constitutes a good faith offer ... failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith," and that, "We feel that the time for expansive negotiation is during the voluntary negotiation period and that, by the time the parties have reached the mandatory negotiation period, only the bare essentials of comparability should be required." In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1587 (December 15, 1995) (emphasis added).

IV. CONCLUSION

Nextel has worked extremely hard to avoid any situation that would call for an involuntary relocation of an incumbent. The intransigence of certain incumbents, however, makes this extreme step a distinct possibility in a small number of cases. Given the fact that certain incumbents are unwilling to provide their most basic system information, an involuntary relocation to a comparable system without any disruption to the incumbent's operations is, in fact, impossible. In view of the foregoing, Nextel respectfully requests that the Commission grant the relief requested herein on an expedited basis.

Respectfully submitted,

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Date: October 26, 2000

APPENDIX A

LIST OF BASIC TECHNICAL DATA TO BE DISCLOSED BY AN INCUMBENT TO AN EA LICENSEE UPON REQUEST

Upon request by an EA licensee, an incumbent must disclose to the EA licensee the following technical data regarding the incumbent's system(s) as part of the mandatory good faith negotiation requirement of 47 CFR §90.699(b)(2) to facilitate preparation by the EA licensee and discussion by the parties of a good faith offer of relocation:

1. What protocol is being utilized on your system(s)? (Such as Motorola, LTR, EDACS, GMARK, or other? If other, please provide.)

2. How many discrete systems do you operate?

3. For each of your discrete systems, what frequencies are being utilized by those systems (both U200 and lower frequencies)?

Note: If you operate more than one system, please answer the following separately for each individual system.

4. What is the type and make of the system equipment (list each system individually):

   A) What type and model number of controller is used?

   B) What make, wattage, model number and quantity of repeaters are used? (Please list how many of each you utilize)

   C) What model number and make combiner(s) do you use? How many cavities are in your combiner? Do you own the combiner, or is it provided by the site owner?

   D) Are any of your systems interconnected? If so, which ones are and how many lines does each have?

   E) If interconnected, what type of equipment is used to handle your interconnect operations? What type of telco equipment do you use? (T1, etc.)

   F) How many TX antennas are utilized and what types are they? List actual antenna height on tower for each TX antenna.

   G) How many RX antennas are utilized and what types are they? List actual antenna height on tower for each RX antenna.

   H) For each combiner, please list your frequencies being utilized by each. If any other frequencies are programmed into the combiner (yours or a third party's) please list the frequencies and which combiner they are utilizing.

5. How many individual units do you bill monthly? How will you be able to verify this number?

   A. How many radios can not reprogram to frequencies in the 851 to 861 range?

   B. How many portables would you estimate are being billed on your system?

6. If a redundant system or repeaters are necessary, is there ample room in the building?

7. Would you like to engage an outside provider to perform the necessary retuning?

8. Other than the information requested above, is there any other equipment being utilized in conjunction with your system? If so, please explain and list in detail.

9. If there are any other issues that you feel need to be considered in evaluating the strategy for retuning your system please explain.

10. If you use Motorola protocol, which frequencies are being used as control channels on each Motorola system and what are the System Ids?

11. If you use LTR protocol, which channels are being utilized as home channels?

12. List each site location address, tower owner and site contact person and phone number.

13. Person to contact for clarifying technical information and their phone number.