CATALANO & PLACHE, PLLC
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 8, 2000

ORIGINAL

BY HAND DELIVERY
Ms. Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

EX PARTE OR LATE FILED

Re: Ex Parte Filing – PR-Docket No. 93-144

Dear Secretary Salas:

In accordance with Section 1.206 of the Commission's Rules, 47 CFR §1.1206, attached for filing in the above docket are two copies of an ex parte letter delivered today to Thomas Sugrue, Chief, Wireless Telecommunications Bureau. Copies of the letter were provided to the following staff of the Wireless Telecommunications Bureau: Richard Arsenault, Paul D'ari, David Furth and William Kunze.

Sincerely,

Albert J. Catalano

Albert J. Catalano

Attachment

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December 8, 2000

EX PARTE OR LATE FILED

BY HAND DELIVERY
Mr. Thomas Sugrue
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

EX PARTE PRESENTATION

Re: Extension of Mandatory Negotiation Period
PR Docket 93-144

Dear Mr. Sugrue:

We are writing on behalf of Nextel Communications, Inc. ("Nextel"), in response to the *ex parte* letter dated November 30, 2000, from Jack Richards, Esq., in PR Docket No. 93-144. Mr. Richards' letter, submitted on behalf of an undisclosed party, asks you "to confirm the Bureau's intentions" regarding the 90-day extension of the mandatory negotiation period announced by the Bureau on November 27, 2000.[1] For the record, Mr. Richards represents Mr. Michael Baird, an incumbent Specialized Mobile Radio ("SMR") licensee in the "upper 200" 800 MHz band pursuant to call sign WPCW916.[2]

In Mr. Richards' view, the extension of the mandatory negotiation period until March 5, 2001 applies only to those incumbents that were applicants in Auction Nos. 34 or 36. Mr. Richards also complains that the Bureau's Public Notice was issued "without benefit of public comment or any other type of input by affected incumbent licensees." Mr. Richards' interpretation is erroneous and should be rejected.

Nevertheless, in the event the Bureau reverses direction and decides now to restrict the extension in accordance with Mr. Richards' interpretation, Nextel submits that

[1] *See* "Wireless Telecommunications Bureau Extends Mandatory Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band Until March 5, 2001", *Public Notice*, DA 00-2672 (Rel. November 27, 2000).

[2] Mr. Richards' letter also suggests that Nextel has failed to negotiate in "good faith" in the context of the Commission's Section 90.699 relocation provisions. These allegations are entirely without merit. Moreover, these charges are inappropriate in the context of Mr. Richards' letter request seeking "confirmation" on the meaning of the Public Notice. Nextel is fully prepared in an appropriate proceeding to rebut these allegations and demonstrate that it has negotiated in good faith with Mr. Richards' client.

the across-the-board extension should, at a minimum, be granted until December 31, 2000. A limited continuation of the broad extension will minimize harm and disruption to negotiations that would result from the Bureau now revising the generally accepted understanding of its extension deadline. Both Economic Area ("EA") licensees and many incumbents have already relied on the clear statement of the Public Notice granting an across-the-board extension of the negotiating period. With sufficient notice, this will provide the necessary time to "wrap up" ongoing negotiations that have been continuing based on the understanding of a 90-day extension.

The Bureau's decision to grant a 90-day across-the-board extension is supported by the following legal and policy justifications:

1. **The clear language of the Public Notice unequivocally states that *both* the 90-day extension of the Mandatory Negotiation Period *and* the 90-day postponement of onset of the Involuntary Relocation Period applies to all incumbent licensees in the "upper 200" channels of the 800 MHz band.** [3]

    - There is no limiting language in the announcement that might restrict the extension of the mandatory negotiation period, or the corresponding delay in the onset of involuntary relocations, only to auction participants. The fact that the auctions are mentioned as a basis for the extension does *not* have the effect of limiting the extension only to auction participants.

    - The Bureau's Public Notice sets forth the paramount public interest justification for the extension, *i.e., to facilitate more negotiated relocations and reduce the need for involuntary relocations*, stating: "We believe that this extension will help facilitate the completion of relocation negotiations among incumbent licensees and EA licensees and reduce the number of instances in which EA licensees would need to initiate involuntary relocation procedures."

[3] The Bureau's Public Notice states, "[T]he Wireless Telecommunications Bureau (Bureau) hereby extends, for an additional 90 days, the mandatory negotiation period for the relocation of incumbent licensees in the upper 200 channels of the 800 MHz band. Accordingly, the December 4, 2000 expiration date for the mandatory negotiation period will be extended until March 5, 2000." The Public Notice also delays the onset of the involuntary relocation period for *all* incumbents, stating, "EA licensees may not initiate involuntary relocation procedures pursuant to Section 90.699(c) prior to March 6, 2001."

2. **The Commission already has interpreted the 90-day extension as applying across-the-board to all "upper 200" 800 MHz incumbents.**

   - On November 29, 2000, the Bureau issued another Public Notice requesting comment on Nextel's Petition for Declaratory Ruling in connection with interpreting the "good faith" requirement applicable during the mandatory negotiation period.[4] In that Public Notice, the Bureau made reference to the 90-day extension of the mandatory negotiation period, stating, "The Bureau recently extended the mandatory negotiation period 90 days, until March 5, 2000." [5]

   - This statement says nothing about the notion that the extension might be limited only to those incumbents that participated in Auction Nos. 34 or 36. <u>There is no reasonable doubt that the Bureau intended to grant an across-the-board extension.</u>

3. **There was appropriate public notice of Nextel's October 24, 2000 request and opportunity for public comment and input from affected parties.**

   - The October 24, 2000 letter request was filed in the Commission's rulemaking in PR Docket No. 93-144 as a written *ex parte* filing.

   - In accordance with 47 CFR §1.1206(b)(4), public notice of the October 24, 2000 letter was provided on October 30, 2000.[6] At least one party did submit comments in response to the Public Notice of Nextel's filing.[7]

   - Thus, there was sufficient public notice in accordance with 47 CFR §1.1206(b)(4)[8] to facilitate comment and input by affected incumbent licensees, and indeed there was such comment and input.

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[4] *See* "Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band", *Public Notice*, DA 00-2694 (November 29, 2000).

[5] *Id.* at fn.4.

[6] *See Public Notice* (October 30, 2000), attached hereto as <u>Exhibit 1</u>.

[7] *See* Letter from Michael A. Lee, President, Western Communications, Inc. to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (November 17, 2000) attached as <u>Exhibit 2</u>.

[8] *See* In the Matter of Amendment of 47 CFR §1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, *Report and Order*, 12 FCC Rcd 7348, para. 57 (March 19, 1997).

4. **Under its own rules and the Administrative Procedures Act, the Commission has the authority to take this action on its own motion without public notice because the extension is procedural in nature.**

- Under 47 CFR §1.925, the Bureau "may waive specific requirements of the rules on its own motion or upon requests." The waiver can be granted if the underlying purpose of the rules would not be served and grant of the waiver would be in the public interest, or if application of the rules would be inequitable, unduly burdensome, or contrary to the public interest. 47 CFR §1.925(b)(3).

- The Bureau has discretion on whether or not to give public notice of the filing of a waiver request and seek comment from the public or affected parties in conjunction with granting a waiver. 47 CFR §1.92(c)(i).

- It is well established that extensions of deadlines, cutoff dates, or other time limits under Commission rules, such as the waiver and extension granted in the instant proceeding, <u>are considered procedural in nature, and not subject to the notice and comments provisions</u> of the Administrative Procedures Act, 5 USC 553.[9]

- Because extensions of deadlines and commencement dates are procedural in nature, they are commonly made without prior public notice and on the Commission's own motion.[10]

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[9] *In re Application of Petroleum Communications, Inc. and Gulf Star communications, Inc. and Fluor Engineers, Inc.; For authority to construct Cellular Radio-Telecommunications Systems in the Gulf of Mexico*, 1984 FCC Lexis 1813 (October 18, 1984) ("establishment of a filing period and cutoff date is a purely procedural action exempt from APA notice and comment rulemaking, according to long-standing precedent"); *In the Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service*," 10 FCC Rcd 7074, 7094 (June 21, 1995) ("The APA by its express terms exempts procedural rules from the notice and comment requirements governing substantive rules, 5 USC Sec. 553(b)(A), and thus the Commission was not required to provide any notice or comment before modifying its cut-off procedures").

[10] *In the Matter of Federal-State Joint Board on Universal Service; Universal Service Support for Eligible Schools and Libraries; Year 3 Filing Window*, 15 FCC Rcd 13932 (June 8, 2000) (Commission on its own motion extended filing window deadline established under 47 CFR §54.507(c)); *In the Matters of Implementation of the Local competition Provisions of the Telecommunications Act of 1996; Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Expedited Declaratory Ruling on Interstate IntraLATA Toll Dialing Parity or, in the Alternative, Various Other Relief*, 14 FCC Rcd 5263, 5265 (March 23, 1999) (Commission granted on its own motion a limited waiver of the rule establishing a deadline for full implementation of intraLATA toll dialing parity and the rules establishing a schedule for Commission review of intraLATA toll dialing parity plans); *In the Matter of: Amendment of Section 22.949 of the Commission's Rules to Provide for a Moratorium on Acceptance of Unserved Area Cellular*

5. **The across-the-board extension is clearly procedural as it places no additional burden on any incumbents.**

    - The extension benefits incumbents by providing additional opportunity to continue to negotiate prior to being subject to involuntary relocation.

    - Incumbents that have not negotiated in good faith will have an opportunity to rehabilitate themselves.

    - Any incumbent that believes it has met its obligation to negotiate in good faith is not required by the extension to do anything more; in other words, the extension imposes no new burden on any incumbent.

    - For situations where negotiations have reached an impasse, action by the Commission on the Petition for Declaratory Ruling could assist in breaking the deadlock, to the benefit of both parties.

6. **As set forth in the Bureau's Public Notice, the Bureau made a public interest determination that this across-the-board extension is justified because it will help facilitate the completion of relocation negotiations among incumbent and EA licensees and reduce the instances in which EA licensees would need to initiate involuntary relocation procedures.**

    - The extension serves the public interest by helping to move incumbents out of the "upper 200" 800 MHz channels, thereby facilitating the establishment of EA operations in this band.

    - The timing of Auction Nos. 34 and 36 directly impacted negotiations with incumbents in the auctions and indirectly impeded negotiations with other incumbents not in the auctions. The prohibition on negotiating with the auction participants influenced negotiations with non-auction participants, since commitments to incumbents not in the auctions could affect the scope of commitments that EA licensees could subsequently make to auction participants during later negotiations. Thus, the timing of the auctions had a ripple effect on non-auction participants, requiring an across-the-board extension.

    - Without the across-the-board extension, there will be a significant number of involuntary relocation proceedings brought before the Commission involving non-auction participants. Nextel estimates that it would initiate

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Applications Within the National Radio Quiet Zone, 15 FCC Rcd 2728 (February 9, 2000) (Commission, on its own motion, waived regulatory cutoff date for cellular buildout requirements).

about 100 such cases. The extension provides additional time to resolve these situations.

- The extension also will allow the Bureau to address the "good faith" issues raised in Nextel's Petition for Declaratory Ruling prior to the end of the mandatory negotiation period, which could well facilitate additional negotiated relocations, and in turn, reduce the number of involuntary relocations.

- In addition to reducing the administrative burden on the Commission from involuntary relocations, the extension will reduce the burden on incumbents that will otherwise be subject to involuntary relocation proceedings, will reduce the disruption to the business of both EA licensees and incumbents, and will speed the transition to EA operations in this spectrum.

- The completion of Auction Nos. 34 and 36[11] has made available additional 800 MHz channels that may help to facilitate completing negotiated relocations, and the extension is needed so that these channels can be used in this regard.[12]

In sum, Nextel submits that Mr. Richards' suggested interpretation of the November 27, 2000 Public Notice should be rejected.

Very truly yours,

Albert J. Catalano
Matthew J. Plache

Counsel for Nextel

CC: David Furth, William Kunze,
Paul D'ari, Richard Arsenault,
Jack Richards, Esq.

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[11] On December 7, 2000, the Bureau announced, via Public Notice, the completion of Auction 36. See DA 00-2752.

[12] This issue was raised in the comments submitted by Western Communications, Inc. (Exhibit 2 hereto). When the original deadline for the end of mandatory negotiations and the onset of involuntary relocations was established several years ago, much of the industry was anticipating that the "lower 150" and "lower 80" auctions were going to be held many months sooner than they eventually were held, which would have allowed more time for the auctions to bring benefit to the relocation process before the end of mandatory negotiations.

EXHIBIT 1

PUBLIC NOTICE

Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

News media Information 202/ 418-0500
Fax-On-Demand 202/418-2830
Internet: http://www.fcc.gov
ftp.fcc.gov

Released: October 30, 2000

Prepared by the Office of the Secretary

Ex Parte Presentations and Post-Reply Comment Period Filings
In Permit-But-Disclose Proceedings

The following is a list of ex parte presentations and Post-Reply Comment Period Filings received by the Commission's Secretary between **October 18 and October 24, 2000.** For your reference, a public notice released March 24, 2000, briefly describes the most commonly listed docket numbers; this notice can be found at the FCC's Internet website as cited above. Copies of the following written presentations and memoranda reporting oral presentations, if they relate to docket proceedings, are available for inspection and copying in the appropriate docket in the FCC Reference Center (Room CY-A257,445 12th Street, SW). The FCC Reference Center is open Monday through Friday, 9:00 AM to 4:30 PM. After a brief period, presentations concerning non-docketed proceedings are available only in the appropriate bureau.

The duplicating contractor, ITS, Inc., will provide, for a fee, copies of the material listed below. ITS, Inc. has offices at 445 12th St., S.W. in Room CY-B400 (202-314-3070), and at 1231 20th St., N.W. For additional information, contact Barbara Lowe, Office of the Secretary, at (202) 418-0310.

Date Received	Presentation by:	Presentation to:	Oral	Written	Docket No.
10/24	Nextel Communications, Inc.	Wireless Telecommunications Bureau		X	PR 93-144
10/24	Rural Task Force	Common Carrier Bureau	X		CC 96-45
10/20	Motorola, Inc.	Ofc. of Cmsr. Tristani Wireless Telecommunications Bureau	X X		WT 96-86
10/23	Com-Net Ericsson Critical Radio Systems	Wireless Telecommunications Bureau		X	
10/24	Competitive Telecommunica-tions Association et al.	Chairman Kennard Enforcement Bureau Common Carrier Bureau	X X X		CC 96-98
10/23	Verizon	Common Carrier Bureau		X	

EXHIBIT 2

EX PARTE OR LATE FILED

MOTOROLA 2-WAY RADIO AUTHORIZED DEALER

Western Communications, Inc.

3108 S. HIGHWAY 79 • RAPID CITY, SD 57701 • PHONE 605-342-7885

NATIONAL MOTOROLA COMMUNICATIONS SERVICE

November 17, 2000

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A-325
Washington, DC 20554

RE: EX PARTE, PR-Docket No. 93-144,

Dear Secretary Salas,

In accordance with Section 1.206 of the Commission's rules, Western Communications, Inc. hereby provides an original of this letter and two copies of the enclosed letter mailed today to Thomas Sugrue, Chief of the Federal Communication Commission's Wireless Telecommunications Bureau. This filing should be associated with the above-captioned proceeding.

Thank you for your attention in this matter.

Respectfully,

Michael A. Lees
President
Western Communications, Inc.

No. of Copies rec'd 0+1
List A B C D E

MOTOROLA 2-WAY RADIO AUTHORIZED DEALER
Western Communications, Inc.
3106 S. HIGHWAY 79 • RAPID CITY, SD 57701 • PHONE 605-342-7885
NATIONAL MOTOROLA COMMUNICATIONS SERVICE

November 17, 2000

Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Opposition to Nextel's request for Extension of Mandatory Negotiation Period: EX PARTE, PR Docket 93-144

Dear Mr. Sugrue,

It has recently come to my attention that Nextel has submitted an October 24, 2000 request to your office to extend the Mandatory Negotiation Period between all 800 MHz upper-200 SMR channel EA licensees and the upper-200 channel incumbent licensees. I strongly oppose any extension of the Mandatory Negotiation period or any other Nextel ploy to further gain additional advantages in their negotiations with the incumbent licensees.

The realities of the negotiation process between Nextel and incumbent licensees are quite different that the ridiculous explanation presented in Nextel's October 24, 2000 letter written by Lawrence. R. Krevor. First of all, there were only a handful of incumbents involved in Auction 34 for the Lower 150 General Category 800 MHz. channels and in Auction 36 for the 80 SMR channels. Not counting Nextel, there were only 25 other bidders in Auction 34 and only 27 in Auction 36. It seems extremely presumptuous of Nextel to request a change in an FCC ruling because Nextel could not talk to 52 out of the thousands of 800 MHz. incumbents.

Further, I disagree with Mr. Krevor's statement that "both EA licensees and incumbents have lost a significant amount of time to complete relocation transactions". From my personal dealings with Nextel, it is my perception that Nextel deliberately delayed negotiating with incumbents until the completion of Auction 34 where they acquired additional channels they could use for relocation. The only semi-realistic relocation offer I have received from Nextel came immediately after Auction 34. This relocation offer was entirely comprised of Auction 34 general category channels where Nextel was the high bidder, but where licenses have not yet been issued by the FCC.

MOTOROLA 2-WAY RADIO AUTHORIZED DEALER

Western Communications, Inc.

3106 S. HIGHWAY 79 • RAPID CITY, SD 57701 • PHONE 605-342-7885

NATIONAL MOTOROLA COMMUNICATIONS SERVICE

Nextel wasn't inconvenienced by FCC Auction 34, they were overjoyed by the negotiating advantage granted to Nextel by the FCC by having the auction before the end of the Mandatory Negotiation period for the Upper 200 SMR channels. For any area where Nextel was faced with a shortage of channels to exchange during relocation, all they had to do was wait until the conclusion of Auction 34 to gather up all the trading stock they needed. It takes a remarkable amount of nerve on Nextel's part to stall negotiations until a huge competitive negotiating advantage is dropped in their lap and then come to the FCC and request more time to use this new advantage! Every incumbent licensee I know was ready to negotiate the day after the Upper 200 channel 800 MHz auction, but it takes two parties to negotiate. Nextel was well aware of the incumbent landscape and the time frame for negotiations, before they ever got into the Upper 200 SMR channel auction and should not be granted any extension for negotiations.

Finally, it would appear to me that the FCC has already answered this question in DA 00-1602, the FCC response to: Emergency Motions of Small Business in Telecommunications(SBT) for Stay of the 800 Mhz Specialized Mobile Radio (SMR) Service Auctions. The FCC has concluded in the final sentence of paragraph 6 in DA 00-1602: " Although we recognize that upper channel incumbents are currently in the second phase of the three-phase process the Commission established, we believe that 18 to 20 months provides a reasonable opportunity for incumbents to relocate."

The FCC clearly established it's position when the incumbents, through their SBT spokesman, sought a delay in an effort to merely keep the same ground rules as originally established by the FCC in the Upper 200 SMR channel auction. It would now seem appropriate that the FCC would continue this position when Nextel seeks to gain yet another negotiating advantage.

Respectfully,

Michael A. Lees
President
Western Communications, Inc.