Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 06-169
The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010	)	WT Docket No. 96-86

To: The Commission

COMMENTS OF RADIOFONE NATIONWIDE PCS, L.L.C.

Radiofone Nationwide PCS, L.L.C. ("Radiofone") hereby submits the following comments in response to the Commission's *Notice of Proposed Rulemaking* (*"NPRM"*) in the above captioned proceeding, regarding issues relating to the reallocation of 700 MHz Guard Band spectrum returned to the Commission by Nextel Communications, Inc. ("Nextel").[1] As discussed below, Radiofone supports the proposal of Access Spectrum, L.L.C., Columbia Capital III, Intel Corporation and Pegasus Communications Corporation (collectively "Access") to relax certain technical and use restrictions so as to facilitate more flexible operations on the commercial 700 MHz Guard Band spectrum. However, Radiofone must oppose any proposal to

[1] *Notice of Proposed Rule Making*, FCC 06-133, 71 Fed. Reg. 55149 (September 21, 2006)

involuntarily confiscate spectrum from prior auction winners, thereby undermining the expectations of all present and future auction participants and investors. However the Commission ultimately decides to re-license the 700 MHz Guard Band spectrum returned by Nextel, the Commission must not strip the existing Guard Band Block B licensees of their spectrum.

I. Statement of Interest

Radiofone is the successful bidder on the license for 700 MHz B Block Guard Band license WPRV424, for the Gulf of Mexico (MEA 052B). The Commission can take official notice that the principals of Radiofone (through Radiofone, Inc. and related entities) have long been involved in the provision of valuable communications services to the public in the Gulf Region, as a regional paging licensee and the A Block cellular licensee for the New Orleans, Baton Rouge and Houma-Thibadoux Metropolitan Statistical Areas, prior to the sale of these operations. Indeed, Radiofone's principals acquired one of the first paging licenses awarded by the Commission; and they won the New Orleans cellular license pursuant to a comparative hearing, upon demonstrating their technical, legal and financial qualifications, and superior service proposal. This A Block cellular operation was built by Radiofone into a viable competitor against BellSouth, the holder of the B Block license. Radiofone acquired the Gulf of Mexico Guard Band license given its roots in the Gulf Region, and its demonstrated ability to develop new services. Radiofone would be adversely affected by any proposal to "reclaim" spectrum it won in the 700 MHz Guard Band auction, or to otherwise reconfigure its license.

II. The Commission Must Protect the Rights of Incumbent Licensees.

In its June 6, 2006 "Optimization Plan" proposal filed in WT Docket No. 96-86 and related comments, Access urges the Commission to reconfigure the 700 MHz commercial Guard Bands, with the intent to create more spectrum for broadband radio services, including services that may be used by public safety entities. As part of this reconfiguration, Access requests the Commission to take spectrum away from the existing B Block licensees (including Radiofone), as a way to enhance the amount of spectrum available for other 700 MHz spectrum blocks. Radiofone applauds Access' desire to explore the more efficient provision of broadband services in the 700 MHz bands, and supports certain rule changes proposed by Access, as discussed below. However, any forcible confiscation of spectrum from existing licensees that are not part of the Nextel voluntary surrender plan or the Optimization Plan would wreak havoc on the Commission's auction process.

Auction participants must be able to count on predictability in the auction process – *e.g.*, that if they buy a license at auction, spectrum will not be reconfigured or confiscated during their license term without their consent – or such entities will be discouraged from participating in future auctions. Spectrum auctions require considerable time and expense, and involve the making of choices and formulation of business plans to the exclusion of other courses of action. Auction winners must know that their purchase of spectrum will not be disturbed afterwards, except under the most extraordinary of circumstances. Investors and financiers must know that their investments will not be undercut after the auction, or they will not provide the capital necessary to develop new services and spectrum may not be used to its full potential.[2] The FCC

[2] *See* Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 111 (1997) ("If spectrum users and their financial supporters are not

has long recognized that regulatory certainty is critical to providing the industry with incentives to make investments in new technologies and services.[3]

Moreover, auction winners are entitled to the benefit of their successful bidding, and the risk that they have undertaken. They should not have to be concerned that a few years later someone will envision another, arguably more profitable use for the spectrum that was won at auction. Otherwise, auction licenses could come under a never-ending series of challenges by entities that believe they have come up with a better way to use the spectrum. Business plans cannot be made in such an environment.

In this instance, Radiofone and nine other licensees participated in the 700 MHz Guard Band auction, were successful bidders, and were each awarded a license. Their expectations as licensees must be protected, or future auction participants (especially

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reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum…. In the absence of such certainty, the spectrum may not be used to its full potential and the public may fail to realize its full value.")

[3] 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, *Order on Reconsideration of Third Report and Order*, 24 CR 727, 16 FCC Rcd 21633 at ¶ 21 (2001); *see also* 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHz CMRS Spectrum Cap, Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, *Report and Order*, 15 FCC Rcd 9219, 9243 ¶ 51 (1999); *see also* Report and Order, WT Docket Nos. 03-103 and 05-42, 70 FR 76414, 76416 (December 27, 2005)(FCC declines to depart from Part I bidding credit schedule, "which the Commission has used effectively since 1997 to promote the participation of small businesses in auctions *and whose predictability is helpful to small businesses in the business planning and capital fundraising process .*" [emphasis added]); *see also* March 24, 1998 Statement of Commissioner Susan Ness, Amendment of the Commission's Rules Regarding Installment Payment Financing for C block Personal Communications Service (PCS) Licensees, WT Docket No. 97-82, 11 CR 873, 63 FR 17111, 13 FCC Rcd 8345 (1998) ("Moreover, financial markets need regulatory certainty and predictability of outcomes. Otherwise the regulatory risk is too great to warrant investment."); *see also* Amendment of Part 1 of the Commission's Rules--Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 386 ¶14 (1997) ("We believe that standardizing the rules regarding definitions of eligible entities, unjust enrichment and bidding credits will assist small, minority and women-owned businesses because the rules' predictability will facilitate the business planning and capital fundraising process.").

small businesses and other designated entities) will find that potential lenders, investors and other capital sources will refuse to make the necessary funding available.

Aside from the adverse policy consequences of confiscating spectrum from existing auction winners, such action would be contrary to the licensing scheme established by Congress. Such confiscation is tantamount to a license revocation. In Section 312(a) of the Act, Congress made it clear that licenses are to be revoked only under the most extraordinary of circumstances, generally related to egregious misconduct by the licensee:

> The Commission may revoke any station license or construction permit—
> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;
> (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
> (3) for willful or repeated failure to operate substantially as set forth in the license;
> (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
> (5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;
> (6) for violation of section 1304, 1343, or 1464 of title 18; or
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.[4]

None of the above circumstances is present here. Instead, the Commission is presented with the question of whether the B Block would be better used in the hands of

other entities. Congress has given the Commission an indication about its view on such "after the fact" judgments. In Section 310(d) of the Act, Congress established the mechanism for Commission approval of license transfers. While Congress authorized the Commission to approve proposed transfers of control, it expressly forbade the Commission from considering whether the license would be better suited for a third party, by decreeing that "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."[5] While Section 310(d) does not directly address the current situation, it is respectfully submitted that the Congressional imperative contained therein – that the Commission should not second guess which entity will best use the spectrum *after* a license has been awarded – must be taken into consideration in this proceeding. In this instance, the Commission is presented with a proposal that in part entails taking spectrum from one licensee and giving it to a potential competing licensee – as would apparently be the case for Radiofone.

The Commission has in rare instances previously found that the public interest was served by reallocating existing spectrum for another use. For example, in ET Docket No. 92-9, the Commission reallocated a portion of the 1.9-2.1 GHz band to create the Personal Communications Service (PCS) and other "emerging technologies" spectrum.[6] However, such reallocation did not involve the confiscation and re-licensing of spectrum that had previously been sold at auction. It is respectfully submitted that stripping

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4 47 USC §312(a)(2006).

5 47 USC §310(d)(2006).

6 *See First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1993).

auction licensees of spectrum for which they have paid raises complex issues such as whether this action amounts to a "taking" under the Fifth Amendment of the United States Constitution. The Commission has yet to address many of these issues. It is respectfully submitted that stripping spectrum from an auction licensee and merely returning their bid amount is not "just compensation", since it would not factor in the time, expense and risk associated with auction participation; the damage to investor relationships caused by a loss of spectrum; and the lost value of the business opportunity represented by a license won at auction. Incumbent licensees affected by the reallocation of spectrum in ET Docket No. 92-9 were given equivalent spectrum or other "comparable alternative facilities".[7] If spectrum is to be taken away from B Block Guard Band incumbents, it should be replaced by an equal amount of equivalent spectrum. No such equivalent spectrum has been identified in this docket.

Radiofone acknowledges that the Optimization Plan is based on laudible goals, driven by the unusual circumstance of Nextel returning a large number of B Block licenses to the Commission as part of the 800 MHz rebanding proceeding. However, the Commission has previously dealt with the relicensing of large amounts of returned spectrum, due to widespread defaults in the PCS C Block; and even though the Commission ultimately modified the band plan and eligibility rules for this spectrum, it relicensed the spectrum without disturbing the grants made to licensees that properly paid for their licenses at auction.[8] If the Commission can configure the B Block in a manner that accomplishes some or most of the goals of the Optimization Plan without affecting

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[7] *Id.*, 7 FCC Rcd at 6890.

the licenses of the existing B Block incumbents, and without causing interference to future operations by such incumbents, then Radiofone is not opposed to such rule changes. Otherwise, in the absence of a consensus by all affected incumbent licensees, it is respectfully submitted that the 700 MHz Guard Bands must be preserved in their current configuration, and the licenses awarded to the ten existing B Block licensees must be honored.[9]

III. Radiofone Supports A Relaxation of Guardband Restrictions.

As noted above, Access has proposed certain rule changes that would provide increased flexibility for Guard Band licensees to utilize their spectrum. In particular, Radiofone supports the following rule change proposals, to the extent that they can be implemented without depriving incumbent B Block licensees of their spectrum:

1. The Commission should eliminate the "band manager" requirement for Guard Band licensees, and should instead allow them to utilize their spectrum for direct provision of service, spectrum leasing to third parties, or internal use. This change would allow Guard Band licensees to realize the full value of their spectrum without creating any increased threat of interference to adjacent public safety licensees.

2. The Commission should allow cellular architecture in the Guard Bands, with the power flux density restriction recommended by Access.

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[8] *See* 24 CFR § 24.709(a)(4); *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service Licensees, Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266 (2000).

[9] The *NPRM* offers other reasons why the B Block allocation should not be changed. First, the public safety community has indicated that the proposed band plan change for the B Block may involve the reprogramming of an estimated 600,000 radios already shipped to public safety providers. *NPRM, supra at para. 45*. In addition, the proposed band plan change may require Canadian treaty changes, and may delay the planning, funding and deployment of public safety systems in the 700 and 800 MHz bands. *Id.*

3. The Commission should apply to public safety radios operating in the 700 MHz Guard Bands the Class A receiver performance standard applied to 800 MHz band operations.

4. The Commission should replace the current Guard Band adjacent channel power (ACP) restrictions with an out-of-band emission (OOBE) protection standard that would protect public safety operations while allowing broadband operations.

Conclusion

Based on the foregoing, Radiofone urges the Commission to protect the rights of incumbent 700 MHz Guard Band licensees, while modifying its rules to allow greater flexibility.

Respectfully Submitted,

RADIOFONE NATIONWIDE PCS, L.L.C.

By _/s/_____

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