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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
) WT Docket No. 01-192 /
Nextel Communications, Inc. and) *Public Notice* No. DA 01-1391
Pacific Wireless Technologies, Inc.) FCC File No. 0000523796
)
Request for Assignment of Licenses)

DOCKET FILE COPY ORIGINAL

Directed to: Chief, Wireless Telecommunications Bureau

CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

Pacific Wireless Technologies, Inc. ("PWT"), by its attorneys and pursuant to the provisions of section 1.939(f) of the regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.939(f), hereby submits its consolidated opposition to the petitions to deny ("Petitions") the above-captioned application ("Application"), that were filed with the FCC by each of (i) the Government of the District of Columbia, (ii) the County of Hamilton, Ohio, (iii) the Cities of Philadelphia, Pennsylvania, Phoenix, Arizona and Scottsdale, Arizona, and (iv) Queen Anne County, Maryland (collectively, the "Petitioners").^{1/} As set forth more fully below, because they are both procedurally and substantively defective, the Commission should dismiss the Petitions.

I. Background.

On July 27, 2001, Nextel Communications, Inc. ("Nextel") and PWT sought FCC consent for a transaction purchase to which Nextel intends to purchase PWT's 800 MHz

^{1/} The *Public Notice* inviting comments on this matter specified that the deadline for the submission of Oppositions was September 24, 2001. In response to a request for extension of time submitted by Nextel and PWT on September 21, 2001, the Commission orally extended the period for submitting Oppositions until September 27, 2001.

F. J. [unclear] 014
[unclear]

Specialized Mobile Radio (“SMR”) Motorola-platform iDEN system in areas of northern California. Neither Nextel, PWT or any third parties have identified the FCC’s spectrum cap, competitive concerns, character issues, foreign ownership, or any other legal issue routinely invoked to challenge applications pursuant to Section 309 of the Communications Act of 1934, as amended (“Act”). On August 14, 2001, the Commission sought comment on the Application.

The Petitioners have each requested that the Application be denied, delayed, or granted with conditions not sought by PWT or Nextel.^{2/} However, the Petitioners do not raise legal issues related to the transaction described above. Instead, each of the Petitions raises legal issues associated with either (i) the Commission’s allocation of spectrum in the 851-866 MHz band in an “interleaved” fashion, or (ii) interference concerns related to other Nextel facilities that are not covered by the Applications. Because the Petitions are not germane to the Applications, they should be dismissed.

II. Discussion.

A. The Petitioners Lack Standing.

Section 1.939(a) of the FCC’s regulations states that only a “party in interest” may submit petitions to deny applications appearing in a *Public Notice*. The FCC has interpreted the term “party in interest” to include a standing element which requires the petitioner to demonstrate that “grant of the subject application would cause the petitioner to suffer a direct

^{2/} None of the Petitioners served a copy of their Petitions on PWT, the licensee of the facilities at issue. Because none of the Petitions contain certificates of service, PWT is generally unable to determine whether service was attempted in each case. Service of the Petitions on PWT is required pursuant to section 1.939(c) of the FCC’s rules, as well as the FCC’s *ex parte* regulations, because the Petitions were delivered to FCC decision-making personnel. See 47 C.F.R. § 1.1208 (2000). Each of the Petitioners should therefore ensure that their replies, if any, are properly served.

injury.”^{3/} Except where the FCC takes official notice of facts supporting the injury claimed, the petitioner must specify claimed facts supporting injury in a sworn declaration. 47 C.F.R. § 1.939(d) (2000). In an effort to keep its application processing system free of frivolous petitions, the FCC routinely dismisses petitions to deny that fail to conform with these well-established and basic requirements.^{4/}

The Commission should similarly dismiss the Petitions because none of the Petitioners attempt to demonstrate that they are parties in interest with standing to oppose the Application. For example, none of the Petitioners -- as their jurisdictional names imply -- allege that they maintain public safety radio operations in the state of California, where virtually all of the stations covered by the Application are located. They obviously do not. Similarly, none of the Petitioners are able to demonstrate that grant of the Application will cause them to suffer a direct injury. It obviously will not. A mere change in ownership of PWT’s existing iDEN facilities^{5/} will not cause entities some three thousand miles distant, such as Queen Anne’s County, Maryland, any injury.

Even if PWT’s facilities were located in the Petitioners’ jurisdictions, the Petitioners could not demonstrate that the proposed transaction would injure the Petitioners. First, the

^{3/} *Applications of Radiophone Nationwide PCS, L.L.C. and Harbor Wireless L.L.C., Order*, DA 01-0081, ¶ 2 (2001).

^{4/} See *Beta Communications, LLC, Memorandum Opinion and Order*, DA 00-2778, ¶ 7 (2000) (“[W]e do not believe that Carolina PCS has shown that it is a party in interest under section 309(d)(1) of the Communications Act, as amended, or section 1.939(a) of the Commission’s rules, and we dismiss Carolina PCS’s petition.”).

^{5/} At least one Petitioner, the County of Hamilton Ohio, appears to be under the misimpression that the facilities Nextel is acquiring are not yet operational.

injuries claimed by the Petitioners^{6/} (as indirect and untraceable to the Applications as they may be) would generally be mitigated by Nextel obtaining additional spectrum for its iDEN operations for several reasons. For example, if Nextel were licensed for additional frequency assignments in a particular geographic area where its operations affected a specific public safety licensee, Nextel could react in a more flexible manner by switching to other frequency assignments, swapping frequency assignments with the public safety licensee, etc. Constraining Nextel's flexibility, by limiting the channels to which it has access, will only make the problem complained of by the Petitioners worse. Second, PWT is already conducting operations with a Motorola-platform iDEN system nearly identical to the system that will be operated by Nextel after the closing of the transaction that is the subject of the Application. PWT has operated with no complaints of harmful interference to public safety or any other entities. There is no evidence to suggest that once Nextel assumes operational control of the PWT system, it will be any more likely to cause interference than does the PWT-controlled system.

B. The Petitioners Selected The Wrong Forum.

As their inability to demonstrate standing confirms, the Petitioners have sought the wrong forum to have the Commission address the issues they seek to raise. Basically, each Petition contains the same basic claim: Nextel is not doing enough to mitigate interference to 800 MHz

^{6/} PWT does not agree that the interference problems claimed by the Petitioners are directly traceable to, or solely caused by, iDEN systems. The Petitioners present only anecdotal evidence. For example, in the City of Philadelphia's Preliminary Interference Study, the engineering consultants retained by the city specify a list of corrective action-items for public safety systems in addition to the list of corrective actions commercial mobile radio service ("CMRS") providers should undertake, indicating that both types of systems may require modifications to ensure a peaceful coexistence. See Comments of Nextel Communities at Appendix C. While the Petitioners have raised issues that may merit further study, the Petitions seek to punish Nextel without sufficient evidence that Nextel's actions are causing the harm complained of, or otherwise violate the FCC's regulations.

public safety radio systems.^{7/} None of the Petitions address legal issues related to applications for assignment, such as market concentration, the legal qualifications of the assignee, etc. In fact, the Petitions do not meaningfully address the transaction at all. Thus, the Petitions are not germane to this proceeding, which is intended to determine whether Nextel is legally qualified to hold the licenses now held by PWT, and if approval of the transaction is in the public interest.

Substantive consideration of the Petitions would create troublesome precedent for the FCC, signaling that any party with any telecommunications-related complaint about one of the parties to an application for assignment^{8/} would be permitted to raise that non-germane complaint before the Commission in the context of the FCC's consideration of that application. The Commission has wisely rejected such attempts to disrupt transactional matters in the past, and should do so here. For example, the Commission has stated that it will not consider private contractual disputes in the context of applications for assignment.^{9/} Similarly, the Commission has refused to consider resale-related complaints lodged against an applicant's post-auction

^{7/} See Comments of Nextel Communities at 6 (urging FCC to condition grant of Application on Nextel's submission of a plan to resolve interference issues); see also Comments of County of Hamilton, Ohio at 1 ("[I]f Nextel is allowed to place more frequencies in nationwide operation they are going to create additional interference with public safety frequencies.").

^{8/} An application for assignment is materially different than an application for new facilities. Certainly, a party in interest should be permitted to object to an application if grant of that application is predicted to result in facilities that would cause harmful interference to the petitioner's facilities.

^{9/} *Network Properties of America, Ltd.*, Memorandum Opinion and Order, 10 FCC Rcd 12413, ¶ 27 (1995).

application for new facilities because the petition to deny was not the “proper avenue” to raise a complaint-oriented claim.^{10/}

The Petitioners already have available several legal options by which to raise the claims they advance in the Petitions. For example, the Petitioners could file complaints against Nextel.^{11/} Even if the Petitioners do not have enough evidence to demonstrate that Nextel should be held liable for any rule violations, and the FCC’s underlying policies (or technological changes) are instead to blame,^{12/} the proper legal avenue for the Petitioners is to submit a petition for rule making.^{13/} Such a petition for rule making would enable the Petitioners to urge the Commission to adopt policies that would help create a more interference-free environment for public safety radio operations. However, in no case should the Commission entertain the Petitions.

Finally, as several of the Petitioners note, the Commission has already endorsed industry-developed methods intended to reduce or eliminate interference between digital CMRS systems

^{10/} See *Nextel License Acquisition Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 11990, ¶ 7 (1999) (“If [the petitioner instead] files a section 208 complaint, it will have a full and fair opportunity to present evidence to support its claims and to seek relief.

^{11/} One of the Petitioners, the Government of the District of Columbia, already claims to have submitted a complaint against Nextel. See Comments of Government of District of Columbia at 1. Accordingly, its Petition is duplicative and wasteful.

^{12/} This appears to be the case here. For example, the City of Philadelphia et al. appear to blame their perceived problems on the FCC’s previous allocation decisions which interleaved public safety and commercial frequency assignments in the 800 MHz frequency band. Comments of Nextel Communities at 3. If this is indeed the source of the problem, the Petitions are completely misplaced.

^{13/} 47 C.F.R. § 1.401 (2000).

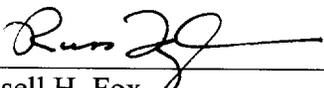
and public safety radio systems.^{14/} The Petitioners present no evidence that Nextel has failed to adhere to those methods. Instead, it is the Petitioners that appear to abandon those FCC-sanctioned cooperative methods in favor of a misplaced approach that threatens Nextel's ability to complete unrelated commercial transactions.

III. Conclusion.

Based on the foregoing, the Commission should refuse to consider legal arguments that are raised in the wrong forum and summarily dismiss the Petitions.

Respectfully submitted,

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^{14/} See *Wireless Telecommunications Bureau Announces Best Practices Guide For Avoiding Interference Between Public Safety and Commercial Wireless 800 MHz Communications Systems*, News Release, rel. Feb. 9, 2001.

CERTIFICATE OF SERVICE

I, Cathy Quarles, a secretary in the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., certify that I have, this 27th day of September 2001, caused to be sent via first class U.S. mail a copy of the foregoing Opposition to the following:

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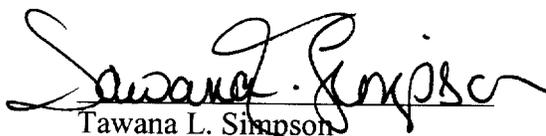
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