Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
NEXTEL LICENSE HOLDINGS 4, INC.	)	File Nos.
	)	0000248634; 0000248636; 0000310011;
	)	0000310015; 0000310023; 0000310116;
	)	0000310120; 0000310135; 0000310141;
	)	0000310145; 0000310147; 0000310149;
	)	0000310150; 0000310153; 0000310155;
	)	0000310157; 0000310163; 0000310165;
	)	0000310166; R496692; R496697;
	)	R496700; R496732; R496791;
	)	R497000
	)	
NEXTEL WIP LICENSE CORP.	)	File Nos.
	)	0000252586; 0000281204; 0000270617;
	)	0000270828; 0000270831; 0000270865;
	)	0000288956; 0000291537; 0000311350;
	)	0000311358; 0000311380; 0000311381;
	)	0000311389; 0000311411; 0000311413;
	)	0000311433; 0000311434; 0000311435;
	)	0000311451; 0000311455; 0000311456;
	)	0000311458; 0000311461; 0000311463;
	)	0000311466; 0000311468; 0000311469;
	)	0000311471; 0000311487; 0000311502;
	)	0000311529; 0000311551; 0000311574;
	)	0000311590; 0000311609; 0000311629;
	)	0000311650; 0000311669; 0000311688;
	)	0000311704; 0000311718; 0000311721;
	)	0000311724; 0000311726; 0000311728;
	)	0000311729; 0000311730; 0000311731;
	)	0000311733; 0000311734; 0000311736;
	)	0000311738; 0000311742; 0000311743;
	)	0000311744; 0000352453; 0000352733;
	)	0000359416; 0000359420; 0000590708;
	)	0000598162; 0000598167; C033501;
	)	C033819

ORDER

Adopted: April 12, 2002 **Released: April 16, 2002**

By the Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. This order addresses multiple pleadings, each entitled "Petition to Deny Application for Authorization" (collectively, "Petitions"), filed by Supreme Radio Communications, Inc. ("Supreme") on April 13, 17, 19, 23, 25 and 27, 2001, May 3, 2001 and October 5, 2001.[1] The Petitions were filed against the above-captioned applications for minor modifications ("Notifications") and applications for renewal ("Renewal Applications," and, collectively with Notifications, "Applications") filed by either Nextel WIP License Corp. ("Nextel WIP") or Nextel License Holdings 4, Inc. ("Nextel Holdings," and, collectively with Nextel WIP, "Nextel").[2] In the Petitions, Supreme alleges that the Applications are defective and requests that we set aside those Applications that may have been granted and dismiss those Applications that remain pending.[3] For the reasons set forth below, we find that 54 of Supreme's Petitions are untimely filed and are hereby dismissed as procedurally defective. We also find that Supreme presents no evidence to support its argument that the Applications should be set aside or dismissed, and therefore we deny Supreme's 42 timely-filed Petitions. For the same reasons, as discussed below, we would deny the late-filed Petitions on the merits even if they were not procedurally defective.

I. BACKGROUND

2. Nextel is an incumbent wide-area 800 MHz licensee for multiple stations located throughout the United States. Nextel filed six Renewal Applications on September 6, 2000. Nextel also filed multiple Notifications of minor system modifications, between August 2000 and September 2001, pursuant to section 90.693 of the Commission's rules, which permits incumbent 800 MHz licensees to add, remove, or modify transmitter sites within the composite 22 dBuV/m field strength contour ("22 dBu Contour") of their existing systems by filing a notification of such modification with the Commission within 30 days after the modification.[4] In addition, section 90.693 requires that a minor modification comply with the Commission's co-channel separation rules set forth in sections 90.621(b)(4)-(6), which govern the permissible distance between co-channel systems to protect against interference.[5] Virtually all of Nextel's Notifications were filed pursuant to Nextel's existing incumbent 800 MHz wide-area authorizations. Nextel

[1] Supreme filed a total of 97 Petitions: 15 Petitions on April 13, 2001; 11 Petitions on April 17; 12 Petitions on April 19; 11 Petitions on April 23; 14 Petitions on April 25; 16 Petitions on April 27; 15 Petitions on May 3, 2001; and 3 Petitions on October 5, 2001.

[2] Although Supreme filed a total of 97 Petitions, Nextel only filed 88 Applications (81 Notifications, 6 Renewal Applications and, as discussed below, one assignment application). Supreme filed two Petitions each against 9 of Nextel's Notifications. In those cases, Supreme claimed that it was necessary to file 2 Petitions because certain of Nextel's modifications allegedly affected Supreme's rights both as an incumbent licensee and as a geographic area licensee.

On June 6, 2001, Supreme filed a Request to Withdraw Petition to Deny Application for Authorization ("Withdrawal Request"), asking to withdraw the Petition filed against File No. 0000252586, which, as Supreme acknowledged, was an assignment application, not a modification application. *See* Reply to Opposition to Petition to Deny Application for Authorization, filed by Supreme on June 5, 2001, at 5 n.3. In the Withdrawal Request, Supreme further acknowledges that the arguments raised in the Petition are not applicable to that particular filing by Nextel. As the Petition apparently was mistakenly filed against File No. 0000252586, we will grant the Withdrawal Request.

[3] Seventy-six Notifications and six Renewal Applications have been granted; five Notifications remain pending.

[4] 47 C.F.R. § 90.693.

[5] *Id.*; 47 C.F.R. § 90.621(b)(4)-(6).

is also the 800 MHz geographic area licensee in certain Basic Economic Areas ("BEA").[6] Accordingly, some of the Notifications were filed as site-by-site applications located within one of Nextel's existing geographic license areas pursuant to its BEA authorization in that particular market.[7]

3. Supreme is the geographic area licensee of channel block A in BEA 101 in the Peoria, Illinois area and is also the licensee of call sign WNGS881, an incumbent 800 MHz authorization in East Peoria, Illinois. Supreme's Petitions against the Notifications are for the most part substantively identical and essentially allege that Nextel's Notifications are defective because they do not contain sufficient information to demonstrate compliance with Commission rules regarding 800 MHz system modification. In addition, Supreme contends that Nextel's filings do not comply with the co-channel separation criteria in section 90.621(b)(4) of the Commission's rules.[8]

4. On April 25, 2001, Nextel WIP filed a Motion for Extension of Time to respond to the Petitions, and Supreme filed an Opposition to Motion for Extension of Time on May 1, 2001. On May 4, 2001, Nextel WIP filed a second Motion for Extension of Time,[9] which Supreme opposed on May 10, 2001.[10] On May 17, 2001, Nextel Holdings filed 25 Oppositions to Petition for Reconsideration. On May 30, 2001, Nextel WIP filed an Opposition ("Opposition") and a Motion to Consolidate.[11] On June 5, 2001, Supreme filed a Reply to Opposition to Petition to Deny Applications for Authorization.

5. On September 12 and 20, 2001, Nextel filed three additional Notifications, against which Supreme on October 5, 2001 also filed additional Petitions.[12] In response, on November 2, 2001, Nextel filed an Opposition and a Motion to Consolidate the additional three Petitions filed by Supreme with the earlier-filed Petitions. On November 15, 2001, Supreme filed a Reply to Opposition to Petition to Deny Application for Authorization and Motion to Consolidate.

6. Nextel argues that Supreme's Petitions are procedurally defective in that they were improperly filed as Petitions to Deny. Specifically, Nextel contends that the Petitions: 1) should have been filed as petitions for reconsideration, as the Notifications were not required to be placed on public notice as accepted for filing and are not subject to petitions to deny; and 2) were filed in most cases more than thirty days after

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[6] Nextel is the geographic area licensee in several markets adjacent to Supreme's BEA 101, including BEA 64, 68, 97, 102, and 103.

[7] Nextel, when modifying to add a site as a geographic licensee, is not required under section 90.683 to seek prior Commission approval or to file a Notification and is permitted to add or modify a site anywhere in their licensed area. *See* 47 C.F.R. § 90.683(a)(1). However, Nextel voluntarily chose to file the Notifications "merely to promote increased internal and external accountability, given the large number of stations that comprise Nextel WIP's network." *See* Opposition, filed by Nextel WIP on May 30, 2001, at 7.

[8] 47 C.F.R. § 90.621(b)(4).

[9] Nextel WIP filed a total of three additional Motions for Extension of Time in which to reply to Supreme's Petitions. Nextel's additional motions were filed on May 4, 2001, May 9, 2001 and May 16, 2001, and each requests an extension of time until May 18, 2001 to respond.

[10] Supreme also filed a third Opposition to Motion for Extension of Time on June 1, 2001.

[11] Nextel Holdings filed one substantive opposition, File No. 0000310155, and in all its other oppositions incorporated that pleading by reference. Nextel WIP's Opposition filed on May 30, 2001 listed all the file numbers that had been subject to Supreme's Petitions filed through May 3, 2001 against Nextel WIP Notifications. While references herein to Nextel's Opposition are to Nextel WIP's May 30, 2001 Opposition, Nextel Holdings' substantive opposition raises virtually the same arguments that are raised in Nextel WIP's Opposition.

[12] *See* Petitions filed against File Nos. 0000590708; 0000598162; and 0000598167.

the Public Notice of the grant of the Notifications and are therefore untimely filed even if the Commission assumes, *arguendo*, that such pleadings were properly considered as petitions for reconsideration.[13] Nextel also argues that, with the exception of 15 Petitions, Supreme does not have standing under section 1.106 of our rules[14] to challenge the Notifications, because it fails to identify an ownership interest in any incumbent SMR station within 70 miles of Nextel's modified facilities and therefore has not alleged injury or even the potential for injury.[15]

7. Nextel also suggests that the Petitions are substantively identical and can be divided into three basic categories: 1) Petitions in which Supreme is an incumbent licensee alleging that Nextel's proposed modifications would result in Nextel operating a co-channel system from a site located less than 70 miles from Supreme's incumbent station under call sign WNGS881; 2) Petitions in which Supreme is a geographic area licensee under call sign WPLM219 alleging that Nextel's proposed modifications would result in a Nextel authorized site located within Supreme's geographic area; and 3) Petitions in which Supreme is a geographic area licensee under call sign WPLM219 alleging that Nextel's proposed modifications would result in a Nextel authorized site located outside Supreme's geographic area, but within 70 miles of the authorized service area represented by Supreme's geographic area license.[16]

8. Nextel further argues that Supreme has failed to meet its burden of showing any substantial or material question of fact and that Nextel has provided all technical parameters required by the relevant Part 90 rules. Nextel asserts that it relied upon either its geographic area license authority or certain 22 dBu Contours of its many incumbent authorizations to justify its modifications, not on a "nationwide footprint" as Supreme alleges.[17] Nextel submits that Commission rules do not require additional engineering to justify its modified footprint and also disputes Supreme's claim that notice of short-spacing is required, because in most cases Supreme is the geographic area licensee and lacks any site-specific station within 70 miles of a Nextel modified site. For Supreme's Petitions filed May 3, 2001, in which Supreme is an existing incumbent licensee, Nextel argues that Supreme has not alleged any failure by Nextel to provide notice.[18]

II. DISCUSSION

A. Procedural Matters:

1. Motions:

9. Nextel WIP filed two motions to consolidate Supreme's Petitions.[19] We agree with Nextel WIP that it would be administratively more convenient and in the public interest to consolidate our consideration of Supreme's virtually identical Petitions filed against Nextel WIP Notifications. We therefore grant Nextel WIP's Motions to Consolidate. For the same reasons, on our own motion we will consolidate our consideration of all of Supreme's Petitions filed against Nextel Holdings' Applications.

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[13] *See* Opposition at 4.

[14] 47 C.F.R. § 1.106. Nextel does not raise the standing issue as to the 15 Petitions that Supreme filed as an incumbent licensee. *See infra* paragraphs 15-16 (discussing standing).

[15] *See* Opposition at 5.

[16] *Id*. at 3.

[17] *Id*. at 6.

[18] *Id*. at 7.

[19] *See supra* paragraphs 4-5.

10. Nextel WIP filed four motions for extension of time pursuant to section 1.46 of the Commission's rules.[20] Nextel WIP states that additional time to file an opposition was necessary to review and prepare answers to the substantial number of Petitions.[21] Supreme opposed the motions for extension of time,[22] arguing that Nextel WIP was late in filing its second motion for extension of time because the Commission had not granted Nextel WIP's May 30, 2001 Motion to Consolidate.[23] As discussed above, we grant Nextel WIP's Motions to Consolidate, and therefore on our own motion we will treat Nextel WIP's May 30, 2001 Opposition as timely filed. Accordingly, we will dismiss Nextel WIP's Motions for Extension of Time as moot.

2. Timing of Petitions:

11. Section 1.933(d) of our rules provides in relevant part that applications or notifications concerning minor modifications to authorizations need not be placed on public notice as accepted for filing prior to grant.[24] We therefore agree with Nextel that the Notifications are not subject to petitions to deny and that an objection to the Notifications filed prior to grant should have been submitted as an informal objection pursuant to section 1.41 of our rules.[25] A challenge filed after the grant of the Notifications should have been submitted as a petition for reconsideration. However, we do not consider the failure merely to label a pleading correctly necessarily to be a fatal procedural flaw. To do so would elevate form over substance.[26] Accordingly, we will treat a Supreme Petition filed prior to the grant of a Notification as an informal objection, and we will treat a Supreme Petition filed after public notice of a grant as a petition for reconsideration under section 1.106 of our rules.[27]

12. However, under Section 405 of the Communications Act of 1934, as amended ("Act"), and section 1.106 (b) of the Commission's rules, a petition for reconsideration must be filed within 30 days of the date upon which public notice is given of the action complained of.[28] Of the 96 Petitions filed by Supreme against the Notifications, 48 of them were filed after the applicable 30-day deadline,[29] and Supreme has not presented any argument as to why it failed to file petitions for reconsideration within the required timeframes.

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[20] 47 C.F.R. § 1.46. *See supra* paragraph 4 and note 9.

[21] *See* Motion for Extension of Time, filed by Nextel on May 16, 2001, at 2.

[22] *See supra* paragraph 4.

[23] *See* Supreme's Opposition to Motion for Extension of Time, filed May 10, 2001 at 2.

[24] *See* 47 C.F.R. § 1.933(d). We note, however, that six of Nextel's filings are Renewal Applications that were listed on Accepted for Filing Public Notices. *See* File Nos. R496692; R496697; R496700; R496732; R496791; and R497000. All of these Renewal Applications were listed in the Wireless Telecommunications Bureau's September 12, 2000 Accepted for Filing PN ("*Accepted for Filing PN*").

[25] 47 C.F.R. § 1.41.

[26] *See* Minnesota PCS Limited Partnership, *Order*, 17 FCC Rcd 126, 127, ¶ 4 (CWD 2002) ("*Minnesota PCS*") ("The Commission, however, is not bound by the title that a filing party gives a pleading.").

[27] 47 C.F.R. § 1.106.

[28] 47 U.S.C. § 405; 47 C.F.R. § 1.106(b).

[29] The 10 Petitions filed on April 23, the 13 Petitions filed on April 25, the 15 Petitions filed on April 27 and the 14 Petitions filed on May 3, 2001 all addressed Nextel Notifications listed in the March 21 grant Public Notice; the 30 day-deadline was April 20, 2001.

13. We also find the six Petitions filed against the Renewal Applications to be untimely, because they were filed after the applicable deadline to file a petition to deny, which was October 12, 2000, thirty days after the *Accepted for Filing PN* was released. [30]

14. Moreover, we note that the Petitions that we dismiss as untimely filed are virtually identical to the Petitions that were timely filed. We deny the timely-filed Petitions on the merits, as set forth below. Accordingly, for the same reasons we also would deny Supreme's untimely Petitions, even if they were not procedurally defective and we were to address them on the merits.

3. Standing:

15. Nextel claims as to all but 15 of the Petitions that Supreme has failed to establish standing[31] to challenge the Applications by demonstrating that it is a "party in interest" as required by Section 309(d)(1) of the Act.[32] Nextel does not dispute Supreme's right to file objections to Nextel's Notifications where Supreme is an incumbent 800 MHz licensee. Nextel only challenges Supreme's right to file objections in instances in which Supreme, as a geographic area licensee, questions Nextel's contour containment and asserts an alleged right to co-channel separation protection.[33]

16. Petitions to deny are not permitted to be filed against the Notifications Nextel filed. More importantly, there is no standing requirement to file an informal objection pursuant to section 1.41 of the Commission's rules.[34] As to those Petitions we choose to treat as informal objections, therefore, the issue of standing need not be addressed in order for those Petitions to be considered. As to the remaining Petitions, to which Nextel's standing argument applies, we need not decide whether Nextel's theory of standing is correct with respect to stations for which Supreme holds a geographic area license and claims co-channel separation protection, because we fully consider all of the arguments raised by Supreme in its Petitions and find them to be without merit, as discussed below. Accordingly, as we deny Supreme's requested relief, Nextel's standing argument is moot.[35]

B. Substantive Issues:

17. In the Petitions, Supreme argues that the Notifications failed to comply with section 90.693[36] and are therefore defective. Specifically, Supreme asserts that: 1) Nextel failed to demonstrate that the stations it adds or modifies fall within Nextel's "original footprint;"[37] 2) even if Nextel were to prove that the stations are within Nextel's original footprint, the Commission should require construction information

[30] *See* 47 C.F.R. § 1.939(a)(2) (requiring that petitions to deny be filed no later than 30 days after the date of the Public Notice listing the application as accepted for filing). The Petitions filed against the 6 Renewal Applications were filed on April 19, April 23, April 25, April 27 and May 3, 2001.

[31] *See* Opposition at 5.

[32] *See* 47 U.S.C. § 309(d)(1) (providing that any "party in interest" may file a petition to deny any application).

[33] *See* Opposition at 5.

[34] *See* 47 C.F.R § 1.41 ("Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally.").

[35] *See* Applications of AirGate Wireless, L.L.C., *Memorandum Opinion and Order*, 14 FCC Rcd 11,827, 11,844, ¶ 36 (CWD 1999).

[36] 47 C.F.R. § 90.693.

[37] *See* Petitions at 2.

to ensure that the stations were indeed constructed in a timely manner and, if not, Nextel's stations cancelled automatically;[38] 3) Nextel has failed to provide any engineering data to demonstrate that its modifications do not expand beyond Nextel's 22 dBu Contour;[39] and 4) Nextel failed to comply with the Commission's co-channel separation rules set forth in sections 90.621(b)(4)-(6), which govern the permissible distance between co-channel systems to protect against interference.[40]

18. We first note that some of Nextel's Notifications were filed pursuant to section 90.683(a)(1), rather than section 90.693.[41] Section 90.683(a)(1) permits a geographic area licensee to add or modify a site anywhere within its authorized EA (Economic Area) without having to seek the Commission's approval or having to file a notification, so long as the geographic area licensee provides co-channel separation protection to existing incumbent licensees.[42] As to those Notifications that were filed pursuant to geographic area authority, Supreme's allegation that they fail to comply with section 90.693 is without merit, because rule 90.693 only applies to incumbent SMR licensees.[43]

19. Most of Nextel's Notifications, however, were filed pursuant to section 90.693 of the Commission's rules, which allows incumbent 800 MHz licensees to add, remove, or modify transmitter sites within the composite 22 dBu Contour of their existing systems by filing a notification of such modification with the Commission within 30 days after the modification.[44] In addition, section 90.693 requires that the modification comply with the Commission's co-channel separation requirements set forth in sections 90.621(b)(4)-(6), which govern the permissible distance between co-channel systems to protect against interference.[45]

20. We now address whether the Notifications failed to comply with section 90.693 of our rules, *i.e*., whether Nextel should have furnished additional information to establish that the modifications did indeed fall within its 22 dBu Contour. Supreme alleges in the Petitions that Nextel's Notifications "appear to rely on a footprint created via its pre-auction wide-area ESMR filings."[46] Supreme argues that Nextel must demonstrate that the specific channels at issue in this proceeding were included in the earlier filings as part of the footprint. We disagree.

21. In the *800 MHz SMR First Report and Order*, the Commission required applicants with Extended Implementation ("EI") authority to rejustify the grant of such authority in order to retain the extra period of time to construct facilities.[47] Nextel complied with these requirements, and the Bureau found in

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[38] *See id*. at 3.

[39] *See id.* at 5.

[40] *See id.* at 6.

[41] 47 C.F.R. §§ 90.683(a)(1), 90.693.

[42] *See* 47 C.F.R § 90.683(a)(1).

[43] *See* 47 C.F.R. § 90.693(a).

[44] *See id*.

[45] *See* 47 C.F.R. § 90.621(b)(4)-(6).

[46] *See* Petitions at 2.

[47] *See* 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, PR Docket No. 93-144, Implementation of Sections 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, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1525, ¶ 111 (continued....)

the *Rejustification Order*[48] that Nextel successfully rejustified its EI authorization. Accordingly, Nextel's failure to rejustify its footprint in the Notifications does not deem the Notifications defective. To the extent that Supreme argues otherwise, we conclude that it is seeking untimely review of applications granted to Nextel pursuant to *Fleet Call* or other grants of EI authority ("ESMR grants"), some of which were granted more than 10 years ago.[49]

22. Supreme also argues that even if the channels were part of the wide-area ESMR grants, we should require Nextel to demonstrate that the stations whose contours encompass Nextel's proposed new sites are constructed and, if so, that they were timely constructed. Supreme argues that if we were to find that the stations were not timely constructed or not constructed at all, the channels cancelled automatically.[50]

23. Supreme misinterprets our rules regarding notifications of minor modifications. First, we do not require applicants that are seeking to make a minor modification to include in their notifications construction information relating to the stations they seek to modify.[51] Second, in the *Fresno Remand Order,* the Commission altered the construction requirements for incumbent wide-area licensees in the 800 MHz SMR service.[52] The Commission concluded in the *Fresno Remand Order* that SMR licensees granted EI authority are sufficiently similar to geographic area licensees that they should have similar flexibility with respect to construction requirements.[53] Under the more flexible geographic area license

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(1995) ("*800 SMR First Report and Order*"). Initially, the Commission granted multi-year extended implementation periods to SMR licensees by waiver when the licensees met the waiver standard by demonstrating that their proposed systems differed sufficiently from conventional systems to make normal construction standards inapplicable. *See* Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, 1534, ¶ 11 (1991) ("*Fleet Call*"). In 1993, the Commission amended section 90.629 of the rules to allow SMR applicants to request up to five years to construct systems that required extended implementation because of wide-area coverage, size, or complexity. *See* Amendment of Part 90 of the Commission's Rules Governing Extended Implementations Periods, *Report and Order*, 8 FCC Rcd 3975-76, ¶ 6 (1993).

[48] *See* 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, Implementation of Sections 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, *Order,* 13 FCC Rcd 1533, 1537, ¶ 9 (WTB 1997) ("*Rejustification Order*"), *Order on Reconsideration*, 12 FCC Rcd 18,349 (WTB 1997).

[49] *See* In the Matter of Nextel Communications, Inc., *Order*, 13 FCC Rcd 281, 284, ¶ 8 (WTB 1998) (finding that Nextel had complied with the requirements to rejustify its EI authority and finding no reason to grant petitioner's untimely request to review applications granted more than two years previously) ("*Nextel Order*").

[50] *See* Petitions at 4.

[51] *See* 47 C.F.R. § 90.693.

[52] *See* 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, *Memorandum Opinion and Order on Remand*, 14 FCC Rcd 21,679 (1999) ("*Fresno Remand Order*"). The action was taken in response to the order by the United States Court of Appeals for the District of Columbia Circuit in *Fresno Mobile Radio, Inc. v. Federal Communications Commission*, 165 F.3d 965 (D.C. Cir. 1999), which remanded for further consideration the Commission's prior decision to maintain the requirement that incumbent licensees who received EI authorization had to construct and operate all sites at all frequencies within a certain period or lose the unconstructed frequencies.

[53] *See Fresno Remand Order*, 14 FCC Rcd at 21,686, ¶ 12 (recognizing that EI licensees may have constructed their systems in accordance with the requirements in place at the time, *i.e.*, site-by-site, frequency-by-frequency, the (continued....)

requirements, an eligible incumbent EI licensee is able to leave certain sites and frequencies unconstructed for potential future use.[54] We note that Nextel has elected to be treated as a geographic area licensee for construction purposes. Therefore, even if we were to find that a particular Nextel site is not constructed, it would not have automatically cancelled in all cases for failure to timely construct.

24. Supreme further contends that the information supplied in the Notifications is insufficient to establish that the modifications are indeed minor, permissive modifications.[55] Our rules do not require that incumbents provide an engineering exhibit corroborating that a proposed modification is within its 22 dBu Contour. Rather, incumbent licensees are permitted to modify or add sites so long as: 1) the site modification falls within the 22 dBu Contour; and 2) the incumbent complies with applicable co-channel separation criteria.[56] By filing its Notifications pursuant to rule 90.693, Nextel is in fact certifying that it complies with both elements of the rule.[57] In this case, Supreme has the burden of proof either to present material evidence that Nextel's proposed modifications do not comply with the rules or to present sufficient and material information to raise a question as to the validity of Nextel's representations.[58] Supreme's Petitions fail to present either, and, accordingly, Supreme has failed to carry its burden in this case. Indeed, Supreme does not actually claim or provide any evidence that Nextel's modifications are beyond its 22 dBu Contour, nor does it contend that Nextel has made misrepresentations to the Commission. Supreme even concedes that "it is possible that Nextel's proposed use of the subject channels is wholly within the rules."[59] Rather, Supreme, without presenting any evidence, merely asserts that the information Nextel furnished in the Notifications is insufficient to assess "whether the Notification violates Section 90.693."[60] Accordingly, we find that Supreme's unsupported assertion that Nextel has failed to establish that its modified or added sites are within its 22 dBu Contour is insufficient to justify setting aside Nextel's Notifications as defective.

25. We next address whether the Notifications complied with the Commission's co-channel separation criteria set forth in section 90.621(b)(4), as required by section 90.693.[61] Supreme alleges that Nextel's proposed modifications "short-space" Supreme's sites, in violation of section 90.621(b)(4).[62]

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Commission gave eligible wide-area licensees the option of complying with the terms of their EI authorization or applying the more flexible Economic Area ("EA") construction requirements to their wide-area systems).

[54] *Id.* at 21,686, ¶ 13.

[55] *See* Petitions at 5.

[56] *See* 47 C.F.R. § 90.693.

[57] *See* 47 C.F.R. § 1.65 (a) ("Each applicant is responsible for the continuing accuracy and completeness of the information furnished in a pending application."). *See also* FCC Form 601 General Certification Statements (3) ("The applicant certifies that all statements made in this application and in the exhibits, attachments, or documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith.").

[58] *See Minnesota PCS*, 17 FCC Rcd at 129, ¶ 8 (finding that the petitioner's arguments were based either on sheer speculation or reflect a fundamental misunderstanding of the Commission's rules and precedent and failed to raise any material and substantial question of fact that would warrant an evidentiary investigation of the applications at issue); *Nextel Order*, 13 FCC Rcd at 284 ¶ 8 (dismissing the petition on the merits because petitioner's arguments provided "no factual basis" and were based on "meager anecdotal information").

[59] Petitions at 4.

[60] *Id*. at 5.

[61] *See* 47 C.F.R. §§ 90.621(b)(4), 90.693.

[62] *See* Petitions at 6.

26. As discussed above, Supreme holds 800 MHz authorizations as both a geographic area licensee and an incumbent licensee. Supreme's claim, applicable to 81 of the Petitions, that it is entitled to co-channel separation protection and notice as a geographic licensee, is without merit. There is no provision in our rules requiring *800 MHz incumbent licensees* either to afford geographic area licensees co-channel separation protection or to provide notice of short-spacing.[63] Instead, *geographic area licensees* are required to afford co-channel separation protection, to all co-channel systems within their licensing area.[64] Our rules and precedent make it clear that only incumbents, and not geographic area licensees, are afforded such co-channel separation protection.[65] The applicable co-channel separation rule, section 90.621(b), specifically excludes geographic area licensees from co-channel separation protection by providing, in relevant part, that: "[s]tations authorized on frequencies listed in this subpart, *except for* . . . EA based and MTA based SMR systems, will be afforded protection solely on the basis of fixed distance separation criteria."[66] Furthermore, section 90.683 of our rules requires geographic area licensees to afford protection, in accordance with section 90.621(b), to all previously authorized co-channel stations *that are not associated with another EA licensee*.[67] Accordingly, we find without merit Supreme's claim *as a geographic area licensee* that sites within its EA, including unconstructed potential sites, are entitled to co-channel separation protection from Nextel.

27. Fifteen Petitions, however, involve stations for which Supreme is an incumbent licensee, rather than a geographic area licensee. For these 15 Petitions, we agree that such stations are entitled to co-channel separation protection, in accordance with the rules discussed above.[68] However, all 15 of the Petitions that Supreme filed as an incumbent were late-filed and, as explained earlier, are dismissed as procedurally defective.[69] In any event, after review of our records, we would conclude that 12 of Nextel's Notifications and the one Renewal Application that are subject to those 15 Petitions fully comply with Commission rules and that two of the Notifications are defective. As discussed below, we set aside on our own motion the two defective Notifications and will require Nextel to re-file such Notifications with complete information.

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[63] We note that the notice requirement only applies to incumbent licensees seeking to add or modify a site to be located less than 55 miles from a co-channel station. In such cases, a waiver of section 90.621(b)(4) is also required. *See* 47 C.F.R § 90.621(b)(4). Supreme does not claim that Nextel has added or modified a station to be located less than 55 miles from a Supreme station. If an incumbent station is located less than 70, but more than 55, miles from a co-channel licensee, the incumbent is only required to comply with the technical parameters of the short-space chart located in section 90.621(b)(4) and is not required to provide notice to the short-spaced co-channel licensee.

[64] *See* 47 C.F.R. § 90.683(a)(1); *see also 800 MHz First Report and Order*, 11 FCC Rcd at 1516, ¶ 92.

[65] *See* 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, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Sections 3(N) and 332 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, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 17,556, 17,574, ¶ 30 (1999) ("Because geographic area licensees were afforded maximum flexibility to add or modify any site within their licensed area, we adopted a strict interference protection criteria to ensure that geographic area licensees do not interfere with existing incumbent operations.").

[66] 47 C.F.R. § 90.621(b) (emphasis added).

[67] *See* 47 C.F.R. § 90.683(a)(1).

[68] *See supra* paragraph 26.

[69] *See supra* paragraphs 12-13.

28. As to the 12 Petitions that pertain to those 12 Notifications,[70] we would conclude that Supreme's argument that Nextel failed to comply with section 90.621(b)(4) in the relevant Notifications is incorrect. Section 90.621(b)(4) provides that incumbents seeking to establish short-spaced sites must include in their notifications a listing of all new or modified sites that are short-spaced in relation to co-channel stations of other incumbent licensees and also must indicate for each site whether the short-spacing is 70 to 55 miles or less than 55 miles. For sites in the 70-55 mile category, the incumbent must list all co-channel stations within 70 miles and list the Effective Radiated Power ("ERP") and Directional Height Above Average Terrain ("DHAAT") of each co-channel station and of the incumbent's new or modified station.[71] Nextel included all the required short-space information in all 12 of the Notifications in this category, and Supreme presents no other basis for asserting that those 12 Notifications are defective.

29. As to the only Renewal Application in this category, File No. R496791**,** Nextel seeks renewal only, not a modification, with respect to call sign KNRU482, which was originally granted on October 31, 1995 for the site specified in Supreme's Petition.[72] Supreme alleges that the required short-space information was not provided. Nextel, however, is not required to provide short-spacing information to renew its previously-granted authorization, and therefore we would deny Supreme's Petition on the merits even if it were not dismissed as late-filed.

30. Finally, we address on our own motion each of the remaining two Notifications, File Nos. 0000311468 and 0000310141. As to the remaining two corresponding Petitions, each of which alleges that Nextel's Notification fails to comply with rule 90.621(b)(4) co-channel separation information requirements, we note again that they were untimely filed and hence are being dismissed hereby as procedurally defective. A review of our records, however, indicates that Nextel's modification in each case results in a station located less than 70 miles from Supreme's incumbent call sign WNGS881. While Nextel has failed in each case to include Supreme as a co-channel licensee in its co-channel separation exhibit, we note that Nextel is in fact required to provide the required short-space information with its Notification.[73] Therefore, on our own motion we will set aside and dismiss the grants of File No. 0000311468 and File No. 0000310141 and require Nextel to re-file its Notifications with all required information within 30 days after the release date of this Order. We also grant Nextel special temporary authority ("STA") on our own motion to continue operations at the modified sites. In the event that Nextel fails to submit within 30 days after the release date of this Order notifications that comply with Commission rules, the STA will be terminated and we will require Nextel to cease all operations at the modified sites.

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[70] Those 12 Petitions relate to File Nos. 0000310141; 0000311358; 0000311380; 0000311455; 0000311456; 0000311466; 0000311529; 0000311724; 0000311731; 0000311733; 0000311734; and 0000352733.

[71] *See* In the Matter of Nextel Licensee Holdings 4, Inc. *Order*, 14 FCC Rcd 6985, 6988, ¶ 9 (WTB 1999) (clarifying the information that should be listed in the Notifications when the applicant seeks to short-space).

[72] The Universal Licensing System ("ULS") database lists FCC File No. R496791 as requesting a "renewal/modification," and on ULS, Nextel appears to add a site located at Mendota, Illinois. In fact, certain technical limitations of our conversion from the earlier legacy database to the current ULS database required the Licensing and Technical Analysis Branch to list electronically filed renewal-only applications as "renewal/modification." This circumstance may have contributed to Supreme's confusion in assuming that Nextel had added a new site to its existing system, when in fact Nextel seeks only renewal of a previously-granted facility.

[73] Nextel admits in its Opposition that the Petition filed against File No. 0000311468 is correct in that the minor modification does result in its station being located within 70 miles of Supreme's incumbent co-channel station. Nextel claims that Supreme's call sign WNGS881 was inadvertently omitted from the short-space report. Nextel further asserts that the location of the modified site falls within the parameters of the short-space table requirement of section 90.621, but it does not provide supporting documentation. *See* Opposition at 7 n.17.

IV. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Request to Withdraw Petition to Deny Application for Authorization filed by Supreme Radio Communications, Inc. on June 6, 2001 is hereby GRANTED.

32. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Motions to Consolidate filed by Nextel WIP License Corp. on May 30, 2001 and November 2, 2001 are hereby GRANTED.

33. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Motions for Extension of Time filed by Nextel WIP License Corp. on April 25, 2001, May 4, 2001, May 9, 2001 and May 16, 2001 are hereby DISMISSED.

34. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.331 and 1.106(f) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106(f), the Petitions to Deny Authorization filed by Supreme Radio Communications, Inc. against the above-captioned applications in File Nos. 0000248636; 0000270831; 0000270865; 0000291537; 0000310011; 0000310015; 0000310116; 0000310120; 0000310135; 0000310141; 0000310141; 0000310147; 0000310149; 0000310150; 0000310165; 0000310166; 0000311358; 0000311380; 0000311389; 0000311411; 0000311411; 0000311455; 0000311455; 0000311456; 0000311461; 0000311463; 0000311466; 0000311466; 0000311468; 0000311469; 0000311502; 0000311529; 0000311529; 0000311551; 0000311718; 0000311721; 0000311724; 0000311724; 0000311726; 0000311729; 0000311731; 0000311733; 0000311734; 0000352453; 0000352733; 0000359416; 0000359420; C033819; R496692; R496697; R496700; R496732; R496791; and R497000 are hereby DISMISSED.

35. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.41 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.41, 1.106, the Petitions to Deny Authorization filed by Supreme Radio Communications, Inc. against the above-captioned applications in File Nos. 0000248634; 0000270617; 0000270828; 0000288956; 0000310023; 0000310145; 0000310153; 0000310155; 0000310157; 0000310163; 0000311350; 0000311358; 0000311381; 0000311413; 0000311433; 0000311434; 0000311435; 0000311451; 0000311458; 0000311471; 0000311487; 0000311574; 0000311590; 0000311609; 0000311629; 0000311650; 0000311669; 0000311688; 0000311704; 0000311728; 0000311730; 0000311731; 0000311733; 0000311736; 0000311738; 0000311742; 0000311743; 0000311744; 0000590708; 0000598162; 0000598167; and C033501 are hereby DENIED.

36. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the grant of the above-captioned application for minor modification File No. 0000310141 is hereby set aside and dismissed, and Nextel License Holdings 4, Inc. is hereby instructed to re-file its application within 30 days after the release date of this Order, as discussed in the body of this Order.

37. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the grant of the above-captioned application for minor modification File No. 0000311468 is hereby set

aside and dismissed, and Nextel WIP License Corp. is hereby instructed to re-file its application within 30 days after the release date of this Order, as discussed in the body of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Linda C. Ray
Deputy Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau