

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

In the Matter of )  
 )  
Nextel Communications, Inc. )  
 )  
Request for Waiver to Operate )  
800 MHz Canadian Primary Frequencies in )  
U.S./Canada Border Area Region 3 )  
On a Secondary Basis )

**ORDER**

**Adopted: April 6, 2001**

**Released: April 9, 2001**

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this Order, we address a request for waiver of section 90.619<sup>1</sup> of the Commission's rules filed by Nextel Communications, Inc. (Nextel) on November 12, 1999 (Nextel Request).<sup>2</sup> The Nextel Request was submitted in conjunction with the filing of 335 applications (Nextel Applications) seeking Commission approval to operate on certain 800 MHz Canadian primary frequencies on a secondary basis at various sites located in Region 3 of the U.S./Canada border area.<sup>3</sup> The Commission requested public comment on the applications and waiver request and five comments and three reply comments were filed.<sup>4</sup> For the reasons set forth below, we grant Nextel's request for a waiver of section 90.619 in part, subject to approval of the Nextel Applications.

**II. BACKGROUND**

2. The United States and Canada currently share use of 800 MHz frequencies along the U.S./Canada border pursuant to a negotiated mutual agreement.<sup>5</sup> The U.S./Canada Arrangement

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<sup>1</sup> 47 C.F.R. § 90.619.

<sup>2</sup> See "Request for Amendment of SCP Between the United States and Canada/Associated Waiver Request" filed on November 12, 1999.

<sup>3</sup> The U.S./Canada border area is divided into eight geographical regions. See 47 C.F.R. §§ 90.619 (b), 90.619(c).

<sup>4</sup> See *infra* note 17.

<sup>5</sup> See Arrangement Between the Department of Communications of Canada and the Federal Communications Commission of the United States Concerning the Use of the Band 806-890 MHz Along the Canada-United States Border, April 7, 1982, *as amended*, December 10, 1994 (U.S./Canada Arrangement).

designates

certain 800 MHz frequencies for U.S. primary use and other frequencies for Canadian primary use in the border area.<sup>6</sup> The U.S./Canada Arrangement further provides that frequencies primarily allotted for unrestricted use by one agency may be assigned by the other agency for use in its country in the border area provided certain conditions are met. These conditions include operating on a secondary basis and not exceeding a specified power flux density (pfd) level at the border.<sup>7</sup>

### III. THE NEXTEL REQUEST

3. In its Request, Nextel seeks a waiver of section 90.619 of the Commission's rules to operate on 64 Canadian primary frequencies on a secondary basis in Region 3 of the U.S./Canada border area, and submits for Commission approval 335 applications proposing site-by-site operation on the Canadian primary frequencies.<sup>8</sup> Nextel states that its request results from the recent acquisition by Clearnet, Inc. (Clearnet), an authorized Canadian carrier, of 64 additional frequencies in the Windsor, Canada area.<sup>9</sup> Nextel and Clearnet have entered into a business arrangement to provide for spectrum-efficient, seamless frequency re-use plans that extend along the U.S./Canada border and facilitate roaming. Nextel indicates that an increase in channel capacity will better enable Nextel and Clearnet to meet increasing demand for wireless service across the integrated Windsor/Detroit-Cleveland metropolitan area.<sup>10</sup> A waiver is requested, to the extent necessary, as Nextel requests authorization to operate on a secondary basis on frequencies which are not specifically allocated for U.S. operation under Commission rules.<sup>11</sup>

4. Nextel further submits that a waiver of section 90.619(b),<sup>12</sup> which specifically sets forth the U.S./Canada border area primary frequencies and allocates them among the land mobile service pools, may not be necessary.<sup>13</sup> In support of this position, Nextel states that the U.S./Canada Arrangement

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<sup>6</sup> See U.S./Canada Arrangement, Section 3.

<sup>7</sup> See U.S./Canada Arrangement, Addendum to Interim Arrangements Concerning the Use of Certain Frequency Bands in the Bands 806-960 MHz, Annex A.

<sup>8</sup> Nextel also asks the Commission to amend an existing special coordination procedure with Canada to include additional channels. See Special Coordination Procedure for the Use of Frequencies in the Bands 806-821 and 851-866 for Land Mobile Services, April 9-May 14, 1998 (SCP). The SCP allows either agency to authorize operations on certain of the other country's primary channels at a higher pfd level at the U.S./Canada border than is normally permitted on such channels under the U.S./Canada Arrangement. Such licensees are subject to various restrictions including requirements that they protect primary operations and do not offer service in the other country. See SCP at 2. The existing SCP replaced an original SCP executed on January 9, 1997.

<sup>9</sup> Nextel Request at 2-3.

<sup>10</sup> *Id.* To maintain reciprocity, Nextel has identified 64 additional U.S. primary channels for sharing with Clearnet on a secondary basis in the Windsor area.

<sup>11</sup> See 47 C.F.R. § 90.603. Nextel indicates that the frequencies subject to the waiver request are between 856.3125 MHz and 860.3125 MHz, and such frequencies are not included in an existing Economic Area (EA) authorization issued to Nextel pursuant to 47 C.F.R. § 90.683. See Nextel Request at 3.

<sup>12</sup> 47 C.F.R. § 90.619 (b).

<sup>13</sup> Nextel Request at 4.

empowers the Commission to license Canadian primary frequencies in the United States on a secondary basis to any potential U.S. licensee, as section 90.619(b) does not speak to secondary uses of the channels in the United States to the extent permitted by the terms and conditions of the U.S./Canada Arrangement.<sup>14</sup> Nextel further submits, with respect to its 335 applications requesting site-by-site facilities operating authority, that “[e]ach application demonstrates that such use will not cause interference to any incumbent primary U.S. licensee consistent with the co-channel separation requirements of section 90.621(b)(4) of the Commission’s Rules.”<sup>15</sup>

#### IV. COMMENTS ON THE NEXTEL REQUEST

5. On December 22, 1999, the Wireless Telecommunications Bureau (WTB or Bureau) sought comment on Nextel’s applications and waiver request<sup>16</sup> and received five comments and three reply comments.<sup>17</sup> In summary, the majority of commenters argue that the Commission should not grant Nextel’s request to use the additional channels without notice and comment in a rulemaking proceeding, as the substantive effect is to limit the effectiveness of local SMR businesses located throughout the regions in the U.S./Canada border area.<sup>18</sup> Most of the commenters also submit that there is nothing unusual or unique about Nextel’s request, insofar as Nextel is merely attempting to gain access to additional spectrum not otherwise available to U.S. 800 MHz licensees, and therefore Nextel fails to meet the requirements for obtaining a waiver of the Commission’s rules.<sup>19</sup> Some commenters also express concern regarding the proposed interference standards set forth in the SCP, as well as the Commission’s ability to enforce certain provisions of the SCP, particularly the provision concerning the ten-day period within which harmful interference is required to be eliminated.<sup>20</sup> Consumers, which was previously granted a waiver to operate on a secondary, non-interference basis on ten of the frequencies identified in the Nextel Request, commented that Nextel should be required to afford Consumers adequate co-channel separation protection

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See “Wireless Telecommunications Bureau Seeks Comment on 335 Applications Filed by Nextel Communications, Inc., and its Request for Waiver of Section 90.619 of the Commission’s Rules to Use 64 Canadian (Primary) Channels on a Secondary Basis in the Detroit/Cleveland Area,” *Public Notice*, DA 99-2991 (rel. Dec. 22, 1999).

<sup>17</sup> Comments were received from the following entities: Small Business in Telecommunications (SBT); Thumb Radio, Inc. (TRI); Bush Electronics (Bush); Chadmoore Wireless Group, Inc. (Chadmoore); and Consumers Energy Company (Consumers). Reply Comments were received from the following entities: Nextel Communications, Inc.; Chadmoore Wireless Group, Inc.; and Allstate Mobile Communications Corp. (Allstate).

<sup>18</sup> See SBT Comments at 1-2; TRI Comments at 2; Chadmoore Comments at 2-3. In making this argument, some commenters apparently failed to distinguish between the effect of the waiver and the SCP. See SBT Comments at 1-2. The U.S./Canada Arrangement permits the FCC and Industry Canada to authorize operation on the other country’s primary channels and this Arrangement combined with grant of Nextel’s waiver request and applications would permit Nextel to operate on those channels in the border area. The SCP agreement addresses only the pfd level at the U.S.-Canada border that may be authorized. Thus, an amended SCP would permit the agencies to authorize Nextel and Clearnet to exceed the pfd limit at the border normally imposed on such secondary operations by the U.S./Canada Arrangement. See *supra* note 8.

<sup>19</sup> See SBT Comments at 2; TRI Comments at 4; Bush Comments at 4; Chadmoore Comments at 3.

<sup>20</sup> See TRI Comments at 2-3; Bush Comments at 2-3.

to prevent interference.<sup>21</sup>

Chadmoore suggests that the Commission should auction the border area channels in keeping with the Commission's policies regarding spectrum allocation.<sup>22</sup> Further, Chadmoore argues that the Commission should deny the Nextel Request because the channels Nextel seeks to use are Business/Industrial Land Transportation (B/ILT) channels outside the U.S./Canadian border area, and the Bureau has previously denied a request by Nextel to use B/ILT channels for commercial purposes.<sup>23</sup> Allstate, in its reply comments, supports grant of the Nextel Request.<sup>24</sup>

## V. DISCUSSION

6. Section 1.925 of the Commission's rules permits a rule waiver if the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest, or, alternatively, where, in view of the unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>25</sup>

7. Nextel requests a waiver of section 90.619(b)<sup>26</sup> to operate on 64 additional Canadian primary frequencies in Region 3 of the U.S./Canada border area. Section 90.619(b) sets forth the U.S./Canada border area primary frequencies available for allocation to U.S. licensees. Nextel requests site-by-site authority under section 90.603<sup>27</sup> for secondary operation on Canadian primary channels at U.S. locations; however, these frequencies are not listed in section 90.619(b) as available for operation within the United States. We find that a waiver of the Commission's rules is required to operate on a site-by-site basis in the United States on frequencies not specifically allocated for U.S. operation, even where such operation is requested on a secondary, non-interference basis.

8. For the reasons set forth below, we find it in the public interest to grant a waiver of section 90.619(b) to permit Nextel to operate on the requested 64 Canadian primary frequencies in Region 3 of the U.S./Canada border area on a secondary, non-interference basis, subject to approval of the Nextel applications. We find it unnecessary to initiate a rulemaking proceeding in this matter because the U.S./Canada Arrangement specifically provides that frequencies primarily allotted for unrestricted use of

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<sup>21</sup> See Consumers Comments at 3-4. In its Comments, Consumers requested co-channel protection from Nextel's proposed operations on Canadian primary frequencies. However, Consumers subsequently withdrew its comments to the extent they may conflict with Consumers' current position supporting the Nextel Request. See Letter from Shirley S. Fujimoto, Esq., counsel for Consumers, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated May 30, 2000 (Consumers Letter). The Consumers Letter further indicates that Nextel has addressed Consumers' concerns as they relate to its operation.

<sup>22</sup> See Chadmoore Comments at 3.

<sup>23</sup> *Id.* at 4-5. See also In re: Applications of Nextel Communications, Inc. and Associated Rule Waiver Request of 47 C.F.R. §§ 90.617(a) and 90.619(b), *Order*, 14 FCC Rcd 1159 (WTB 1999).

<sup>24</sup> Allstate Comments at 1-2.

<sup>25</sup> 47 C.F.R. § 1.925 (b)(3). See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 2153 (D.C. Cir. 1969).

<sup>26</sup> 47 C.F.R. § 90.619 (b).

<sup>27</sup> 47 C.F.R. § 90.603.

one agency may be assigned by the other agency for use in its country under certain conditions, including requiring secondary operation within certain power limits in border areas to prevent interference.<sup>28</sup> We find that granting, in part, Nextel's request for a waiver of section 90.619 of the Commission's rules to permit its site-by-site use of Canadian primary frequencies on a secondary basis will promote spectrum-efficient, seamless frequency re-use plans extending along the U.S./Canada border and will further facilitate cross-border roaming. We agree with Nextel that the facts of this case are unusual and that a waiver is warranted in the public interest.<sup>29</sup> Nextel has entered into a business arrangement with the applicable Canadian licensee, Clearnet, to allow more efficient use of frequencies in the border area and has coordinated with the Canadian licensee to ensure that interference will not occur to primary Canadian use. The increase in channel capacity for use on a secondary, non-interference basis will enable Nextel to provide more efficient service to customers in Region 3 of the U.S./Canada border area. As a condition of this waiver grant, Nextel must provide to the Commission, within five business days of initiating operations on any frequency that is the subject of this waiver, information, in the form specified by the Division, on the specific frequency, coordinates, antenna height above average terrain (antenna haat), and antenna radiation pattern with maximum effective radiated power (ERP). Although the waiver grant in this instance applies to Nextel, other U.S. licensees are not precluded from entering into similar arrangements, coordinating with Canadian carriers, and seeking similar waivers to further promote more efficient frequency re-use in border areas.<sup>30</sup>

9. We disagree with the commenters' contention that granting the requested relief will afford Nextel an opportunity not available to any other 800 MHz licensee. In fact, in 1996 and 1997, we granted similar requests by Consumers to operate on Canadian primary frequencies on a secondary, non-interference basis.<sup>31</sup> We conclude that Chadmoore's assertion that the Commission should auction the frequencies on which Nextel seeks authority to operate<sup>32</sup> is beyond the scope of this proceeding. As discussed above, these frequencies are expressly allocated for Canadian primary use pursuant to the U.S./Canada Arrangement. Chadmoore's contention that Nextel is improperly seeking to use B/ILT

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<sup>28</sup> See U.S./Canada Arrangement, Addendum to Interim Arrangements Concerning the Use of Certain Frequency Bands in the Bands 806-960 MHz, Annex A.

<sup>29</sup> See Nextel Request at 4.

<sup>30</sup> While beyond the scope of our request for comment on the applications and waiver request, we note that some commenters also expressed concern about the ten-day period allowed in the SCP for resolving cross-border interference complaints. See TRI Comments at 2-3; Bush Comments at 2-3. However, the SCP requires *immediate* action to address any interference, and requires an interfering station to cease operation altogether within ten days of when it was first notified of the interference problem if the matter remains unresolved. (The provision does not state 10 days after some later formal notification by the licensing agency, as some commenters suggest.) This provision provides significantly greater protection than is provided in the Commission's rules and most cross-border sharing arrangements, which normally have no such time limits. We also note that no difficulties with the operation of this provision have been reported and we consider the provision reasonable. Regarding the suggestion by some commenters that the SCP agreement should be subject to a notice and comment rulemaking proceeding, we note that spectrum coordination between the United States and other countries is a foreign affairs function not subject to such proceedings. See 5 U.S.C. § 553(a).

<sup>31</sup> Consumers indicates that it requested a waiver of section 90.619(b)(3) in 1996 to operate on Canadian primary frequencies at four site locations in Michigan. The call signs and associated frequencies are as follows: WPGD-703 (856.3125 MHz, 860.3125 MHz, 860.4125 MHz); and WPKV-738 (856.3375 MHz, 856.3625 MHz, 856.4125 MHz, 857.3375 MHz, 857.4125 MHz, 858.3375 MHz, 858.9875 MHz). See Consumers Comments at 2, n. 1.

<sup>32</sup> Chadmoore Comments at 3-4.

frequencies for its commercial systems in circumvention of the Bureau's decision denying a prior request to that effect is without merit.<sup>33</sup> In Region 3 of the U.S./Canada border area, where Nextel seeks authority to operate on a secondary basis, the requested frequencies are allocated for Canadian primary use, not for domestic B/ILT use. Therefore, our decision here does not confer any right to use B/ILT channels. In fact, as set forth herein, Nextel is required to provide co-channel protection to U.S. B/ILT primary licensees located outside Region 3.

10. We note that, after Nextel filed its applications and waiver request, the Commission completed the auction of licenses in the 800 MHz SMR Service Lower 80 channels. Nextel was the high bidder for a number of licenses.<sup>34</sup> Some of the applications filed by Nextel in this proceeding were for authorization to operate on a secondary basis on the 24 Canadian primary frequencies in Region 3 that are categorized as 800 MHz SMR Service Lower 80 frequencies in areas outside Region 3 of the U.S./Canada border area.<sup>35</sup> Now that the auction of the 800 MHz SMR Lower 80 frequencies is completed, Nextel may wish to amend some of the license applications that are the subject of this proceeding, and we provide a 60-day period for Nextel to make such amendments.

11. While we find Nextel's waiver request to be in the public interest, we agree with the commenters that the operations that are the subject of this waiver must not cause interference to other licensees. Therefore, for Nextel to operate under this waiver, we require Nextel to meet the co-channel separation requirements set forth in section 90.621(b) of the Commission's rules. In applying section 90.621(b), we require Nextel to operate on a secondary, non-interference basis and provide protection to: 1) current and future co-channel U.S. licensees authorized for primary U.S. operation;<sup>36</sup> and 2) previously authorized co-channel U.S. licensees operating on Canadian primary channels on a secondary basis. In its Request, Nextel indicates that it submitted approximately 330 applications for site-by-site authority to operate on the referenced Canadian primary channels.<sup>37</sup> Nextel also represents that "[e]ach application demonstrates that such use will not cause interference to any incumbent primary U.S. licensee consistent with the co-channel separation requirements of Section 90.621(b) of the Commission's Rules."<sup>38</sup> In order to grant Nextel's applications for secondary operation, the frequencies set forth on site-specific applications

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<sup>33</sup> *Id.*

<sup>34</sup> *See* 800 MHz SMR Service Lower 80 Channels Auction Closes, Public Notice, DA 00-2752, (rel. December 7, 2000).

<sup>35</sup> The 24 referenced frequencies are allocated as SMR pool frequencies outside the U.S./Canada border area and 6 of the 24 frequencies are also allocated as SMR frequencies in Region 2 of the U.S./Canada border area.

<sup>36</sup> In its Request, Nextel provides an example illustrating the type of co-channel protection required using channel 859.0125 MHz, which is a Canadian primary channel in Region 3. Specifically, 859.0125 MHz is a Business/Industrial Land Transportation frequency in Region 7 and a Specialized Mobile Radio frequency outside the U.S./Canada border area. Nextel acknowledges that its secondary use of 859.0125 MHz in Region 3 would require it to provide co-channel protection under section 90.621 to the primary U.S. B/ILT and SMR licensees located in adjacent regions within 70 miles of a Nextel facility. *See* Nextel Request at 4, n. 11. As set forth herein, we will also require Nextel, as a secondary operator, to provide co-channel separation protection pursuant to rule 90.621(b) to all future primary U.S. operators located outside Region 3 of the U.S./Canada border area. Specifically, Nextel will be required to cease operations on any frequency located at a facility that becomes short-spaced through subsequent licensing to a primary U.S. license located outside Region 3, unless Nextel can demonstrate compliance with section 90.621(b) of the Commission's rules.

<sup>37</sup> Nextel Request at 4.

<sup>38</sup> *Id.*

must reflect compliance with the co-channel separation requirements set forth in section 90.621(b). We note, however, that some of Nextel's applications propose operation at facilities located less than seventy miles from authorized co-channel stations and do not include specific information required by section 90.621(b) to demonstrate compliance with the short-spacing requirements.

12. Nextel may file application amendments within 60 days of the release of this order.<sup>39</sup> Amendments should be made to applications that propose to operate on sites that do not meet the required channel separation requirements of section 90.621(b), particularly where the following is not provided: 1) documentation of compliance with the short-spacing separation table set forth in section 90.621(b)(4) (including a list of co-channel stations within 113 km, applicable DHAAT calculations and ERPs); 2) an interference analysis for stations located at distances less than those prescribed in the table; and 3) for facilities proposed to be granted pursuant to section 90.621(b)(5), a letter of concurrence, whereby the concurring licensee agrees to accept any interference resulting from the reduced separation between the systems, and certifies that the system of the concurring licensee is constructed and fully operational. Under section 90.621(b)(5), Nextel is also required to provide a certificate of service indicating that all concurring co-channel licensees have been served with actual copies of the applications.

13. For the reasons set forth above, we grant in part Nextel's request for a waiver of section 90.619 of the Commission's rules, subject to appropriate amendment and subsequent approval of the Nextel Applications. After the 60-day period provided herein for Nextel to file amendments, the Division's Licensing and Technical Analysis Branch will review the applications for processing.<sup>40</sup>

14. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), and sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, Nextel's request for waiver of section 90.619 of the Commission's rules IS HEREBY GRANTED IN PART to the extent specified herein, subject to the terms and conditions set forth herein and is DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>39</sup> We conclude that it is in the public interest that this order be effective immediately.

<sup>40</sup> As indicated previously, grant of authorizations to operate at a higher pfd level at the border than permitted by the U.S./Canada Arrangement will require completion of an amended SCP or other similar arrangement with Canada. *See supra* notes 8 and 18.