

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

In the Matter of )
)
C&W COMMUNICATIONS, INC. ) File No. EB-02-IH-0643
)
Licensee of Private Land Mobile Stations )
WNJB566 and KNBV420 )
)
STEVE GILL )
)
Licensee of Private Land Mobile Station )
WNEC236 )
)
RADIO SERVICE COMPANY ) File No. EB-02-IH-0386
)
Licensee of Private Land Mobile Stations )
WPBB209, WNXZ684, and WNXZ686 )
)
FRESNO MOBILE RADIO, INC. ) File No. EB-02-IH-0681
)
Licensee of Private Land Mobile Stations )
WYY797, WYY798, WYY799, KNDC491, )
and WNA511 )

ORDER ON REVIEW

Adopted: March 10, 2005

Released: March 14, 2005

By the Commission:

I. INTRODUCTION

1. In this Order on Review, we deny the April 19, 2004, Application for Review<sup>1</sup> filed by Nextel Communications, Inc. and Nextel Partners, Inc. (collectively referred to as "Nextel"), of the Enforcement Bureau's decision<sup>2</sup> denying Nextel's requests for the commencement of license revocation proceedings against Private Land Mobile licensees C&W Communications, Inc. and its owner, Steve Gill (collectively "C&W"); Radio Service Company ("Radio Service"); and Fresno Mobile Radio, Inc.

<sup>1</sup>Application for Review filed by Nextel Communications, Inc. and Nextel Partners, Inc. against C&W Communications, Inc., Steve Gill, Radio Service Company, and Fresno Mobile Radio, Inc., on April 19, 2004 ("Application for Review").

<sup>2</sup>In the Matter of C&W Communications, Inc. et al., Memorandum Opinion and Order, 19 FCC Red 4495 (EB 2004) ("MO&O").

("Fresno") (collectively referred to as the "Incumbent Licensees").<sup>3</sup> As discussed more fully below, we have thoroughly reviewed the record before us and find no basis for commencing license revocation proceedings against any of the Incumbent Licensees. Accordingly, we affirm the Bureau's *MO&O*.<sup>4</sup>

## II. BACKGROUND

2. During the mid-1990s, the Commission determined that a new framework for the licensing of some 800 MHz licenses was appropriate.<sup>5</sup> The Commission recognized that the advent of new technologies would permit licensees of wide area systems to achieve greater efficiencies than those operating small, site-based systems.<sup>6</sup> As a result, the Commission concluded that it was in the public interest to allow licensees to operate wide area systems in certain geographic areas (referred to as "Economic Areas" or "EAs") in the upper portion of the 800 MHz band. To accomplish this goal, the Commission adopted competitive bidding rules to award overlay wide area licenses and established a procedure for the auction winners of these EA licenses to relocate any incumbent site-based licensees operating within the Economic Area on the assigned upper 800 MHz frequencies to comparable spectrum. By thus relocating any relatively small site-based licensees to other frequencies, the new EA licensee could utilize more efficient technologies and provide wide area service to more customers in competition with personal communications services ("PCS") and cellular providers.<sup>7</sup> The Commission determined that it was best to rely primarily on market forces to accomplish such relocation and, in instances in which

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<sup>3</sup>Also before the Commission are the following related pleadings: Oppositions to Application for Review, filed on May 4, 2004, by C&W; Opposition to Application for Review, filed on April 30, 2004, by Radio Service; Opposition to Application for Review, filed on April 30, 2004, by Fresno; Motion for Extension of Time to Consolidate Pleading Cycle, filed on May 6, 2004, by Nextel; Opposition to Extension of Time to Consolidate Pleading Cycle, filed on May 7, 2004, by Radio Service; Opposition to Extension of Time to Consolidate Pleading Cycle, filed on May 7, 2004, by Fresno; Reply to Opposition of C&W to Application for Review, filed on May 14, 2004, by Nextel; Reply to Opposition of Radio Service Company to Application for Review, filed on May 14, 2004, by Nextel; Reply to Opposition of Fresno Mobile Radio, Inc. to Application for Review, filed on May 14, 2004, by Nextel; Motion to Accept Unauthorized Pleading and Motion to Strike Reply to Opposition to Application for Review, filed on May 18, 2004, by Fresno; Motion to Accept Unauthorized Pleading and Motion to Strike Reply to Opposition to Application for Review, filed on May 19, 2004, by Radio Service; Opposition to Fresno Motion to Accept Unauthorized Pleading filed by Nextel on May 28, 2004; and Opposition to Radio Service Company Motion to Accept Unauthorized Pleading filed by Nextel on May 28, 2004.

<sup>4</sup>The Commission does not recognize a formal right to seek revocation of a license. *See, e.g., MCI Telecommunications Corp.*, 3 FCC Rcd 3155 (1988); *KDSK, Inc.*, 93 FCC 2d 893 (1983). The Commission, however, has treated such requests as informal requests for action pursuant to section 1.41 of the Commission's rules, 47 C.F.R. § 1.41.

<sup>5</sup>*Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of the SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, First Report and Order, Eighth Report and Order, and Second Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995) ("*First R&O*").

<sup>6</sup>*First R&O*, 11 FCC Rcd at 1476-77.

<sup>7</sup>*Id.*, 11 FCC Rcd at 1475.

the parties failed to reach an agreement and the EA licensee requested intervention, the Commission would become involved and order involuntary relocation.<sup>8</sup>

3. To this end, Section 90.699 of the Commission's rules<sup>9</sup> sets forth a three step procedure whereby an EA licensee may arrange for the relocation of an incumbent licensee's site-based 800 MHz system operating in the upper 800 MHz band to comparable spectrum in the lower 800 MHz band. The first phase of the relocation procedure consists of a one-year voluntary negotiation period during which the EA licensee and the incumbent may negotiate any mutually agreeable relocation arrangement. If no agreement is reached by the end of this voluntary period, a one-year mandatory negotiation period commences, during which both the EA licensee and the incumbent must negotiate in "good faith." If no agreement is reached during either the voluntary or mandatory negotiation periods, the EA licensee may request involuntary relocation of the incumbent's system.<sup>10</sup>

4. In 1997, Nextel obtained a number of EA licenses in the upper 800 MHz band in Auction No. 16, including licenses for channels used by the Incumbent Licensees.<sup>11</sup> Nextel notified each of the Incumbent Licensees of its desire to relocate their respective systems to comparable frequencies.<sup>12</sup> Nextel and each of the Incumbent Licensees thereafter engaged in negotiations during both the voluntary and mandatory periods; however, the negotiations proved unsuccessful.<sup>13</sup>

5. Subsequently, Nextel filed a motion for revocation of licenses against each of the three Incumbent Licensees.<sup>14</sup> Nextel argued in each motion that it had sent each of the Incumbent Licensees a request to meet face-to-face; however, none met personally with Nextel during either of the negotiation periods.<sup>15</sup> Nextel also claimed that it had made relocation offers that went unanswered or that were rejected without adequate explanation.<sup>16</sup> Nextel claimed that the Incumbent Licensees engaged in intransigent behavior during the negotiations in order to force Nextel to purchase their systems at inflated

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<sup>8</sup>*Id.*, 11 FCC Rcd at 1503-08. See also *Amendment of Part 90 to Facilitate Future Development in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd 19079, 19110-17 (1997).

<sup>9</sup>47 C.F.R. § 90.699.

<sup>10</sup>47 C.F.R. § 90.699(b) and (c).

<sup>11</sup>See *800 MHz Auction Closes: Winning Bidders in the Auction of 525 Specialized Mobile Radio Licenses*, Public Notice, 12 FCC Rcd 20417 (1997).

<sup>12</sup>Nextel notified C&W, Fresno and Radio Service of its intent to relocate their respective systems by letters dated January 19, 1999. See Motion for Revocation of Licenses, filed on October 16, 2001, by Nextel against C&W ("Nextel/C&W Motion") at 4; Motion for Revocation of Licenses, filed on April 15, 2002, by Nextel against Radio Service ("Nextel/Radio Service Motion") at 5; and Motion for Revocation of Licenses, filed on June 14, 2002, by Nextel against Fresno ("Nextel/Fresno Motion") at 5.

<sup>13</sup>Nextel/C&W Motion at 5; Nextel/Fresno Motion at 5; and Nextel/Radio Service Motion at 5.

<sup>14</sup>See Nextel/C&W Motion, Nextel/Radio Service Motion, and Nextel/Fresno Motion described in note 11, *supra*.

<sup>15</sup>Nextel/Fresno Motion at 7-8; Nextel/Radio Service Motion at 6-7; and Nextel/C&W Motion at 13, 22. C&W asserts that despite Nextel's letter, it was Nextel that was unwilling to meet to negotiate. C&W Opposition to Motion for Revocation of Licenses, filed October 31, 2001 ("C&W Opposition") at 1.

<sup>16</sup>Nextel/C&W Motion at 7-18; Nextel/Fresno Motion at 7-10; Nextel/Radio Service Motion at 6-8.

prices.<sup>17</sup> Each of the Incumbent Licensees countered that, while it may have failed to reach an agreement with Nextel, there was no absence of “good faith” on its part.<sup>18</sup> Each Incumbent Licensee maintained that it engaged the services of counsel to negotiate with Nextel,<sup>19</sup> and in fact did negotiate to sell and/or relocate their respective systems.<sup>20</sup>

6. In its *MO&O*, released on March 18, 2004, the Bureau considered each of Nextel’s motions in a consolidated decision and declined to commence license revocation proceedings against any of the Incumbent Licensees. The Bureau noted that the Commission’s discretion to institute revocation proceedings under section 312(a) of the Communications Act of 1934, as amended, is very broad.<sup>21</sup> After considering the facts of each case, the Bureau concluded that, taken as a whole, the conduct of each of the Incumbent Licensees was not so grave as to raise questions about its respective basic qualifications to remain Commission licensees.<sup>22</sup> Thereafter, on April 19, 2004, Nextel filed its Application for Review of the *MO&O*.

### III. DISCUSSION

7. Under section 312(a) of the Act, “[t]he Commission may revoke any station license or construction permit . . . for willful or repeated violation of . . . any rule or regulation of the Commission authorized by this Act . . . .”<sup>23</sup> We note, as did the Bureau below, that our discretion under section 312(a) to institute revocation proceedings is very expansive. The Commission has held that initiation of revocation proceedings through an order to show cause, as permitted by section 312(a), “is, of course, wholly subject to our discretion. . . . Pursuant to the legislative intent behind 47 U.S.C. § 312 . . . the Commission has complete discretion, after considering allegations of noncompliance with our rules, even *prima facie* evidence of violations, to determine not to issue orders to show cause . . . .”<sup>24</sup> Indeed, within its “broad discretion in this area, the Commission can refuse to issue an order to show cause based upon

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<sup>17</sup>Nextel/C&W Motion at 25; Nextel/Fresno Motion at 17; Nextel/Radio Service Motion at 5-6. In further support of its requests for revocation, Nextel maintained that it has successfully negotiated the relocation of approximately 1,000 incumbent site-based licensees to other spectrum and that the Incumbent Licensees are the only licensees with whom negotiations have failed. Nextel/C&W Motion at 3; Nextel/Fresno Motion at 4; and Nextel/Radio Service Motion at 4.

<sup>18</sup>C&W Opposition to Motion for Revocation of Licenses, filed October 31, 2001 at 10-13; Radio Service Opposition to Motion for Revocation of Licenses, filed September 16, 2002, at 13-18; and Fresno Opposition to Motion for Revocation of Licenses, filed October 1, 2001, at 3-5.

<sup>19</sup>Nextel/C&W Motion at 6; Nextel/Fresno Motion at 5; and Radio Service Opposition to Motion for Revocation of Licenses at 10.

<sup>20</sup>C&W Opposition to Motion for Revocation of Licenses at 2-7, and 10-18; Radio Service Opposition to Motion for Revocation of Licenses at 10-18; and Fresno Opposition to Motion for Revocation of Licenses at 3-5.

<sup>21</sup>*MO&O*, 19 FCC Rcd at 4498.

<sup>22</sup>*Id.* at 4499.

<sup>23</sup>47 U.S.C. § 312(a).

<sup>24</sup>*Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978).

the petition of a third party even if it determines that a violation of Commission rules exists.”<sup>25</sup> With this discretionary standard in mind, we turn to Nextel’s Application for Review.

8. At the outset, Nextel asserts that the Bureau failed to follow Commission policy and precedent by ruling that it would exclude the possibility of license revocation as a sanction available in cases involving violations of the “good faith” relocation negotiation requirement.<sup>26</sup> In so doing, according to Nextel, the Bureau ignored Commission pronouncements that it intended to use the “full realm of enforcement mechanisms” available to it -- including license revocation -- to ensure that licensees bargain in good faith.<sup>27</sup> Nextel mischaracterizes the *MO&O*. The Bureau did not suggest, much less state, in the *MO&O* that it would exclude license revocation as a possible sanction in cases involving a failure to negotiate in good faith. To the contrary, the Bureau discussed at length in the *MO&O* the merits of Nextel’s allegations and determined that there was no basis *in this instance* for commencing license revocation proceedings against any of the Incumbent Licensees because their individual behavior did not impugn their respective basic qualifications. Revocation remains an available sanction in appropriate relocation cases; these are simply not appropriate cases.

9. Nextel also claims that the Bureau failed to undertake a case-by-case analysis of its motions, in contravention of Commission policy, because the Bureau rejected license revocation as a possible sanction.<sup>28</sup> In support, Nextel asserts that the Incumbent Licensees’ misconduct was willful and repeated, and the *MO&O* improperly considered all three motions “*en masse* in a single order”<sup>29</sup> without any individual analysis. Nextel’s argument again lacks merit. Nextel’s suggestion that a determination of “good faith” requires a separate order in each instance has no basis in law. All three of Nextel’s motions discussed similar, if not identical, facts and raised similar allegations in many respects. In the interest of administrative efficiency, it was entirely appropriate for the Bureau to have considered the motions in a consolidated order. Such consolidation did not diminish the integrity of the Bureau’s deliberative process, and it certainly was not barred procedurally by any rule, policy, or precedent. The Bureau considered all the facts presented by Nextel, determined that revocation proceedings were not warranted, and, accordingly denied each of the motions in one order. We have again reviewed the record before us and agree with the Bureau that the information presented does not reveal misconduct so egregious as to warrant the extraordinary sanction of license revocation proceedings. This does not mean that we reject license revocation as a possible sanction in other cases involving alleged violation of section 90.699,<sup>30</sup>

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<sup>25</sup>*Humboldt Bay Video Co.*, 56 FCC 2d 68, 71 n. 9 (1975).

<sup>26</sup>Application for Review at 7, *et seq.*

<sup>27</sup>In support of this proposition, Nextel cites the Commission’s holding involving an earlier relocation rule in *Amendment of the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825 (1996). *Id.* at 8. Nextel notes that the Wireless Bureau had cited this microwave relocation decision in *Petition for Declaratory Ruling Concerning the Requirement of Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band*, Memorandum Opinion and Order, 16 FCC Rcd 4882, 4884 (WTB 2001) to support the proposition that any decision as to whether revocation is appropriate for a violation of section 90.699 will be made on a case-by-case basis. *Id.*

<sup>28</sup>*Id.* at 11, *et seq.*

<sup>29</sup>*Id.* at 15.

<sup>30</sup>47 C.F.R. § 90.699.

only that, in the exercise of our discretion, we reject such a sanction as to each of the Incumbent Licensees in this instance, based upon the information before us.

10. Finally, Nextel also argues that the Bureau improperly suggested that involuntary relocation procedures contained in Section 90.699 of the Commission's rules may serve as an appropriate "sanction" in cases in which incumbent licensees failed to engage in good faith relocation negotiations.<sup>31</sup> Nextel again mischaracterizes the *MO&O*. The Bureau noted that the rules establish involuntary relocation procedures for parties, like those here, that have failed to reach an accord during the two negotiation periods.<sup>32</sup> The Bureau expressed its belief that a request by Nextel to invoke such involuntary relocation procedures as to each of the three Incumbent Licensees, rather than the commencement of protracted license revocation proceedings, "would produce the most expeditious result" and serve the public interest.<sup>33</sup> Contrary to Nextel's assertion, the *MO&O* in no way implied that the involuntary relocation procedures contemplated by section 90.699 are penal in nature or constitute "sanctions."<sup>34</sup>

11. In sum, we conclude that the commencement of revocation proceedings for alleged violations of section 90.699 of the Commission's rules,<sup>35</sup> which may be an appropriate response under certain circumstances, is not appropriate here. We therefore affirm the Bureau's decision below and deny Nextel's instant Application for Review.

#### IV. CONCLUSION

12. ACCORDINGLY, IT IS HEREBY ORDERED THAT, the Application for Review, filed on April 19, 2004, by Nextel Communications, Inc. and Nextel Partners, Inc. IS HEREBY DENIED.

13. IT IS FURTHER ORDERED THAT Nextel's May 6, 2004, request for an extension of the time for filing its replies to the oppositions filed by Fresno and Radio Service IS GRANTED, and the Motions to File Unauthorized pleadings filed by Fresno and Radio Service on May 18 and 19, 2004, respectively, ARE DENIED.

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<sup>31</sup>Application for Review at 11, *et seq.*

<sup>32</sup>*MO&O*, 19 FCC Rcd at 4500.

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

<sup>34</sup>We note that, on April 19, 2004, concurrent with the filing of its instant Application for Review, Nextel filed a "Petition for Involuntary Relocation" with respect to each of the captioned licensees. These petitions are currently pending.

<sup>35</sup>47 C.F.R. § 90.699.

14. IT IS FURTHER ORDERED THAT the Office of the Secretary SHALL SEND COPIES of this Order on Review, via First Class Mail, to: Albert J. Catalano, Esquire, Catalano & Plache, PLLC, 3221 M Street, N.W., Washington, DC 20007 (counsel for Nextel Communications, Inc. and Nextel Partners, Inc.); Michael F. Morrone, Esquire, Keller & Heckman, LLP, 1001 G Street, N.W., Suite 500 West, Washington, DC 20001 (counsel for C&W Communications, Inc. and Steve Gill); Dale D. Avery, Radio Service Company, P.O. Box 338, Burley, ID 83318;<sup>36</sup> and Robert H. Schwaninger, Jr., Esquire, Schwaninger & Associates, P.C., 1331 H Street, N.W., Suite 500, Washington, DC 20005 (counsel for Fresno Mobile Radio, Inc.).

## FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>36</sup>On August 11, 2004, Schwaninger & Associates, P.C., filed a Notification of Withdrawal of Legal Representation stating it would no longer be representing Radio Service Company with respect to Nextel's Application for Review.