priorities that are cooperatively identified by the States and the Service in consultation with the public.

Alternative 3—Emphasis on Additional Funding for Biodiversity and Watchable Wildlife Projects. States will be provided an expanded funding base for use on biodiversity and watchable wildlife enhancement projects.

Alternative 4—Increase Administrative Flexibility of States. Increased responsiveness to State needs, such as administrative flexibility, aquatic education expansion, and adult education for wildlife programs.

Alternative 5—Eliminate Most Service Overview of States. Propose legislation and policy changes to eliminate most Service overview of State projects including project approval. States would be provided program rules, general guidance, and apportionment of funds. States would provide reports of accomplishments and would be periodically monitored by the Service.

Decision

Alternative 1, ''No Change to the Existing Program Direction'' was selected by the Service for future administration of the Program. This selection was made in response to overwhelming support of the existing program by respondents to the draft document issued in November 1993. The majority of comments received during the comment period expressed the opinions that the Program was working well and urged the Service not to make changes. Most persons commented that States are in the best position to assess the needs of citizens for fish and wildlife resources and that the Federal Government should not get more involved in establishing priorities for State projects. The Service is convinced that the existing Program is effectively meeting the needs of hunters, anglers, boaters, and other users of the nation's fish and wildlife resources and does not plan to change the way the Program is administered.

Significant Issues Raised

After the final SPEIS was distributed to the public in December 1994, several parties asked that the Service adopt a more flexible policy relating to projects to educate State employees. Currently, employees that are actively working on Federally funded projects may be trained using Program funds, but training of employees not working on active projects may not be funded. The Service intends to explore the need for this change with the States independently of this Record of Decision.

No other significant issues were raised during review of the Final SPEIS. Because the Final SPEIS adopted the preferred alternative suggested by most public comments, the few public comments on the final draft were supportive.

Copies Are Available

Copies of the Final SPEIS are available from the U.S. Fish and Wildlife Service, Division of Federal Aid, Arlington Square Building, MS–140, 4401 North Fairfax Drive, Arlington, Virginia, 22203, during normal working hours. Telephone (703) 358–2156.

Dated: March 22, 1995.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 95–9414 Filed 4–14–95; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Delaware and Lehigh Navigation Canal National Heritage Corridor Commission; Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice announces an upcoming meeting of the Delaware and Lehigh Navigation Canal National Heritage Corridor Commission. Notice of this meeting is required under the Federal Advisory Committee Act (Public Law 92–463).

MEETING DATE AND TIME: Wednesday, April 19, 1995; 1:30 p.m. until 4:30 p.m.

ADDRESSES: Aldie Mansion, 85 Old Dublin Pike, Doylestown, PA 18901.

The agenda for the meeting will focus on implementation of the Management Action Plan for the Delaware and Lehigh Canal National Heritage Corridor and State Heritage Park. The Commission was established to assist the Commonwealth of Pennsylvania and its political subdivisions in planning and implementing an integrated strategy for protecting and promoting cultural, historic and natural resources. The Commission reports to the Secretary of the Interior and to Congress.

SUPPLEMENTARY INFORMATION: The Delaware and Lehigh Navigation Canal National Heritage Corridor Commission was established by Public Law 100–692, November 18, 1988.

FOR FURTHER INFORMATION CONTACT: Acting Executive Director, Delaware and Lehigh Navigation Canal National Heritage Corridor Commission, 10 E. Church Street, Room P–208, Bethlehem, PA 18018, (610) 861–9345.

Dated: April 6, 1995.

Donald M. Bernhard,

Chairman, Delaware and Lehigh Navigation Canal NHC Commission.

[FR Doc. 95–9338 Filed 4–14–95; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Motorola, Inc. and Nextel Communications, Inc.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States publishes below the comments received on the proposed Final Judgment in *United States of America* v. *Motorola, Inc. and Nextel Communications, Inc.*, Civil Action No. 1:94CV02331, filed in the United States District Court for the District of Columbia, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in room 3233 of the Antitrust Division, United States Department of Justice, Tenth Street and Pennsylvania Avenue, NW., Washington, DC 20530, and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, NW., Washington, DC 20001.

Constance K. Robinson,

Director of Operations, Antitrust Division.

Response to Public Comments to the Proposed Final Judgment

[Case No. 1:94CV02331]

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)–(h) (''APPA''), the United States of America hereby files its Response to Public Comments to the proposed Final Judgment in this civil antitrust proceeding. The United States has reviewed the comments on the proposed Final Judgment and remains convinced that entry of the proposed Final Judgment is in the public interest.

I. Summary of Proceedings

This proceeding relates to the proposed consolidation of the trunked specialized mobile radio (''SMR'') businesses of Nextel Communications, Inc. (''Nextel'') and Motorola, Inc. (''Motorola''), the two largest providers of those services in the United States. This transaction is part of Nextel's

seven-year effort to accumulate sufficient radio spectrum to establish a digital wireless network in competition with the cellular telephone companies.

Trunked SMR service is a type of radio service used by contractors, service companies, delivery services and other businesses that need to communicate with fleets of vehicles on a one-to-one or one-to-many basis. It is provided pursuant to licenses granted by the Federal Communications Commission (''FCC'') in the 800 MHz and 900 MHz spectrum bands. A limited number of licenses are available for these services.

In the last seven years, Nextel has entered into agreements to purchase or manage the assets of dozens of companies holding licenses to provide SMR service in the 800 MHz band, making it the largest holder of 800 MHz SMR spectrum, as well as the primary supplier of SMR service, in the United States.[1] Nextel's numerous acquisitions are part of a plan to replace the currently deployed analog technologies used in those systems with a new digital technology developed by Motorola. Deployment of digital technology and the reconfiguration of radio transmitters in a cellular-like pattern will greatly increase the number of customers that may be served and allow Nextel to offer a greater variety of services including, in addition to dispatch service, data and wireless telephone service. Nextel also owns and manages a substantial number of 900 MHz SMR channels in major cities around the country. However, the new Motorola technology cannot be deployed on them.

Motorola is the second largest holder of 800 MHz SMR spectrum and Nextel's primary competitor in the provision of dispatch services in many cities around the country. Motorola also owns and manages a substantial number of 900 MHz SMR channels in major cities, including many reached by Nextel's 800 MHz and 900 MHz SMR services. By an agreement dated August 4, 1994, Motorola agreed to sell Nextel its SMR business in the 800 MHz band. The agreement also provided that Nextel would manage Motorola's 900 MHz SMR business for three years, subject to renewal for subsequent periods of two years.[2]

The United States commenced this action on October 27, 1994 alleging that Nextel's control of virtually all available options for customers seeking SMR services, i.e., simultaneous control, of virtually all channels on which such services are provided in both the 800 MHz and 900 MHz bands in fifteen (15) major cities in the United States would substantially lessen competition in these markets.[3] On the same date, the United States submitted, with the consent of the defendants, a proposed Final Judgment that requires defendants to divest certain SMR assets and licenses and prevents defendants from reacquiring the specified assets and licenses, or acquiring comparable assets and licenses, in the fifteen (15) cities. With the exception of Atlanta, Georgia, the contemplated relief is limited to 900 MHz channels.

The relief provided in the proposed Final Judgment is intended to prevent any lessening of competition in the provision of trunked SMR service in a manner consistent with the efforts of the FCC to facilitate the creation of a new digital wireless telephone service competitor that would significantly benefit the public.[4] Recognizing that Nextel may require additional 800 MHz spectrum to compete, the FCC has permitted Nextel to be assigned a substantial number of 800 MHz SMR licenses and has initiated proceedings aimed at promoting the aggregation of spectrum to facilitate the development of digital SMR networks.[5] In order to avoid any interference with these efforts by the FCC, the relief required by the Final Judgment is, with the exception of Atlanta, limited to 900 MHz spectrum. Since the Motorola technology cannot be deployed on SMR channels in 900 MHz band, the possible benefits from Nextel's creation of a digital wireless network are not put at risk by requiring Nextel to relinquish control of 900 MHz SMR channels. Conversely, if Nextel is permitted to own and manage the 900 MHz SMR channels, Nextel would gain control of the most widely available alternative to dispatch services provided on the 800 MHz band and significantly increase its ability to increase the prices of dispatch services.

Comments on the proposed Final Judgment were received from a group composed of Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accucomm, Inc., Earl's Distributing Inc., Earl's Wireless Communications, Total Communications, Communications Center, Inc., and Leflore Communications, Inc. (collectively ''the Clark Group'');[6] from Communications Center, Inc. (''CCI''); from General Electric Mobile Communications Dealer Board of Directors (''GE''); and from Gerard and Harold Pick (''Pick'').[7] These commenters are all operators of SMR systems and are competitors of Nextel or Motorola in various regions of the United States. The primary concern in the comments is that Nextel's acquisition of such a large percentage of 800 MHz SMR spectrum will prevent competitors from being able to expand their systems and give Nextel the power to raise prices and reduce the quality of service to its customers. Generally they request that the Department withdraw its consent.

As explained below, the United States concluded that the divestiture and release of 900 MHz spectrum by the defendants would address the principal anticompetitive effects of the transactions, and that a requirement that Nextel divest or release 800 MHz channels would unnecessarily impede the efforts of Nextel to deploy its digital technology and compete in the provision of wireless telephone services. If such additional action was required, Nextel's planned wireless services would serve fewer people and the anticipated downward pressure on cellular service rates would diminish or not materialize.

II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment, 15 U.S.C. 16(b). In this case, the sixty-day comment period commenced on November 8, 1994, and was due to terminate on January 9, 1996. On that date, the United States filed a motion

[1] Through its agreements to acquire OneComm Corporation and Dial Page, Inc., which had been accumulating 800 MHz spectrum in other regions, Nextel established a nationwide presence and now owns SMR spectrum in most areas of the continental United States.

[2] Motorola is to receive twenty-four percent of Nextel's voting securities. Agreements entered the same day commit Nextel to purchase Motorola equipment for its 800 MHz SMR business.

[3] The cities identified in the complaint and CIS were Atlanta, Georgia; Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver, Colorado; Detroit, Michigan; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; Seattle, Washington; and Washington, DC.

[4] In the Matter of Applications of Nextel Communications, Inc., FCC 95–263 at 13–14 (February 17, 1995).

[5] *See* Amendment of Part 90 to Facilitate Development of SMR Systems in the 800 MHz Frequency Band, FCC 94–271 (November 4, 1994) (Further Notice of Proposed Rulemaking).

[6] The Clark Group filed an initial comment on December 14, 1994, consisting of a copy of it filing with the FCC on the Nextel—OneComm transaction. On January 9, 1995, it filed additional comments. Its numerous pages of exhibits, consisting of, among other things channel ownership tables, have been submitted to the Court, but have not been published. Its December 14, 1994, and January 9, 1995, filings are Attachments A and B, respectively.

[7] The CCI, GE and Pick comments are Attachments C, D and E, respectively.

with the Court on behalf of OneComm Corporation requesting that the comment period be extended until January 17, 1995. On January 17, 1995, OneComm notified the United States that it would not, in fact, file a comment.[8] The United States has received comments from four persons. Upon publication of the comments and this response in the **Federal Register**, pursuant to 15 U.S.C. 16(d) of the APPA, the procedures required by the APPA prior to entry of the proposed Final Judgment will be completed. The United States will move the Court for entry of the proposed Final Judgment after publication of the comments and this response, and the Court may then enter the proposed Final Judgment.

III. Standard of Review

Under the APPA, the primary responsibility for enforcing the antitrust laws and protecting the public interest in competitive markets rests with the Department of Justice.[9] In carrying out its responsibilities, the Department has very broad discretion in prosecuting alleged antitrust violations and determining appropriate relief for the settlement of cases.[10] Before entering a proposed consent decree, the Court must determine that the decree is in the public interest, 15 U.S.C. 16(e),[11] but that test is limited to ensuring that the government has met its public interest responsibilities, that is, determining that the proposed Final Judgment falls within the range of the government's antitrust enforcement discretion. The Ninth Circuit Court of Appeals has explained these respective obligations as follows:

> The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General * * *. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' * * * More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decrees.[12]

Indeed, the courts repeatedly have held that the purpose of their review of proposed consent decrees is not to determine ''whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder.'' [13] or whether this is the remedy ''the court might have imposed had the matter been litigated.'' [14] Rather:

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its response to comments in order to determine whether those explanations are reasonable under the circumstances. The Court must also give appropriate recognition * * * to the fact that every consent judgment normally embodies a compromise, and that the parties each give up something which they might have won had they proceeded to trial.[15]

The Court may reject the agreement of the parties as to how the public interest is best served only if it has ''exceptional confidence that adverse antitrust consequences will result.'' *United States v. Western Electric Co.,* 993 F.2d 1572, 1577 (D.C. Cir.), *cert. denied,* 114 S.Ct. 487 (1993).

In this case, the United States carefully considered the matters that are now being raised in the comments when it formulated its position with respect to the transaction. We concluded, for reasons discussed below and in the Competitive Impact Statement, that the public would be best served by the remedial action set forth in the proposed Final Judgment. If the Court finds that the United States' action represented a reasonable exercise of its antitrust enforcement responsibility and prosecutorial discretion, it may enter the proposed Final Judgment as soon as compliance with the APPA is completed by publication of the comments and Response in the **Federal Register.**

IV. Response to Public Comments

In its comments, the Clark Group challenges the Competitive Impact Statement insofar as it explains the proposed Final Judgment is in the public interest. In support of its view, the Clark Group cites *United States* v. *Western Electric Co.,* 552 F.Supp. 131 (D.C.D.C. 1982) for the proposition that a proposed Final Judgment is inadequate if it does not render impotent the monopoly power found to violate the antitrust laws. As explained below, the Clark Group's market definition is too narrowly drawn and improperly fails to recognize the potential of these transactions to increase competition in wireless services.

A. Benefits from New Wireless Services

The various comments on the proposed Final Judgment explicitly and implicitly question whether Nextel's consolidation of 800 MHz SMR spectrum, now being used to provide analog dispatch services to small businesses, and its deployment of a new technology on that spectrum to provide dispatch, wireless telephone and data services, is really in the public interest. By granting numerous requests that SMR licenses be transferred to companies consolidating spectrum, granting wide area waivers, relaxing construction schedules, and other actions, the FCC has indicated that it believes that the public would benefit from the deployment of digital technology on 800 MHz SMR spectrum.[16] Those decisions were an exercise of policy judgment by an expert agency within its area of expertise and jurisdiction. We do not believe that it would be appropriate to revisit those decisions in the context of this antitrust proceeding.[17]

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[8] The OneComm filing is Attachment F.

[9] *United States v. Waste Management, Inc.,* 1985–2 Trade Cas. (CCH) ¶ 66,651 at page 63,045 (D.D.C. 1985).

[10] *United States v. Mid-American Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508 at page 71,980 (W.D. Mo. 1977), citing *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 689, (1961) and *Swift & Co. v. United States,* 276 U.S. 311, 331–32 (1928).

[11] This determination can be properly made on the basis of the Competitive Impact Statement and this Response. The procedures of 15 U.S.C. § 16(f) are discretionary, and a court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the Court in resolving those issues. *See* H.R. Rep. 93–1463, 93d Cong. 2d Sess. 8–9 *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6535, 6538.

[12] *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981) (citations omitted). See also *United States v. Western Electric Co.,* 900 F.2d 283, 309 (D.D. Cir.) cert denied, 498 U.S. 911 (1990).

[13] *United States v. National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978), quoting *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975).

[14] *United States v. Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985).

[15] *United States v. Mid-American Dairymen, Inc., supra,* ¶ 61,508 at 71,980.

[16] In February 1991, the FCC authorized Nextel, then called Fleet Call, to construct digital mobile networks in six cities, finding that doing so would ''generally encourage the larger and more efficient use of radio in the public interest.'' In Re Request of Fleet Call, Inc. for Waiver and Other Relief, 6 FCC Rcd 1533 (1991). Subsequently, the FCC granted additional waivers to Nextel and other companies authorizing the construction of such systems and facilitating their efforts to construct their systems. See, e.g., PR Docket No. 92–210, FCC 93–256, (May 13, 1993) (giving companies proposing digital wide-area systems five years to place their systems in operation).

[17] We also note that insofar as the commenters question the wisdom of the FCC's decision, they do so in an effort to protect their interests as providers of analog SMR services and competitors of Nextel. The antitrust laws were meant to protect competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977). The commenters seek to limit the 800 MHz SMR spectrum that Nextel may own or control and use in the provision of its proposed digital wireless services. The FCC has determined, however, that if

Section 16(e)(2) of the APPA permits the Court to consider, determining whether the judgment is in the public interest, ''the impact of entry of such judgment upon the public generally.'' Thus, public policy considerations other than the competitive impact of the judgment on the markets alleged, such as deference to the FCC's judgment on possible benefits to the wireless market, may be considered.[18]

The FCC's decisions, however, provide no basis for allowing Nextel to acquire control of 900 MHz spectrum in the relevant geographic markets, in addition to the substantial portion of 800 MHz spectrum that it intends to use for its digital network. The complaint and CIS reflect the conclusion of the United States that, given Nextel's control of a large portion of available 800 MHz SMR spectrum, its simultaneous control of the principal substitute for 800 MHz SMR service, *i.e.*, 900 MHz SMR service, would unnecessarily and unreasonably restrain competition.

B. Product Market

GE and CCI state that the appropriate product market is not trunked SMR service on 800 MHz, 900 MHz and 220 MHz, but, instead, comprises only 800 MHz SMR service. GE and CCI exclude 900 MHz SMR from the product market on the basis of different technical and regulatory constraints which apply to the 900 MHz services, which they maintain make 900 MHz service significantly more costly to provide than 800 MHz service.[19] GE and CCI also appear to believe that 220 MHz service is and will be subject to sufficiently different technical and regulatory constraints that it should not be included in the relevant product market.

The evidence developed by the government, however, showed that these services, particularly 800 MHz and 900 MHz trunked SMR service, are substitutes from the perspective of the potential dispatch customer. Customers that have significant field operations and need to provide their personnel with the ability to communicate directly with each other perceive that the quality of 800 MHz and 900 MHz service is comparable and, more important, often purchase 900 MHz service, rather than 800 MHz service, when both services are available and 800 MHz service increases a small but significant amount. As a result, 900 MHz service acts to constrain the prices of 800 MHz service and the relevant product market cannot be limited to 800 MHz trunked SMR service.

Existing dispatch customers face a different purchase decision than customers who have not previously purchased trunked SMR service. A customer's initial investment in 800 MHz equipment may act as a disincentive to move to 900 MHz service (or 220 MHz service) in the event of a price increase by its 800 MHz service provider.[20] However, these customers, too, consider 900 MHz trunked SMR service when evaluating whether to continue obtaining service from their current 800 MHz provider. Notwithstanding their sunk costs in equipment, existing 800 MHz customers are willing to move to 900 MHz service when the price of their 800 MHz trunked SMR service increases significantly. SMR service providers track customer changes—what is known as ''churn'' data. The churn data provided to the United States reveals that when dispatch customers using 800 MHz change wireless service providers (rather than dropping service altogether), they frequently move to 900 MHz services.[21] Customers are willing to change formats and bands because 900 MHz service providers have offered a variety of incentives to customers to reduce their costs. In addition, customers can sometimes reduce switching costs by selling their used equipment. As a result, 800 MHz trunked SMR service providers have not been able to impose significant, non-transitory price increases for their service because of the availability of 900 MHz service alternatives.[22]

C. The Markets Selected by the United States

CCI, the Clark Group and GE comment that the Final Judgment is inadequate in failing to address Nextel's dominance of 800 MHz spectrum in other areas of the country, including markets below the top 50, where 900 MHz SMR service was never licensed by the FCC. These areas include New Orleans, where CCI operates, and the cities in which members of the Clark Group operate. The Clark Group offers HHI calculations that show very high concentration in seven selected small cities around the country, which, it argues, constitutes *prima facie* evidence of the illegality of Nextel's acquisitions in these areas.[23] It states that many of the channels Nextel controls are not being used, but ''warehoused'' to prevent their use by competitors.

The government believes, however, that market conditions are significantly different in rural areas and smaller cities than in major metropolitan areas and, moreover, that market conditions in rural areas and smaller cities are likely to change soon. First, unlike the major metropolitan areas, rural and smaller urban areas have generally not experienced spectrum crowding. In the absence of spectrum constraints, existing competitors could expand services in response to any effort by Nextel to raise prices. Second, there is less differentiation between conventional and trunked SMR services, and between trunked SMR services and cellular services in rural areas and smaller cities.[24] In those areas, the lack of congestion reduces the difference in the reliability of subscriber access to conventional versus trunked dispatch systems. In addition, cellular and trunked SMR service are more readily

Nextel is successful in deploying its digital network, it will provide new competition to the cellular telephone companies which would benefit the public far more than the continued use of that spectrum for the provision of dispatch services to businesses. The FCC decisions will displace many current SMR service providers and their customers and make 800 MHz spectrum more scarce for companies seek to increase their analog SMR capacity. In reaching those decisions, however, the FCC concluded that Nextel's deployment of its network, using the Motorola technology, will dramatically increase the number of customers served on an 800 MHz channel, over the number served currently with analog SMR services.

[18] *See United States* v. *BNS, Inc.*, 858 F.2d 456, 462–63 (9th Cir. 1988).

[19] GE asserts, among other things, that 900 MHz service providers must construct more sites from which to send signals because of its poorer signal propagation, thus increasing their cost of infrastructure equipment vis-a-vis 800 MHz service providers.

[20] This disincentive is also present when a customer considers whether to change service providers within the 800 MHz band. A service provider will generally deploy a particular format—Motorola or GE/Ericsson or EF Johnson—that is not interchangeable with another. Consequently, someone receiving service from an 800 MHz Motorola trunked SMR system would have to buy new equipment to receive service form an 800 MHz E F Johsnon trunked SMR system.

[21] For example, in response to a late-1993 price increase by Transit Communications, a predecessor to Nextel's dominant 800 MHz SMR service position in Atlanta, more than four times as many dispatch units moved to Motorola's competing 900 MHz service, as to its competing 800 MHz services.

[22] As was stated in the Complaint and CIS, the exact effect of the deployment of 220 MHz SMR service in the trunked SMR market cannot be determined with any precision at present. However, based on the planned characteristics of 220 MHz SMR service, it cannot be excluded from the relevant product market.

[23] The Clark Group's channel count appears to count channels that are re-used as multiple channels, rather than discrete frequencies, thereby significantly overstating Nextel's channel position.

[24] As explained in the Complaint and CIS, conventional dispatch service should generally be excluded from the trunked SMR product market because it offers lesser privacy and lower reliability. Cellular telephone service is not in the market because it is significantly more expensive than trunked SMR service, is significantly more difficult for customers to restrict communications to the defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.

substitutable in those areas.[25] Thus, customers in rural areas and smaller cities appear to be better able to turn to alternative types of service in response to a significant increase in price by trunked SMR service providers.

Third, the FCC will soon grant new 900 MHz and 220 MHz SMR licenses in rural and small metropolitan areas. The Clark Group argues that the additional spectrum to be introduced in these markets will not be effective to constrain Nextel because Nextel's dominance in the 800 MHz band is a predictor of its likely dominance of those other bands. There is no reason to believe, however, that Nextel will be able to gain a dominant position in the 900 MHz or 220 MHz bands. Given its position in the 800 MHz band, and the commitment it has already made to implement its planned digital network in that band, it is unlikely that Nextel has the incentive to acquire significant blocks of 900 MHz or 220 MHz spectrum.

The Clark Group suggests that Nextel should be required to divest itself of 800 MHz channels in excess of those necessary to construct its planned digital network.[26] As explained above, the United States believes that such divestitures would be inconsistent with FCC efforts to facilitate the creation of new digital systems that would significantly benefit the public. Moreover, this suggestion would entail severe practical difficulties in most of the markets at issue because it would be extraordinarily difficult to establish how many channels might be needed in each of the relevant markets.

There is no single number of channels at which the technology will operate most efficiently or with the same costs as the cellular companies. Evidence provided to the Department establishes that Nextel's cost of doing business will decrease as the number of channels it holds increases over a large number of channels. Moreover, any calculation of operational efficiency will vary substantially from city to city, based on the potential number of customers served, the topography, the number of sites operated and other factors. Further, the costs may well change as technology changes in the wireless industry.[27]

In making its public interest determination this Court should focus on whether the relief provided by the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint.[28] It should not look to ''markets other than those alleged in the government's complaint.'' [29] In this case, the proposed Final Judgment removes the threat to competition from defendants' simultaneous control of virtually all available 800 MHz and 900 MHz SMR spectrum in fifteen (15) of the largest cities in the country. At the same time, the proposed Consent Decree allows Nextel to go forward with its plans for a digital mobile network. Hamstringing its efforts by limiting the number of 800 MHz SMR channels it may own or control to preserve traditional competition between Nextel and analog dispatch service providers should be rejected.

The Clark Group also asserts that the United States was only evaluating the proposed Nextel/Motorola transaction, and did not give adequate consideration to the effects of the Dial Page and OneComm acquisitions.[30] This assertion is wrong. The Complaint and proposed Final Judgment both clearly indicate that they are intended to address the competitive ramifications of the entire series of transactions by which Nextel is to acquire the spectrum holdings of Motorola, Dial Page and OneComm.[31] Their objection really goes to the decision to limit the relief sought to the fifteen (15) cities identified in the complaint.

D. Geographic Market

The Clark Group believes that the geographic markets in which the transaction should be judged are Rand McNally Basic Trading Areas or Metropolitan Statistical Areas, rather than the geographic core markets defined in the Complaint and CIS. The Clark Group's proposal would increase significantly the area in which concentration is assessed over that in the proposed Final Judgment: frequencies owned or managed within twenty five miles of each city's center.

However, neither the Clark Group nor any other commenter has seriously challenged the geographic market definition posited by the United States. The geographic market definition proposed by the United States is based upon the method of license allocation historically utilized by the FCC for the dispatch industry. The FCC has issued licenses based upon a service radius from a center point in which the licensee has exclusive use of a frequency. As described in the CIS, because of the SMR operator's need to provide service in critical, high-traffic areas, the geographic market in any particular city may be approximated by a 25 mile radius from the center point of that city.

E. Regulatory Complaints

Many of the commenters' complaints relate more to the alleged inadequacy or impropriety of the FCC's regulation of SMR than to the proposed Final Judgment. Pick alleges that many of Motorola's licenses have been fraudulently obtained. CCI asserts that the FCC's granting of wide-area waivers led to the development of license mills and spectrum warehousing, thus permitting the accumulation of channel concentrations which would have been prohibited by the underlying rules. GE, CCI and the Clark Group argue that the warehousing or holding of spectrum injures other small operators (such as themselves) who cannot expand their 800 MHz systems because there is no spectrum available to them to do so. Their inability to expand their systems eventually leads to degraded service quality as customers are added and congestion grows worse.

In this antitrust proceeding, the United States has not attempted to assess whether any person has improperly obtained or used the licenses they hold. Improper conduct in obtaining licenses and the failure to use the licenses in accordance with legal requirements are matters within the jurisdiction of the FCC. Where any person has information that a license

[25] Trunked SMR providers in more rural areas use more of their capacity to provide interconnection to the public switched telephone network, deriving as much as 60% of their revenues from this mobile telephone service. In major metropolitan areas trunked SMR service providers generally limit the amount of interconnect sold on their systems to 15 to 25% of their business in order to accommodate the demand for dispatch services.

[26] This is the relief the Clark Group seeks in its comments. Clark Group Comments at 25, January 9, 1995.

[27] With respect to Atlanta, the United States found that Nextel would own more channels than it needed to provide digital service and another company was poised to enter the market. These factors distinguished it from the other cities in the complaint.

[28] *United States* v. *Bechtel Corp.*, 1979–1 Trade Cas. (CCH) ¶ 62,430 at 76,565 (N.D. Cal. 1979), *aff'd*, 648 F.2d 660, 665–66 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

[29] *United States* v. *BNS, Inc., supra*, 858 F.2d at 462–63.

[30] As noted in the CIS, over the past few years a few companies, including Nextel, Dial Page and OneComm, have purchased hundreds of small companies holding licenses to provide trunked SMR service in the 800 MHz band. As a result of those acquisitions, OneComm is by far the largest holder of trunked SMR spectrum in 16 Western States, Dial Page is the largest holder of such spectrum in 12 Southeastern states, and Nextel is the largest holder of such spectrum in the other states.

[31] The definition of ''Nextel'' includes both Dial Page and OneComm. In addition, Atlanta, Miami and Orlando were identified as problem cities in the Dial Page service area, while Seattle and Denver were identified as problem cities in the OneComm service area. Dial Page and Nextel announced a definitive merger agreement on February 20, 1995.

has been obtained through fraud or misrepresentation, the matter is properly addressed to the FCC for it to investigate as a possible violation of its licensing regulations.

F. Effects in the Equipment Market

GE and the Clark Group (in a footnote) assert that the proposed Final Judgment will permit Motorola to control the SMR equipment market in the 800 MHz band because the proposed Final Judgment does not address the possible effect of the ancillary agreements pursuant to which Nextel will purchase Motorola's digital infrastructure and subscriber equipment for its planned 800 MHz wide-area SMR system.

The ancillary equipment agreements require Nextel to implement Motorola's digital system on its 800 MHz channels but do not control Nextel's decision whether to utilize Motorola's analog equipment on its 800 MHz or the 900 MHz SMR channels.[32] As discussed in the CIS, the United States considered the desirability of requiring the modification of the ancillary equipment agreements. The United States rejected that alternative because Motorola's digital SMR equipment pricing practices are likely to be constrained by those of other wireless equipment suppliers to the cellular service providers and to the personal communications service providers.

Moreover, a proceeding under the Tunney Act is to consider whether entry of the proposed Final Judgment, agreed to by the parties, is in the public interest. A Tunney Act proceeding should not consider whether the government might have brought some other case or a hypothetical settlement to which the parties have not agreed. Simply stated, the Tunney Act does not give the Court the power to impose different terms on the parties. *See, e.g., United States* v. *American Tel. & Tel. Co.,* 552 F.Supp. 131, 153 n.95 (D.D.C. 1982) *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983)(Mem).

G. Effects in a Second Market

GE, the Clark Group and CCI contend that the United States inappropriately considered competitive benefits in a second market when analyzing the likely effects of this transaction in the trunked SMR market. All three argue that consideration of effects in the cellular market was inappropriate, impermissible and irrelevant to a determination of harm in the trunked SMR market. The commenters also refer to a recent article in the *Wall Street Journal* of January 3, 1995. In that article, Nextel is said to have abandoned its ambitions to become a cellular competitor, and chief executive Morgan O'Brien is allegedly quoted as saying that Nextel never portrayed itself as a provider of cellular-like services to consumers, but as a provider of such services to persons now using analog dispatch services.[33]

The United States believes that it is entirely appropriate, in exercising its discretion to devise an appropriate remedy in this case, to consider the policies and decisions of the FCC, and the effects that proposed remedies might have on the efforts of the FCC to achieve its policy objectives.[34]

With respect to the newspaper articles Nextel has provided the United States with letters from its executives and others in which they challenge the accuracy of the statements in the articles, and an affidavit from the Chairman of its Board in which he indicates that Nextel's business plans have not changed. Given these statements, and Nextel's other statements in filings to the Securities and Exchange Commission, the FCC and the Department of Justice, the United States is satisfied that Nextel is committed to the construction of a digital SMR network that will soon compete with cellular service providers.[35]

V. Conclusion

After careful consideration of the comments, the United States continues to believe that, for the reasons stated herein and in the Competitive Impact Statement, the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint. There has been no showing that the proposed settlement constitutes an abuse of discretion by the United States or that it is not within the zone of settlements consistent with the public interest. Therefore, entry of the proposed Final Judgment should be found to be in the public interest and should be entered.

Respectfully submitted,

Dated: March 24, 1995.

Anne K. Bingaman,
Assistant Attorney General.
Steven C. Sunshine,
Deputy Assistant Attorney General.
Constance K. Robinson,
Director of Operations.
Donald J. Russell,
Chief, Telecommunications Task Force.
George S. Baranko,
Katherine E. Brown,
J. Philip Sauntry, Jr.,
Susanna M. Zwerling,
Attorneys.
Department of Justice,
Antitrust Division.

Certificate of Service

I, Kathy L. Cuff, hereby certify under penalty of perjury that I am not a party to this action, that I am not less than 18 years of age, and that I have on this 24th day of March 1995, caused a copy of the accompanying United States Response to Public Comments to the Proposed Final Judgment to be served by mailing a copy, postage prepaid, upon:

James D. Sonda,
Kirkland & Ellis.
Counsel for Motorola, Inc.
and
Charles A. James,
Jones, Day, Reavis & Pogue.
Counsel for Nextel Communications, Inc.

Kathy L. Cuff,

Dated: March 24, 1995.

Attachment A

Via Hand Delivery

George S. Baranko:

U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Washington, D.C. 20002.

RE: U.S. Motorola, Nextel, *Civil Action No. 94–2331*

December 14, 1994.

Dear Mr. Baranko:

Please consider the enclosed pleading a comment by the Clarks' Group to the proposed Final Judgment in the above referenced case.

Sincerely,

Raymond J. Kimball,

RJK/rid
Enclosure

cc: Michael R. Carper, Esquire, Counsel for OneComm Corporation; Joel M. Margolis, Esquire, Counsel for Nextel Communications, Inc.; R. Michael Senkowski, Esquire, Counsel for Motorola.

In the Matter of: Applications of Nextel Communications, Inc. for Transfer of Control of ONECOMM Corporation, N.A. and C–Call Corp.

To: Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau

[32] Implementation of the digital SMR system will not be immediate across the nation; some of Nextel's 800 MHz channels are likely to remain analog for some interim period.

[33] In addition, a *Land Mobile Radio News* article of December 2, 1994, a Motorola spokesperson discussed refocusing MIRS marketing efforts to stress MIRS as a bundle of integrated wireless services for dispatch rather than a third cellular competitor. The *Wall Street Journal* and *Land Mobile Radio News* articles are Attachments G and H, respectively.

[34] The modified final judgment entered by the *Court in United States* v. *Western Electric, Co.,* 552 F.Supp. 131 (D.D.C. 1982), reflected an extensive analysis of the FCC's regulatory policies and its abilities to address specific competitive problems.

[35] Nextel's letters and its affidavit to the Department of Justice are Attachments I and J, respectively.

[DA 94–1087]
[File No. 903335]
[File No. 903334]

Comments on Proposed Antitrust Final Judgment

Raymond J. Kimball,

Ross & Hardies.

Attorneys for Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc., Earl's Distributing Inc. and Earl's Wireless Communications.

Dated: December 14, 1994.

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C. The Proposed Merger Will Reduce Competition Between Nextel and OneComm
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Summary of Argument

Following the Nextel/OneComm merger, Nextel will control 91% of all licensed frequencies in Washington State, Oregon, and Idaho. Nextel would control ninety-six percent (96%) of all licensed 800 MHz SMR trunked frequencies in Washington State, eighty-seven percent (87%) of licensed frequencies in Oregon, and seventy-three percent (73%) of all 800 MHz SMR channels in Idaho. This concentration meets the classic definition of monopoly power. 800 MHz SMR is the only relevant SMR market in these and most of the other 13 Western states where this monopoly will occur.

Nextel's monopoly will enable it to reduce actual and potential competition, affect price and quality of service, and inhibit the development of alternative technologies. Independent systems no longer can expand; customer quality is falling, and employee layoffs and cessation of radio sales will occur in 1995. 1994 capital expansion plans already have been curtailed as a result of predatory practices by monopoly companies.

There is enough room and spectrum for every kind of mobile radio service provider, including independent operators, dispatch, low-powered digital, mobile telephone, ''traditional'' SMR, high-powered analogue and digital, and high-cost cellular-like and low-cost wide area operations. It would be inconsistent with the public interest for the FCC to approve monopoly mergers which will eliminate markets created, matured and encouraged by the Commission for over a quarter-century.

Comments on Proposed Antitrust Final Judgment

Clarks' Electronics, Lewiston, ID (''Clarks''); Teton Communications, Idaho Falls, ID (''Teton''); Radio Service Company, Burley and Twin Falls, ID (''RSI''); Zundel's Radio, Inc., Pocatello, ID (''Zundel's''); Business Radio, Inc., Kennewick, WA, (''BRI''); and Accu Comm, Inc., Mukilteo, WA (''AccuComm''); Earl's Distributing Inc. and Earl's Wireless Communications (''Earl's'') (collectively ''Clarks''), by their attorneys and pursuant of Section 1.41 and 1.46 of the Commission rules, hereby files its comments in support of and in supplement to its Preliminary Comments filed on November 30, 1994.[1]

These comments primarily provide factual information which demonstrate monopolization of the 800 MHz Specialized Mobile Radio (''SMR'') market, resulting from the proposed transfer of control of Nextel and OneComm. As a result of the proposed merger, Nextel will monopolize[2] SMR frequencies in sixteen (16) western states.

I. Justice Department's Filings

On October 27, 1994, the U.S. Department of Justice (''DOJ'') filed an antitrust complaint and proposed Final Order, among other papers, with the District of Columbia District Court, complaining that Nextel's proposed merger with Motorola would monopolize SMR service in the thirteen (13) largest urban markets.[3]

On November 3, Motorola filed in this proceeding the proposed Final Judgment, citing its relevance to the issues herein. Motorola failed to file all the papers DOJ filed with the District Court, including the complaint and the DOJ's Competitive Impact Statement (''CIS''). Those additional papers clearly are relevant to this proceeding. The CIS gives the context and reasoning of DOJ, and the complaint explains what was examined in detail and what was not. The ''missing'' papers are attached hereto as Exhibit A. Motorola's selective proffer of the Final Judgment as the only document ''relevant'' to this proceeding is, to say the least, a most narrow definition of relevancy.

In its complaint, the DOJ identified the relevant product market as ''trunked SMR service in 800 MHz, 900 MHz and 220 MHz.'' Complaint at 6. The relevant geographic markets were defined as ''the service areas in which the FCC has issued licenses for the provision of SMR service.'' *Id.* The DOJ noted that Nextel had agreed to acquire OneComm's ''accumulated 800 MHz spectrum in sixteen Western states,'' and DialPage, Inc.'s 800 MHz holdings in ''twelve Southeastern states.'' *Id.* at 8. The DOJ did not further analyze the monopoly effect of such acquisitions on the relevant geographic markets in these twenty-eight (28) states, concentrating only on the competitive impact of Nextel's acquisition of Motorola licenses in the top thirteen urban markets. The DOJ justified its lack of analysis of the OneComm acquisition with only minimal discussion:

> As an alternative to the proposed Final Judgment, the United States considered litigation seeking to limit the number of 800 MHz channels Nextel held in each affected city. The United States rejected that alternative for two reasons: First, it is satisfied that the relief it has obtained relating to 900 MHz frequencies will adequately address the harm to competition alleged in the complaint; Second, the Department did not want to inhibit Nextel's ability to offer cellular telephone service.[4]

The DOJ did not adequately analyze the anti-competitive impact on the SMR markets in the sixteen (16) western states which would result from the proposed OneComm merger. Indeed, the DOJ did not analyze the impact at all, because that merger was not the focus of its complaint—only the Motorola merger was. However, Nextel's ability to dominate the SMR markets through market concentration following the OneComm merger will violate Section 7

[1] On November 30, 1994, Clarks filed a Motion to Accept Pleading and filed preliminary comments, indicating that additional factual showings were under preparation but could not have been completed by November 21. See Declaration of William Holesworth attached hereto. Acceptance of this additional information is in the public interest. An additional Motion for Acceptance is filed simultaneously.

[2] Monopoly control is used herein in its strict antitrust definition, *i.e.*, control of greater than 70% of the relevant market. *See Caldwell* v. *American Basketball Association*, 825 F. Supp. 558, 575 (S.D.N.Y. 1993) (noting that courts usually find monopoly power where defendants possess more than 70% of the market); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 167–69, 68 S. Ct. 915, 934–935 (1948) (finding monopoly power where five major film-production companies effectively controlled which theaters could exhibit first-run films through the companies' affiliation with at least 70% of the first-run theaters in major U.S. cities).

[3] *United States of America v. Motorola, Inc., and Nextel Communications, Inc.*, Case No. 1:94 CV02331 (Hogan, J.) (D.C., District of Columbia, filed October 27, 1994) (hereinafter ''US v. Motorola, Nextel'').

[4] CIS at 17–18.

of the Clayton Act in the following ways:

(a) Actual and potential competition between Nextel and OneComm (and the licenses they manage) in the sale of SMR services in the sixteen (16) western states and their submarkets will be eliminated;

(b) Competition generally in the sale of trunked SMR services in the sixteen (16) Western states where OneComm has licenses will be substantially lessened; and

(c) The deployment of alternative technologies will be inhibited.

The following sections discuss these conclusions.

II. Nextel Would Monopolize Trunked SMR Service in Sixteen (16) Western States Following the OneComm Merger

Nextel will monopolize trunked SMR service in sixteen (16) Western states following the OneComm merger, if approved. Clarks has selected three of those states for detailed study—Washington, Oregon and Idaho. Clarks, *et. al.*, believe, through their knowledge of SMR license concentration in Western states that the concentration levels are higher than or equal to the concentration levels in the three surveyed states.

Following the merger, Nextel will control 91% of all licensed frequencies in Washington, Oregon, and Idaho. Nextel would control ninety-one percent (i.e., 90.65%) of all licensed frequencies in Washington, Oregon, and Idaho:

State	Nextel/ Onecomm freq.	Total freq.
Washington	10,018	10,424
Oregon	6,543	7,461
Idaho	1,404	1,932
Total	17,965	19,817 [5]=90.65%

[5] Source—FCC Database as of November 10, 1994, frequencies in the 800 MHz band licensed for trunked SMR (YX) service. See attached Declaration of William Holesworth, Exhibit D.

Nextel would control 96% of all 800 MHz SMR channels in Washington State, 88% of all 800 MHz SMR channels in Oregon, and 73% of all licensed channels in Idaho.[6] This level of concentration meets the classic case law definitions of monopoly under the relevant case law.[7]

A. Relevant Product Market

Clarks agrees with the Department of Justice that a relevant product market is the trunked SMR market. The trunked SMR market in Washington, Oregon, and Idaho is slightly different from the thirteen (13) largest urban markets, in that it does not primarily include 900 MHz channels, and only includes 220 MHz channels to a limited extent.[8]

The 800 MHz SMR business dominates the SMR product and geographic markets and is the only market for analyzing SMR concentration outside the top 50 markets. Substantial 800 MHz market domination by Nextel in the Western states also is a predictor of future 900 MHz and 220 MHz frequency concentration. Many of the presently viable competitors to Nextel would be eliminated prior to introduction of 900 MHz and 220 MHz channels, based on the proposed Nextel/OneComm merger.

B. Geographic Market

The relevant geographic market was defined by the Department of Justice for the top 13 markets as a 25-mile radius from center city.[9] Most current independent SMR operators serve BTA [10] or MSA [11] markets. The Commission has proposed that 800 MHz SMRs be licensed through auctions on an MTA market basis.[12] The MTAs are indeed large markets not reflective of the current market, but of what the FCC would like the market to become through auction.[13]

For example, the Salt Lake City MTA includes most of Utah, all of Southern Idaho, including Boise and Twin Falls, and Eastern Oregon. No one SMR operator presently provides service to this entire region; however, through acquisition of OneComm, Nextel proposes to serve state-sized regions in the Western states.

Clarks analyzed 800 MHz frequency concentration in the three Western states in which its members provide service. Given the various geographic market definitions currently operating in the SMR industry, state-wide and 3-state combined analysis approximates actual business patterns and the future prospective market sizes, including MTAs. The results are set forth in the Declaration of William Holesworth, attached hereto, showing frequency concentration levels in 800 MHz SMR about 85% in many Western markets, and above 70% in virtually all markets.

DOJ found that:

> * * * Nextel holds a dominant share of the 800 MHz SMR spectrum available for trunked SMR services in most of the largest markets in the country.

It can be concluded, based on the material submitted herein, that:

> Following the Nextel/OneComm merger, Nextel will hold a dominant share of the 800 MHz SMR spectrum available for trunked SMR service in most markets, large and small, in the states of Washington, Oregon, and Idaho.

Further, based on this survey and based on the FCC's database records of licensed frequency use by Nextel and OneComm, Nextel cannot be heard to deny that it will hold a dominant share of the 800 MHz SMR spectrum available for trunked SMR service in most markets in the 16 Western states in which OneComm operates if the merger with OneComm is approved.

III. Anti-Competitive Impact of Undue Concentration in the 800 MHz SMR Markets

Will Nextel's market domination in Washington, Oregon and Idaho, and in the 13 other states in which OneComm is licensed, reduce actual and potential competition, affect price and quality of service, and inhibit the development of alternative technologies? [14]

Attached are declarations of various independent SMR operators in Washington, Oregon, and Idaho describing in detail the present and future effect of Nextel's proposed market domination through acquisition of OneComm. Those effects include:

1. *Product Market Expansion.* Elimination of competitors' ability to expand product service and maintain service quality.

[6] See attached Declaration of William Holesworth.

[7] *United States* v. *Grinnell Corp.*, 385 U.S. 563, 571, 86 S. Ct. 1698, 1704 (1966) (stating monopoly power "ordinarily is inferred from the seller's possession of a predominant share of the market" and finding monopoly where company controlled approximately 87% of the market); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 974 and n.6 (noting that "a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition" and surveying monopoly findings in cases where companies controlled at least 70% of the markets).

[8] The 900 MHz band presently is not licensed outside the top 50 urban markets. The 220 MHz band, while licensed, has not been substantially constructed, based on lack of equipment. Neither of these bands is a significant factor in the Western states smaller cities or rural areas.

[9] See Final Judgment 2. It is unclear whether this definition is the only DOJ definition since it is not employed in the complaint. See Complaint at 6–7.

[10] Rand McNalley Basic Trading Areas.

[11] Census Bureau Metropolitan Statistical Areas.

[12] Rand McNalley Major Trading Areas. There are 51 MTAs used by the FCC for PCS purposes.

[13] See Further Notice of Proposed Rule Making, PR Docket 93–144 (November 4, 1994).

[14] See DOJ Complaint at 15. *See also American Tobacco Co.* v. *United States*, 328 U.S. 781, 811, 66 S.Ct. 1125, 1139–40 (1946) (finding monopoly where "power exists to raise prices or to exclude competition when it desired to do so"); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665 (1966) (explaining purpose of Clayton Act is to prevent companies from lessening competition through acquisition).

2. *Geographic Expansion.* Elimination of competitors' ability to expand geographic service areas, through dominant control and warehousing of available frequencies, many of which frequencies will not and cannot be built.

3. *Consumer Prices.* Increased pricing. Nextel is charging and proposes to charge higher prices in its markets than independent analogue SMR operators.[15]

4. *Inhibiting Restraints on Competing Technologies.* Nextel's dominance threatens the development of new wide-area alliances by independent operators, *e.g.*, Northwest Wireless, by inhibiting expansion and the continued viability of competing equipment manufacturers to Motorola.

A. The Merger Would Inhibit the Deployment of Alternative Technologies

The Nextel/OneComm merger would inhibit the deployment of the Northwest Wireless Network in these Western states, and would effectively inhibit competition from other manufacturers. In Washington State, where Nextel would dominate 96% of the available frequencies using Motorola equipment, only 4% of the market is left to competing SMR equipment manufacturers.[16] This is hardly sufficient to sustain a market presence. The percentage of the market available to competitors in Oregon and Idaho is not much better—*i.e.*, 13% and 27%, respectively. If that largest market in Idaho is equally divided three ways, each of the three competing equipment manufacturers could only expect to serve less than 10% of the market.

The impact on the development of independent roaming alliances such as Northwest Wireless Network would also be severe. NWN was formed to give the operators of EF Johnson equipment an opportunity to offer their customers an alternative to Motorola's planned MIRS system. However, with continued short-spacing of SMR operators using EF Johnson SMR equipment on the local level, and forcing small market shares on competing manufacturers in the various states, Nextel/Motorola/OneComm can use their dominant market position to keep NWN from successfully offering alternative digital SMR service to new and existing customers.

B. Nextel and OneComm's Dominance of Available Frequencies Is Already Affecting the Quality of Service

The monopoly impact on quality of service is already being experienced in 1994, even in advance of the merger. The merger will exacerbate the situation, by permitting Nextel to combine its Questar and Motorola license holdings with those of OneComm.[17]

A number of the attached declarations demonstrate that service quality among independent operators is declining as a result of the inability to get access to frequencies OneComm/Nextel have warehoused.[18] SMR frequency domination is leading to lessened service quality to existing customers, both on a ''dropped call'' basis, and through customer inability to expand on non-Motorola systems. These are *exactly* the kind of anti-competitive effects the Clayton Act is designed to prevent. This Commission also should take very seriously the public interest considerations inherent in permitting market concentration to squeeze out competing manufacturers and operators, and to reduce quality service to the public.

C. The Proposed Merger Will Reduce Competition Between Nextel and OneComm

Nextel has purchased Questar's and Motorola's licenses in the Western states, and has monopolized trunked SMR service in the major urban markets, including Seattle, Washington among others.[19] OneComm is a major potential competitor to Nextel, both now and in the FCC's proposed auctions of SMR markets.[20] That actual and potential competition would be completely eliminated by the proposed merger. OneComm and CenCall are by far the largest SMR license holders in the Western markets; in contrast, Motorola was the second largest ''provider of service'' in the nation.[21]

By eliminating this competition in the sixteen (16) Western states, Nextel eliminates the potential for the following competitive environment:

1. Sale of some of OneComm's frequencies to existing operators to permit expansion, including possible forced divestiture by the FCC to avoid anti-competitive effects.

2. Merger prevents another equipment manufacturer from obtaining a significant share of the SMR market in the Western states.

D. Impact on the Cellular Market

The DOJ admits that it could litigate against Nextel on its 800 MHz concentration—*i.e.*, that the Clayton Act is violated by those concentrations:

> As an alternative to the proposed Final Judgment, the United States considered litigation seeking to limit the *number of 800 MHz channels Nextel held in each affected city*.[22]

The DOJ refuses to disturb an admitted monopoly, in order, it says, to permit Nextel to enter the ''cellular market.''[23]

Contrary to DOJ's assumptions, Nextel is not entering the cellular market. Motorola's MIRS technology is *not* competitive with cellular:

> * * * Motorola, Inc.'s officials last week stressed the need to adjust their marketing strategy for ESMR technology. *The greatest marketing change would attempt to alter the perception that ESMRs would soon be a third cellular competitor, focusing instead on integrated wireless services for dispatch*, said Lise Farmer, spokeswoman for the Motorola division supplying * * * MIRS technology to Nextel * * * and its potential partners, OneComm Corp. and DialPage, Inc.
>
> Robert Pass: ''They just started talking about being a third cellular carrier * * * but they didn't have technology that was superior to cellular.'' [Without superior technology] and if they can't price it well below cellular, then how are they going to [complete with cellular].''[24]

Thus, DOJ's concern that the Nextel should be allowed to enter the cellular market through concentrating 800 MHz frequencies in one operator ignores two important facts. Nextel/MIRS will not compete effectively with cellular, and, as a system, is not *designed* to compete effectively.

Take away the ''hype'' about entering the cellular market, which Nextel and Motorola have successfully sold to the FCC (and now DOJ) over the past few years, and it now becomes clear what independent operators have been saying all along. The SMR market, as a stand-alone, competitive, independent low-cost alternative market, has been and is being systematically eliminated by Nextel's predatory acquisitions and anti-competitive practices, simply so Nextel can dominate the frequency spectrum's value.

The FCC has encouraged such predatory practices through permissive

[15] See Declaration of Rick E. Hafla, and attachments thereto.

[16] *E.g.*, EF Johnson; Ericsson/GE; and Uniden, the major competitors at this time in the SMR market.

[17] The concentration is continuing with OneComm acquiring seventeen (17) ''speculator'' channels recently constructed in the Southwestern Idaho market.

[18] See Declarations of Rick Hafla, Steven T. Earl.

[19] Seattle is one of the subject markets in the DOJ Complaint. See Complaint at 6.

[20] See Further Notice of Proposed Rule Making, D. 93–144 (November 4, 1994).

[21] DOJ Complaint at 8. OneComm's systems are not substantially constructed, and therefore it is not presently the most significant provider of service in all 16 states. However, its unconstructed license holdings are prodigious in the Western states, including Washington, Oregon, and Idaho, and every bit as dominant as Motorola's existing operations on the present and near future status of SMR services.

[22] DOJ CIS at 17.

[23] *Id.*, at 17–18.

[24] Land Mobile Radio News, Vol. 48, No. 47, p. 1, (December 2, 1994). (Emphasis and brackets in original.)

rule changes which encouraged frequency warehousing and short-spacing rules which have been used to squeeze independent operators out of the market. The FCC and DOJ acted in the mistaken belief they were creating a third cellular operation. That premise is no longer tenable.

Nextel is offering a ''next generation'' of digital SMR service, which independent operators intend to provide also, through co-operatives and alliances such as Northwest Wireless Network. The public interest considerations which guide this Commission should not lead it to approve a merger which will establish single-provider dominance, once and for all, and eliminate independent competition in the emerging and *still growing* mobile radio markets.

There is enough room for everyone—dispatch, mobile telephone services, low-powered digital, high-powered analogue and digital, high-cost and low cost operations. However, if the FCC signals telecommunications providers that they can ignore the antitrust laws, acquire 91% of a relevant market, drive equipment suppliers and low-cost service providers, small businesses, and rural service out of the market, and force service quality reductions on the surviving market segments, then the Communications public interest standard does not stand for much. While the Commission may not have jurisdiction to enforce the Clayton Act, it is not empowered to ignore its existence or impact on the public interest, especially where the impact on a relevant market is so pronounced.

In fact, Congress intended for the Commission to avoid license concentrations which would tend to lessen competition when the Congress enacted 47 U.S.C. 309(j). Within the statute, Congress expressed its interest in promoting the public interest through its promotion of economic opportunity and competition. *See* 47 U.S.C. 309(j)(3)B). In the House Report, the House Committee on Energy and Commerce declared that although the Committee noted the Commission did not need to apply any particular antitrust tests, the Commission should take into account single licensee's domination of a service. H. Rep. No. 103–111, at p. 254. The Committee expressed its concern ''that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries,'' *Id.* At no point did Congress declare the anti-trust laws inapplicable to the Commission's considerations.

The FCC should not approve mergers which will eliminate markets it has created, nurtured and promoted over a quarter century. The FCC also should adjust its short-spacing and warehousing policies to prevent the present anti-competitive effects of those policies on existing, viable businesses.

Wherefore, the premises considered, the above referenced applications for transfer of control should be denied.

Respectively submitted,

Dated: December 14, 1994.

Raymond J. Kimball, Ross & Hardies.

Attorneys for Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc., Earl's Distributing, Inc. and Earl's Wireless Communications.

Additional Comments of Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accucomm, Inc., Earl's Distributing Inc., Earl's Wireless Communications, Total Communications, Communications Center, Inc., and Leflore Communications, Inc. to the Proposed Antitrust Final Judgment

[Case Number 1:94CV02331]

[Judge: Thomas F. Hogan]

[Deck Type: Antitrust]

[Date Stamp: 10/27/94]

Pursuant to 15 U.S.C.A. 16, Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu-Comm, Inc., Earl's Distributing Inc., Earl's Wireless Communications, Total Communications, Inc., Communications Center, Inc., and Leflore Communications, Inc. (collectively referred to as ''Clarks''),[1] by their counsel, hereby submit their additional comments[2] and attached exhibits in opposition to the proposed Final Judgment between Motorola, Inc. (''Motorola''), Nextel Communications, Inc. (''Nextel''), and the United States Department of Justice (''Justice Department'') in the above-captioned action (the ''Action'').

Introduction

The Justice Department has proposed this Final Judgment to address the potential anticompetitive effect of the pending acquisitions by Nextel of OneComm, Inc. (''OneComm''), Dial Page, Inc. (''Dial Page'') and of all specialized mobile radio (''SMR'') licenses owned and managed by Motorola (collectively, the ''Nextel Acquisitions'') on the market for trunked SMR service. SMR is a unique blend of radio dispatch and interconnect communication service. The Nextel Acquisitions will have had a pronounced anticompetitive effect on many SMR service markets, large and small, urban and rural, throughout the country. The proposed Final Judgment purports to remedy this anticompetitive effect in only ''fifteen of the largest cities in the United States'' (the ''15 Select Cities''), but does not address the anticompetitive effect of the Nextel Acquisitions in other markets. Thus, the proposed Final Judgment will permit Nextel to own or control a dominant (and in some instances a monopoly) share of the SMR service markets in the smaller urban and rural areas in which SMR operators such as Clarks operate and compete. Because it neither addresses nor remedies the anticompetitive effect of the Nextel Acquisition in these markets, nor in any markets outside of the 15 Select Cities, as a matter of law, the proposed Final Judgment cannot be in the public interest and must be rejected.

Background

A. SMR Technology

SMR is a form of land mobile communication service utilized by business customers such as contractors, service companies, delivery services and other businesses that have significant field operations. (Competitive Impact Statement, October 27, 1994 (hereinafter ''CIS'') at p. 3.) SMR permits a customer to communicate with its *entire* field force on a one-to-many, or ''dispatch'' basis, yet also permits that customer to communicate to a single person *within* its field force on a one-to-one, or ''interconnected'' basis. (*Id.*).

SMR operators are licensed by the Federal Communications Commission (''FCC''). Licensed SMR operators are assigned specific channels of radio frequency by the FCC. The operator has exclusive use of that channel within its service area (''Service Area''). There is a limited amount of frequency spectrum

[1] The aforementioned entities are licensees and managers of Specialized Mobile Radio licenses in Idaho, Washington State, Oregon, Oklahoma, Louisiana and Mississippi. They serve public safety and individual customers throughout their local and regional service areas. They are, or would be in direct competition with SMR licenses, existing and unconstructed, owned, controlled or managed by Nextel Communications, Inc.

[2] Clark submitted its initial comments, a Petition For Rulemaking filed by Fleet Call, Inc. (now Nextel) to the Federal Communications Commission on April 22, 1992, under cover of a letter from their counsel to George S. Baranko dated December 14, 1994.

available for SMR service. (Complaint at ¶ 15.) Channels are assigned in pairs to facilitate two-way communication. *Id.*

SMR systems typically use a single high-elevation base station centrally located within each Service Area to receive, allocate and transmit signals to and mobile units throughout the Service Area. (*Id* at ¶ 14.) The FCC generally mandates that SMR base stations be constructed at least 70 miles apart, and that the signal from one base station may not interfere with the same frequency channel assigned in an adjoining Service Area. (47 CFR 90.621(b).) As a result, the minimum Service Area of any SMR operator is generally defined by a 35 mile radius from its base station, and the operator enjoys exclusive use of its channels within that 35 mile radius. (CIS at p. 4.) An SMR signal, however, can travel distances of up to 100 miles. Accordingly, where a channel in use on one SMR system has not been allocated to a licensee on an SMR system in an adjoining Service Area, the SMR coverage area may extend beyond the minimum protected 35 mile radius.

B. Development of SMR Industry

The FCC first licensed SMR service in the late 1970's. The FCC allocated 280 channel pairs in the 800 MHz radio band within each Service Area to operators throughout the country.[3] (Complaint at ¶ 15.) Licensees could apply for up to 5 trunked channels at a time, with a maximum of 20 channel pairs per operator in any Service Area. (47 CFR 90.621, 90.627; *see also* Complaint at ¶ 19.) To retain its channels, an SMR operator had to build its facility within one year and ''load'' each of its allocated channels with, at least, 70 radio units within five years. (CIS at p. 7.) Any ''unbuilt'' or ''unloaded'' channels were reassigned to applicants on a waiting list. (*Id.*) Unconstructed facilities could not be transferred or assigned. (*See* 47 CFR 90.609.)

By the mid-1980's, the allocated 800 MHz channels had reached their capacity of 100 to 150 customers per channel in most large cities. (*Id.* at ¶ 15.) As a result, in 1986, the FCC allocated an additional 200 channel pairs in the 900 MHz radio band. (*Id.*) This 900 MHz capacity, however, was allocated exclusively to Service Areas in the 50 largest metropolitan service areas. (*Id.*) *In the smaller urban and in the rural markets, SMR operates exclusively on the originally allotted channels in the 800 MHz frequency.* (*Id.*) (emphasis supplied.)[4]

C. Recent Concentration in the SMR Industry

The competitive landscape of the markets for trunked SMR service and equipment changed dramatically in 1993. Touting the benefits of a wider-area national SMR network that might compete with existing mobile cellular service, Nextel successfully lobbied the FCC to relax its limitations on channel applications, holdings and temporal build-out/loading requirements. (See *In the Matter of Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods,* 8 FCC Rcd. 3975 (1993); Nextel's Petition For Rulemaking, RM 7985 (filed at FCC April 22, 1992)). This signaled the beginning of the end for robust competition between SMR providers, large and small. Instead, from that point forward, the markets for trunked SMR service have been a study in systematic concentration. In the second half of 1994 alone, Nextel announced 21 mergers and acquisitions that promise to more than double its SMR subscriber base. (*See* Report of Economic and Management Consultants International, Inc. (''EMCI''), January 5, 1995, Table 3 at p. 7, a true and correct copy of the report is attached as Exhibit A). More importantly, however, these consolidations will give Nextel a strangle-hold on the 800 MHz spectrum, the life-blood of the SMR industry, in the smaller markets in which Clarks operates and competes.

D. The Nextel Acquisitions

The most significant of Nextel's mergers and acquisitions are those involving OneComm, Dial Page and Motorola. Upon consummation of its proposed agreement with Motorola, Nextel will acquire all of Motorola's 800 MHz SMR systems and the right to manage Motorola's 900 MHz SMR systems. In doing so, Nextel will have effectively disarmed the nation's second largest SMR operator and Nextel's single largest competitor.[5]

Nextel's mergers with OneComm and Dial Page will have a similar, and perhaps greater, anticompetitive effect. OneComm and Dial Page each are operators of sizeable trunked SMR systems that presently compete with Nextel in numerous markets in 16 western and 12 southeastern states, respectively. The Nextel Acquisitions, therefore, will lessen existing competition in the markets for trunked SMR service within these states. In addition, however, Nextel's mergers with OneComm and Dial Page will give Nextel a strangle-hold over future competition in these markets. Indeed, by virtue of the FCC waiver, OneComm and Dial Page have accumulated system licenses pursuant to which they control virtually *every* available channel in the 800 MHz spectrum. (See Clarks' Opposition Comments to the FCC, October 18, 1994, File Nos. 90335, 90334). Neither OneComm nor Dial Page have any present need for these large blocks of channels in these states, and have ''warehoused'' these channels. Neither OneComm nor Dial Page is required to build out its facilities for five years. See *Extended Implementation Periods,* 8 FCC Rcd. 3975 (1993); Letter to *David E. Weisman,* 8 FCC Rcd. 143–144–45 (1993).[6]

In short, the Nextel Acquisitions will give Nextel a dominant share of both constructed and unconstructed facilities in the 800 MHz spectrum throughout the country, including some of the largest metropolitan markets. As a result, Nextel will control present and future competition in this market through use and nonuse of the built-out and warehoused capacity.

E. The Action and Proposed Final Judgment

The Justice Department commenced this Action on October 27, 1994 to address the cumulative anticompetitive effects of the Nextel Acquisitions. Although Nextel and Motorola are the

[3] Additional 800 MHz channels are, in theory, available in some cities for SMR trunked service use through ''intercategory sharing'' of capacity with various private systems. Most private systems, however, utilize virtually all of the capacity on their allocated channels. Accordingly, these systems are unwilling or unable to participate in ''intercategory sharing'' of their 800 MHz capacity. (*See* CIS at p. 5, n.1.)

[4] To limited extent, a similar service is provided in the 220 MHz band in selected areas.

[5] Moreover, by virtue of a contemporaneously executed equipment supply agreement between Nextel and Motorola, Motorola will supply Nextel, on an exclusive basis, with digital equipment to build out all of the 800 MHz channels it will obtain. By doing so, Motorola has essentially foreclosed a significant amount of competition in the SMR equipment market in which it currently holds a dominant (58%) share. (*See* EMCI Report, Ex. A at Figure 5) This is particularly so where the future SMR equipment market lies primarily in the build out of the 800 MHz channels. *See generally United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974) (in markets characterized by long term performance, ability to meet future demand rather than past performance is the best measure of a company's ability to compete in the relevant market. This concentration of market power in the hands of Motorola threatens to abruptly reverse the trend of decreasing equipment prices. (*See* EMCI Report, Ex. A at Figure 6).

[6] This transfer of licenses to Nextel to operate such facilities prior to their completion and construction, in apparent violation of 47 CFR 90.609(b) is the subject of a separate petition filed by Clarks before the FCC.

only named Defendants, the proposed Final Judgment expressly purports to ''*resolve issues with respect to . . . proposed mergers and acquisitions between Nextel, OneComm Corporation and Dial Page, Inc.*''[7] (Final Judgment, VIII.B.) (emphasis supplied).

The gravamen of the Action is that the Nextel Acquisitions would have the cumulative effect of ''eliminating all but a few suppliers of trunked SMR services in a number of cities in the United States.'' (CIS at p. 11). By way of illustration, the Justice Department described the effect of the Nextel Acquisitions in the 15 Select Cities in which Nextel would control virtually all of the SMR spectrum. On October 27, 1994, the parties to the Action executed the proposed Final Judgment, whereby Nextel/Motorola would divest itself only of ownership, control or management of their 900 MHz channels in each of the 15 Selected cities.

Analysis

The Justice Department commenced this Action because it determined that the Nextel Acquisitions violated Section 7 of the Clayton Act in three ways: (1) By substantially lessening competition between the Nextel and Motorola, the industry's two largest providers of trunked SMR service; (2) by substantially lessening competition generally in the sale of trunked SMR service; and (3) by inhibiting the deployment of alternative technologies. (Complaint at ¶ 43). Absent intervention, the Justice Department determined that Nextel's dominance would give it the ability ''to raise prices and reduce the quality or quantity of [trunked SMR] service.'' (*Id.* at ¶ 25; CIS at p. 12–13).

In proposing this Final Judgment, the Justice Department contends that:

> The risk to competition posed by the transaction would be substantially eliminated by the relief provided in the proposed Final Judgment which will ensure that alternative trunked SMR service providers will be available in *all the relevant geographic markets.*

(CIS at p. 10) (emphasis added).

In fact, however, the proposed Final Judgment does not eliminate the risk to competition in ''all,'' or even most, relevant markets. Any arguable remedial effect that the proposed Final Judgment might have on the trunked SMR service market is limited to the 15 Select Cities in which 900 MHz frequency divestiture was ordered. The proposed Final Judgment does not remedy the anticompetitive effect of the Nextel Acquisition on smaller markets in which SMR trunked service is licensed exclusively on channels in the 800 MHz spectrum. Quite the contrary, the proposed Final Judgment blesses monopolistic concentration in these small markets.

The unambiguous mandate of the Clayton Act requires that the proposed Final Judgment protect competition in all SMR markets, not simply those within the 15 Select Cities. Because it fails to comply with this mandate, entry of the proposed Final Judgment cannot be in the public interest.

I. The Public Interest and Applicable Standard of Review

It is well settled that the ''public interest,'' within the meaning of the Tunney Act, lies in the enforcement of the antitrust laws designed to preserve ''free and unfettered competition as the rule of trade.'' *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 149 (D.D.C. 1982) *aff'd, sub nom Maryland* v. *United States*, 460 U.S. 1001 (1983)[8] (quoting *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958). This Court need not unquestioningly accept the proposed decree proffered by the Justice Department as in the ''public interest'' simply because it ''somehow, and however inadequately, deals with the antitrust * * * problems implicated in the lawsuit.'' *AT&T*, 552 F. Supp. at 151. Rather, any consent decree must ''render impotent the monopoly power found to be in violation of the [antitrust laws and] * * * must leave the defendant without the ability to resume the actions which constituted the antitrust violation in the first place.'' *Id.* at 150 (quoting 2 P. Areeda & D. Turner, *Antitrust Laws* section 327 (1978)).

Section 7 of the Clayton Act, on which this Action is premised, prohibits acquisitions where the effect would be to substantially ''lessen competition or tend to create a monopoly.'' 15 U.S.C.A. § 18. More importantly, the Clayton Act extends the protection of this Section to ''any line of commerce or * * * any activity effecting commerce *in any section of the country*.'' *Id.* (emphasis added). Indeed, the United States Supreme Court has held that ''if anticompetitive effects of a merger are probable in ''any'' significant market, the merger—at least to that extent—is proscribed'' by Section 7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336–37 (1962). *See also RSR Corp.* v. *Federal Trade Com.*, 602 F.2d 1317, 1323 (9th Cir. 1979) *cert. denied*, 445 U.S. 927 (1980). The anticompetitive effects of a merger in one market cannot be ignored simply because they are offset by procompetitive effects in another market. *Id.* at 1325 (citing *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370–71 (1973). Under this standard, the proposed Final Judgment is not in the public interest.

II. The Nextel Acquisitions Will Give Nextel a Dominant Market Share in the Smaller Markets in which Operators Like Clarks Operate and Compete

Although ignored or forsaken by the Justice Department, competition in the smaller markets in which Clarks operates and competes will be severely and adversely impacted by the Nextel Acquisitions. In *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 370–71 (1963), The Supreme Court defined the appropriate analysis of a merger under Section 7 of the Clayton Act:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. at 363. The Court expanded the rule of presumptive illegality in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 279 (1964) when it held that ''even slight increases in concentration'' which resulted from horizontal acquisition would be presumed illegal if the acquisition involved markets where the ''concentration was already great.'' Applying this analysis to the smaller markets, the Nextel Acquisition, without further proscription, would have the precise anticompetitive effects that mandate an injunction.

A. The Relevant Market

The Justice Department expressly defined the relevant product and geographic markets in analyzing the effect of the Nextel Acquisitions in the 15 Select Cities. This same analysis, with a slight modification, is adequate for use in defining the relevant markets in the areas ignored by the Justice Department.

The Justice Department defined the relevant product market accordingly:

> The product market consists of trunked SMR service in the 800 MHz, 900 MHz and 220 MHz bands. Conventional dispatch service is not a substitute for trunked SMR service because it affords lesser privacy and lower reliability. Cellular telephone service is not a substitute because it is significantly

[7] Indeed, for purposes of the proposed Final Judgment, Nextel, by definition, includes OneComm and Dial Page. (*See* proposed Final Judgment, II (Definitions) E and J).

[8] Citations to later proceedings omitted.

more expensive than SMR service, is significantly more difficult for customers to restrict communications to a defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.

(CIS at p. 6). For purposes of analyzing these effects in markets *outside* these 15 Select Cities, however, the relevant product market must be defined more narrowly. There are no SMR 900 MHz licenses in the smaller markets in which SMR operators like Clarks operate. Moreover, as the Justice Department concedes, 220 MHz frequency, to the extent it becomes available and is constructed in these smaller markets, ''will require some time to gain commercial acceptance and to effect competition for the 800 MHz . . . service.'' (Complaint at ¶ 16).[9] Accordingly, the relevant product market in which Clarks competes is presently (and for the foreseeable future) limited to the 800 MHz frequency.[10]

The Justice Department's geographic market definition as each license area in which, the FCC has authorized the provision of SMR service (generally, a service area with a radius of 35 miles) is, generally, adequate. Given, however, that the product market is defined by availability of channel frequency within a Service Area *and* in adjoining Service Areas, under the FCC's station separation and short spacing rules, and their present effect on the Clarks markets, it is more appropriate to expand the geographic radius from 35 to 70 miles. *See* 47 CFR 90.621(b). This 70 mile radius provides the most accurate measure of the geographic limits (and expandability) of frequency availability, predatory licensing practices, propagation and customer range, and is especially applicable in the 16 Western States markets where Nextel proposes to merge with OneComm a given SMR Service Area.[11]

B. As a Result of the Nextel Acquisition, Nextel Will Dominate the 800 MHz Trunked SMR Service Market

Based on these definitions, Nextel would own, manage or control a staggering percentage of the SMR market within the following smaller markets in which Clarks operates and competes:

Market	800 MHz capacity	Nextel owned	Percent Nextel
Columbia, SC	1733	1375	79
Sunnyside, WA	3136	2897	92
Covington, LA	2126	1626	76
Washington, IL	1495	1038	69
Kosciusko, MS	1003	588	59
Idaho Falls, ID	1376	882	64
Enid, OK	3109	2904	93

See SMR Won-7 Market Frequency Study, a true and correct copy of which is attached as Ex. B. These post-acquisition market shares are presumptively illegal under Section 7 of the Clayton Act.[12] *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370–71 (1962) (post merger market share 33%, concentration ratio of five largest competitors 78%); *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 279 (1964) (post merger market share 29%, concentration ratio of four largest competitors 76%); *RSR Corp.* v. *Federal Trade Com.,* 602 F.2d at 1323 (post merger market share 15%, concentration ratio of three largest competitors 65%); *Liggett & Myers* v. *FTC,* 567 F.2d 1273 (4th Cir. 1977) (post merger market share 19%, concentration ratio of four largest competitors 54%); *FTC* v. *Warner Communications, Inc.,* 742 F.2d 1156 (9th Cir. 1984) (post merger market share 26%, concentration ratio of four largest competitors 67%); *United States* v. *Rockford Memorial Corp.,* 898 F.2d 1278 (7th Cir. 1990) (post merger market share 64%, concentration ratio of three largest competitors 90%) *cert. denied* 498 US 920 (1990). Nextel's post-merger market share in each of these markets also approaches or exceeds the concentrated market share of the largest three, four and five competitors in the referenced cases. Accordingly, the presumptive illegality of the Nextel Acquisitions is a foregone conclusion.[13]

Similarly, the Herfindahl-Hirschman Index (''HHI'') as a measure of ''pre'' and ''post'' Nextel Acquisitions concentration in these referenced markets also supports a finding that the Nextel Acquisitions, without further proscription, are presumptively illegal.[14] With respect to the 15 Select Cities, the Justice Department determined that the HHI of market concentration was already greater than 2200 and that the Nextel-Motorola transaction alone would increase the HHI in these markets by more than 1400 points. (Complaint at ¶ 25). These figures pale in comparison to the ''pre'' and ''post'' Nextel Acquisitions indices in some of smaller markets in which SMR operators like Clarks operate and compete. In Sunnyside, Washington, the post-Acquisition HHI will increase by more than 2,141, from 6,464 to 8,606; in Idaho Falls, Idaho, the post-Acquisition HHI will increase by more than 1,317, from 2,733 to 4,051; in Kosciusko, Mississippi, the post-Acquisition HHI will increase by more than 534, from 1,033 to 1,568; and in Enid, Oklahoma, the post-Acquisition HHI would increase by more than 752, from 8,476 to 9,222. These staggering figures vastly exceed those cited by the Justice Department in the 15 Select Cities, and plainly mandate further proscription of the Nextel Acquisitions.

III. The Proposed Final Judgment Does Nothing To Remedy the Substantial Anticompetitive Effects of the Nextel Acquisitions in the Smaller Markets in Which Clarks Operates and Competes

Having demonstrated the presumptive illegality of the Nextel Acquisitions, the burden shifts to the parties thereto to

[9] There are substantial differences in propagation, technology, bandwidth, and customer use which distinguish the 800 MHz SMR market from the 900 MHz and 220 MHz markets. Most importantly, 900 MHz and 220 MHz equipment is not compatible with traditional 800 MHz SMR equipment and cannot be trunked into 800 MHz systems. Accordingly, the equipment in the different bands limits an operator and the customer to the spectrum for which the equipment is manufactured.

[10] In a market defined by scarce or finite resources, capacity to meet future, rather than present demand is the appropriate measure of market share. *See generally United States v. General Dynamics Corp.,* 415 U.S. 486 (1974).

[11] In any case, the expanded radius did not result in any spill-over into any of the 50 largest markets in which the availability of 900 MHz frequency capacity must be considered.

[12] Most of those market shares exceed the 70% threshold figure traditionally used to find monopoly power under the Sherman Act. *See Caldwell* v. *American Basketball Association,* 825 F. Supp. 558, 575 (S.D.N.Y. 1993) (noting courts typically find monopoly power where more than 70% of the market is possessed by the defendant); *see also Hiland Dairy, Inc.* v. Kroger Co., 402 F.2d 968, 974 & n. 6 (8th Cir. 1968) (reviewing several anti-trust cases and noting that percentages greater than 70% generally are found to constitute monopoly power), *cert. denied,* 395 U.S. 961 (1969).

[13] This dominant market share is not a phenomenon existing only in these rural markets. On the contrary, these shares reflect the results of Nextel's systematic and concerted attempt to control 800 MHz capacity across the country. By virtue of these acquisitions, Nextel will own or control between 67 and 95% of the total available 800 MHz spectrum allocated for trunked SMR service throughout the following states: Washington, Idaho, Oregon, Utah, Colorado, Georgia, Louisiana, New Jersey, Oklahoma, and South Carolina—all states in which Clarks presently operates. *See* Declarations of William Holesworth, attached hereto as Ex. C.

[14] The HHI takes into account the relative size and distribution of competitors within a relevant market (Complaint Appendix A). The HHI approaches zero when a market consists of a large number of firms of relatively equal size, or can reach 10,000 in the case of pure monopoly power. (*Id.*) Markets in which the HHI exceeds 1000 are moderately concentrated. (*Id.*) Markets in which HHI exceeds 1800 are considered concentrated. (*Id.*) Transactions that increase the HHI by more than *100 points* in moderately concentrated and concentrated markets ''*presumptively raised antitrust concerns.*'' (*Id.*) (Emphasis supplied).

rebut this presumption with non-statistical evidence to demonstrate that the Nextel Acquisitions will not reduce competition. In this case, however, the relative size of the merging parties, the trend toward market concentration and absolute barriers to market entry plainly *aggravate* rather than ameliorate the monopolistic market share that will result upon the consummation of the Nextel Acquisition.

The most direct anticompetitive effect of any merger is the elimination of competition between the merging entities. Accordingly, special attention must be paid to the relative size and number of parties to the transaction. *United States* v. *M.P.M. Inc.,* 397 F. Supp. 78 (D. Colo. 1975). In this case, each of the parties to the Nextel Acquisitions have substantial channel holdings. *Indeed, Nextel and Motorola are the two largest competitors in the industry.* An acquisition involving *two* dominant firms, the effect of which accelerates a trend to *oligopoly* in the market, provides a basis to find a violation of Section 7 of the Clayton Act. *United States* v. *First National State Bancorporation,* 479 F. Supp. 1339 (D.N.J. 1979). The merger of *three or four* dominant firms which results in *monopoly* power within the market mandates such a finding. This is particularly so where the recent trend within the SMR industry has been toward consolidation and concentration. *See generally* Department of Justice and Federal Trade Commission ''Horizontal Merger Guidelines'' (hereinafter ''Guidelines'') § 1.521 (April 7, 1992)

More importantly, this Court must consider the extreme barriers to entry into the SMR markets. *United States* v. *Black and Decker Mfg. Co.,* 430 F. Supp. 729 (D. Md. 1976) (substantial entry barriers to market to be considered in action brought under Clayton Section 7 to enjoin merger); *See also* Guidelines, §§ 1.522, 2.2 and 3.0. High entry barriers into the market signal the potential that a particular merger may potentially impair competition. *See Fruehauf Corp.* v. *Federal Trade Com.,* 603 F.2d 345 (2nd Cir. 1979). SMR operators need spectrum to enter or expand within a market. No such frequency is available in the smaller urban and rural areas in which SMR operators like Clarks operate and compete. The Justice Department has acknowledged this. (Complaint at ¶ 14.) Upon consummation of the Nextel Acquisition, nearly all available frequency in these markets will be controlled (and warehoused) by Nextel. The result is an *absolute* entry barrier that prevents new competition in the trunked 800 MHz market.

Moreover, by mere *non-use* of the warehoused frequency it will control, Nextel will prevent existing SMR operators like Clarks from strengthening their competitive position in the respective markets. Unable to obtain additional frequencies, these operators cannot expand their systems to accommodate additional subscribers or expand their geographic coverage area of their systems.[15] Overcrowding on these systems will result in ''dropped calls'' and inhibit operators like Clarks from adequately serving their *existing* clients.[16] Without access to this warehoused capacity, therefore, independent operators, to the extent they can survive, will be essentially frozen in place. At the same time, Nextel will have the luxury of adding channels to its systems in these small markets only as needed, while its competition, starved for capacity, weakens or disappears. Thereafter, Nextel can build out the remaining channels to meet the remaining new and spill-over demand. Indeed, Nextel's prices already exceed those charged by independent operators. *See* letter from Fred Goodwin to Raymond J. Kimball dated January 4, 1995, attached hereto as Ex. F. A monopoly share of the market will only exacerbate that disparity.

Finally, Nextel's dominance over the available capacity will retard the growth and development of technological innovations in the SMR market; namely co-operatives and alliances such as Northwest Wireless Network through which independent operators can provide maximum coverage area.

In short, the proposed Final Judgment does not safeguard competition in these smaller markets in which Clarks operates and competes. Quite the contrary, for these markets the proposed Final Judgment offers lessened competition between the merging entities, lessened competition in the market in general, increased prices, decreased service and disincentive to innovate. Ironically, these are the same anticompetitive effects that the Justice Department so zealously sought to prevent, albeit only in the 15 Select Cities.

IV. Any Procompetive Impact on Competition In the Cellular Market Can Have No Bearing on this Action

The only ''pro-competitive'' shading that Justice Department can offer in support of the Final Judgment is that the proposed Final Judgment could possibly benefit competition in the cellular market. For that reason, the proposed Final Judgment was necessarily limited so as not to inhibit Nextel's intention or ability to offer wide-area digital SMR service using the newly unveiled Motorola Integrated Radio System (''MIRS''). (CIS at pp. 17–18).[17] This proposed rationale is misplace, suspect and wholly inappropriate.

First, as set forth above, the anticompetitive effects of these Nextel Acquisitions in one market cannot be ignored simply because they are offset by procompetive effects in another market. *RSR Corp.* v. *Federal Trade Com.,* 602 F.2d at 1325 (citing *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370–71 (1973). This is particularly so where, as in this case, the Justice Department has expressly stated that the two markets, SMR and cellular, do not complete and fill different market niches. In any case, whatever Nextel's stated objective is for embarking on its course of mergers, whether true or not, has no bearing in this action. Indeed, it is axiomatic that the ''circumstances leading to an acquisition are irrelevant in determining whether § 7 has been violated.'' *United States* v. *Phillips Petroleum Co.,* 367 F. Supp. 1226, 1258 (C.D. Cal. 1973). The sole focus under § 7 is the effect on competition of an acquisition. *Id.*

Moreover, although Nextel has apparently convinced the Justice Department that Motorola's MIRS equipment will enable it to compete with cellular telephone service, Motorola, itself recently has doubt over whether this even possible. Motorola admitted that its MIRS technology will not compete with cellular:

> * * * Motorola, Inc.'s officials last week stressed the need to adjust their marketing strategy for ESMR technology. *The greatest marketing change would attempt to alter the perception that ESMRs would soon be a third cellular competitor, focusing instead on integrated wireless services for dispatch,* said Lise Farmer, spokeswoman for the Motorola division supplying * * * MIRS technology

[15] *See* the Declarations of William Holesworth, Richard Hafla and Steven G. Earl, independent SMR operators in Washington and Idaho, attached hereto as Exs. C, D and E, respectively.

[16] See Declarations of Rick Hafla, Steven T. Earl attached hereto as Exs. D and E, respectively.

[17] The Justice Department acknowledged that it considered an alternative to the proposed Final Judgment which would have limited the number 800 MHz channels that Nextel could hold in each ''affected city.'' (CIS at p. 17) This alternative was purportedly rejected because the Justice Department was satisfied that the relief it had obtained relating to 900 MHz divestiture adequately address harm to competition. (*Id.*) Again, however 900 MHz divestiture was not ordered beyond outside of the 15 Select Cities, nor possible in any market outside of the top 50 urban markets. Accordingly, this ''relief'' was neither intended nor considered to address the anticompetitive effect on the small market in which Clarks operates.

to Nextel * * * and its potential partners, OneComm Corp. and Dial Page, Inc.

Robert Pass: ''They just started talking about being a third cellular carrier * * * but they didn't have technology that was superior to cellular.'' [Without superior technology] and if they can't price it well below cellular, then how are they going to [compete with cellular].'' [18]

Finally, any bona fide interest that Nextel may have in experimenting with a digital SMR seamless nationwide network can be accomplished without monopolizing the 800 MHz frequency in any relevant market. By its own admission, Nextel's envisioned digital network requires *no more than* 42 800 MHz channel blocks to assure sufficient capacity for subscriber growth and roaming capacity. (See pleading already submitted to Justice at p. 7). The Nextel Acquisitions, however, would give Nextel control over more channels in the 800 MHz spectrum than it could possibly sue. For example, Nextel stands to obtain blocks of 141 and 233 channels (representing all available capacity) in the areas servicing the towns of Moscow, Idaho, and Lewiston, Idaho, respectively. The aggregate population of these towns is approximately 50,000. This population could not possibly support any system, digital and/or conventional, that could utilize anywhere near this number of channels. (See Petition for Reconsideration and Special Relief, filed October 18, 1994, Exhibit G.) Nextel can simply warehouse the substantial remaining capacity, effectively freezing its competitors in place.

Accordingly, not even Nextel's hyped ''next generation'' of digital SMR service (which independent operators intend to also provide) necessitates approval of a merger which will establish single-provider dominance, once and for all, and eliminate independent competition in the emerging and *still growing* mobile radio markets. Indeed, it seems unnecessary and counterproductive to destroy the market for SMR—a low cost *alternative* to cellular—in small markets simply to enable SMR to compete in the *same* product market *with cellular* on a large scale. This is particularly so where the impact on the public interest of robust competition in all markets is so adversely impacted.

[18] Land Mobile Radio News, Vol. 48, No. 47, p. 1, (December 2, 1994). (Emphasis and brackets in original.) *See also* ''For Nextel, '94 Was Best of Times and Worst of Times,'' Wall Street Journal, Jan. 3, 1995, p. 14, *See* Exhibit H.

V. The Public Interest Requires That the Proposed Final Judgment Be Revised To Remedy the Anticompetitive Effects of the Nextel Acquisitions in Every Market

There is substantial room to fashion a solution which meet the needs of all parties while preserving the precepts of fair and even-handed competition. The proposed Final Judgment should be revised to provide for partial divestiture of 800 MHz channels in every market in which the Nextel Acquisitions would result in Nextel's ownership or control of more channels than is necessary to construct its planned digital network. By making these remaining frequencies available to existing operators for expansion, the Final Judgment will restore and foster a competitive balance in the SMR service industry over the short and long terms.

Dated: January 9, 1995.

Respectfully submitted,

Raymond J. Kimball,

Ross & Hardies, Attorneys for Clarks Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc., Earl's Distributing, Inc. and Earl's Wireless Communications, Total Communications, Communications Center, Inc., Leflore Communications, Inc.

Attachment C

United States Department of Justice,
Antitrust Division,
555 4th Street N.W.,
Washington, D.C. 20002.

January 6, 1995.

Ref: Civil Action No. 1:94CV02331, United States vs. Motorola and Nextel

Gentlemen: Please find enclosed the comments of the Communications Center related to the above captioned matter. Please contact me if you have any questions or if I can be of assistance.

Yours truly,

Walter Gallinghouse,

Owner/President.

Comments

United States vs. Motorola & Nextel Communications, Civil Action No. 1:94CV02331

Submitted To: United States Department of Justice, Antitrust Division, January 6, 1995

Submitted by: Communications Center, Inc., Covington, Louisiana

I. Introduction

On November 8, 1994, the Final Judgment in the case of the United States of America, Plaintiff versus Motorola, Inc. and Nextel Communications, Inc, Defendants, was published in the Federal Register under Civil Action Number 94–2331. Included within this proceeding was a Competitive Impact Statement, herein referred to as CIS, under case Number 1:94CV02331, Judge Thomas F. Hogan, Antitrust, 10/27/94.

Section V of the CIS provides, ''any person who wishes to comment should do so within (60 days) of the date of publication of the CIS in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments.''

The Competitive Impact Statement and Final Judgment have been reviewed by a large number of specialized mobile radio (SMR) operators who will be directly effected by the Nextel/Motorola consortium that has gained control of the majority of the 800 Mhz radio spectrum nationwide. Pursuant to the provisions of section V of the CIS, the following comments are hereby submitted.

Upon reviewing the information provided herein, it should be obvious that because of the highly technical and complex nature of the radio industry and FCC regulatory policies, the United States has overlooked anticompetitive consequences of the ongoing Nextel/Motorola activities as related to the 800 trunked SMR service. If the Judgment is approved and the current trend continues, Nextel/Motorola will have monopolistic control over the 800 Mhz SMR market nationwide, leading to the closure of many small businesses, loss of services to the public, higher rates for the consumers, and restraint of trade.

The United States properly identified an antitrust problem with the Motorola/Nextel control of the spectrum and it sought a prompt solution by using the consent decree. The Judgment was based on information contained within the Competitive Impact Statement. In the opinion of operators who have extensive experience in the two-way radio and 800 MHz SMR industry, the CIS is seriously flawed.

Based upon the reasons in these comments, it is respectfully requested that the United States withdraw its consent to the Judgment and conduct a more thorough investigation to properly assess the anticompetitive impact on the trunked 800 MHz SMR industry by the actions of Nextel/Motorola.

II. Background

The Communications Center, Inc. is filing comments in this matter, submitted by the company's president Walter Gallinghouse.

The Communications Center, Inc. is a Louisiana corporation providing mobile radio communications equipment sales and service, UHF community repeater rental, and 800 Mhz SMR (Specialized Mobile Radio) service. The company was incorporated in 1982. It has been under current ownership since 1986.

Offices are located in Covington, on the northshore of Lake Ponchartrain, approximately 30 miles from New Orleans. The northshore area can be considered a suburb of New Orleans. According to the Greater New Orleans Expressway Commission, over 8,000 commuters cross the Causeway from the northshore to New Orleans on a daily basis.

The Communications Center's principal business territory includes St. Tammany, Tangipahoa and Washington parishes. Repeater coverage areas extend customer usage into adjoining parishes of Louisiana and Mississippi. The SMR service area

includes most of metropolitan New Orleans, a market within the top 50 cities nationwide. The business serves approximately 500 customers, which includes business, industry, government and public safety accounts.

The Communications Center operates five sites within the three parish area with 18 channels of 800 MHz SMR and 12 UHF (450–470 MHz) relay stations. The Company is an authorized dealer for a number of manufacturers, including Ericsson-General Electric, Maxon, Yaesu, Uniden and Shinwa.

Walter Gallinghouse has fifteen years of experience in the land mobile radio industry, with a background of 30 years in radio communications. He is the former sales director of Electrocom, Inc. one of the largest two-way dealers and SMR operators in the New Orleans market. Under his leadership Electrocom was among the top ten dealers in the nation for Standard Communications for five consecutive years. He also pioneered development of the SMR operations in St. Tammany Parish (Abita Springs and Lacombe). In 1986 he left Electrocom to open his own business in west St. Tammany.

Walter Gallinghouse is also a director and secretary of SMR WON, a trade association, incorporated in Washington, DC. SMR WON has approximately 100 members, including SMR operators and two-way radio equipment manufacturers.

The Communications Center manages and maintains SMR systems using both General Electric Marc V/VE and Johnson LTR protocols. The company not only sells SMR services to the public, it also sells SMR airtime to other two-way radio dealers who are free to resell at their own rates.

Resellers of GE Marc V airtime include Saber Communications, an Alabama corporation based in Mobile that is a wholly owned subsidiary of Nextel. The GE Marc V airtime resale arrangement was assumed by Saber in its acquisition of the SMR assets of Electrocom. Saber has however refused to resell service on the LTR systems it acquired from other dealers in the market. Saber's Vice President of operations said *''It is Nextel's policy that they do not resell airtime on any type system.''* This is evidence of Nextel's intent to control the 800 MHz SMR marketplace. This issue is addressed in more detail at another point in these comments.

III. 800 MHz SMR History and the New Orleans Market

Prior to the acquisition of SMR assets by Nextel and affiliates (including Coastel, Saber Communications, Motorola and Dial Page), the New Orleans market had vigorous competition with a number of SMR service providers using four manufacturers protocols (General Electric, Motorola, Johnson, LTR and RCA Tactel). Equipment for use on these systems was sold by a number of competing companies.

At the end of 1993 the Communications Center and other SMR operators were contacted by several prospective buyers interested in acquiring their SMR assets. The buyers used high pressure tactics, advising dealers to ''avoid missing the window of opportunity.'' Many of the companies entered into agreements to sell their 800 SMR systems to Saber Communications, Coastel Communications or Dial Page.

The FCC had rules in place that would have prohibited these acquisitions. Presumably the rules were originally designed to prevent one company from obtaining a concentration of channels in any market. With the intent of promoting the development of new technology, the FCC waived its regulations upon request of Fleet Call and Nextel.

The seed of wide area communications was firmly planted by Fleet Call and Nextel. The concept was nurtured by the FCC in broad acceptance that Nextel's proposals promised a wide area digital communications system. Unfortunately, anticipating the buyouts by Nextel and affiliates, speculators seized the opportunity to buy and ''flip'' channels for quick profits. This quickly led to licensing mills that duped the public out of millions of dollars. It also led to the warehousing of the radio spectrum for the purposes of speculation. The end result was the licensing of all 800 Mhz frequencies throughout the nation, leaving none for expansion of systems owned by legitimate operators who had no affiliation with Nextel.

The FCC was inundated by license applications in the wake of the acquisitions. With some 40,000 applications pending, the FCC refused to accept any additional applications and it froze all pending applications.

With the FCC's freeze, the business plans of legitimate operators have been damaged, public use of the spectrum has been denied and the 800 MHz SMR industry is in turmoil. To compound matters, the FCC has proposed the auctioning of 800 MHz spectrum (which is already licensed) on a Market Trading Area (MTA) basis in direct response to the Nextel's request for a more flexible wide area licensing plan. Under such plan, small operators will be virtually excluded from the bid process and denied further expansion.

The acquisitions of SMR systems in the New Orleans market have led to an excessive number of channels being controlled by Nextel and affiliates.

IV. Comments—Flaws in the Justice Department Complaint and CIS

A. Arbitrary Selection of Markets Affected by Nextel Motorola Activities

The CIS does not address the competitive impact in all the geographic markets that are actually affected by the Motorola/Nextel activities. It is restricted to 15 selected cities, ignoring the balance of the nation where excessive concentrations actually exist. The Nextel/Motorola transactions, including the mergers, acquisitions and attempts to acquire the entire 800 Mhz SMR, *are likely to reduce competition in most cities and counties throughout the entire nation.*

The ability of Nextel to warehouse the majority of frequencies nationwide for as long as five years under extended construction deadlines (allowed by the FCC upon request of Nextel and affiliates), will prevent the licensing of competing operators who will sell products manufactured by companies other than Motorola. With Nextel's control over this spectrum, competing companies have no systems to sell on, and manufacturers competing with Motorola will have no outlet for their 800 Mhz products.

The consequences are a restraint of trade, the loss of jobs and probable closure of many businesses. Although Nextel & Motorola have claimed they will build out the top 50 cities within a few years, during this period the public will be deprived of the valuable resources of the 800 spectrum. The vast population outside the top 50 markets may not see the build outs for many years, and it is questionable if some areas will ever receive the digital service described by Nextel. Existing radio dealers will be frozen in place with no ability to expand their SMR services to the public. Rural areas will be seriously impacted.

B. Contradictions

The CIS was based upon the concept that Nextel would be a major competitor in the cellular market. According to a recent article in the Wall Street Journal ''Nextel has all but abandoned ambitions to become a cellular titan any time soon. It will get back to the basics, jazzing up the dispatch services''. This is confirmed in public statements by Motorola: ''the greatest marketing change would attempt to alter the perceptions that ESMRs would soon be a third cellular competitor, focusing instead on the integrated wireless services for dispatch, said Lisa Farmer, spokeswoman for the Motorola division supplying * * * MIRs technology to Nextel * * * and its potential partners, OneComm Corp. and Dial Page, Inc. Just three months earlier, August 31, 1994, headlines read ''Nextel Pins Hopes for Cellular Riches Nationwide on Lowly Two-Way Dispatch Systems''.

The Justice Department rejected litigation seeking to limit the number of 800 MHz channels because ''the Department did not want to inhibit Nextel's ability to offer cellular telephone service''. When describing the Product Market, the Department says ''Cellular telephone is not a substitute because it is significantly more expensive than SMR service * * * and because it cannot be provided on a one-to-many dispatch basis.'' Further, ''cellular telephone companies ''reuse'' spectrum by dividing a licensed service area into ''cells'' and reusing a frequency within the same system. Several cells would have to be used to transmit a communication to reach a group of vehicles; consequently, this method of operation is not well suited for SMR customers who need the capability of sending frequent, short messages over a broad area to one or many recipients.''

The Motorola ''MIRS'' technology, according to the FCC multi site licensing scheme with close spacing, is based on a ''cell'' concept with low antenna heights. Accordingly this ''is not well suited for SMR customers'' because of the need to transmit over multiple cells.

These contradictions and changes in marketing strategies necessarily questions the planning, forethought and intent of the 800 MHz channel acquisition frenzy by Nextel and affiliates. The FCC waived the very regulations that would have prevented any one company from obtaining an

anticompetitive concentration of channels in any market. Now we have a situation where Nextel is not focusing on being a major competitor with cellular, its ''MIRS'' cellular style technology is ''not well suited'' for SMR, and it holds an excessive concentration of channels that have been providing the public low cost mobile radio communications services. Considering the enormous amounts of money that were paid for the channel acquisitions, the capital requirements for the future buildout for the system, one can generally assume that if Nextel survives and builds the system, the consumer will bear the burden in higher cost and less effective service. In the meantime, using FCC waivers that granted extended construction periods of up to five years, the public will have been deprived of the use of the radio spectrum.

C. 800 MHz SMR is a Distinct Product Market

220 MHz, 800 MHz and 900 MHz SMR should not be considered the same for the definition of product market. 220 MHz SMR and 900 MHz SMR are not a substitute for 800 MHz SMR service. There are no operational 200 MHz or 900 MHz SMR systems that can compete with the existing mature 800 MHz service which has coverage throughout most of the nation. There are significant technical differences in the three bands. Each band has distinctive operational characteristics that make one more suitable than the other in certain applications.

800 MHz SMR is the premium spectrum. It has a short wave length, and on a lesser degree than 900 MHz, it is also absorbed by dense foliage. The line of site range and limited periods of interference from extended signal propagation have made it the mainstay of the two-way radio industry. The propagation characteristics and FCC channel spacing scheme make it an ideal spectrum for the majority of two-way radio dispatch and interconnect services.

900 MHz has a very short wavelength (nearly microwave) with poor performance in areas with dense foliage. The range slightly less than 800 MHz. It is more particularly suited to large cities. Because of the FCC's method of channel assignments with close spaced frequencies, it has not been widely accepted by the industry. The cost of system construction is much higher because of the compensation for losses in close spaced antenna combiners (higher losses of combiner, requires higher input power, hence higher cost power amplifiers; as a substitute for combiners, separate antennas and feedlines for repeater transmitters can be used, but at a very high cost).

The modulation bandwidth on 900 MHz is narrower than 800 MHz, and therefore the audio quality and range is not as good as 800 MHz and 220 MHz.

220 MHz has greater range than 800 and 900 MHz and is more suited to rural markets. It is more susceptible than 800 and 900 MHz to interference caused by extended propagation during changes in atmospheric conditions. Because of the FCC's past and present 220 MHz licensing process, the development of this band will be slow. It will take some time to determine the band's effectiveness, particularly in major markets.

Because of the FCC regulatory framework and the high cost of buildout of 220 and 900, it is unlikely that systems will be established on 220 MHz and 900 MHz spectrum within a reasonable period of time. Considering the lack of available systems in adjoining markets for networking between dealers, 900 MHz and 220 cannot be substituted for 800 MHz. The United States supports this in its statements. ''At present, however, the only constructed 220 MHz SMR systems are in California. * * * 220 MHz service will require time to gain commercial acceptance.'' ''SMR service in the 220 band will be a substitute for SMR service in 800 MHz and 900 MHz at some point in the future. * * * Further 220 MHz service will require some time to gain commercial acceptance, just as 800 MHz and 900 MHz services required when they were first implemented.''

The United States refers to 220 MHz as a future service, and the comments about 900 MHz indicate 900 MHz SMR has not been widely accepted. Thus, as a practical matter, it is not appropriate to speculate on the acceptance of 220 or 900 and assume they can be substituted for each other. The existing 800 MHz product market is mature and at the present time, it is being substantially affected by the Motorola/Nextel activities.

From the standpoint of products and service, there are a large number of manufacturers providing equipment for operation within the 800 spectrum. This includes fixed stations, switching equipment, system controllers, end user mobiles and portables. Robust competition has existed in equipment sales of all 800 MHz products. 900 MHz SMR has not been widely accepted and product availability is somewhat limited. 220 MHz SMR is relatively new and it is difficult to enter this business because of FCC regulations.

From a product availability standpoint, 800 MHz should be considered a distinct market.

D. CIS Ignores the Importance of 800 MHz SMR

The 800 MHz SMR service is mature industry providing an effective low cost two-way radio service to business, industry and public safety. Competing systems are now in operation covering a large percentage of the United States. Recent technological developments have spurred the development of wide area networking between systems owned by radio dealers in adjoining markets.

The United States has also overlooked the importance of the existing 800 MHz analog dispatch SMR services to business, industry and public safety. It has taken the viewpoint that Nextel will develop more competition for the cellular industry.

When the Justice Department stated it ''did not want to inhibit Nextel's ability to offer cellular telephone service, it effectively condoned the dismantling of the entire 800 MHz SMR analog dispatch service in favor of the desires of the Nextel/Motorola, which includes acquisition of the contiguous 861–865 SMR spectrum. It just so happens that this part of the SMR spectrum is the most heavily loaded with customers because it was the first SMR spectrum to be released by the FCC. If the Department allows the dismantling of this service, it will cause the displacement of hundreds of thousands of radio systems, disruption of the communications of hundreds of thousands of users, and an enormous cost in labor and resources.

E. Damages to the Public Interest Not Fully Examined By CIS

Because there is no other service available with all the existing low cost benefits of 800 MHz SMR, Nextel's acquisitions of existing SMR dispatch systems and customer bases will force the public to replace their equipment. The consumer will have to enter into a new service which will be more expensive and less effective.

While the Nextel/Motorola team decides on its buildout method and schedule, and it is uncertain about its position as being ''the third cellular'' or a wide area dispatch provider, they will have used the FCC's wide area waivers to side-step the original regulations that were designed to prevent the development of monopolies. Instead, they can use the extra freedoms granted by the waivers, increase the cost of service to the public, and drive their competitors out of business.

F. Anti-Competitive Problem Not Solved With Divestiture in Certain Markets

The United States has totally ignored the anti-competitive aspects of the Nextel/Motorola actions in the 800 MHz SMR product market nationwide. On page 17, the United States says, ''It is satisfied that the relief it has obtained relating to 900 MHz frequencies will adequately address the harm to competition alleged in the complaint.''

Although the CIS is relevant because within certain cities Nextel/Motorola holds the majority of channels in 800 MHz and a number of 900 MHz, the divestiture of the 900 channels and 40 800 MHz channels in one market does not solve the problem of the monopolistic control of the 800 MHz product market. Nextel would still control the majority of channels in 800 SMR, inhibiting the ability of independent operators from providing services on non-cellular type systems which use high-elevation base station antennas. These systems are needed to continue to serve the needs of business and industry for trunked 800 MHz that can provide dispatch service over broad coverage areas.

IV. Analysis of New Orleans Market

Using various sources, including a FCC license data base from Interactive Systems (ISI), Washington Radio Reports, frequency monitoring, verifications with system operators, and first hand knowledge, the Communications Center conducted an analysis of the New Orleans market area. The geographic area used was generally in line with the BEA Economic Areas as represented by the US Department of Commerce in the Federal Register (Volume 59, No. 214). The study was completed on January 3, 1995 and it is believed to be a fairly accurate representation of the New Orleans market situation.

The analysis was conducted for 260 800 MHz SMR channels in the FCC channels of 201 through 600. 900 MHz SMR was not

considered. It is believed that 800 MHz SMR should stand alone as a relevant product market because 220 MHz and 900 MHz are not substitutes for 800 MHz SMR. The reasoning is further fully described earlier in this document. In fact, there are no viable 900 MHz or 220 MHz systems in the New Orleans marketplace at this time.

The conclusion can be drawn that after the acquisitions are completed by Nextel of the channels of Dial Page, Saber and Motorola, Nextel and Motorola will have effective control of the New Orleans 800 MHz SMR marketplace.

The study shows the following channel concentration:

	Percent
Nextel & affiliates, 241 channels ..	86.0
Independents, 27 channels	9.5
Unknown, 2 channels	1.0
Other business (Motorola format), 10 channels	3.5

To further determine the effect on competition, an analysis of the principal sales and service providers in the New Orleans market was conducted. These SMR sales and service operators of New Orleans are listed below, followed with their office locations and manufacturers SMR protocol. A copy of the telephone directory yellow pages is attached (Exhibit A,B) which list some of the two-way radio dealers in New Orleans. There are SMRS operators who are not listed in the directory.

Tomba—Motorola
New Orleans
Slidell
Marrero
Metairie
Destrehan
Bogalusa
Electrocom—GE & LTR
New Orleans
Mandeville
Landline Communications—LTR
Chalmette
Two-Way Communications—LTR
Metairie
Morgan Communications—GE
New Orleans
Crescent Radio—GE
Metairie
New Orleans Carfone—LTR
Metairie
JMT Communications—LTR
Lacombe
SOLA Communications—Motorola
New Orleans
Communications Towers—Motorola
Covington
Communications Center—GE & LTR
Covington

The principal SMR operators who are non-Nextel affiliates are:

Communications Center—GE & LTR
Covington
Crescent Radio—GE
Metairie
Landline Communications—LTR
Chalmatte

Thus, after the final acquisitions are completed, the number of providers of non-Nextel/Motorola service will be reduced from 11 to only 3. This is a vivid illustration of the lack of service alternatives once the Nextel/Motorola transactions are complete.

V. Evidence of Market Control

There is evidence that Nextel wishes to maintain complete control of the marketplace, denying competing two-way radio dealers of the ability to obtain recurring revenue through resale of SMR services on Nextel's systems. Because of the acquisitions, Nextel may be the only service SMR service provider in certain areas.

In a letter dated November 30, 1994 to Saber Communications (Exhibit C) the Communications Center formally requested a suitable agreement that would allow the resale of LTR SMR services on Saber's Louisiana network. The letter outlines the Communications various request for this service which dated back to October 26th, 1994. Finally on December 9th, the Communications Center received a reply (Exhibit D), but Saber denied the resellers agreement and said ''It is Nextel's policy that they do not resell airtime on any type system.'' Instead Saber offered a Independent Sales Representative commission plan which required all new customers to be billed direct by Saber. Thus, once the sale was made by the Communications Center, that customer would be turned over to Saber for recurring billing. Although there would be a commission paid for the turn on, there was no allowance for recurring revenue.

Recurring revenue from SMR and repeater services is the primary income for most successful two-way radio businesses. With the highly reliable low cost end user products available today, the potential for sales profits is somewhat reduced. Therefore recurring income from resale of SMR services can be critically important to cover the overhead of basic operations, including employment of office staff and technicians. By drying up another source of revenue, Nextel can effectively drive Motorola's competitors out of the two-way radio sales and service business.

Independent Sales Representative plans may be suitable when used for those in the consumer retail market, but when the primary business is two-way radio sales and service, the plan is generally unacceptable.

The fact that the customer is effectively relinquished after the initial sale, allows Nextel and Saber to easily bypass the sales representative when the user needs additional equipment. In the case of Saber, the monthly bills emblazoned with the logos Motorola. There are not advertisements for Johnson LTR products or General Electric, even though Nextel owns systems with both protocols.

With multiple SMR operators in a marketplace there has been fair competition. Open agreements for resale of SMR service are commonplace. Networking over wide geographic areas has been accomplished with cooperation between dealers in adjoining markets. Refusals by Nextel to provide resellers agreements will lessen competition and degrade services to the public.

VI. Conclusion

Trunked analog 800 MHz SMR is the most cost effective and feature packed mobile radio communication service available to business, industry and public safety. It is the mainstay of the dispatch mobile radio communications industry, and the United States should consider its importance before casting it aside upon the request of a single service provider.

Because Nextel is using the Motorola ''MIRS'' switching equipment, and because Motorola can control delivery, service and software for the controllers on the Nextel ''MIRS'' systems, it can effectively manipulate Nextel's policies. By using Nextel's concentration of spectrum, Motorola can control the 800 Mhz SMR marketplace. As stated in the US comments on Page 15 of the Complaint, ''the deployment of alternative technologies will be inhibited''.

With Nextel's control of such a significant portion of the radio spectrum as a Commercial Mobile Radio Service (CMRS) provider, it has an added responsibility of offering resale agreements to all qualified CMRS providers.

The question then arises, is it appropriate, upon the request of one manufacturer and one supplier of service, to dismantle operational dispatch systems, disrupt the public's use of the existing systems, and allow installation of a system that, according to the Department's CIS, is not particularly suited to dispatch service?

After evaluating the comments in this document, the Justice Department should understand that a more thorough investigation is needed to determine the true competitive impact of the Nextel/Motorola activities.

Exhibits A and B

Exhibits A and B, copies of a Yellow Pages document, are omitted from publication herein; a copy can be obtained on request for inspection and copying in room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530 and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, N.W., Washington, D.C. 20001.

Saber Communications, Attn: Mr. Greg Wood,
Vice-President of Operations, 107 St. Francis, Suite 1900, Mobile, AL 36602.

VIA FAX: (205) 415–8528 Re: Request for resellers agreement, LTR SMR Service
November 30, 1994.

Dear Greg: On October 26, 1994, I called you and requested a suitable agreement that would permit the Communications Center to resell service on the Louisiana LTR SMR system which Saber acquired from Two Way Communications. Further, we talked about the Communications Center's GE Marc V SMR system, and our practice of buying and reselling services from each other since the Saber acquisition of Electrocom's GE Marc V SMR network. You advised me of your interest in a LTR roaming arrangement, but you couldn't give me a definite answer at the time.

October 27th, Slade Lindsey called me regarding the Antenna Sites tower leases in Abita, Hammond and Kentwood. I asked

about the LTR roaming agreement, but he said he would talk with you and have you contact me.

October 31st, once again I spoke to Slade about the tower leases. I asked about LTR roaming, but he said you had jury duty and wouldn't be available for a couple of weeks.

November 8th, Slade came to my office to work on the tower site leases, but he was unable to offer any information on my LTR roaming request.

In 1993, after Fitzsimons received his SMR grant for five channels at Abita Springs, I was involved in the system planning when it was decided to use the LTR protocol. Lester Boihem agreed to integrate the system into the Two Way Communications network with a reseller's agreement for dispatch, interconnect and networking. Before the Fitzsimons system was constructed. Two Way's network was acquired by Saber Communications. The Fitzsimons system has been fully constructed using Trident TNT controllers, with the capability of dispatch, interconnect and networking. We are selling LTR systems and have immediate need for the roaming and networking services that were agreed upon in the system planning sessions last year.

This letter will serve as my formal request to provide resale service on Saber's LTR SMR network in accordance with my agreement with Two Way Communications in 1993. The principal interest at this time is in the areas adjoining west St. Tammany, which includes the systems at Lacombe, Slidell, New Orleans, Hammond, Kentwood, Sheridan and Picayune. Limited service may be needed in Baton Rouge and Biloxi/Gulfport. The services requested are: dispatch; interconnect; and system networking. Please furnish the rates for resale of these services and the method of process for turn-ons.

In the interest of providing improved mobile communications services to the public, I trust you will respond favorably to my request in writing, by mail or facsimile, before December 8th. I remain,

Yours truly,

Walter Gallinghouse,

Owner-President.

Mr. Walter Gallinghouse,
Communications Center, Inc.,
16218 Highway 190,
Covington, LA 70434.

December 9, 1994.

Dear Walter: I have received your letter dated November 30, 1994 concerning a resellers agreement for LTR and GE SMR services. As you know, Saber has been acquired by Nextel Communications and we are now a wholly owned subsidiary. Since this transaction has taken place, we are now bound by their policies and procedures. It is Nextel's policy that they do not resell airtime on any type system. They do welcome all loading and are willing to compensate the person or company responsible under a Independent Sales Representative commission plan. If you are interested in this plan I will have one of our indirect representatives call on you.

Those customers already being invoiced on a Saber/Nextel managed or Communications Center system will be allowed to remain under the current plan along with any new unit they may add. All new customers requesting service on our systems will be invoiced direct by Saber and we will refer any customer requesting service in an area you provide directly to you.

We are also unable to grant your request to access the network currently managed by Saber for the system you manage in Abita Springs, Louisiana. We were not made aware of any agreement between Two-Way and the Communications Center concerning these channels during our due diligence on this acquisition. In fact, Two-Way suggested that Saber should talk to Fitzsimons about acquiring his channels. As you know, we are operating three channels of LTR in Abita Springs with excess capacity. Therefore there is no value to us or our customers to include your system on the network.

Nextel and Saber are both dedicated to providing the best mobile communications services available. We hope you will be interested in our Independent Sales Rep Program and we look forward to working with you on tower sites you own.

Sincerely;

Gregory T. Wood,

Operations Manager.

Attachment D

George S. Baranko, Esquire,
Attorney, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street NW., Room 8104, Washington, DC 20001.

January 9, 1995.

Re: Proposed Final Judgment in United States v. Motorola, Inc. and Nextel Communications, Inc., Civ. No. 1:94 CV02331, U.S. District Court for the District of Columbia

Dear Mr. Baranko: The General Electric Mobile Communications Dealer Board of Directors (the ''Board''), a group of specialized mobile radio (''SMR'') operators who own and operate SMR systems in the 800 MHz and 900 MHz bands throughout the United States, hereby submits its comments regarding the above referenced Proposed Final Judgment and respectfully urges that the United States withdraw its consent to the Proposed Final Judgment in its present form. The Board represents the interests of a cross-section of the General Electric SMR dealers throughout the United States.

In the Competitive Impact Statement, the Department of Justice (''DOJ'') recognizes that Nextel ''has become the primary supplier of trunked SMR services in the United States,'' and that Nextel ''controls far more 800 MHz SMR channel in the United States than any other company.'' DOJ also recognizes that Motorola ''is the second largest provider of trunked SMR services in the United States'', and that it ''owns or manages a substantial number of 800 MHz and 900 MHz channels it has used to provide trunked SMR services.''

DOJ correctly asserts that the combination of Nextel's and Motorola's owned and managed 800 MHz and 900 MHz SMR channels ''would result in Nextel holding virtually all of the SMR spectrum in 15 major cities.'' However, with the exception of requiring Nextel and Motorola to divest a certain number of 800 MHz SMR channels in Atlanta, Georgia, the relief in the Proposed Final Judgment is directly exclusively to 900 MHz SMR channels. The Board respectfully submits that the proposed relief ignores the realities of competition in the SMR market in the United States, and is inadequate to preserve and protect competition in that market.

I. 800 And 900 MHz Trunked SMR Service Is Not Interchangeable; 900 MHz SMRs Are At A Significant Competitive Disadvantage

In the Competitive Impact Statement, DOJ states that while ''mobile radios used on 800 MHz and 900 MHz systems are not compatible with each other, 800 MHz and 900 MHz systems provide interchangeable service.'' While the Board agrees that 800 MHz and 900 MHz equipment is not interoperable, the Board strongly disagrees that 800 MHz and 900 MHz SMR systems provide ''interchangeable service.''

900 MHz SMR spectrum is channelized, allocated and technically different than 800 MHz spectrum and, as a result, 900 MHz is considerably less desirable to both the provider and the user than 800 MHz spectrum. For example, 900 MHz does not propagate as well as 800 MHz and, therefore, 900 MHz service providers are forced to install more sites to get the same coverage as 800 MHz service providers.[1] Installing more sites means additional infrastructure costs for purchasing and installing base stations. The net result of more infrastructure equipment is that the cost of operating a 900 MHz system is higher than for a 800 MHz system; thereby putting 900 MHz SMRs at a competitive disadvantage.

The Federal Communications Commission (''FCC'') is well aware of the differences in 900 MHz and 800 MHz SMR channels and addressed a number of them in its Report and Order in PR Docket 92–17, August 4, 1992. The FCC stated that many 900 MHz SMR ''licensees have failed to construct and place their systems in operation * * *.'' The FCC also recognized that the 900 MHz licensing scheme ''*may have placed 900 MHz SMR licensees at a competitive disadvantage to 800 MHz licensees, by making it difficult to develop the types of wide-area and regional systems characteristic of current, competitive (800 MHz) SMR offerings.*'' (Emphasis added.) The FCC further noted that ''[o]ur multiphase licensing scheme has limited 900 MHz SMR systems to artificially defined markets and has precluded a free selection of sites in each market. As a result, licensees have been unable to develop the kind of wide-area services expected by today's private radio customers.''[2] This conclusion was echoed by Nextel (formerly Fleet Call) in its comments in the FCC docket.[3] Thus, the

[1] Both free-space transmission loss and ''knife edge'' diffraction increase as frequency increases. Higher frequencies incur greater losses and, therefore, cover less area given equivalent power output and antenna height.

[2] Report and Order, Docket 92–17, released August 4, 1992.

[3] *See* Comments filed by Fleet Call in Docket 92–17 on March 11, 1992.

900 MHz spectrum does not offer the technological capabilities for wide area service that are required by many SMR customers, and the requirements to divest 900 MHz channels does not adequately provide service alternatives for users with a need for wide-area trunked SMR services or for other SMR operators who need to provide such services in order to compete with Nextel.

Nextel is using Motorola Integrated Radio Service (MIRS) products for its network backbone and Motorola handsets, which can handle voice, paging and data capabilities on a single piece of equipment. A Wall Street Journal article dated January 3, 1995 reported that Nextel believes that SMR customers will require these enhanced features: ''Nextel must persuade customers who spend only about $20 a month to spend as much as three times that sum to get a new array of fancier features, such as wireless messaging and cellular phone service.'' [4] 800 MHz spectrum is well-suited for data applications due to the 25 KHz wide channels allocated in this band. 900 MHz spectrum is allocated in 12.5 KHz channels which limits the maximum data rate achievable on a 900 MHz channel to approximately one-half that of an 800 MHz channel utilizing the same radio technology.[5] This negatively impacts the 900 MHz SMR's competitiveness in offering data service.

The narrower bandwidth also impacts the number of SMR users that can be placed on a channel. For example, MIRS is marketed as a 6:1 capacity gain per 800 MHz channel, *i.e.*, 6 users per time slot utilizing a 25 KHz channel. In contrast, if equivalent technology is applied to narrowband 900 MHz channels, only a 3:1 capacity gain can be achieved. Each user that is loaded onto an SMR system represents revenue. Thus, one 800 MHz channel is essentially equivalent to two 900 MHz channels in terms of revenue generation potential.[6]

II. Due to the Number of Channels and the Limited Areas in Which 900 MHz SMRs Licenses Are Allocated, 900 MHz SMRs Have Significant Limitations On Equipment Availability and Price, and Ability to Load Their Systems

At 800 MHz, there are 280 channels allocated to SMRs and, at 900 MHz, there are 200 channels allocated to SMRs. However, at 900 MHz, only the top 50 cities (designated filing areas) have been licensed, while at 800 MHz, licenses have been granted to all areas within the United States. 900 MHz SMR systems are more expensive to build and operate and, therefore, when 800 MHz service is available, 900 MHz SMR operators are at a significant competitive disadvantage and it is harder to attract 900 MHz customers. In addition, because of the limited market, at 900 MHz there is less choice of equipment and features, and the equipment is more expensive than similar 800 MHz equipment. Nextel, in its SEC Form 10Q filing (June 30, 1993) noted that ''900 MHz systems generate lower revenues and profitability than the 800 MHz systems because: i) the revenue per subscriber unit is lower on the 900 MHz systems than the 800 MHz systems due to excess capacity, and ii) the operating costs on 900 MHz systems often include management fees paid to licensees.'' [7]

The Proposed Final Judgment does nothing to protect competition in the trunked SMR market outside of the 15 cities covered by the Judgment. DOJ asserts that ''the proposed Final Judgment preserves competition for trunked SMR customers by limiting the 900 MHz spectrum Nextel and Motorola will own and control for the next ten years.'' However, the proposed Final Judgment will do nothing to protect the vast majority of SMR customers who are located outside of the 15 covered cities, where Nextel will be permitted to maintain and exploit its dominant position in 800 MHz SMR spectrum. Furthermore, in cities outside of the top 50 cities, there will not even be potential 900 MHz competition with Nextel until after the FCC issues 900 MHz SMR licenses through its auction procedures.

Furthermore, current technology does not allow for equipment to be interchangeable between the 800 MHz and 900 MHz bands. SMRs which have significant investment in existing 800 MHz infrastructure and subscriber units will not be able to expand their networks and effectively compete against Nextel unless additional 800 MHz channels are available. 900 MHz channels will be of no use to such SMRs because customers cannot roam between 800 MHz and 900 MHz systems. The unsatisfactory alternative would be for the SMR to build and operate a separate 900 MHz system in addition to its present 800 MHz system.

III. DOJ's Rationale For Providing No Relief With Regard To Nextel's Control of 800 MHz SMR Spectrum Is Contrary To The Facts

DOJ states that ''[c]ellular telephone service is not a substitute because it is significantly more expensive than SMR service, is significantly more difficult for customers to restrict communications to a defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.'' Despite this, DOJ contends, as its rationale for limiting relief to the 900 MHz SMR spectrum, that: ''Nextel's consolidation of SMR spectrum, *may enable it* to create a third mobile telephone service to compete with established cellular services. The result *could be* a wider variety of wireless services at a lower cost in the near future. The Department saw substantial benefits to new competition in another market [the cellular telephone market] *if* Nextel could obtain sufficient capacity at 800 MHz to enable it to enter that market.'' (Emphasis added.)

It is simply impermissible under the antitrust laws to sanction the acquisition of dominant market power in one market on the theory that such dominance may have procompetitive benefits in a second market. This is particularly so when, as in this case, the perceived benefits in the second market are *admittedly purely speculative*!

Furthermore, the contention that Nextel/Motorola's consolidation of SMR spectrum may have procompetitive benefits in the cellular telephone market is *expressly contradicted by recent pronouncements by both Nextel and Motorola.* As reported in the December 2, 1994 edition of Land Mobile Radio News, a spokeswoman for the Motorola division that supplies Motorola Integrated Radio System (MIRS) technology to Nextel and its potential partners. OneComm Corp. and Dial Page Inc., stated that *''the greatest marketing change would attempt to alter the perception that ESMRs soon would be a third cellular competitor, focusing instead on integrated wireless services for dispatch.''* [8] (Emphasis added.) Similarly, Nextel's CEO, Morgan E. O'Brien, recently stated that ''Nextel never portrayed itself as the next cellular giant pursuing 'glove-compartment' consumers. Instead, it has always aimed its new cellular features at 'the mobile work force' now using dispatch.'' [9] As Nextel and Motorola are now publicly denying that they will attempt to compete with cellular telephone, DOJ cannot attempt to justify the Proposed Final Judgment on the basis of the possible benefits of such competition. As its recent pronouncements reflect, Nextel's objective is to dominate the SMR market by obtaining all of the SMR spectrum it can obtain. Such anticompetitive conduct should not be countenanced.

IV. Motorola Will Become the Sole Supplier for Virtually Every 800 MHz SMR Enabling it to Control the Price, Quality and Availability of Equipment

DOJ recognizes that, as a result of its agreement with Motorola, Nextel would control ''virtually all of the frequencies currently used for SMR service in fifteen (15) of the largest cities in the United States.'' DOJ also states that ''Nextel's numerous acquisitions of 800 MHz SMR service providers are part of a plan to replace the currently deployed analog technologies in these systems with the new Motorola Integrated Radio System (''MIRS'') developed by Motorola.'' Since virtually all of the spectrum will be owned by Nextel, all the equipment purchased will be provided by Motorola. As a result, Motorola, which has an exclusive supply arrangement with and a 24% ownership interest in Nextel, will become the dominant supplier of 800 MHz SMR equipment, enabling it to control the prices, quality and availability of such equipment.

V. DOJ Is Correct in Excluding 220 MHz as a Substitute For 800 MHz

The Board agrees with DOJ's position that ''220 MHz service will require some time to

[4] ''For Nextel, '94 Was Best of Times and Worst of Times'', *The Wall Street Journal*, January 3, 1995, p. A–14.

[5] *See* Nyquist's Theorem of Bandwidth Limitations.

[6] *See* Motorola Paper presented to the European Telecommunications Standards Institute, ''Advantages of Linear Modulation For a Pan-European Digital Trunked System,'' dated January, 1991.

[7] Form 10-Q, filed with the Securities and Exchange Commission for the quarter ended June 30, 1993 by Nextel Communications, Inc., p. 11.

[8] ''Motorola Rethinks Marketing Plans In Wake of ESMR Stock Decline,'' *Land Mobile Radio News*, December 2, 1994, pp. 1 & 4.

[9] ''For Nextel, '94 Was Best of Times and Worst of Times'', *The Wall Street Journal*, January 3, 1995, p. A–14.

gain commercial acceptance, just as 800 MHz and 900 MHz service required when they were first implemented. As a result, when 220 MHz systems are constructed, they will not adequately discipline the parties' control of 800 MHz and 900 MHz systems in the 15 cities.'' In fact, even after 220 MHz systems are constructed, they will not be a viable substitute for 800 MHz systems. Systems operating at 220 MHz require 5 KHz equipment and very few manufacturers make that type of equipment. In addition, the 220 MHz band contains only 2 MHz of spectrum, which means the SMR channel allocation is not comparable to that allocated for SMRs at 800 MHz.

VI. Conclusion

As explained above, the Competitive Impact Statement is premised upon a misunderstanding of the competitive realities in the SMR marketplace and perceived procompetitive benefits that have been disclaimed by both Nextel and Motorola. The Nextel/Motorola agreement will have serious adverse effects upon competition in the SMR marketplace and the Proposed Final Judgment does not adequately protect against such injury to competition. The Proposed Final Judgment is not in the public interest and the United States should withdraw its consent to the Proposed Final Judgment.

Respectfully submitted,

General Electric Mobile Communications Dealer Board of Directors.

Michael D. Salmon,

Recording Secretary.

Mr. George Barako,

Room No. 8104, Att.: Telecommunications Section, US Department of Justice, Judiciary Building, 555 4th Street NW, Washington DC 20001.

December 16, 1994.

Dear Mr. Barako: The purpose of this letter is to submit to the Department of Justice that actions taken against Motorola, Inc. for violations of the Anti-Trust Act touch only upon the surface, so to say, of possibly criminal infringements. Motorola's business strategy seems to be to gain control of the Communications Industry by dominance over the issuance of FCC licenses, the manufacture and distribution of equipment, such as Repeaters (Transceivers), Mobile Stations for installation in dispatch offices, hand-held radios for use in vehicles and above all semiconductors, much needed by the Two-Way Radio Industry.

By making both equipment and holding licenses Motorola would have full control over users of a radio system who had bought it from that company. Motorola has chosen to be THE company in the USA that makes equipment, repairs and provides repeater service, all needed to make a system work. After selling the equipment it is set up on Motorola-owned station repeaters. Trunked 800 MHz and 900 MHz systems made by Motorola operate on a proprietary Digital Format, thus only Motorola radios will work. If a user decides upon a Motorola systems he MUST buy Motorola equipment from Motorola or buy used Motorola radios and have Motorola program them.

Sometimes there are companies, other than Motorola, that do provide repeater service, e.g. NEXTEL (formerly Fleetcall), who however must buy the equipment from the only supplier who happens to be Motorola.

There are a few smaller companies who provide repeater service but before they can get equipment they must sell to the user the Motorola Digital Controler/Repeater system; there have also been cases where Motorola has refused to sell equipment. The buyer may become a competitor, a possibility Motorola would not like.

Motorola also keeps control of radio programming on any systems. Motorola has set up computer systems so that only Motorola, some authorized dealers and Motorola Service Centers can program the trunked radios.

Motorola and NEXTEL over the past several years have bought most competing systems all over the U.S. and mainly in the major cities. Buying most and sometimes all their competitors permits Motorola/NEXTEL to control the price of airtime on the repeater systems.

In Los Angeles Motorola has the ONLY 900Mhz trunking service with the Motorola Digital Format. This was made possible by buying out the other companies that could supply this trunking service format. Once Motorola had control of All the 900Mhz systems in the Los Angeles area Air Time fees were increased. The users who had bought Motorola equipment did not know then that Motorola would be the only provider of Air Time; now the only way to obtain a fair market price on Air Time meant buying a new radio system which many users simply cannot afford to do.

The other major trunking format in the U.S. is the E. F. Johnson LTR trunking format. While Johnson makes the equipment other manufacturers also make equipment compatible with the Johnson system. In all markets in the U.S. there are choices to obtain service for the Johnson system. People almost anywhere in the U.S. can choose where to procure repeater services at a fair price. This does not hold true for the Motorola/NEXTEL systems. Therefore he/she who buys a Motorola system is stuck with a high starting price, high operating and possible replacement costs.

NEXTEL wants to obtain the Johnson systems nation-wide in order to force existing users to buy Motorola/NEXTEL system radios.

The DOJ might make Motorola and NEXTEL give up frequencies on the 800Mhz and 900Mhz bands to other systems. Motorola and NEXTEL ought to keep up some of the older systems instead of trying to force existing users to buy Motorola/NEXTEL radios and give users a wider choice.

Motorola also holds licenses for 800Mhz systems in relatively small markets like Ventura in California where Motorola claims to have more frequencies than the company is entitled to. This practice is known as paper loading and is a fraudulent activity to gain control of more frequencies than what would be fair for one organization.

The DOJ should, nay: must stop Motorola/NEXTEL from gaining total control of the mobile radio industry. If Motorola and NEXTEL are not stopped the future of the business will become Motorola's to make the equipment and NEXTEL's to supply Air Time at any price they choose because the users will have no other place to go.

Motorola has also obtained FCC licenses [frequencies] fraudulently by putting licenses in the name of people who have no intention of using these systems and then have such un-suspecting non-user sign the application with Motorola ''taking over'' once the license is recorded. I (Harold) had learned about this scheme because one James Kay, now being investigated by the FCC, and possibly by the DOJ, has ''worked'' this angle to obtain some (possibly many) of the 164 licenses he holds.

I (Harold) ran into this scheme myself when I got a frequency in which Motorola was also interested. Motorola acquired a customer [Tow-R-Us] and had him apply for a frequency to tie up one I was using. I asked the customer why he wanted of all possible frequencies just the one I was using; he told me that Motorola had asked him to apply for that license but he had no intention of ever using the frequency.

The foregoing shows how Motorola together with NEXTEL tries anything and everything to gather frequencies in the 800 and 900Mhz bands by any and all means and methods.

If the Motorola/NEXTEL methods and enterprises are not stopped in their tracks, and NOW!, the two will develop and build and thereby become an unimpeded MONOPOLY nation-wide of the Mobile Radio Systems and will make not only competition by but the existence of small business impossible.

The Motorola/NEXTEL system will also provide a Local Dial Tone to users making it ''The Third Cellular System''. The system is unfair to the other cellular carriers as well as to the user, the general public, for once a user is on the NEXTEL system he cannot change service to another cellular systems. The NEXTEL system is also inherently unfair to manufacturers of cellular equipment because Motorola has a contract with NEXTEL stating that Motorola is the only company that may make radios for the NEXTEL [Motorola] system.

Motorola made a deal with NEXTEL whereby Motorola will trade its 800Mhz frequencies for NEXTEL stock and that NEXTEL must buy equipment only from Motorola. Trading FCC frequencies for stock is a rather questionable practice; first of all, an FCC license is simply a permit granted by the US Government to an individual or company to use the electro-magnetic spectrum in a prescribed manner. The holder of a license does not own it; it is a use permit and consequently it has no monetary value. It may also be rather impossible to ascertain the true value of Motorola's and NEXTEL's stock because an unreal value could be placed upon the stock that might include a fictitious evaluation of the ''monetary value'' of the licenses.

It seems Motorola is trying to settle the DOJ anti-trust lawsuit by giving up 900Mhz frequencies to keep the 800Mhz ones. This would be costly to users; different radios must be used on the 800Mhz and 900Mhz bands, rendering one set of radios or the other obsolete.

Research also shows that Motorola is the only US company that makes various types of transistors that are used in the radio field; Motorola has bought TRW's transistor division so only Motorola can supply these devices; US radio manufacturers must buy them from Motorola.

We have fought Motorola and Los Angeles based companies owned by one James A. Kay Jr.* who has been closely associated with Motorola* for many years. According to the FCC Kay holds 164 licenses+ in which Motorola is much interested and had wanted to obtain a large number of 800Mhz frequencies from Kay.

PS*: Kay: ''Me and Motorola are in cahoots!'' (quote-unquote)

PS+: Many of Kay's 164 licenses are registered under different names.

When we told the FCC and the Congress about the wrong done by Motorola and Kay both filed bogus law suits against us at the same time.

We are requesting help from the DOJ by protecting us from Kay and Motorola because they want to destroy us. Three times we went to depositions, each time with a different car, and each time the rear R tires were slashed in a rather unique fashion. The first time, I (Harold) was alone; the car over-turned on the Freeway and came to rest in a ditch. Fortunately I was not hurt. The second time we were riding together; we noted the slash in the R rear tire in time. The third time Mrs. Pick was watching the car while she in turn was watched by two men who seemed to be very interested indeed in what she was doing; they carried hand-held radios that looked like Motorolas and carried on a conversation with Kay—in the same upstairs room as I (Harold) was at the time.

We are willing to testify against both Motorola and Kay.

Sincerely,

Harold Pick.

By Hand

George S. Baranko, Esq.,
U.S. Department of Justice—Antitrust Division, 555 4th Street, N.W., Room 9901, Washington, DC 20001.
January 17, 1995.

Confidential

Dear George:

Attached are the comments of OneComm Corporation on the proposed consent decree in *U.S. v. Motorola, Inc. and Nextel Communications, Inc.,* Civ. No. 1:94CV02331.

If you have any questions, please call me.

Sincerely,

Bernard A. Nigro, Jr.

Comments of OneComm Corporation on Proposed Final Judgment and Stipulation by Motorola, Inc. and Nextel Communications, Inc.

On January 9, 1995, the United States Department of Justice filed a motion in the above-referenced proceeding to extend until January 17, 1995, the period of time for interested persons to file comments pursuant to the Antitrust Penalties and Procedures Act, 15 U.S.C. 16(b)–(h). The motion was filed at the request of OneComm Corporation (''OneComm''), an interested person in this case, because its merger with Nextel had not yet closed. Since the motion for an extension of time was filed, OneComm has received assurances that Nextel is moving forward in good faith to close its transaction with OneComm and, therefore, OneComm has no comments.

Dated: January 17, 1995.

Respectfully submitted,

James F. Rill,

Bernard A. Nigro, Jr.,

Collier, Shannon, Rill & Scott.

Counsel for OneComm Corporation.

Attachment G

Attachment G, a Wall Street Journal article ''For Nextel, '94 Was Best of Times and Worst of Times,'' is omitted from publication herein; a copy can be obtained on request for inspection and copying in room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530 and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, N.W., Washington, D.C. 20001.

Attachment H

Attachment H, a Land Mobile Radio News article ''Motorola Rethinks Marketing Plans in Wake or ESMR Stock Decline'' is omitted from publication herein; a copy can be obtained on request for inspection and copying in room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Pennsylvania Avenue N.W., Washington, D.C. 20530 and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, N.W., Washington, D.C. 20001.

Attachment I

Attachment I, copies of letters to Wall Street Journal, are omitted from publication herein; a copy can be obtained on request for inspection and copying in room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530 and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, N.W., Washington, D.C. 20001.

Attachment J

Morgan E. O'Brien, being duly sworn, deposes and says:

1. I am the Chairman of Nextel Communications, Inc. (''Nextel''), defendant in the above-captioned action. Nextel is headquartered in Rutherford, New Jersey. My office is located at 800 Connecticut Avenue, N.W., Washington, D.C. 20006. I have been asked to reconfirm Nextel's long-term business plans in response to concerns raised by the public and the media about Nextel's intention to move forward with its proposed nationwide wireless telecommunications system. I have personal knowledge of the facts set forth in this affidavit.

2. Since Nextel's (formerly ''Fleet Call'') founding in 1987, Nextel's business objective has remained constant—to become a major provider of wireless communications services. For the last several years, Nextel's business plans and efforts have been, to a large extent, directed toward replacing the conventional analog SMR systems that it currently operates with advanced digital mobile (or ESMR) networks, which offer mobile calling services, alphanumeric messaging, dispatching and data transmission in a single digital phone. The implementation process has been gradual and ongoing. Nextel has activated its Digital Mobile network systems, and has commenced offering commercial service throughout most of the state of California (e.g., Los Angeles, Sacramento, San Francisco and the Central Valley), as well as in the greater metropolitan areas in and around Chicago and New York. Today, the Nextel Digital Mobile systems that are operational in these markets provide wireless communications services to areas that, in the aggregate, represent approximately 25% of the total population of the United States. The construction of the Digital Mobile systems involves significant amounts of preparatory activities, such as frequency planning, site procurement and preparation, obtaining zoning approvals and similar tasks in advance of system infrastructure installation and system activation, testing and optimization. Such activities have been substantially completed or are currently ongoing in most of Nextel's remaining major market areas, including San Diego, Las Vegas, Reno, Cleveland, Detroit, New England and the Mid-Atlantic regions. As disclosed in Nextel's numerous filings with the Securities and Exchange Commission (''SEC''), Nextel's nationwide Digital Mobile network

build-out plan is premised on a number of factors, such as availability of sufficient financing on acceptable terms and achievement of satisfactory system performance in the relevant markets. To the extent such build-out plan would encompass market areas beyond those in which Nextel currently possesses sufficient holdings of spectrum, it would be dependent on the factors noted above and also on consummation of Nextel's currently pending or proposed transactions with other parties, including Motorola, Inc., OneComm Corporation, American Mobile Systems Incorporated and Dial Page, Inc.

3. As described in numerous Nextel documents and presentations, including the company's Annual Reports on Form 10–K for the fiscal years ended March 31, 1992, 1993, and 1994, as well as Nextel's interrogatory responses to the DOJ's Second Requests, Nextel's marketing strategy for its Digital Mobile network services is intended to be implemented in three stages. In the first stage, which Nextel currently is in now, Nextel is focusing its efforts on migrating its current dispatch-users to the digital mobile network. The second stage will concentrate on attracting new business users (e.g., current subscribers of traditional SMR or other two-way services), who may be especially attracted by the integrated package of services achievable through the new digital technology. The third stage will be geared towards a broader category of users, i.e., attracting potential customers who are interested in general mobile telephone service. Nextel expects to rely on its ability to provide an integrated package of digital wireless services in marketing itself to this segment as a viable and unique competitor providing services that are not only similar to those available from cellular operators and any other providers of mobile telephone services, but also paging and enhanced dispatch service providers.

4. Nextel expects that its mobile telephone services will be competitive with those offered by cellular providers and other providers of mobile telephone services in terms of quality of service, features offered, pricing structure and airtime utilization. In addition, Nextel believes that its ability to provide an integrated package of mobile communications services will appeal to a wide array of users of wireless communications services, including private network dispatch, paging and mobile telephone and mobile data transmission. Cellular providers currently do not directly provide such integrated services. Essentially, Nextel's business goal is to capture a significant share of the potential wireless customer base, not just the dispatch customers.

5. Nextel expects to charge rates that are competitive with those charged by other providers of wireless communications services. For example, Nextel's customers will pay only for the services used, with package pricing available for customers who subscribe to more than one service. If a customer uses digital dispatch, Nextel's charge is comparable to or reflects a slight premium over conventional analog dispatch rates, reflecting larger calling areas, higher quality transmission, and enhanced privacy. Similarly, a customer who uses Nextel's mobile telephone service will be charged rates comparable to those charged by cellular telephone providers and any other providers of mobile telephone services. Only where customers subscribe to services in addition to dispatch service will they be charged for such additional services capabilities, and accordingly, to the extent such customers utilize such an integrated digital wireless service package would they be likely to pay significantly more than they do today for dispatch.

6. Nextel's business and marketing plans are subject to periodic review and would, of course, be subject to adjustment as may from time to time be deemed advisable to respond to particular conditions affecting the economy generally, the evolving wireless services industry or the company specifically.

7. Motorola remains strongly committed to the success of its advanced digital technology, referred to as MIRS, and to its investment in Nextel.

Sworn to before me this 15 day of February, 1995.

Morgan E. O'Brien.

Clare Pugsley,

Notary Public District of Columbia.

[FR Doc. 95–8814 Filed 4–14–95; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated February 17, 1995, and published in the **Federal Register** on March 1, 1995, 1994, (60 FR 11115), Organix Inc., 65 Cummings Park, Woburn, Massachusetts 01801, made application to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Morphine (9300)	II

No comments or objections have been received. Therefore, pursuant to Section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations, § 1301.54(e), the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: April 7, 1995.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 95–9391 Filed 4–14–95; 8:45 am]

BILLING CODE 4410–09–M

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on February 9, 1995, Sigma Chemical Company, 3500 Dekalb Street, St. Louis, Missouri 63118, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
Fenethylline (1503)	I
Aminorex (1585)	I
Methaqualone (2565)	I
Alpha-Ethyltryptamine (7249)	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
4-Bromo-2,5-dimethoxyamphetamine (7391)	I