



# PUBLIC NOTICE

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**WIRELESS TELECOMMUNICATIONS BUREAU  
MOBILITY DIVISION  
APPROVES SETTLEMENT AGREEMENT AND  
DISMISSES APPLICATION FOR REVIEW**

This Public Notice approves a Settlement Agreement between Charles W. Fortner (Fortner) and Nextel Communications, Inc. (Nextel), and dismisses Nextel's Application for Review filed December 21, 2001 of the Wireless Telecommunications Bureau's (Bureau) grant of Fortner's Petition to Correct Commission Records and grant of Fortner's application for certain 800 MHz frequencies pursuant to the Commission's former finder's preference program.<sup>1</sup>

On December 16, 2003, Nextel filed a Request for Approval of Withdrawal of Application for Review (Withdrawal Request) and the Settlement Agreement. In addition, pursuant to Section 0.459,<sup>2</sup> Nextel requests that the Settlement Agreement be afforded confidential treatment and protected from public disclosure.

The Bureau's Mobility Division has reviewed the Settlement Agreement and the Withdrawal Request and finds that they raise no substantial or material questions of fact under Section 309(d) of the Communications Act of 1934, as amended.<sup>3</sup> Each party filed individual certifications in support of the Settlement Agreement and the withdrawal of all pleadings pursuant to Section 1.935 of the Commission's rules.<sup>4</sup> Accordingly, pursuant to Sections 0.331<sup>5</sup> and 1.935 of the Commission's rules, and based on the statements contained in the Withdrawal Request, the Mobility Division hereby approves the withdrawal of and dismisses the Application for Review filed by Nextel Communications, Inc. on December 21, 2001; all other pleadings filed in this matter are hereby deemed moot and the proceeding is terminated.

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<sup>1</sup> See In re: Petition of Charles W. Fortner, *Order*, 16 FCC Rcd 20,359 (WTB, CWD 2001). The Commission discontinued the Finder's Preference Program for the 800 MHz Service on December 15, 1995. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1634 ¶ 416 (1995).

<sup>2</sup> 47 C.F.R. § 0.459.

<sup>3</sup> 47 U.S.C. § 309(d).

<sup>4</sup> 47 C.F.R. § 1.935.

<sup>5</sup> 47 C.F.R. § 0.331.

Finally, with regard to Nextel's Confidentiality Request,<sup>6</sup> we apply the standards of Exemption 4 of the Freedom of Information Act (FOIA) to determine whether the Settlement Agreement may be withheld from public inspection. FOIA Exemption 4 protects from public disclosure "trade secrets and commercial information or financial information obtained from a person [that is] privileged or confidential."<sup>7</sup> We note that "the Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding, or where the Commission has identified a compelling public interest in disclosure."<sup>8</sup>

We have reviewed the Settlement Agreement and find that it contains competitively sensitive, highly confidential financial and commercial information that is not of the type customarily disclosed to the public.<sup>9</sup> We find that public disclosure of the agreement could impair the Commission's ability to obtain necessary information in the future and cause competitive harm to the parties.<sup>10</sup> Accordingly, the Settlement Agreement is protected from disclosure.

Action by the Deputy Chief, Mobility Division.

FOR FURTHER INFORMATION CONTACT: Wilbert E. Nixon, Jr. of the Mobility Division at (202) 418-7240 or wilbert.nixon@fcc.gov.

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<sup>6</sup> See Letter from Alberto J. Catalano, Catalano & Plache, PLLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Charles W. Fortner licensee of Station WPUI348, (filed Dec. 16, 2003) ("Confidentiality Request"). Mr. Fortner supports Nextel's request. See Letter from Benjamin J. Aron, Counsel for Charles W. Fortner, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Charles W. Fortner, Call Sign WPUI348, at 1 (filed Feb. 19, 2004).

<sup>7</sup> 5 U.S.C. § 552(b) (4).

<sup>8</sup> In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24822, ¶ 8 (1998) (footnotes omitted) (*Confidentiality Report and Order*). Courts also have recognized that settlement agreements may constitute privileged information under FOIA Exemption 4. See, e.g., *M/A-Com Information Systems, Inc. v. U.S. Dep't of Health and Human Svcs.*, 656 F. Supp. 691 (D.D.C. 1986).

<sup>9</sup> In fact, the Settlement Agreement itself is subject to a confidentiality clause to protect the parties from economic and commercial harm and to protect the information contained within the agreement from disclosure.

<sup>10</sup> The Commission seeks to avoid "unnecessary disclosure of information that might put its regulatees at a competitive disadvantage." *Confidentiality Report and Order*, 13 FCC Rcd at 24822 ¶ 8.