

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

In re Applications of	)	
	)	
Motorola, Inc.; Motorola SMR, Inc.; and	)	DA 00-2352
Motorola Communications and Electronics, Inc.,	)	
Assignors;	)	File Nos. 0000224876
	)	0000224877
and	)	0000224878
	)	
FCI 900, Inc.	)	
Assignee,	)	
	)	
For Consent to Assignment of 900 MHz	)	
Specialized Mobile Radio Licenses	)	

To: Chief, Wireless Telecommunications Bureau

**OPPOSITION TO PETITION FOR RECONSIDERATION**

In accordance with Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), Motorola, Inc. ("Motorola") hereby submits this Opposition to the Petition for Clarification and Reconsideration filed by Southern Communications Services, Inc., d/b/a Southern LINC ("Southern") in the above-captioned matter on May 17, 2001.<sup>1</sup> Southern asks the Wireless Telecommunications Bureau ("Bureau") to reconsider and rescind its decision granting the applications to assign fifty-eight 900 MHz Specialized Mobile Radio ("SMR") licenses held by Motorola and two of its wholly-owned subsidiaries to FCI 900, Inc., a wholly-owned subsidiary of Nextel Communications, Inc. (collectively "Nextel").<sup>2</sup> In an attempt to discredit the Bureau's

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<sup>1</sup> Southern Communications Services, Inc., d/b/a Southern LINC, Petition for Clarification and Reconsideration, DA 00-2352, *et al.*, (filed May 17, 2001) ("*Southern Petition*").

<sup>2</sup> *Applications of Motorola, Inc.; Motorola SMR, Inc.; and Motorola Communications and Electronics, Inc.*, DA 00-2352, *et al.*, (rel. April 17, 2001) ("*Bureau Order*").

decision, Southern argues that the Bureau's Herfindahl-Hirschman Index ("HHI") analysis for the trunked dispatch market is based on assumptions that cannot be verified and is in error because it (i) did not include all of Nextel's 800 MHz spectrum, and (ii) included 5 MHz of spectrum in the 450-470 MHz band.

As discussed in detail below, Southern's claims are wholly without merit and do not provide a basis for reconsideration, let alone rescission of the Bureau's decision granting the underlying assignment applications. Southern's petition essentially attacks the Bureau's decision on technical grounds that are either tortured and inaccurate or of absolutely no decisional significance. Because Southern has not – and, indeed, cannot – establish that the Bureau's decision granting the assignment applications was erroneous, its Petition should be denied without delay.

**I. The Bureau's HHI Analysis Does Not Require Clarification And Does Not Warrant Reconsideration**

Southern first argues that the HHI analysis conducted by the Bureau for the trunked dispatch market "is based on a number of assumptions not clearly explained or documented."<sup>3</sup> Motorola disagrees and submits that the rationale undergirding the Bureau's HHI analysis was described in full and sufficient detail. Moreover, the Bureau's HHI calculation was only part of its analysis and was not a determinative part at that. Thus, Southern's allegations – even if true – would not establish a basis for reconsideration.

The Bureau's *Order* discusses at length the reason for its decision not to use the HHI analysis submitted by either Southern or the Applicants, as well as the basis for its determination that the Applicants' calculations were more reliable and closer to its own than Southern's. In

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<sup>3</sup> *Southern Petition*, at 2-3.

particular, the Bureau found that Southern's HHI analysis was "flawed" and yielded an "unreasonably high picture of concentration" because it excluded 800 MHz site licenses, non-SMR 800 MHz licensees providing commercial trunked dispatch service, commercial trunked 450 MHz services, and land-based AMTS at 217-219 MHz, while including all of Nextel's 800 MHz spectrum.<sup>4</sup> While the Bureau agreed with the Applicants that the trunked dispatch market should include those portions of Nextel's and Southern's spectrum used for trunked dispatch service, other 800 MHz and 900 MHz spectrum, 220 MHz spectrum, and 450 MHz spectrum, it nonetheless adjusted the Applicants' analysis to include only portions of both the 220 MHz and 450 MHz bands as opposed to the entire bands; to exclude the 700 MHz guard band spectrum entirely; and to include AMTS spectrum, which Nextel and Motorola had omitted.<sup>5</sup>

The Bureau also explained that its analysis was based on information in the record concerning the amount of spectrum in the 450 MHz, 217-219 MHz, and non-SMR 800 and 900 MHz bands used to provide trunked dispatch service, and cited Nextel's own figures on the amount of its 800 MHz spectrum devoted to trunked dispatch services.<sup>6</sup> In these circumstances, Motorola submits that the Bureau's explanation clearly set forth the basis for its HHI calculations, including the amount of Nextel's spectrum devoted to trunked dispatch services as well as other trunked dispatch offerings considered in the analysis.

Moreover, the Bureau based its determination that the proposed assignment would not allow Nextel to behave anticompetitively on considerations beyond its HHI calculation. For

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<sup>4</sup> *Bureau Order*, ¶ 28.

<sup>5</sup> *Id.*, ¶ 29.

<sup>6</sup> *Id.*, nn.94, 102.

example, the Bureau expressly noted that anticipated new entry by 220 MHz, 217-219 MHz, 450 MHz providers, cellular and PCS carriers, and 800 MHz Business and Industrial and Land Transportation licensees would mitigate any potential for Nextel to exercise market power.<sup>7</sup> The Bureau also found that the existence of other alternatives, such as traditional dispatch, private dispatch, and data dispatch, constrains Nextel from engaging in anticompetitive conduct.<sup>8</sup>

Significantly, the Bureau observed that, *even if* the Applicants' HHI calculations "were adjusted to yield a more conservative estimate of market concentration, the proposed assignment [would] not unduly increase concentration or otherwise cause competitive harm" because there exist (i) alternatives for trunked dispatch services, (ii) the potential for additional entry, and (iii) other dispatch-like services that are competitive alternatives for some trunked dispatch consumers.<sup>9</sup> Thus, regardless of its particular HHI calculations, the Bureau found that the proposed transaction would not produce undue concentration or competitive harm as a result of numerous market considerations.

Finally in this regard, it is critical to underscore that HHI analyses are simply a tool available to the Commission in evaluating the competitive effects of a proposed transaction; the FCC is not under any obligation to apply HHI analyses nor are HHI results meant to be conclusive on its decisionmaking process. In fact, the Commission has expressly stated that, "given the unique economic, legal, and technical circumstances that color the telecommunications industry, we will not rigidly adhere to the results of this analysis where our

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<sup>7</sup> *Id.*, ¶ 31.

<sup>8</sup> *Id.*, ¶ 32.

<sup>9</sup> *Id.*, ¶ 27.

independent expert analysis suggests a different outcome.”<sup>10</sup> Thus, even if its HHI analysis had shown that the proposed transaction would result in significant increases in concentration, the Bureau was free to find that grant of the assignment applications was in the public interest. Against this backdrop, it is clear that Southern faces a difficult task in attempting to establish that alleged errors or omissions in the Bureau’s HHI analysis were of decisional significance, and it has failed to make such a showing here.

## **II. The Bureau Correctly Included A Portion Of Nextel’s 800 MHz SMR Spectrum In Its HHI Analysis**

Southern also argues that the Bureau’s HHI analysis is erroneous because it included a portion – as opposed to all – of Nextel’s 800 MHz spectrum. Specifically, Southern claims that, under the Department of Justice’s Horizontal Merger Guidelines, all of Nextel’s 800 MHz spectrum holdings should have been included because the seminal consideration is consumer response in the face of a monopolistic price increase, not a service provider’s current allocation of services.<sup>11</sup>

Southern’s argument is inconsistent with Commission precedent and, once again, overlooks the Commission’s discretion to conduct HHI and related analyses as the agency deems appropriate based on its unique expertise. In analyzing the level of competition in the trunked dispatch market, the Commission has consistently included a portion of Nextel’s 800 MHz spectrum, namely, that portion devoted to trunked dispatch offerings. For example, in its

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<sup>10</sup> *Applications of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18048 (1998). See also *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, 12 FCC Rcd 19985, 20053 (1997) (same); *RIG Telephones, Inc., d/b/a DataCom and Stratos Offshore Tele. Co.*, DA 00-2239, at n.39 (rel. Oct. 6, 2000) (same).

<sup>11</sup> *Southern Petition*, at 4-5.

*Fifth Annual CMRS Competition Report*, the Commission noted that, “all Nextel subscribers should not be counted in the dispatch sector, and estimates of the dispatch sector that include all Nextel subscribers overstate the size and concentration of that sector.”<sup>12</sup> Similarly, in the *Nextel-Geotek Order*, the Bureau declined to include all of Geotek’s spectrum in its analysis of the trunked dispatch market, noting that, “not all of the spectrum that Nextel seeks to acquire – which varies between 0.5 MHz and 1.75 MHz per geographic market – should be considered an addition to the trunked market. Much of this capacity will be used for provision of mobile voice.”<sup>13</sup>

Likewise, in the instant matter, the Bureau explained that, because Nextel’s 800 MHz spectrum “is used for both trunked dispatch and interconnected mobile voice services, it is not appropriate to assign Nextel’s 800 MHz capacity entirely to the trunked dispatch market as Southern urges.”<sup>14</sup> This approach is entirely consistent with the Commission’s prior decisions and Southern has not provided any basis for a reversal of course.

### **III. The Bureau Properly Included 450-470 MHz Spectrum In Its Competitive Analysis**

Southern’s argument that the Bureau erred in including a portion of the 450-470 MHz band in its analysis of the product market for trunked dispatch services also misses the mark. The

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<sup>12</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 15 FCC Rcd 17660, 17728 (2000) (“*Fifth Annual CMRS Competition Report*”).

<sup>13</sup> *Applications of Various Subsidiaries and Affiliates of Geotek Communications, Inc., et al.*, 15 FCC Rcd 790, 805 (2000) (Wireless Telecommunications Bureau) (the Bureau also noted that an analysis that treats Nextel’s DirectConnect® product solely as a trunked dispatch product overstates Nextel’s trunked dispatch capacity because DirectConnect® is not used exclusively for dispatch services).

<sup>14</sup> *Bureau Order*, ¶ 28.

Bureau's decision was well explained and premised on credible industry analyses, and Southern's arguments to the contrary are unavailing.

In deciding to include a portion of 450-470 MHz band in its analysis, the Bureau observed that there are currently commercial providers in the band offering trunked dispatch services. The Bureau also cited a study indicating that, "migration by Nextel's former 800 MHz trunked dispatch customers has spurred growth in the 450 MHz band."<sup>15</sup> While acknowledging that trunked dispatch service in the band had been slow to develop as a result of the shared nature of the spectrum, the Bureau noted a "generally high rate of growth of dispatch subscribers on 450 MHz systems." Finally, the Bureau observed that, as demand for trunked dispatch services in the band develops, additional licensees may find it beneficial to trunk their systems. On this basis, the Bureau concluded that "trunked dispatch service offered at 450 MHz is a viable substitute for some customers and should be included as part of our market analysis."<sup>16</sup>

In attacking this determination, Southern stresses the Commission's prior observation that the 450-470 MHz band is heavily congested in many urban areas. Southern states that, for this reason, the agency declined to adopt geographic area licensing in the band. Southern claims that the FCC itself has, therefore, "declined to facilitate commercial trunked dispatch service in this frequency band."<sup>17</sup>

Southern's argument is a *non sequitur*. It is true that the 450-470 MHz band is heavily congested in many markets; the band already contains numerous incumbent licensees, including

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<sup>15</sup> *Id.*, ¶ 20.

<sup>16</sup> *Id.*

<sup>17</sup> *Southern Petition*, at 6-7.

both commercial and private operators. It is also true that the level of incumbent occupancy was critical in causing the Commission to decline to adopt a geographic licensing scheme in the 450-470 MHz band. Specifically, the Commission observed that, “the number of incumbents, particularly in the areas where geographic overlay licenses would be most desirable, would create nearly impossible due diligence requirements and would make the spectrum, at best, only marginally useful to a geographic area licensee.”<sup>18</sup> The Commission’s decision did not rest on a desire to curb or prevent commercial service in the band, as Southern appears to suggest, nor does it bear any relationship to the likelihood of trunked dispatch operations in the band existing or increasing.

Southern’s related claim that the Commission’s decision not to license spectrum in the 450-470 MHz band on a geographic basis “only supports a conclusion that the trunked dispatch market will not increase in this band in the next two years,”<sup>19</sup> is incorrect for similar reasons. Commercial operations – including trunked dispatch services – already exist in the 450-470 MHz band and there is nothing to prevent them from increasing, whether through conversion of existing operations or entry by new site-by-site licensees.<sup>20</sup>

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<sup>18</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, et al.*, WT Docket No. 99-87, *et al.*, at ¶ 95 (rel. Nov. 20, 2000).

<sup>19</sup> *Southern Petition*, at 7.

<sup>20</sup> Southern also misstates Motorola’s position in RM No. 9705. Motorola did not “oppose[ ] a proposal to license 10 MHz of 450 MHz frequencies on a commercial basis,” nor did it “state[ ] that commercial operation would not meet the needs of private radio users.” See *Southern Petition* at 7. Rather, Motorola opposed AMTA’s geographic area licensing proposal because of the impact on incumbent licensees, which Motorola did not believe had been sufficiently addressed. In addition, Motorola expressly acknowledged the benefits of the existing site-by-site licensing scheme, which allows business, industrial and government users to “choose whether to install their own, private internal systems *or to rely on the services of specialized wireless*

(Continued...)



#### IV. Conclusion

For the foregoing reasons, Motorola urges the Bureau to deny Southern's Petition for Clarification or Reconsideration. The points raised by Southern lack merit and do not provide any valid basis for reconsideration or rescission of the Bureau's decision granting the subject assignment applications. After considering all of the evidence in the record, the Bureau determined that the proposed transaction would not cause competitive harm and would produce significant public interest benefits. Southern has not demonstrated that either of these findings was in error.

Respectfully submitted,

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*carriers.*" See Comments of Motorola, RM No. 9705, at 3 (filed Sept. 23, 1999) (emphasis added).

## CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 31st day of May, 2001, I caused a true copy of the foregoing "Opposition to Petition for Reconsideration" to be delivered to the following persons via first class, postage prepaid mail:

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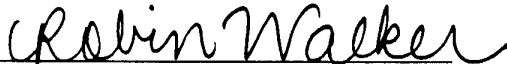
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