

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
)	0000224878
and)	
)	
)	
FCI 900, Inc.)	
Assignee,)	
)	
)	
For Consent to Assignment of 900 MHz)	
Specialized Mobile Radio Licenses)	

ORDER ON RECONSIDERATION

Adopted: August 10, 2001

Released: August 13, 2001

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition filed by Southern LINC (“Southern”)¹ requesting that the Wireless Telecommunications Bureau (“Bureau”) both clarify and reconsider its April 17, 2001 decision to grant applications to assign various 900 MHz Specialized Mobile Radio

¹ Petition for Clarification and Reconsideration of Southern LINC (filed May 17, 2001) (“Southern Petition”). Motorola, Inc. and Nextel Communications, Inc. each filed an opposition to Southern’s Petition. *See* Opposition to Petition for Reconsideration, filed May 31, 2001 by Motorola, Inc. (“Motorola Opposition”); Opposition of Nextel Communications, Inc. to Southern LINC’s Petition for Clarification and Reconsideration, filed May 31, 2001 (“Nextel Opposition”).

(“SMR”)² licenses from Motorola, Inc., Motorola SMR, Inc., and Motorola Communications and Electronics, Inc. (collectively, “Motorola”) to FCI 900, Inc., a subsidiary of Nextel Communications, Inc. (“Nextel”).³ For the reasons discussed below, we deny Southern’s petition.

II. DISCUSSION

2. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁴ As explained below, Southern has neither demonstrated an error or omission nor raised new facts that would cause the Bureau to reconsider its decision.

3. Southern bases its Petition on alleged errors in the Bureau’s methodology for determining the relevant product market for analyzing the transaction, challenging the assumptions underlying the Bureau’s calculation of Herfindahl-Hirschman Indices (“HHIs”) in this case.⁵ Specifically, Southern contends that the Bureau’s conclusions regarding which spectrum should be included in an analysis of a trunked dispatch market caused the Bureau wrongly to: (1) exclude some spectrum in the 800 MHz band licensed to Nextel and (2) include a portion of spectrum allocated at 450-470 MHz. Had we adopted Southern’s assumptions, Southern argues, we would have found that the proposed transaction would result in undue concentration levels in the affected markets, requiring denial of the Applications as against the public interest. We disagree. We reaffirm the assumptions made in the HHI calculations. Moreover, as explained in the *Order*, the HHI calculations were only one factor in the overall analysis conducted by the Bureau, several other factors supported the Bureau’s conclusion, and the Bureau did not rely on the HHI calculations in finding that the assignment was in the public interest.

4. We, first, reject Southern’s contention that the Bureau’s HHIs reflected overly low concentration levels because the Bureau erroneously included a portion of the 800 MHz SMR spectrum licensed to Nextel in an interconnected mobile voice market, instead of assigning that spectrum entirely to a trunked dispatch market.⁶ Southern’s argument that no portion of this

² The “900 MHz” SMR band refers to spectrum allocated in the 896-901 and 935-940 MHz bands. See 47 C.F.R. §90.603.

³ *In re Applications of Motorola, Inc., et al.*, Order, DA 01-947 (rel. Apr. 17, 2001) (“*Order*”). See also Applications of Motorola for Consent to Assign Licenses to FCI 900, Inc., filed Sept. 25, 2000, ULS File Nos. 0000224876, 0000224877, 0000224878 (“Applications”).

⁴ 47 C.F.R. § 1.106; *LMDS Communications, Inc.*, Order on Reconsideration, DA 00-2674, at ¶ 6 (WTB, rel. Nov. 30, 2000) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)).

⁵ See *Order* at ¶ 28 and note 91 for an explanation of HHIs.

⁶ Southern Petition at 4.

spectrum belongs in the interconnected mobile voice market is both unreasonable and incorrect. As explained in the *Order*, Commission policy permits the provision of various services on 800 MHz SMR spectrum, including interconnected mobile voice and dispatch,⁷ and Southern does not dispute that Nextel currently offers both interconnected mobile voice and trunked dispatch services via 800 MHz SMR licenses.

5. Southern bases its position that all of Nextel's 800 MHz spectrum should be assigned to a trunked dispatch market on a hypothetical possibility that if, in the future, prices for existing trunked dispatch service increased, "Nextel's entire 800 MHz spectrum capacity could easily be used for trunked dispatch service[.]"⁸ We reject that analysis for a number of reasons. First, one could just as easily hypothesize that changing market circumstances, such as growth in demand for interconnected mobile voice service could lead Nextel to use its entire 800 MHz spectrum capacity for interconnected mobile voice service. Therefore, in our view, it is unreasonable and produces a highly inaccurate result to assign the entire amount of spectrum to any one market. Second, taken to its logical conclusion, Southern's argument would require us to include all spectrum used for interconnected mobile voice service in a trunked dispatch market, which would produce extremely low concentration levels in the relevant markets.⁹ Third, we disagree that focusing on Nextel's current usage patterns "defies practical reality" because "Nextel's customers, not Nextel, control whether trunked dispatch or two-way interconnected service is used."¹⁰ Southern offers no rationale for ignoring those customers' current usage patterns or for adopting the thoroughly unrealistic position that consumers might in the future demand purely trunked dispatch service from Nextel. We find that our approach better reflects practical reality. Finally, and perhaps most importantly, Southern's argument ignores that, in the event of a future price increase for Nextel's trunked dispatch service, there are various alternatives available for consumers, so the most likely outcome is not the use of all of Nextel's 800 MHz spectrum for trunked dispatch service, but the loss of trunked dispatch customers to other services.¹¹ Therefore, a portion of the 800 MHz spectrum licensed to Nextel was correctly assigned to an interconnected mobile voice market in the Bureau's calculations.¹²

⁷ *Order* at ¶ 14 (citing *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, Policy Statement, 14 FCC Rcd. 19868 (1999); see also *In re Applications of Various Subsidiaries and Affiliates of Geotek Communications Inc. and FCI 900, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 790 ¶ 25 (WTB 2000).

⁸ Southern Petition at 5.

⁹ See also Nextel Opposition at 4; Motorola Opposition at 5.

¹⁰ Southern Petition at 5.

¹¹ See *Order* at ¶ 32.

¹² We also do not believe, as Southern suggests, that we are bound to follow the analysis suggested by the Department of Justice's Merger Guidelines. See Southern Petition at 4.

6. Southern also contends that the Bureau's HHIs reflect overly low concentration levels because the Bureau erroneously included a portion of spectrum allocated in the 450-470 MHz frequency band in the trunked dispatch market.¹³ Southern's argument ignores that there is currently trunked dispatch service available on the 450 MHz band, and that current trends indicate that such usage is increasing.¹⁴ Southern's emphasis on the Bureau's decision not to adopt geographic licensing and competitive bidding rules for this spectrum does not contradict the conclusion relevant to the analysis that trunked dispatch services on this band exist and are increasing.¹⁵ Accordingly, we reaffirm our inclusion of a portion of the 450 MHz band in a trunked dispatch market.

7. Moreover, the market concentration levels reflected by the Bureau's HHI calculations played only a limited role in our analysis that the assignment would not cause competitive harm in urban trunked dispatch markets. The Bureau's grant of the Applications was largely based on a number of other factors, none of which Southern contests in its Petition, including: (1) the number of current alternatives available for consumers desiring trunked dispatch services;¹⁶ (2) the potential for additional entry into the trunked dispatch market;¹⁷ and (3) other dispatch-like services not included in the market but nonetheless providing effective competitive alternatives for some trunked dispatch consumers.¹⁸ Indeed, Southern cites a Department of Justice finding that significant entry into dispatch markets may come from licensees in other services.¹⁹ The *Order* explained, and Southern does not dispute, that all of these factors would prevent Nextel from charging supracompetitive prices to trunked dispatch customers or otherwise behaving anticompetitively.²⁰ Accordingly, any additional discussion of the HHI calculations, as requested by Southern, would not alter the final analysis.²¹

¹³ *Id.* at 6-7.

¹⁴ *See Order* at ¶ 20; *see also* Nextel Opposition at 6.

¹⁵ *See* Southern Petition at 7-8.

¹⁶ *See Order* at ¶¶ 27, 32.

¹⁷ *See Order* at ¶¶ 27, 31.

¹⁸ *See Order* at ¶¶ 22, 27.

¹⁹ Southern Petition at 7.

²⁰ *See Order* at ¶¶ 27, 31-33; *see also* Motorola Opposition at 2-4.

²¹ *See* Southern Petition at 2-3 (requesting "clarification" of certain HHI calculation factors). The Bureau's estimates of market concentration were more conservative than those provided by the Applicants, and sufficient detail regarding those calculations was provided in the *Order* and in further correspondence with Southern. *See Order* at ¶¶ 28-30; *see also* Letter from James D. Schlichting, Deputy Bureau Chief, Wireless Telecommunications Bureau, to John R. Delmore, McDermott, Will & Emery, Counsel for Southern LINC, dated April 27, 2001.

8. In sum, Southern has failed to raise an error or omission that would cause the Bureau to reconsider its *Order* and/or rescind the grant of the Applications. Accordingly, we deny the Petition, except to the extent that the above further clarifies the *Order*.

III. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, and 310(d), that the Petition for Reconsideration filed on May 17, 2001 by Southern LINC IS DENIED to the extent indicated herein.

10. This Order on Reconsideration is taken on delegated authority under section 0.331 of the Commission's rules, 47 C.F.R. § 0.331. Applications for review under section 1.115 of the Commission's rules, 47 C.F.R. § 1.1115, may be filed within thirty days of the date of the public notice.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau