

Before the
Federal Communications Commission
Washington, DC 20554

2001 MAY 21 P 2:21P

In re Applications of)
Motorola, Inc.; Motorola SMR, Inc.; and)
Motorola Communications and Electronics, Inc.)
Assignors;)
and)
FCI 900, Inc.)
Assignee,)
For Consent to Assignment of 900 MHz)
Specialized Mobile Radio Licenses)

DA 00-2352

File Nos. 0000224876
0000224877
0000224878

To: Chief, Wireless Telecommunications Bureau

PETITION FOR CLARIFICATION AND RECONSIDERATION

Pursuant to Section 1.106 of the Commission's rules, Southern Communications Services, Inc., d/b/a/ Southern LINC ("Southern LINC"), by its attorneys, hereby petitions the FCC to clarify certain aspects of its Herfindahl-Herschman Indices ("HHI") calculations in the above-referenced proceeding and to reconsider the grant of the above-captioned assignment of 900 MHz Specialized Mobile Radio (SMR) licenses ("Licenses") from Motorola, Inc., Motorola SMR, Inc., Motorola Communications and Electronics, Inc. (collectively "Motorola") to FCI 900, Inc., a wholly-owned subsidiary of Nextel Communications.¹ In support of its Petition, Southern LINC sets forth the following.

¹ *Motorola, Inc.; Motorola SMR, Inc.; and Motorola Communications and Electronics, Inc. Assignors and FCI 900, Inc., Assignee, for Consent to Assignment of 900 MHz Specialized Mobile Radio Licenses, Order*, DA 01-947, released April 17, 2001 (hereinafter, "Order").

I. Summary of Grounds for Clarification and Reconsideration

The Wireless Telecommunications Bureau ("Bureau") Order included independent HHI calculations that require clarification in order to determine if the Bureau's analysis accurately reflects post-transaction concentration in the trunked dispatch market and if its assignment of the Licenses to Nextel meets the requirements of the relevant merger guidelines. In addition to the issues requiring clarification the Bureau erred in discounting Nextel's existing 800 MHz resources for purposes of analyzing the effects of the acquisition in the trunked dispatch market. The Bureau's decision also erroneously failed to consider Southern LINC's supplemental economic analysis of the 450-470 MHz band in its analysis of that market.²

As set forth more fully below, granting the assignment of the Licenses to Nextel will increase concentration in an already highly concentrated trunked dispatch market. Such an increase is clearly not in the public interest. Therefore, the Bureau should reconsider and rescind its grant of the assignment of the Licenses from Motorola to Nextel.

II. Clarification of the Bureau's HHI Calculations

The Bureau's independent HHI analysis of the effects of Nextel's acquisition of the Licenses is based on a number of assumptions not clearly explained or documented in the Order. Southern LINC received a copy of the Bureau's HHI calculations for the trunked dispatch markets, but still cannot validate all of the Bureau's assumptions regarding the calculations of market concentration. Specifically, the Bureau did not explain how Nextel's spectrum holdings were calculated. In addition, in order to reach the HHI calculations, the Bureau made assumptions regarding the number of firms with spectrum holdings in the 800 MHz, 900 MHz, 220 MHz, and 450 MHz frequencies. The numbers the Bureau used appear to be different than those submitted by Nextel, but it is not clear how the Bureau arrived at those numbers. Since the number of firms is a key

² See Ex Parte Presentation submitted by Southern LINC, Supplemental Affidavit of Michael G. Baumann and Stephen E. Siwek of Economists, Inc., filed March 20, 2001 (hereinafter, "Baumann and Siwek Supplemental Affidavit").

factor in calculating the HHI values upon which the Order is founded, the Bureau must provide an explanation of how the numbers were derived in order to meet the minimum standards for rational decision making.³ Moreover, Southern LINC assumes the Bureau arrived at these firm counts and market shares on a “hypothetical” basis. If the Bureau looked at actual service providers, Southern LINC requests clarification of which licensees the Bureau determined were competitors in the market.

Second, the Commission’s Order does not make clear which “discount” of Nextel’s 800 MHz spectrum was used in calculating market concentration in dispatch markets. Nextel’s HHI calculations only included 31% of Nextel’s existing spectrum in its calculations, because Nextel claims that the remaining 69% is used for two-way, interconnected service.⁴ However, the Order states that Nextel estimates that 47% of its minutes are used for dispatch, which would have resulted in exclusion of 53% of Nextel’s spectrum.⁵ Moreover, in either case, Southern LINC believes that the Bureau’s reliance on current relative spectrum usage, rather than actual spectrum holdings, is a key flaw in the Order’s analysis. Therefore, Southern LINC requests reconsideration of the discounting of Nextel’s spectrum considered in the trunked dispatch market analysis, and consequently reconsideration of the Bureau’s ultimate conclusion to grant the assignment of the Licenses to Nextel.

³ “The agency must examine the relevant data and articulate a satisfactory explanation for its actions including a ‘rational connection between the facts found and the choice made.’” Astroline Communications Company L.P., 857 F.2d 1556, citing Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962).

⁴ Rosston at Table 3, n.3.

⁵ Order, n. 94.

III. The Bureau Erred By Failing To Include All Of Nextel's 800 MHz Spectrum In Its Analysis Of The Effects On the Trunked Dispatch Market.

In addition to the calculations that require clarification, the Bureau's independent HHI calculations of dispatch market concentration are flawed. Consequently, the Bureau's ultimate conclusion that Motorola's assignment of the Licenses to Nextel would not significantly increase market concentration is incorrect. The Bureau incorrectly failed to consider all of Nextel's existing 800 MHz spectrum in its analysis, as required under relevant government merger guidelines, the facts unique to Nextel's wireless services, and sound economic principles.

The Bureau decided that only part of Nextel's 800 MHz spectrum holdings should be included in its analysis of the trunked dispatch market. Specifically, the Bureau assumed that 47% of Nextel's spectrum is used for trunked dispatch service. Southern LINC believes that the Bureau's decision to focus on how Nextel uses the spectrum, rather than the amount of such spectrum Nextel holds, is contrary to the requirements of the Department of Justice Horizontal Merger Guidelines.⁶

Specifically, Bureau's decision does not correctly define the product market upon which it based its analysis of the effect of Nextel's acquisition of the Licenses. The product market definition is the part of the HHI analysis that requires the Bureau to determine what consumers would do in the face of price increases.⁷ The Guidelines ask what would happen if a hypothetical monopolist increased prices.⁸ If enough consumers would switch to "substitute services" to cause

⁶ U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, dated April 2, 1992, as revised April 8, 1997 (hereinafter, "Merger Guidelines").

⁷ "Market definition focuses solely on demand substitution factors— i.e., possible consumer responses." Merger Guidelines at §1.0.

⁸ Specifically the Guidelines direct the relevant agency to "begin with each product (narrowly defined) . . . and ask what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price. . ." HHI at §1.11.

the monopolist to have an unprofitable reduction in sales, that “substitute” should be included in the product group.⁹

The Bureau incorrectly applied this concept to Motorola/Nextel. The issue is not whether 47% (or 31%) of Nextel’s capacity is currently being used for trunked dispatch, as the Bureau implies. Rather, the relevant test is whether consumers would use the remaining 53% (or 69%) of Nextel’s 800 MHz spectrum resources for trunked dispatch service if prices for existing trunked dispatch service increased.¹⁰ Because equipment currently accommodates both two-way and dispatch service, Nextel’s entire 800 MHz spectrum capacity could easily be used for trunked dispatch service in response to such a price increase by other dispatch carriers. Accordingly, under the Merger Guidelines, Nextel’s entire 800 MHz spectrum holdings are part of the properly defined market. Thus, the Bureau erred in deciding that “it is not appropriate to assign Nextel’s 800 MHz capacity entirely to the trunked dispatch market . . .”¹¹ and only included 47% (or, possibly only 31%) of Nextel’s 800 MHz spectrum in its analysis of the acquisition’s impact on the trunked dispatch market.

Moreover, focusing on Nextel’s current usage pattern defies practical reality. All of Nextel’s spectrum must be included in the market analysis when one considers the fact that Nextel’s customers, not Nextel, control whether trunked dispatch or two-way interconnected service is used.¹² Nextel offers unlimited dispatch with all of its service plans.¹³ Its equipment can clearly

⁹ If, after such a price increase, “the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm’s product.” HHI at §1.11, emphasis added.

¹⁰ As noted in Section II above, the Order says it allocates 47% of Nextel’s spectrum to the trunked dispatch market. However, Nextel’s economic study indicates that it included less than 1/3 of its spectrum holdings, 31%, in its economic analysis of the market. Thus, significantly more spectrum may have been erroneously excluded from the concentration calculations. Since the Bureau’s Order references 47%, Southern LINC will use that number for the purpose of this petition.

¹¹ Order at 16, ¶ 28.

¹² The Order notes that “upon request, Direct Connect[®] may be purchased separately from interconnected mobile voice.” Order at n.6. It is Southern LINC’s understanding that either Nextel or its customers can opt to disable the two-way interconnected voice service feature of its handsets altogether. Such disabling would demonstrate further that the spectrum should be included in the dispatch market, rather than two-way interconnected voice market.

¹³ See www.nextel.com/phone_services/directconnect.shtml (May 15, 2001).

accommodate increased dispatch use with virtually no additional expenditure. Consequently, Nextel has virtually no control over the amount of spectrum allocated for such trunked dispatch services. The fact that the percentage of Nextel's spectrum used for trunked dispatch is dynamic, rather than fixed, is another reason to include all of Nextel's spectrum in the Bureau's analysis of the trunked dispatch market.

IV. The Bureau Erred In Including the 450 MHz Frequency Band in its Analysis.

The Bureau erred in including 5 MHz of the 450-470 MHz frequency band in its analysis of concentration in the trunked dispatch market. Although the Bureau's rules allow trunked dispatch service on the 450-470 frequency band,¹⁴ and at least one report indicates that the 450 MHz band supports migrating 800 MHz SMR trunked dispatch,¹⁵ all previous reviews of this market and Southern LINC's supplemental economic analysis demonstrated that the 450-470 MHz frequency band should not be included in the economic analysis of trunked dispatch service in metropolitan markets.¹⁶

Southern LINC's economic analysis showed that the Bureau itself recognized that the 450-470 MHz band was heavily congested in most major urban areas.¹⁷ The Bureau itself declined to adopt geographic licensing and competitive bidding rules for this spectrum, thus declining to facilitate commercial trunked dispatch service in this frequency band.¹⁸ The Bureau also recognized that frequencies below 470 MHz are licensed on a shared basis, further impeding such commercial service.¹⁹ The Bureau also denied a petition for rulemaking requesting commercial licensing of the

¹⁴ Order at 11.

¹⁵ Order at 11, n.64.

¹⁶ Baumann and Siwek Supplemental Affidavit at 17-20. See also, Memorandum of the United States in Opposition to Nextel's Motion to Vacate the 1995 Consent Decree, U.S. v. Motorola, Inc. and Nextel Communications, Inc., Feb. 26, 1999, p. 17, and Response of the United States to Public Comments on the Proposed Modified Consent Decree, U.S. v. Motorola, Inc. and Nextel Communications, Inc., Aug. 26, 1999, p. 12 and n.11.

¹⁷ Baumann and Siwek Supplemental Affidavit at 20, citing Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22,709 22,754 (2001).

¹⁸ Id. at 22,755.

¹⁹ Id.

450-470 MHz band.²⁰ Motorola itself opposed a proposal to license 10 MHz of 450 MHz frequencies on a commercial basis, stating that commercial operation would not meet the needs of private radio users. The Bureau's decision not to license the spectrum on a commercial basis only further supports a conclusion that the trunked dispatch market will not increase in this band in the next two years. This conclusion is also consistent with the Department of Justice's finding that significant entry into dispatch markets may come from cellular, PCS, and 220 MHz licensees,²¹ rather than in the 450-470 MHz band. Thus, the Bureau's decision to include 5 MHz of the 450-470 MHz spectrum in its HHI calculations was incorrect.

In traditional antitrust analysis, a transaction must

“be functionally viewed, in the context of a particular industry. That is whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants”²²

In light of Nextel's existing domination of the trunked dispatch market, the Bureau must reconsider its grant of the Nextel/Motorola transaction and analyze the acquisition with a focus on spectrum functionality. The Bureau's grant of Nextel's acquisition of the Licenses further facilitates Nextel's goals, to the detriment of the trunked dispatch market. Furthermore, “under Bureau precedent [the FCC's] public interest analysis is not limited to traditional antitrust principles, but also encompasses the broad aims of the Communications Act”²³ Promotion of fair and equitable competition is clearly one of those broad aims.

²⁰ *Id.* at 22,712.

²¹ Memorandum of the United States in Opposition to Nextel's Motion to Vacate the 1995 Consent Decree, U.S. v. Motorola, Inc. and Nextel Communications, Inc., Feb. 26, 1999, p. 17, and Response of the United States to Public Comments on the Proposed Modified Consent Decree, U.S. v. Motorola, Inc. and Nextel Communications, Inc., Aug. 26, 1999, p. 12 and n.11.

²² Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962).

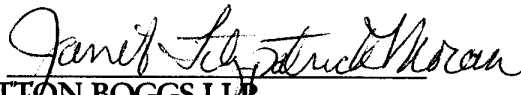
²³ AirTouch Communications, Inc., 14 FCC Rcd 9430 (1999).

V. Conclusion.

The Bureau erred in its HHI calculations for the Motorola/Nextel transaction. Southern LINC requests that the Bureau revise its HHI calculations to 1) include all of Nextel's 800 MHz spectrum and 2) exclude all 450 MHz spectrum in its trunked dispatch market analysis. Revision of HHI calculations will demonstrate that the grant of the assignment from Motorola to Nextel would result in substantial concentration in the trunked dispatch market²⁴ and therefore is not in the public interest. Southern LINC requests that the Bureau rescind its grant of the assignment of the Licenses from Motorola to Nextel.

Respectfully submitted,

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²⁴ Southern LINC believes that, regardless of the outcome of the clarifications requested in Section II herein, correction of the market definition to include all of Nextel's 800 MHz spectrum and to remove the 450 MHz spectrum will result in a post-transaction HHI of over 2000 in all geographic markets, and a change of over 100 in at least six of the nine geographic markets, thus establishing the presumption of undue market concentration. Southern LINC will supplement the record with revised HHI calculations supporting this finding, as requested, upon clarification of the issues in Section II.

CERTIFICATE OF SERVICE

I, Sandra Hileman, a legal secretary in the law firm of Patton Boggs LLP, hereby certify that on this 17th day of May, 2001, I caused to be delivered by Courier (*) or First Class U.S. Mail a copy of the foregoing "Petition for Clarification and Reconsideration" to the following individuals:

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