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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL

In The Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
and		
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket 253

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To: The Commission

COMMENTS
OF
THE SOUTHERN COMPANY

THE SOUTHERN COMPANY

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Executive Summary

The Southern Company disagrees with the underlying premise driving this proceeding -- that 200 channels of contiguous Specialized Mobile Radio ("SMR") spectrum are necessary to create a viable wide-area SMR system that will be comparable to and compete with existing cellular systems. It is true that the total SMR spectrum allocation and the current licensing scheme hinder SMR competition with other wireless mobile services. However, the broad regulatory leap to geographically-defined service areas for wide-area SMR systems at this juncture is an unachievable step for creating a SMR market that is truly competitive with cellular and other wireless mobile services.

If the Commission was starting anew, i.e., creating a new service and allocating virgin spectrum for wide-area SMR use, the proposals set forth in this proceeding would be a feasible way to license wide-area SMR systems. The reality is that the SMR service is not new, and the 800 MHz SMR spectrum block is already virtually completely licensed. Therefore, it is impossible to achieve the Commission's desire to geographically license the remaining SMR spectrum in the upper 200 channel block on a Major Trading Area ("MTA") basis. Likewise, it is also impossible to license

the remaining lower 80 SMR channels on a Basic Trading Area ("BTA") basis.

From the outset, the Commission never intended for SMR and cellular services to be alike and competitive, and the FCC's original regulatory scheme fostered a different market development for each service. It is illusory to think that waving the magic wand of regulatory and procedural rule change will automatically make these services alike and competitive. As the Commission is well aware, the SMR service was created to provide local dispatch service normally associated with fleets, taxicab communications and community repeaters. Today, wide-area SMR companies provide a variety of mobile services, including enhanced dispatch, interconnected voice as well as paging and data services using digital technology. While new digital wide-area systems will be able to offer cellular-like services, there will still be a considerable emphasis on serving the traditional dispatch market.

Mere adoption of a geographically-defined licensing scheme for SMR systems will not make the SMR service more competitive with cellular, particularly when the spectrum to be auctioned is almost totally nonexistent, and one competitor holds directly or through proposed mergers such a

predominant position in the channel block as to make holding an auction a useless exercise. Accordingly, Southern disagrees with the Commission's tentative conclusion that MTA licensing of the upper 200 SMR channels is the cure-all remedy for wide-area SMR licensees. Southern believes that this proposal is infeasible primarily because there is insufficient SMR spectrum available to license on either an MTA or BTA basis, and even if there was sufficient spectrum available, there is no "true" market since the majority of the SMR spectrum is controlled or will be controlled by one entity, Nextel. For this reason, Southern believes that this proposal is not in the public interest since it will further exacerbate the anticompetitive market environment between existing SMR licensees and the one potential MTA licensee, Nextel.

Imposing a geographically-defined licensing scheme for either wide-area or local SMR systems is anticompetitive in result and unachievable in light of the current state of SMR spectrum availability. However, should the Commission decide to proceed with this FNPRM, Southern requests that (1) a 140-channel SMR spectrum cap be adopted; (2) MTA applicants be limited to bidding on no more than <u>two</u> 50-channel blocks within an MTA; and (3) specific SMR channels be designated as universal control channels to facilitate subscriber roaming.

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To: The Commission

COMMENTS
OF
THE SOUTHERN COMPANY

The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's rules, submits the following Comments on the above-captioned Further Notice of Proposed Rule Making ("FNPRM").[1/]

[1/] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR, PR Docket 93-144 and PP Docket 93-253, Further Notice of Proposed Rule Making, adopted October 20, 1994, 59 Fed. Reg. 60111 (November 22, 1994), Order extending the Comment Date to January 5, 1995 and Reply Comments to January 20, 1995, adopted November 28, 1994.

Statement of Interest

1. Southern is the licensee of an 800 MHz wide-area SMR system which, upon completion, will provide state-of-the-art digital service throughout Alabama, Georgia, the panhandle of Florida, and southeastern Mississippi.[2/] Southern anticipates using its stations to provide mobile radio service to its affiliated utility companies, and to provide wide-area enhanced dispatch service on a commercial basis throughout its four-state service area. As such, Southern will be directly affected by the outcome of this proceeding.

[2/] Southern is an electric utility holding company which wholly owns the common stock of five electric utility operating companies -- Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company -- and a system service company -- Southern Company Services, Inc. -- which together operate an integrated electric utility system which serves over 11 million consumers in a contiguous area of 122,000 square miles, including most of the State of Alabama, almost all of the State of Georgia, the panhandle of Florida, and 23 counties in southeastern Mississippi. Southern is in the process of improving its mobile radio communications and is implementing a wide-area, digitally-enhanced 800 MHz system. Southern will sell the excess capacity of its system to state and local governments, utilities, industrial and commercial users, and other customers who can use the dispatch, two-way voice, and data transmission capabilities of Southern's wide-area SMR system. The Southern wide-area SMR system will provide service in rural and urban areas corresponding with its utility system operations.

2. Southern filed Comments in the initial stage of this proceeding, urging the Commission to allow SMR licensees the flexibility to develop their wide-area systems. In essence, Southern recommended allowing licensees to develop wide-area SMR systems within the confines of the existing FCC rules, without forcing licensees to adhere to the wide-area licensing scheme that was proposed by the Commission.

3. Today, Southern still believes that the existing regulatory regime for SMR licensees is more suitable for the development of a competitive SMR industry than that being proposed in this proceeding. Furthermore, due to the almost complete lack of spectrum in the current SMR market, Southern questions the feasibility of licensing any slivers of remaining SMR spectrum on a geographically-defined basis. Finally, Southern believes that the proposals espoused in this FNPRM foster an anticompetitive, rather than a competitive, environment -- a result which is contrary to the overall public interest. These are the concerns that Southern wishes to elaborate on in its Comments, and appreciates this opportunity to do so.

Background

4. The primary focus of this proceeding is to facilitate the development of SMR systems operating in the 800 MHz band. This proceeding was originally driven by a Petition for Rule Making proposed by the American Mobile Telecommunications Association ("AMTA") which, through its "Blueprint for Change," sought to facilitate the development of wide-area SMR systems by geographically-defined service areas. Nextel later promoted its wide-area SMR system (called Enhanced SMR ("ESMR")) as a competitor to cellular, and recommended in its Reply Comments in GEN Docket 93-252, that 10 MHz of SMR spectrum constitutes the minimum allocation necessary for an SMR licensee to compete with cellular and broadband Personal Communications Service ("PCS").[3] Nextel also argued that obtaining contiguous spectrum is essential to the competitive viability of wide-area SMR.[4] Accepting Nextel's contentions as true, the Commission tentatively concluded that distinction between contiguous and non-contiguous spectrum has merit for designating spectrum for wide-area licensing. The

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[3] FNPRM at 13.

[4] Id.

Commission further concluded that the contiguous 200 SMR channels are best suited for wide-area licensing.[5]

Comments

5. Southern believes that the above-mentioned rationale for instituting this proceeding is based on ill-conceived, unsubstantiated facts and is fatally flawed because the true nature of the SMR landscape does not support a geographically-defined SMR licensing scheme for wide-area or local licensing. More importantly, the MTA licensing proposal fosters an anticompetitive environment, and can only benefit one company, Nextel. In addition, this proposal will further jeopardize the competitive position that a small, non-dominant SMR licensee may currently have. The pivotal issue for the Commission to decide is whether the proposals set forth in this FNPRM are in the public interest. The answer to this question has to be a resounding no.

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[5] Id. at 13-14.

I. 200 Contiguous Channels are Unnecessary for the Viability of a Competitive Wide-Area SMR System

6. The greatest unsubstantiated assumption of this proceeding is that contiguous spectrum, especially the upper 200 SMR channels, is needed for SMR to compete with cellular. There are three fallacies associated with this false premise. First, wide-area SMR systems are not designed to compete head-to-head with cellular telephony, but rather will complement cellular service, reaching distinct parts of the mobile services market. Second, all 200 channels are not necessary to build a competitive wide-area system. Third, the digital design of wide-area SMR equipment does not require contiguous spectrum.

7. As indicated earlier, the Commission tentatively concluded that 200 channels of contiguous SMR spectrum were necessary to compete with cellular and broadband PCS. As the Commission is well aware, the SMR industry was originally created to provide dispatch service primarily to local markets.[6] Even with the recent FCC licensing of "wide-area" SMR systems incorporating frequency re-use, enhanced dispatch service has always been the goal of major SMR proponents. In fact, Motorola has indicated it is

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[6] See, Docket 18262, Second Report and Order, 46 FCC 2d 752 (1974).

focusing on integrated wireless services for dispatch.[7] Nextel also tried at the outset to focus on dispatch in a multi-segment environment, but later evolved a business that focused more on penetrating the cellular market.[8] Southern's business plan contemplates providing enhanced dispatch services, including paging and data delivery as well as two-way voice. In fact, the SMR market is more multi-faceted than the Commission has been willing to recognize. Basing regulatory policies on the desires of one dominant SMR player, Nextel, to have a block of contiguous spectrum, does not serve the public interest.

8. Second, a 200 contiguous SMR channel block is not the magic number for creating a viable wide-area SMR system. Moreover, while any SMR would benefit from contiguous spectrum, the digital characteristics of the new SMR equipment make it nonessential. Furthermore, both the Commission and the industry are on record as indicating that 42 SMR channels are sufficient for implementation of a

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[7] See, "Motorola Rethinks Marketing Plans in Wake of SMR Stock Decline," Land Mobile Radio News, December 2, 1994, pp. 1, 4-5 and "Counterpoint: Another View of MIRS Technology," Land Mobile Radio News, December 9, 1994, p. 3.

[8] Id. at 4 (emphasis in original).

viable frequency re-use SMR system.[9] Aggregation of 80 to 150 channels is ideal for wide-area, high volume traffic.[10] Except for Nextel's proposal, no one has documented a need for contiguous spectrum. The Booz Allen & Hamilton study submitted with Southern's Comments in GEN Docket No. 93-252 indicated that 140 channels of non-contiguous spectrum were sufficient to provide a viable wide-area SMR system.

9. Southern also wishes to disagree with the Commission's tentative conclusion that no limit on 800 MHz SMR spectrum aggregation is necessary.[11] Southern recommends that a 140-channel spectrum cap be adopted in this proceeding to preserve the competitive environment for all SMR licensees interested in licensing a wide-area system.[12] Such a cap will give other entities an opportunity to enter into the wide-area SMR market. While implementation of a spectrum cap may require further

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[9] See, "Getting There: A Wild Ride" Wireless for the Corporate User, Volume 3, No. 1, 1994, p. 20. See also, Southern Comments at 14-19, GEN Docket 93-252 and its attachment, Assessing Network Economics of SMR Services, prepared by Booz Allen & Hamilton which are incorporated herein by reference.

[10] Id.

[11] FNPRM at 16.

[12] Southern Comments at 15-16, GEN Docket No. 93-252.

crafting, the Commission should undertake to review this issue in greater detail in a future proceeding.

10. Despite the fact that the Commission apparently believes that 200 contiguous channels are necessary to compete with other mobile wireless services, it proposes to divide the upper 10 MHz of SMR spectrum into four blocks of 2.5 MHz,[13] thus undermining its own premise. If all 200 contiguous channels are necessary to effectively compete, it appears illogical to propose to divide the contiguous channels into four separate blocks within each MTA. If, however, a number less than 200 contiguous channels, as Southern believes, is sufficient to implement a satisfactory wide-area SMR system, then proceeding with this rulemaking is unnecessary since the existing SMR licensing scheme will suffice.

II. There is Inadequate Spectrum to License the Upper 200 SMR Channels on an MTA Basis

11. The FNPRM proposes to license wide-area systems on an MTA basis. However, Southern questions the feasibility of this proposal based on the availability of SMR spectrum left to be licensed. Southern believes there is

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[13] FNPRM at 15.

insufficient spectrum available to justify a new licensing scheme for SMR systems, namely MTAs. Southern offers the following statistical data in support of this contention.

12. On October 11, 1994, AMTA and the Industrial Telecommunications Association ("ITA") submitted two reports on 800 MHz SMR spectrum availability.[14] The reports were based on a 55-mile and 75-mile radius of the local BTAs throughout the country. They are an analysis of the upper 200 channels proposed to be licensed on an MTA basis. The reports indicate that in almost every instance there are absolutely no SMR frequencies available in the 80 largest BTAs. Even some smaller BTAs in rural areas, such as Muskogee, Oklahoma, BTA #311, have no 800 MHz SMR channels available for licensing on either a BTA or MTA basis.

13. Moreover, Southern conducted an independent SMR market study of its four-state service area (Alabama, Georgia, Mississippi and the panhandle of Florida) using the most recent FCC databases from Interactive Systems, Inc.[15] These studies not only reveal that all of the upper 200 SMR

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[14] A copy of the 55-mile search is attached as Exhibit A, and a copy of the 70-mile search is attached as Exhibit B.

[15] A copy of the studies of Alabama, Florida, Georgia and Mississippi are attached as Exhibits C, D, E and F, respectively.

channels are already licensed, but also that a substantial number of these frequencies are re-used throughout the entire state, thus leaving little or no spectrum available for licensing to new entrants. For example, in the state of Georgia, the frequencies 861.2625 MHz, 862.2625 MHz, 863.2625 MHz, 864.2625 MHz and 865.2625 MHz are licensed 35 times, with an additional nine SMR applications pending at the FCC.[16] Similarly, in the panhandle of Florida, the frequencies 861.5375 MHz, 862.5375 MHz, 863.5375 MHz, 864.5375 MHz and 865.5375 MHz are licensed 24 times, with an additional four pending applications. In Alabama, some frequencies are licensed as many as 34 times throughout the state. Finally, in Mississippi, there are frequencies licensed up to 20 times throughout the state.

14. Consequently, there is no "white space" left where these frequencies could be authorized. The market is

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[16] Southern prepared two maps depicting channel usage in the state of Georgia for two typical 800 MHz frequencies 861.1375 MHz and 863.3875 MHz. Each of these channels were licensed a total of 19 times throughout the state. As Exhibits G and H show, the licensing pattern of these frequencies covers the entire state of Georgia. In fact, well over half of the 200 channels in the state of Georgia are licensed more than 19 times! One can only imagine what the frequency reuse picture looks like in these instances. A copy of the map depicting the 70-mile radius of frequency 861.1375 MHz, is attached as Exhibit G, and a copy of the map depicting the 70 mile radius of frequency 863.3875 MHz is attached as Exhibit H.

saturated. Therefore, it is difficult to discern what the MTA purchaser of these frequencies at auction would acquire, or what value to place on these frequencies. Southern believes a similar pattern would emerge with regard to most of the 200 channels in questions. Even with the proposed advantage of allowing an MTA licensee to negotiate to acquire existing SMR spectrum within its geographic area, there is still inadequate spectrum to justify MTA licensing. Furthermore, licensees already have the ability to purchase and relocate existing licensees, and no further regulatory action is needed in this regard.

15. Similarly, the alternative to license the remaining 80 non-contiguous SMR channels on a BTA basis is not feasible because these channels are also scarce. Therefore, Southern finds no particular benefit to going to the BTA licensing alternative for the so-called 80 local SMR channels.[17]

16. Southern believes it is too late to propose a geographically-defined licensing scheme for both wide-area and local SMR systems. This holds especially in light of the fact that the scarcity of SMR spectrum will only be

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[17] FNPRM at 17.

exacerbated once the Commission processes its backlog of pending SMR applications. Simply stated, there will be precious few SMR frequencies left to auction and license. The Commission must acknowledge this reality, and agree that it is not in the public interest to go through the process of auctioning nonexistent SMR spectrum on a geographically-defined basis.

III. Geographically-Defined Licensing Fosters an Anticompetitive SMR Environment

17. The Communications Act requires the Commission to make rapid, efficient radio services available, to the extent possible, to all Americans at reasonable charges.[18] In implementing this mandate, the Commission's role is to be "dynamic, proactive, and forward-looking."[19] In this regard, competition is the key. In discharging its statutory responsibilities, the Commission has found it axiomatic that anticompetitive market developments are contrary to the public interest.[20] The Commission has found that its obligations "'are satisfied when the

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[18] 47 U.S.C. § 151.

[19] Third Report and Order, GEN Docket No. 93-253, at ¶ 46.

[20] See, e.g., In the Matter of Centel Corp., 8 FCC Rcd 1829 (1993); In re Contel Corp., 68 R.R.2d (P&F) 1260 (1991).

Commission seriously considers the antitrust consequences of a proposal and weighs the consequences with other public interest facts.' In other words, we [the FCC] are required to consider anticompetitive consequences as one part of our public interest calculus."[21] To divert from that path in this proceeding would be unjustifiable and, more importantly, would contradict the Commission's mandate.

18. The Commission always has recognized the need to promote competition when allocating spectrum for new services. For example, in concluding its creation of the cellular service, the Commission resolved to designate two frequency blocks within each geographic area to promote competition.[22] Similarly, in the PCS arena, the Commission has designed an allocation format that provides for as many as six providers per market.[23] The FNPRM itself acknowledges the importance of competition.[24]

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[21] In re Contel Corp., 68 R.R.2d at 1263-1264, (citing United States v. F.C.C., 652 F.2d 72, 88 (D.C. Cir. 1980)).

[22] See, An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, CC Docket 79-318, Report and Order, 49 RR 2d 809 (1981).

[23] See, Amendments of Commission's Rules to Establish New Personal Communications Service, GEN Docket 90-314, Order on Reconsideration, 59 Fed. Reg. 32830 (June 24, 1994).

[24] FNPRM at 13-14.

19. Unfortunately, the FNPRM proceeds to foster an anticompetitive environment through the advantages granted to MTA licensees. First, the FNPRM proposes to allow an MTA applicant to bid on as many blocks (including all four blocks) within the same MTA,[25] thus creating an environment whereby one MTA applicant could successfully bid and hold licenses for all four blocks within a single MTA. This potentially allows one SMR licensee to emerge within the MTAs. This would be a serious problem within a single MTA. This becomes an enormous problem when viewed in the context of Nextel's existing dominant spectrum position in the 200 channel block. Nextel is poised to become the owner of every MTA in the country. If the Commission decides that it will nevertheless proceed with MTA licensing, at a minimum, there should be a limitation on the number of frequency blocks that one entity can bid on within an MTA. Specifically, Southern recommends a limit of two 50-channel blocks that a single applicant can bid on within an MTA.

20. Another proposal would allow the MTA licensee to automatically receive an incumbent's authorization within the MTA where the incumbent failed to construct or operate

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[25] Id. at 16.

its system.[26] This proposal forecloses any opportunity for other interested parties to apply for the unused license. Additionally, such a policy undermines the current Finder's Preference policy.[27] Allowing an MTA licensee to automatically receive the license of the unconstructed or non-operational incumbent unduly gives the MTA licensee a preference. This proposal also inhibits competition, and moots a potentially mutually exclusive situation where auctions could be conducted.

21. Finally, the FNPRM confers the right of MTA licensees to negotiate with incumbent licensees for the purchase or relocation of their facilities. All assignments or transfer of control will be considered presumptively in the public interest.[28] Such a proposal creates no opportunity for others to negotiate to acquire this spectrum. Moreover, the Commission should well attend to the lessons to be learned from the Justice Department's investigation of the Motorola/Nextel merger.[29] There, the

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[26] Id at 20.

[27] See, Public Notice "Finder's Preference Program," DA 94-980, released September 8, 1994.

[28] FNPRM at 20.

[29] See, U.S. v. Motorola, Inc. and Nextel Communications, Inc., Final Judgment, Civ. Action No. 94-2331, October 27, 1994.

Justice Department found that Motorola/Nextel held an undue concentration of 900 MHz SMR spectrum, and ordered divesture of certain of the holdings in major metropolitan markets. The Judgment also affected the 800 MHz SMR arena, as Nextel and Motorola were required to divest 42 800 MHz SMR channels in Atlanta, Georgia, the largest metropolitan area in Southern's service territory. Therefore, the Commission should exercise abundant caution before prematurely blessing a transfer of control or an assignment without making a determination regarding market concentration or public interest. Otherwise, more Justice Department divestures will be forthcoming, or worse, court challenges to the validity of such premature FCC approval.

22. Not only do the rights conferred on the MTA licensee promote an anticompetitive environment, it is possible that this licensing scheme will only benefit one dominant SMR player, Nextel. The MTA licensing approach merely ratifies the existing wide-area SMR market structure. It sanctions the "land grab" phenomenon created by Nextel who already holds a substantial number of SMR licenses nationwide.

23. This approach also solidifies Nextel's holdings, while sadly hindering the growth of small, non-dominant SMR

players, potentially driving them out of business. Because the FNPRM proposes to prohibit existing SMR licensees, including small providers, from expanding their current operations without the MTA licensee's consent,[30] the MTA licensee can, in essence, "box in" the smaller providers and stifle their business development. The MTA licensee could unreasonably withhold its consent from allowing the incumbent to expand.

24. Should the very real possibility occur that Nextel makes the highest (and perhaps only) bid for the MTA spectrum blocks, the result will be that small, non-dominant SMR players will not be able to effectively compete. This potential result undermines the Congressional directive to ensure that minorities and small business owners are given the opportunity to participate in the provision of spectrum-based services.[31]

IV. Auctions Will Not Attract Participants Because of the Market Dominance of Nextel

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[30] FNPRM at 23.

[31] Pub. L. No. 103-66, Title VI, Section 6002(a), 107 Stat. 312, 392 (1993).

25. The FNPRM proposes to allow applicants to bid for the four blocks of SMR spectrum within each MTA.[32] Nevertheless, the FNPRM fails to acknowledge that the lack of spectrum will not attract auction participants. Based on Southern's SMR market studies, it will be difficult for the Commission to fashion an auction around scarce SMR spectrum -- the "swiss cheese" approach. First, as indicated above, the SMR market studies show that most of the upper 200 SMR channels are already licensed extensively throughout each state. Due to the unavailability of SMR spectrum, and consequent uncertainty about what is actually being auctioned, potential participants are not likely to risk financial investments in the auctions, especially non-dominant SMR licensees.

26. But what will be more discouraging to any potential auction participants is the fact that Nextel alone, due to its extensive spectrum holdings in the 200 channel block, will have the largest incentive to participate in the proposed SMR auctions. The SMR market studies show that in Southern's four-state region, Nextel (and/or its consolidated entities) already holds 70% of the

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[32] FNPRM at 16.