EX PARTE OR LATE FILED

A Partnership Including
Professional Corporations
1850 K Street, N.W.
Washington, DC 20006-2296
202-887-8000
Facsimile 202-778-8087

Boston
Chicago
Los Angeles
Miami
Newport Beach
New York
St. Petersburg (Russia)
Vilnius (Lithuania)
Washington, D.C.

Associated
(Independent) Offices:
Barcelona London
Brussels Madrid
Lisbon Paris

McDERMOTT, WILL & EMERY
Including the practice formerly carried on by Cole, Toomey & Kent

Christine M. Gill
Attorney at Law
202-778-8283

September 29, 1995

SEP 29 1995

**Via Hand-Delivery**

Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Written Ex Parte Presentation of The Southern Company: PR Docket No. 93-144 and PP Docket No. 93-253**

Dear Gentlemen:

On behalf of The Southern Company, inclosed please find an original and duplicate copy of a "Written Ex Parte Presentation" being filed in the above-referenced proceeding.

In accordance with the Commission's rules, we are requesting that two copies of this letter be included in the record in the above-referenced proceeding and a copy be file stamped and returned to my office.

Thank you for your attention to this matter.

Very truly yours,

Christine Gill

Christine M. Gill

Enclosures

No. of Copies rec'd 0+2
List A B C D E

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

| | | |
|---|---|---|
| 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 |
| and | | |
| Implementation Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR | ) | PP Docket No. 93-253 |

To: The Commission

**WRITTEN EX PARTE**
**PRESENTATION OF**
**THE SOUTHERN COMPANY**

**THE SOUTHERN COMPANY**

By: Carole C. Harris
Christine M. Gill
Tamara Y. Davis
McDermott, Will & Emery
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000

Its Attorneys

Dated: September 29, 1995

| | | |
|---|---|---|
| **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** |
| **and** | | |
| **Implementation Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR** | ) | **PP Docket No. 93-253** |

**To: The Commission**

**WRITTEN EX PARTE**
**PRESENTATION OF**
**THE SOUTHERN COMPANY**

The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.1206 of the Federal Communications Commission's rules, submits the following written ex parte comments on the above-captioned Further Notice of Proposed Rule Making ("FNPRM").[1/]

---

[1/] In the Matter of Amendment of Part 90 of the Commissions'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 No. 93-144 and PP Docket No. 93-253, Further Notice of Proposed Rule Making, adopted October 20, 1994, 59 Fed. Reg. 60111 (November 22, 1994), Order extending the Comments to January 5, 1995 and Reply Comments to January 20, 1995, adopted November 29, 1994, Order extending Reply Comments to March 1, 1995, adopted January 18, 1995.

## Introduction

1. Southern has been an active participant is this proceeding, filing both Comments and Reply Comments on the FNPRM as well as making other ex parte presentations to the Commission's staff regarding its position concerning this proceeding.

2. During its September 18, 1995 meeting, the Wireless Telecommunications Bureau ("the Bureau") outlined its recommendations as well as sought comment on its recommendation in hopes of addressing all final issues that the public will raise in the proceeding. The Bureau solicited comments from the public regarding its recommendations. Southern is pleased to submit this written ex parte presentation in response to the Bureau's recommendations.

3. Southern is licensed for and operates a wide-area system which includes some SMR (both the upper 200 and lower 80) channels and some General Category channels. Southern is unique in that its SMR system will serve a dual role. The system will provide internal communications for Southern's five operating companies as well as will provide service to other industrial users on a commercial basis. Southern may also be unique in that it has actually constructed and implemented a true wide-area, state-of-the-art digital system that will bring significant digital wireless capacity to rural as well as urban areas.

4. Today, Southern has over 200 base stations operating and integrated into a single digital trunked system. Southern's service area is extensive with a 122,000 square mile electric power control area. Its digital service area exceeds the cellular service area offered by Bell South Mobility and exceeds the digital coverage in the four southern states (Mississippi, Alabama, Georgia and Florida) offered by Dial Call. Southern has expended in excess of $100 million implementing this systems to date.

5. Southern's wide-area SMR system will consist of 300 base stations and will be completed in early 1996. As site availability pans out, Southern must continually modify its base station locations which includes adding new facilities where new requirements emerge. Southern has implemented its systems in reliance upon existing 800 MHz rules, and desires to maintain the flexibility to move forward with its current business plan which relies on these rules. Therefore, Southern urges the Commission to include protection for the implementation of wide-area systems that are currently licensed, and provide protection beyond the mere contours of an existing base station sites because Southern's system and many others like it are more than a sum of their parts. Nevertheless, Southern appreciates the benefits proposed to be given to wide-area SMR licensees, and believes that these benefits should also be extended to all 800 MHz wide-area systems. To this end, Southern submits this written ex parte comments addressing the Bureau's recommendations.

## Background

6. The Bureau's recommendations regarding the upper 200 SMR channels are not substantially different from the proposals adopted in the FNPRM. First, the Bureau recommends that the upper 200 SMR channel block be licensed on a wide-area basis through the use of competitive bidding. However, the Bureau is now recommending that the Department of Commerce's Bureau of Economic Analysis ("BEA") economic areas be the protocol for wide-area licensing rather than Rand McNally's Metropolitan Trading Areas ("MTA"). The Bureau also recommends that the each BEA be divided into three distinct channel blocks for auctioning: 120-channel block, 60-channel block and 20-channel block. The Bureau suggests allowing unrestricted aggregation of these channels blocks. Thus, a single BEA auction winner will have the opportunity to be the licensee of all 200 channels within a BEA.

7. Second, the Bureau recommends granting certain rights to the BEA licensee. For example, the BEA licensee would have the ability to engineer and operate its frequencies anywhere within the BEA geographic area (as long as incumbent co-channel and adjacent channel licensees are protected). The BEA licensee also would have the first right to any frequencies forfeited by an incumbent operating within the BEA. Furthermore, the Bureau recommends presuming that the public interest will be served where a BEA licensee negotiates for assignment or transfer of control of an incumbent's authorization. The BEA licensee also

will be allowed to geographically partition its license to other SMR eligibles.

8. A third recommendation from the Bureau involves the obligations of BEA licensees. The primary obligation of a BEA licensee is to construct its wide-area SMR facilities within five years. One-third of the geographic service area must be served within three years and the remaining two-thirds of the service area must be constructed within five years, resulting in a loss of the BEA authorization for failure to meet the construction requirements. Another obligation that the BEA licensee must meet is the requirement to provide interference protection for co-channel and adjacent channel incumbent users. At present, the Bureau recommends providing protection of the incumbent's 40 dBu contour.

9. Consistent with the obligation to protect incumbent licensees, the Bureau will allow, but not mandate, relocation of incumbent facilities where the BEA deems such relocation is necessary. To facilitate the relocation process, the Bureau recommends imposing a one-year voluntary and a two-year mandatory relocation period. During this period, the Bureau recommends partially lifting the current freeze on SMR applications only to the extent to allow incumbents, who are in relocation agreements, to move their facilities and hasten the relocation process. The Bureau also purports to recommend that a partial lifting of the

freeze would be allowed pre-auction to facilitate early negotiations of relocation where possible.

10. The Bureau's recommendations regarding incumbent SMR licensees involve limiting their existing operations to current technical parameters. For example, the Bureau recommends that the incumbents be precluded from expanding their existing service area unless such expansion accommodates a BEA licensee. Therefore, the incumbents' existing 40 and/or 22 dBu contour cannot be changed. In addition, the Bureau recommends eliminating slow-growth authority for existing SMR licensees. It would require incumbent SMRs to re-justify their need for extended implementation schedules, and would limit incumbents' slow-growth authority to two years or the remainder of the slow-growth period whichever is shorter.

11. Finally, the Bureau recommends adoption of a Second FNPRM which would reallocate the 150 General Category channels for exclusive SMR use. Unlike its current proposal, the Bureau also recommends that the lower 80 SMR channels be licensed on geographic, rather than site-specific basis. Both bands would be subject to wide-area licensing using the competitive bidding process. Additionally, the Bureau recommends designating this band as an entrepreneurs' block where only small businesses would be eligible to bid on the spectrum. It also proposes to initially grandfather existing operations of General Category

incumbent licensees, and later require mandatory relocation if necessary.

12. Southern appreciates the Commission's desire to implement a purportedly simpler and less burdensome licensing system. Such as transition should not impair investment-backed expectations and nor actual delivery of digital mobile wireless services to the public, especially in non-urban areas. Failure to allow existing wide-area systems like Southern's to be viable within their service area would be inconsistent with the public interest standard imposed by Section 303 of the Communications Act of 1934 ("the Act"). 47 U.S.C. § 303. As well as the explicit directives of the Commission's auction authority.[2/] Moreover, progression to market-based licensing without considering all of the costs involved is not rational decision-making as required by the Administrative Procedure Act, 5 U.S.C § 4(b), and not in the public interest.

## [illegible] The Communications Act and the Omnibus Budget Reconciliation Act of 1993 Require Rational Decision-Making and Public Interest Determinations

13. The Communications Act which is the enabling statute for the Commission and which defines the Commission's general powers to act, makes it paramount that all decisions regarding

---

[2/] Section 309(j)(4) directs the Commission to ensure that its competitive bidding regulations "ensure prompt delivery of service to the public." 47 U.S.C. § 309(j)(4).

radio regulation must be in the "public convenience, interest, or necessity." 47 U.S.C. § 303. This mandate includes classifying radio stations and assigning frequency bands to various classes of stations. 47 U.S.C. § 303(a) and (c). Moreover, the courts have warned that where the FCC's actions involve numerous departures from prior policies and precedents, they will carefully scrutinize the FCC's actions to ensure that all relevant factors and available alternatives were given adequate consideration in the course of the rule making proceeding. Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). The upheaval about to be embark upon to facilitate wide-area licensing not only departs from current FCC rules and procedures, but disrupts viable 800 MHz systems, both wide-area and site-specific alike. Congress has explicitly directed the Commission to avoid such results where possible by continuing to use traditional licensing mechanisms when possible. 47 U.S.C. § 309(j)(6)(E).

14. The Commission has a statutory obligation to first weigh the adverse impact of its proposals on the public with the alleged benefits to be derived from the proposal. The adverse impact of its proposals on the public are many: (1) existing 800 MHz SMR licensees are denied a fair opportunity to modify their authorizations to meet increased demand for services and will essentially be frozen in place; (2) the public, especially rural parts of the country, will lose dispatch service if systems, like Southern's which are designed to serve these areas, cannot remain

viable due to the unanticipated costs now being placed on them (i.e., the purchasing of spectrum they are currently using); (3) existing 800 MHz licensees will lose available frequencies needed for future growth due to the relocation of incumbents from the 800 SMR MHz pool; and (4) existing SMRs operating in the upper 200 channel block and licensees operating in the General Category pools will be disrupted by relocation to other spectrum if spectrum is even available for relocation.

15. Southern believes that disruption to existing SMRs current operations and pending applications for new or modified SMR facilities is contrary to the public interest standards which must always be met by the Commission. To place a freeze on the modification of existing SMR and General Category licenses, in essence, "hems in" existing 800 MHz licensees to their current operations. It impedes growth and system modification which are inevitable and necessary in the build-out of a complex radio system using new technology.

16. Moreover, the legislative history in the Omnibus Budget Reconciliation Act of 1993 ("OBRA") admonishes the Commission to avoid just this type of unnecessary disruption.

> Interruptions in the on-going filing, processing and approval of applications for licenses for existing services, which have not been characterized by rampant speculation, would be disruptive to business operations of existing wireless businesses and damaging to the economy.

H. Rep. No. 103-111, 103rd Cong., 1st Sess. § 5206, 1993.

The Commission's current freeze on SMR applications and proposed freeze on General Category applications contravene Congress' admonishment.

17. In theory, the wide-area auctioning of SMR and General Category channels seems appealing and plausible. The reality is that this process is very disruptive to existing licensees and is not likely to generate the revenue to justify the exercise. The process will not bring in millions of dollars as anticipated since only a very few parties are positioned to participate in the auction and the channels are all fully licensed to incumbents. This continual regulatory upheaval will likely have the detrimental effect of delaying service to many unserved rural areas of the country. Southern urges the Commission to reevaluate its public interest criteria in light of these Comments before proceeding with the contemplated auctions.

## II. The Commission Should Allow Pre-Auction Modification of Existing SMR Facilities

18. The existing freeze on 800 MHz SMR applications was imposed to establish a concrete service area and make available SMR frequencies for wide-area licensing. The Bureau recognizes that not many SMR frequencies or other 800 MHz frequencies are available for licensing. Nevertheless, the Bureau seems to be considering partially lifting the freeze to allow existing licensees to relocate their facilities, but only to accommodate

any pre-auction negotiations. Southern, is in the process of fine tuning its SMR station locations, based on site availability and engineering considerations, the results of which could require minor relocations for some of its base station sites. In this process, Southern does not intend to drastically expand or change its existing service area, but minor relocations that will change the existing contours may be necessary. To accommodate this necessary process, the Commission should at least partially lift the SMR freeze, to allow minor modifications. Southern requests that the Commission define minor modifications to not only include technical parameters that do not change the existing contour, as currently permitted by waiver, but to also include an adjustment in site location of 5 miles or less. These modifications should be permissible pre-, during and post-auction. These types of modifications should have a de minimus impact on the spectrum auctions since changes in location should not in most cases increase overall signal coverage but will only change it to some degree.

## III. Cancellation of Extended Implementation Schedules is Injurious to Existing SMR Licensees

19. The Bureau recommends eliminating the slow-growth authority for SMR licensees presumably both in the SMR and General Category frequency pools. The Bureau does not provide any sound justification for such action, except that future SMR systems will be licensed on a wide-area basis and will not need

such construction authority. Nevertheless, the Commission has overlooked the fact that existing wide-area SMR systems, such as Southern's, have been financed and construction has been planned based on an FCC-approved extended implementation schedule. True wide-area licensees should be given the same flexibility as being proposed for a BEA auction winner to ensure that their complex systems are constructed and engineered properly. In Southern's case, it is essential that Southern be allowed the flexibility to continue meeting its construction schedule as authorized because SMR frequencies in both the upper 200 channel block and the lower 80 channel block are inextricably integrated into a system which incorporates channels from other 800 MHz frequency pools. Cancellation of slow-growth authority would have the unintended effect of applying to certain parts of its system but not others. Southern needs the flexibility to construct these frequencies in accordance its current slow-growth authority.

20. Southern believes that the Bureau should modify its construction requirements for BEA licensees to prevent them from spectrum warehousing. Accordingly, it recommends that the construction requirement for the BEA auction winner should require that one-third of the service area plus 25% of the channels be constructed in three years and the remaining two-thirds and 75% of the channels be constructed in five years.

## IV. Incumbent Licensees Should be Treated Fairly

21. Southern supports requiring the BEA licensee to provide co-channel and adjacent channel interference protection for incumbent licensees. Southern recommends affording protection based on the incumbent's 40/22 dBu contour. Furthermore, any relocation of an incumbent's facility should be on a purely voluntary basis. Where the parties voluntarily enter into relocation negotiations and those negotiations fail, Southern believes that the Commission should not intervene by requiring mandatory relocation. If the Commission requires mandatory relocation, Southern supports a definition of "comparable facilities" as providing the incumbent with the same number of channels in the same location, consistent with the incumbent's 40/22 dBu contour. A requirement to upgrade an incumbent's system may not be reasonble, however, if upgrading is mutually agreeable between the parties, then the Commission should allow the terms of the contract to control.

22. Southern believes that all incumbents should have a right to maintain their existing facilities as well as make minor modifications as defined above. Major modifications should be permitted as well where the incumbent and the BEA licensee agree by contract.

## V. Existing Wide Area Systems Should Be Given BEA Rights

23. Southern has not yet determined whether the incremental capital needed to participate in an auction will be available. At risk, however, is the extent to which system capacity will be available to serve the outside public. The capital hurdle that existing wide-area 800 MHz SMR licensees without a large foothold of frequencies in the upper 200 channel block encounter is the financial ability to relocate licensees in this block to other spectrum. Yet these licensees are already operating wide-area systems in the truest sense.

24. Southern's ultimate goal is to allow its personnel and subscribers to communicate over its entire service territory on a seamless system. For example, work crews located at a substation in Gulfport, Mississippi will be able to communicate directly with personnel at a substation located in Valdosta, Albany or even Savannah, Georgia. The system incorporates highly efficient technology and requires the benefits of a full-fledged wide-area SMR system. Accordingly, Southern recommends that the Commission afford wide-area status to those existing 800 MHz SMR licensees who currently have constructed and operational at least 100 base stations in any regional area. Southern also recommends that frequency re-use authority and extended implementation authority (i.e., the same construction requirement as defined above) be given to such wide-area systems that is being proposed to be given to wide-area SMR auction winners.

25. Southern's position is not unique in that the Commission recently ruled in the 900 MHz services that incumbents can have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, granted post-auction, would convert the site licenses to a single "partitioned" license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. Incumbents seeking "partitioned" licenses would be required to make a one-time filing of specific technical parameters for each of their external base station sites to assist the Commission is updating its database after the close of the auction.[3/] Southern seeks extension of a similar policy in the 800 MHz services for 800 MHz wide-area licensees who do not participate in and/or win the auction so that they can likewise have a wide-area license covering its entire service area footprint plus allow for extended construction schedules.

---

[3/] In the Matter of Amendment of Parts 2 and 90 of the Commission's Rules Provide for the Use of 200 Channels Outside the Designated filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted the Specialized Mobile Radio Pool, PR Docket No. 89-553, Second Order on Reconsideration and Seventh Report and Order, adopted September 14, 1995, 60 Fed. Reg. 48913 (September 21, 1995).

## VI. The Bureau's Recommendations for a Second Further Notice of Proposed Rule Making are Premature

26. In the event that the Commission proceeds with the auctioning of the upper 200 SMR channels, it is inevitable that some incumbent SMR licensees operating on these channels will have to be relocated to accommodate any new operations especially in congested, metropolitan areas. Therefore, both the lower 80 SMR channels and the General Category channels should be available as replacement spectrum for those displaced licensees. If the Commission desires to have a successful auction, replacement spectrum is necessary. Southern believes that the Commission should wait until the upper 200 SMR channel block auctions are held and the relocation process takes place before proceeding with what may be a very ill-advised further auctioning of heavily occupied spectrum.

27. Southern opposes the auctioning of both the lower 80 SMR channels and the 150 General Category channels for exclusive SMR use. Southern is particularly concerned about reallocating the General Category frequencies for exclusive SMR use and auctioning these channels as an entrepreneur's block (i.e., limiting eligible auction participants only to small businesses). The General Category channels are licensed to a mix of users. Although the Bureau's random sampling seems to reveal that these channels are licensed primarily for SMR use, a significant amount of these channels are licensed to the public safety, industrial

and power radio users as well. These frequencies have been invaluable in instances when no in-category channels have been available for licensing in a particular service area. Moreover, in Southern's case, it is using General category channels in its system and these channels are particularly important in Atlanta where virtually no 800 MHz frequencies are available in any pool. In addition, these channels provide the necessary frequencies for system growth and expansion. Auctioning these channels will hinder essential communications of private use systems and the ability to relocate displaced SMR licensees operating in the upper 200 channel block to other spectrum. Limiting the auction of these channels to small business would further restrict the ability of an ongoing business, such as Southern's wide-area SMR service, to have access to critical spectrum resources.

28. Furthermore, once auctioned the relocation issue for incumbents is further exacerbated since there will be no replacement spectrum for these users. The value to be realized by the government from holding such an auction is highly speculative with little revenue likely to be realized. Auctioning of the General Category channels merely disrupts existing operations on these frequencies for no purpose. If a freeze is contemplated, it also inhibits future growth of systems on these channels. Finally, if the Commission adopts a Second FNPRM to auction these channels, it should abandon the idea to limit the auction to small businesses. On the General Category channels, most users are actually large, industrial (but private)

entities who would be ineligible to bid on frequencies already licensed to them. This will definitely require mandatory relocation which is impossible for a small business to afford. This recommendation is not well-reasoned and should be held in abeyance until issues surrounding the upper 200 SMR channels are resolved.

## Conclusion

29. The Commission should encourage the use and a construction of true wide-area 800 MHz systems by affording the same rights and privileges proposed to be given to BEA auction winners. The Commission also must maintain flexibility for incumbents to continue to accommodate system growth by reasonable modifications and the preserving of the lower 80 SMR channels and the 150 General Category channels for such modifications.

**WHEREFORE, THE PREMISES CONSIDERED,** The Southern Company respectfully requests that the Commission act upon its Further Notice of Proposed Rule Making in a manner consistent with the views expressed herein.

Respectfully submitted,

**THE SOUTHERN COMPANY**

Carole C. Harris
Christine M. Gill
Tamara Y. Davis

McDermott, Will & Emery
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000

Its Attorneys

Dated: September 29, 1995

## CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of September, 1995, caused copies of the foregoing "Written Ex Parte Presentation of The Southern Company" to be served by hand on the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Regina Keeney
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Rosiland Allen
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7002
Washington, D.C. 20554

Daniel Phythyon
Senior Legal Assistant
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Dwana Speight
Acting Deputy Chief of Legal Branch
Commercial Mobile Radio Service Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7130
Washington, D.C. 20554

Dorene G. Tabaka

Dorene G. Tabaka