

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
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)  
Amendment of Part 90 of the ) PR Docket No. 93-144  
Commission's Rules to )  
Facilitate Future Development )  
of SMR Systems in the 800 MHz )  
Frequency Band )  
  
Implementation of Sections ) GN Docket No. 93-252  
3(n) and 322 of the )  
Communications Act Regulatory )  
Treatment of Mobile Services )  
  
Implementation of Section )  
309(j) of the Communications ) PP Docket No. 93-253  
Act - Competitive Bidding )

To: The Commission

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**THE SOUTHERN COMPANY'S REPLY TO NEXTEL'S  
OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The Southern Company ("Southern"), through its undersigned counsel and pursuant to section 1.429 (g) of the Rules of the Federal Communications Commission ("the Commission"), respectfully submits this Reply to Nextel's Opposition to Petitions for Reconsideration ("Nextel's Opposition") which was filed herein on April 16, 1996 in response to petitions for reconsideration challenging the Commission's First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making

(collectively "First R&O") in the above-captioned proceedings.<sup>1/</sup>

## I. INTRODUCTION

1. On December 15, 1995, the Commission released new rules governing Specialized Mobile Radio ("SMR") systems on the upper 200 800 MHz channels.<sup>2/</sup>

2. On March 18, 1996, twenty-three parties, including Southern, filed Petitions for Reconsideration and/or Clarification, of the First R&O. Southern sought reconsideration of numerous aspects of the Commission's decision for the following reasons: (1) The Commission lacks authority pursuant to section 309 of the Communications Act to conduct auctions of heavily occupied 800 MHz spectrum; (2) Auction of the 800 MHz spectrum violates section 309(j)(3)(B) of the Communications Act which requires the Commission to promote economic opportunity and avoid excessive concentration of licenses; (3) The Commission violated its statutory mandate to achieve regulatory parity among "substantially similar" Commercial Mobile Radio Service ("CMRS") providers by promulgating rules that favor the Economic Area ("EA") auction winning SMRs over incumbent

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<sup>1/</sup> FCC 95-501, released December 15, 1995.

<sup>2/</sup> See First R&O.

SMRs; (4) Even if the Commission has the statutory authority to auction encumbered spectrum, the Commission's actions were arbitrary and capricious because the Commission failed to adequately consider the public interest in promulgating its rules; and, (5) The rules set forth in the First R&O and the Eighth R&O must be set aside as arbitrary and capricious because the Commission failed to address the anticompetitive concerns surrounding Nextel's dominant licensing position in the 800 MHz spectrum.

3. On April 16, 1996, Nextel Communications, Inc. ("Nextel") filed its Opposition to Petitions for Reconsideration in the above-referenced proceeding. Although Nextel's Opposition to Southern's Petition for Reconsideration fails to address the substantive arguments raised by Southern, because Nextel attempts to divert the Commission's attention from the fundamental statutory and procedural defects in the First R&O, Southern is compelled to file this Reply.

## II. DISCUSSION

### A. **Nextel's Opposition Fails to Address the Statutory and Procedural Issues Raised by Southern's Petition for Reconsideration.**

4. Nextel's Opposition completely avoids the substantive arguments raised in Southern's petition.

Instead, Nextel takes issue with tangential points in an effort to muddle the record. For example, Southern argued in its petition that the Commission should have considered Nextel's predominant position in the Upper 200 channels when promulgating the rules that define the EA license in order to "avoid the excessive concentration of licenses."<sup>2/</sup> As support for its position, Southern argued, in part, that Nextel controls over 60% of all licensed and pending 800 MHz channels designated for SMR use in the 800 MHz spectrum across the country, and, in some markets, up to 92% of all the licensed SMR channels. This predominant incumbent position in the Upper 200 channels should have been explicitly considered by the Commission in promulgating the rules governing the creation of the EA license in order to avoid "excessive concentration" of the EA licenses in violation of § 309(j)(3)(B) of the Communications Act.

5. Nextel disingenuously attempts to refute this argument by explaining why it has so many licenses. Significantly, however, Nextel completely fails to address the issue of its market dominance over the vast majority of channels in the Upper 200 of the 800 MHz frequency band. As such, Nextel's Opposition completely fails to rebut Southern's argument that Nextel's market dominance must be

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<sup>2/</sup> Southern's Petition for Reconsideration at 7-11.

considered in order to promulgate rules that comply with the statutory mandate.

6. Nextel further responds to Southern's argument that the rules in the First R&O unfairly favor Nextel by pointing to the Commission's determination that the relevant market for assessing competition includes cellular and Personal Communication Services ("PCS").<sup>4/</sup> Once again, however, Nextel's response evades the point raised by Southern. Regardless of how one defines the relevant market in which the auction winner will compete,<sup>5/</sup> because the rules promulgated in the First R&O heavily favor Nextel, the auction process unfairly favors Nextel in violation of the Communications Act. As such, the rules promulgated in the First R&O violate the express will of Congress, and therefore must be abandoned.

7. More significantly, Nextel's Opposition does not challenge Southern's primary arguments concerning the statutory and procedural infirmities in the First R&O. Nextel does not refute Southern's argument that the auction mechanism has no application to spectrum which is already

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<sup>4/</sup> Nextel Opposition at 8.

<sup>5/</sup> Southern supports the Department of Justice's analysis concerning the relevant geographic market. See DOJ Complaint, Exhibit F to the Comments of SMR Won.

occupied. Nextel does not refute Southern's argument that the auction rules will lead to the excessive concentration of licenses under Nextel's control. Nextel does not refute the fact that the Commission's rules in the First R&O will result in the creation of "second class licensees" in direct contravention of the Congressional command to achieve regulatory parity. As such, Nextel's Opposition contributes very little to the discussion surrounding the legal flaws in the Commission's decision.

**B. Nextel Erroneously States That the Rules Governing the Upper 200 Channels Treat All SMRs Fairly and Equitably and Adequately Consider the Public Interest.**

8. Nextel claims that the Commission's general auction and mandatory relocation/retuning rules for the upper channels, when coupled with the Industry Consensus Proposal for the Lower 80 and General Category channels, will offer all SMR participants a fair and equitable opportunity for continued operation and growth.<sup>5/</sup> Given the mandatory relocation rules and Nextel's predominant position in the upper 200 channels, how can any EA auction participant other than Nextel equally compete for any of the upper 200 channel blocks?

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<sup>5/</sup> Nextel Opposition at 5.

9. The channel block size and build-out coverage requirements favor Nextel. Moreover, only Nextel has sufficient spectrum to permit the relocation of incumbent licensees, which would be necessary because of the coverage requirements for the license.<sup>7/</sup> It is common knowledge among industry participants that Nextel's predominant position in the Upper 200 channels will allow it to dominate the auction. The Personal Communications Industry Association ("PCIA") has characterized the auctioning of the upper block of channels as essentially a "private auction" for Nextel and its affiliates.<sup>8/</sup> The Industrial Telecommunications Association stated in its Opposition to Nextel's petition for reconsideration, that Nextel and its affiliates will be, by far, the dominant bidder in the auction.<sup>9/</sup> In spite of this well-accepted view, Nextel continues to maintain that SMRs will have a fair opportunity for continued growth.

10. Nextel further argues that the Commission sufficiently considered the public interest by pointing to the duration of the proceeding and the length of the

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<sup>7/</sup> PCIA Petition for Reconsideration at 15.

<sup>8/</sup> See PCIA Petition for Reconsideration at 14.

<sup>9/</sup> Industrial Telecommunications Association, Inc. Opposition at 6.

Commission's opinion.<sup>10/</sup> However, Nextel does not explain how the public interest is served by conducting what amounts to a "sham" auction. In order to properly consider the public interest, the Commission must consider whether it is possible for any entity to actually license Upper 200 spectrum and relocate Nextel to comparable spectrum. Because the Commission failed to address this significant issue, the Commission has not properly considered the public interest, and therefore its decision is arbitrary and capricious and must be reversed.

**D. Nextel's Discussion of Ex Parte Communications Misconstrues the Issue Raised by Southern.**

Nextel argues that there was no violation of the ex parte rules because the Commission properly notified all interested parties on September 12, 1995 of its intention to convene an industry-wide meeting on September 18, 1995.<sup>11/</sup> Because Southern explicitly refers to ex parte meetings with the Commission prior to the September 12, 1995 Public Notice, Nextel's argument simply is not responsive to the issue raised by Southern. As such, Nextel's arguments concerning the ex parte violations should be ignored.

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<sup>10/</sup> Nextel Opposition at 8.

<sup>11/</sup> Nextel Opposition at 12-14.

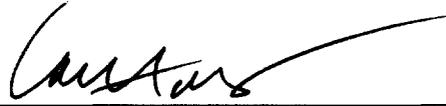
11. For the reasons stated above, the Commission should vacate the rules adopted in the First R&O.

**III. CONCLUSION**

**WHEREFORE, THE PREMISES CONSIDERED**, Southern, urges the Commission to consider this Reply to Nextel's Opposition to Petitions for Reconsideration of the First R&O and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: May 9, 1996

**CERTIFICATE OF SERVICE**

I, Jane L. Simon a legal secretary of the law firm, McDermott, Will & Emery, certify that a copy of "The Southern Company's Reply to Nextel's Opposition to Petitions for Reconsideration" was sent via first-class mail, postage prepaid on May 9, 1996 to:

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