RECEIVED
NOV 27 1996
Federal Communications Commission
Office of Secretary

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

DOCKET FILE COPY ORIGINAL

To: The Wireless Telecommunications Bureau Licensing Division

SUPPLEMENTAL INFORMATION REGARDING RESPONSE TO REQUEST FOR REJUSTIFICATION OF EXTENDED IMPLEMENTATION AUTHORITY OF THE SOUTHERN COMPANY

On July 15, 1996, the Southern Company ("Southern"), submitted a Response to the Federal Communications Commission's Request for Rejustification of Its Extended Implementation Authority[1/] for its wide-area 800 MHz SMR system. As Southern explained at length in its original request, it believes that it should be given the same construction flexibility as other CMRS providers. Cellular, PCS and SMR EA licensees are required to

---

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, PR Docket No. 93-144 and PP Docket 93-253, First Report and Order, Eighth Report and Order, and Second Notice of Proposed Rule Making, adopted December 15, 1995, 61 Fed. Reg. 6212 (1996); Public Notice providing recommended filing format for rejustification of extended implementation authority released June 4, 1996, and Order extending the filing deadline to July 15, 1996, adopted June 13, 1996.

No. of Copies rec'd 0+9
List ABCDE

meet population/geographic coverage standards rather than the more rigid site-by-site construction standard that now applies to Southern. The following is submitted in support of Southern's request to be given a similar population/coverage construction standard.

I. PARTICIPATION IN THE 800 MHZ SMR AUCTIONS WILL NOT GIVE SOUTHERN EQUAL CONSTRUCTION REQUIREMENTS FOR SPECTRUM ALREADY LICENSED

1. The Commission has suggested that if Southern wants the benefit of population-coverage requirements for construction, then it should participate in the upcoming 800 MHz auctions. This suggestion fails to address Southern's central argument that the Commission must treat similarly situated CMRS providers equally, regardless of how the licensee has acquired the spectrum. Indeed, the legislative history of the Budget Reconciliation Act of 1993 reveals that "the rules are intended to ensure that services that were formerly private land mobile services and become common carrier services as a result of this Act are subjected to technical requirements that are comparable to the technical requirements that apply to similar common carrier services."[2/] Consistent with the congressional objective of regulatory symmetry, the legislative history states that Congress intended that the Commission refrain from granting "any right to a licensee [pursuant to auction] different from the rights awarded to licensees who obtained their license through

---

[2/] H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 498 (1993) (hereinafter "House Conf. Rep.").

assignment methods other than competitive bidding."[3] Accordingly, CMRS providers who derive their spectrum assets through auctions should have no greater rights than CMRS providers who obtained their spectrum through traditional licensing processes.[4] Cellular, PCS and certain SMR providers have all been classified as "CMRS", yet each service licensed its spectrum differently. As such, requiring Southern to participate in the 800 MHz SMR auction for the sole purpose of gaining comparable construction requirements simply ignores the central issue raised by Southern that its current wide-area 800 MHz system, in which it has already invested significant capital, should receive the benefit of population-coverage requirements for the remainder of its construction build-out.

2. The Commission has recognized that the congressional mandate to treat similarly situated CMRS providers equally derives from the congressional goal "to ensure that economic forces--not disparate regulatory burdens--shape the development of the CMRS marketplace."[5] The Commission has stated that its goal in regulating the CMRS marketplace is to "minimize[] the

---

[3] See 47 U.S.C. § 309(j)(6)(D); House Conf. Rep. at 485.

[4] Alternatively, even if the Commission decides some minimal amount of disparate regulation is permissible, the competitive disadvantage, or conversely the competitive advantage, caused by the disparity between population-coverage construction requirements and site-by-site construction requirements should not be sanctioned by the Commission.

[5] CMRS Third R&O at 7994 ¶ 4.

potentially distorting effects of asymmetrical regulation."[6] "This in turn leads [the Commission] to conclude that, to the extent practical, technical and operational rules should be comparable for virtually all existing and reclassified CMRS services."[7] The Commission has further stated that it intended to maximize flexibility "so that carriers have a real opportunity to use their allocated spectrum in ways that adapt quickly to changing consumer demand." Id. 8011 at 41. As Michele Farquhar recently remarked:

> Spectrum flexibility also means the freedom not to use the spectrum at any particular time if a licensee determines that the highest valued use of the spectrum is not something it currently can offer--for example, because the technology is still in development, or because demand does not currently exist. As long as there are no barriers to entry, licensees bear the opportunity cost of letting spectrum lie idle.

Remarks of Michele C. Farquhar, Chief of the Wireless Telecommunications Bureau, at 5 (November 20, 1996) ("Farquhar Remarks"). This rationale is compelling in Southern's case where the capital investment made to date (over $143 million) and the dynamic nature of the CMRS market, provide a more than adequate motivation for efficient spectrum use. The relief Southern is requesting, is only to be given the flexibility that its competitors will have to make ongoing construction implementation decisions based on market forces rather than rigid regulatory deadlines.

---

[6] Id. at 7996 ¶ 13.

[7] Id. at 7997 ¶ 14.

3. Moreover, participation in the 800 MHz SMR auctions does not provide construction relief for spectrum already licensed to Southern.[8/] Southern seeks construction relief for 800 MHz channels already licensed to it which will allow Southern to compete with other CMRS providers in the mobile communications marketplace. As shown in Exhibit A attached to this pleading, all CMRS providers, except wide-area SMRs who acquired their spectrum through traditional site-by-site base station licensing, have very flexible construction requirements. Wide-area SMRs therefore have an uneven regulatory playing field which runs counter to Congress's directive of regulatory parity among CMRS providers.

II. SOUTHERN'S USE OF CONVERTED I/LT AND BUSINESS RADIO CHANNELS IS SPECTRUM EFFICIENT

4. The fact that Southern's frequencies were originally licensed from the I/LT and Business pools should not affect the Commission's response to Southern's request for construction relief because these classifications ignore the current, FCC-approved use of the spectrum. The Commission has approved the conversion of Southern's I/LT and Business pool spectrum to commercial-use spectrum. Based on this decision by the Commission, Southern heavily invested in the construction and operation of a commercial system in an effort to meet the market

---

[8/] Southern's only reason to participate in the upcoming 800 MHz SMR auctions would be to acquire additional spectrum from the upper 200 SMR channels. Although Southern foresees the need to acquire additional spectrum, it has yet to determine whether participation in the 800 MHz SMR auction is the best mechanism for obtaining such spectrum.

demand for commercial dispatch service. At the same time, as discussed above, the Commission has reinforced its view that Cellular, PCS and wide-area SMR providers are part of one relevant market. Given its current commercial use of its spectrum, Southern simply requests that the Commission apply construction regulations to it which accurately reflect its existence as a CMRS provider.

5. Moreover, Southern's commercial use of I/LT and Business channels is spectrum efficient. Southern lacks the incentive to warehouse spectrum in a market as dynamic as the CMRS marketplace. Southern seeks to put the spectrum to its highest and best use given the evolving market demand for wireless services in its markets. Indeed, Southern currently utilizes a significant majority of its assigned channels in a digitally-enhanced, frequency re-use configuration. Southern's use of these channels in a state-of-the-are digital system meets a continuing internal need as well as a commercial need -- the epitome of spectrum efficiency.

6. Furthermore, Southern's frequency re-use plan is engineered in such a way that even if the Commission recaptured Southern channels not yet constructed, it would be difficult to re-license many of these frequencies to other eligible users because of Southern's co-channel presence at other nearby locations. The Commission's own co-channel separation rules

(see, 47 C.F.R. § 90.621) would prevent other licensees from being coordinated and licensed on these channels.

III. INCREASED REGULATORY OBLIGATIONS FOR ALL CMRS PROVIDERS REQUIRE REGULATORY PARITY IN CONSTRUCTION OBLIGATIONS

7. The Commission has adopted numerous rulemaking proceedings imposing additional regulatory requirements on CMRS providers, including "covered SMRs" like Southern. These requirements include meeting manual roaming and resale obligations; providing enhanced 911 services and telephone number portability; and meeting other Title II common carrier regulations such as access by persons with disabilities. Southern must adhere to each of these additional regulatory burdens, and will need to devote adequate time and attention to meeting the CMRS requirements already in effect. Because Southern must meet these additional CMRS requirements, it should be entitled to the benefits of CMRS status, particularly population-coverage construction requirements. The construction requirements imposed on Southern by the traditional site-by-site licensing are the very sort of "regulatory obstacle" that the Commission should eliminate in order to allow economic forces to shape the CMRS marketplace.

8. In addition, Southern may wish to take advantage of the CMRS provider's ability to offer fixed services on a co-primary basis on its mobile communications system. In order to do so, however, Southern must have the spectrum flexibility afforded by population-coverage construction requirements. The traditional

site-by-site construction paradigm simply does not allow a CMRS provider the flexibility necessary to implement innovative service offerings. As such, these regulations, as applied to Southern, directly impede the Commission's effort to allow CMRS providers to compete as a "lower cost alternative to wireline service."[9/] For this reason, the Commission should treat Southern like other CMRS providers and eliminate the site-by-site construction requirements of the old SMR rules so that Southern might also take advantage of the flexibility to offer fixed services.

9. Based on the foregoing and the fact the Southern has constructed over 50 percent of its discrete 800 MHz SMR channels and has covered over 90 percent of the population in its service territory, it has met and indeed exceeded the appropriate construction standards of a CMRS provider.

Respectfully submitted,

THE SOUTHERN COMPANY

Carole C. Harris
Christine M. Gill
Tamara Y. Davis
Thomas J. Navin
McDermott, Will & Emery
1850 K Street, N.W.
Washington, D.C. 20006
202-887-8000

Its Attorneys

Dated: November 27, 1996

9/ Farquhar Remarks at 9.

CERTIFICATE OF SERVICE

I, Jacqueline Jenkins, a secretary in the law office of McDermott, Will & Emery hereby certify that on November 27, 1996, a copy of the foregoing Supplemental Information Regarding Response to Request for Rejustification of Extended Implementation Authority of the Southern Company was hereby served, via hand delivery to the following:

Michele Farquhar
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

David Furth
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Rosalind Allen
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Larry Spiwak
Office of the General Counsel
1919 M Street, N.W., Room 650-H
Washington, D.C. 20554

John Berresford
Office of the General Counsel
1919 M Street, N.W., Room 650-I
Washington, D.C. 20554

Peter Tenhula
Office of the General Counsel
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Lisa Higginbotham
Office of the General Counsel
1919 M Street, N.W., Room 628-I
Washington, D.C. 20554

Walter Strack
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5202-F
Washington, D.C. 20554

Gregory Rosston
Office of Policy & Planning
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Jacqueline Jenkins

EXHIBIT A

Comparison of Construction Requirements for CMRS

Wide-Area SMR	Site-by-Site Frequency-by-Frequency	1 - 5 years	All Channels
Cellular	MSA Coverage	1 - 5 years	No Channel Requirement
800 MHz and 900 MHz (EA-SMR Licensees)	1/3 of Population 2/3 of Population	3 years 5 years	50% of Channels
PCS (30 MHz) MTA	1/3 of Population 2/3 of Population	5 years 10 years	No Channel Requirement
PCS (10 MHz) BTA	1/4 of Population	5 years	No Channel Requirement