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MCDERMOTT, WILL & EMERY

July 11, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA MESSENGER

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

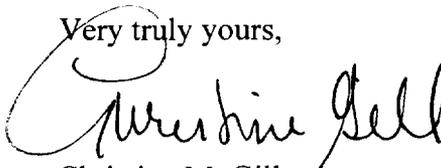
Re: ***Ex Parte Meeting; Fresno Mobile Radio Inc., v. FCC;***
PR Docket No. 93-144

Dear Ms. Salas:

Pursuant to Section 1.1206(b) of the Commission's rules, this is to inform you that on July 10, 2000, Christine M. Gill and Thomas P. Steindler (Counsel to Southern Company) met with Clint Odom, legal advisor for wireless and international matters in the office of Chairman Kennard. The purpose of the meeting was to discuss with him the Further Order on Remand in *Fresno Mobile Radio, Inc., v. FCC*, PR docket No. 93-144, which we understand has been sent to the 8th floor for action. A copy of a memo dated January 27, 2000, which outlines Southern's position in this case, is enclosed.

An original and one copy of this letter and enclosure are provided for inclusion in the record in this proceeding.

Very truly yours,



Christine M. Gill

Enclosure

cc: Clint Odom

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MCDERMOTT, WILL & EMERY
Washington, DC

MEMORANDUM

TO: Mark D. Schneider **DATE:** January 27, 2000
FROM: Christine M. Gill
Thomas P. Steindler
RE: **Southern Company, 800 MHz SMR Construction Standards**
***Ex Parte* Presentation, Fresno Mobile Remand Order, PR Docket No. 93-144**

Southern Company's telecom subsidiary, Southern Communications Services, Inc., operates a digital wireless system in a 125,000 square mile footprint in four states, Mississippi, Alabama, Georgia and Florida, under the name Southern LINC. Southern LINC currently has more than 160,000 subscribers, including federal, state and local governments and emergency management agencies such as sheriff's departments and ambulance services, etc.

Southern is an "incumbent wide-area 800 MHz SMR licensee." 47 C.F.R. §20.3 Ninety-five percent of the Southern LINC channels are converted Business and I/LT channels. There is no carve-out in the definition of incumbent wide-area 800 MHz SMR licensees for converted Business and I/LT channels. The FCC stopped permitting the conversion of Business and I/LT channels to commercial use in 1995.

In the 1993 Budget Act, Congress established a national policy for regulation of the wireless industry by directing the FCC to establish a uniform regulatory regime for all commercial wireless services.

One vital aspect of equal regulatory treatment is the construction standards applicable to wireless service providers. The major segments of the wireless industry, including cellular and PCS, are entitled to population-based standards.

The FCC addressed construction standards for 800 MHz SMR services in a rulemaking proceeding culminating in 1997, PR Docket No. 93-144 (800 MHz SMR Rulemaking). The FCC concluded that while new EA licensees in the 800 MHz SMR service were entitled to population-based standards, incumbent wide-area 800 MHz SMR service providers such as Southern were subject to the old site by site construction standards. This ruling meant that only Southern and the handful of other incumbent wide-area 800 MHz SMR providers would be required to pre-build the capacity by a date certain or lose their licenses.

Southern appealed the FCC's decision to the United States Court of Appeals for the D.C. Circuit. The appellate court agreed with Southern in *Fresno Mobile v. FCC*, 165 F.3d 965 (D.C.

Cir. 1999), ruling the FCC had provided no rational basis for denying incumbent wide-area 800 MHz SMR service providers such as Southern the same type of population-based construction standards enjoyed by the rest of the commercial wireless industry. The court vacated the FCC's order and remanded the case to the FCC.

On remand, the FCC concluded that "incumbent wide-area SMR licensees such as Southern" should be entitled to population-based construction standards. Memorandum Opinion and Order on Remand, PR Docket No. 93-144 (released Dec. 23, 1999). However, the FCC also stated that this decision does not apply to converted Business and I/LT channels. *Id.* at ¶20. According to the Order, converted channels had not been a part of the 800 MHz Rulemaking and the *Fresno* decision but instead would be addressed in a subsequent rulemaking implementing the 1997 Balanced Budget Act. We are told a decision is expected in Q2 2000.

Southern has argued in seven separate proceedings before the Commission that it is entitled to population-based construction standards under the national wireless industry policy announced in the 1993 Budget Act. Southern took its case to the court of appeals, and won. But because Southern LINC is 95% converted Business and I/LT channels (a fact which has been fully briefed on numerous occasions to the Wireless Bureau), Southern obtained no relief on remand.

Without population-based standards, Southern will have to begin immediately to consider whether to commit up to \$200 million to pre-build capacity -- a financial burden none of Southern's competitors in the wireless industry has to shoulder. This requirement is not consistent with the national wireless industry policy established by Congress in 1993, nor is it consistent with the *Fresno* court's decision or the FCC's own decision on remand.

The remand order's claim that converted Business and I/LT channels were "beyond the scope" of the *Fresno* court decision and the 800 MHz Rulemaking is completely and utterly untrue. Among other things, the 800 MHz Rulemaking required incumbent wide-area 800 MHz SMR providers, including Southern, to "rejustify" their extended (site by site) implementation schedules. The Commission thereupon established site by site deadlines for construction of all channels, including Southern's converted Business and I/LT channels. There was no "carve out" or "exemption" for converted Business and I/LT channels in this proceeding.

In addition, the 800 MHz Rulemaking also addressed converted Business and I/LT channels in the context of changing the Intercategory Sharing rules to prohibit the conversion of Business and I/LT channels to commercial use. Memorandum Opinion and Order On Reconsideration at ¶103-108. To suggest that converted Business and I/LT channels were beyond the scope of the rulemaking proceeding is utter nonsense.

Similarly, the *Fresno* court dealt incumbent wide-area 800 MHz SMR licensees, without a carve-out or exemption for converted channels. There was never any suggestion, either in the briefs or at oral argument, that this case did not include converted Business and I/LT channels. Indeed, there would have been no reason for Southern to be in court if the case had not included converted channels, given that 95% of Southern's system is converted from Business and I/LT channels.

The remand order's claim that the 800 MHz Rulemaking and the *Fresno* decision do not cover converted spectrum is palpably false and, we expect, will not pass even the red face test on appeal. There is no reason not to give Southern the relief it seeks, and went to court to obtain, in the remand order.

Putting aside the procedural infirmities associated with failing to deal with this issue in the remand order, on the merits there is no conceivable justification for failing to afford regulatory parity to converted Business and I/LT channels. The *Fresno* court has already rejected the argument that the origin of the channels justifies different construction standards. 165 F.3d at 969. Moreover, to the extent that the Bureau is concerned with spectrum warehousing, the *Fresno* court also rejected warehousing as a rational basis for refusing to extend population-based standards to incumbent 800 MHz SMR providers. *Id.*

This country's national wireless industry policy established by the Congress in 1993 mandates a level regulatory playing field for every segment of the commercial wireless industry. Southern has briefed this issue before the FCC seven times, gone to court and won, and still is denied equal treatment with the rest of the wireless industry.

Southern seeks from the FCC revision of the Order on Remand to remove the carve-out for converted Business and I/LT spectrum.