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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **Automatic and Manual Roaming Obligations Pertaining To Commercial Mobile Radio Services** | ) ) ) | **WT Docket No. 00-193** |

**COMMENTS OF SOUTHERN LINC**

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## EXECUTIVE SUMMARY

In this proceeding, the Federal Communications Commission is considering whether to adopt an "automatic" roaming rule for Commercial Mobile Radio Service ("CMRS") systems. Southern Communications Services, Inc., d/b/a Southern LINC ("Southern"), takes no position on whether such a rule should be adopted for cellular or broadband PCS systems. However, it strongly believes that the Commission must adopt an automatic roaming rule for Specialized Mobile Radio ("SMR") carriers that provide service using wide-area digital systems. This would primarily encompass Nextel Communications ("Nextel"), Nextel Partners, Southern, and Pacific Wireless Technologies, digital SMR carriers which utilize iDEN technology to operate in the 800 MHz band. Along with a roaming requirement, the Commission should also enact a specifically-tailored enforcement scheme through which carriers can file complaints against non-compliant carriers.

Simply stated, an automatic roaming rule for digital SMR carriers is necessitated by Nextel's dominance of the trunked dispatch market. Through that dominance, it has created a nationwide network that cannot be matched by any of its existing or potential competitors; it has amassed so much 800 and 900 MHz spectrum that other companies cannot establish meaningful systems of their own beyond their current regional coverage areas. The state of the U.S. SMR market exacerbates this problem: unlike the cellular and PCS markets, it is consolidating and there are fewer carriers today than ever before. This consolidation has been to the benefit of Nextel, removing any incentive for it to cooperate in any manner with the remaining players. Accordingly, Nextel refuses to enter into automatic roaming agreements with any non-affiliated

U.S.-based carriers. Likewise, it has refused to enter even manual roaming agreements despite the Commission's manual roaming rule.

Nextel's rejection of any reasonable roaming agreements is highly detrimental to both consumers individually and the SMR industry generally. Most obviously, the hundreds of thousands of digital SMR customers in the United States who do not subscribe to Nextel or its affiliate, Nextel Partners, are unable to use their phone outside their carriers' regional coverage areas for critical communications, whether it be emergency, business, or personal. Additionally, any hope of meaningful competition in the SMR market is stifled, as neither current nor potential providers can or will be able to offer consumers the ability to roam. Toward that end, far from simply lawfully promoting a distinguishing feature of its product, Nextel is leveraging its lock on the necessary spectrum to anticompetitive advantage.

Also as explained in Southern's Comments, automatic roaming between digital SMR carriers is technically and economically feasible. Analysis on the part of Southern and Motorola, the iDEN vendor, confirms the lack of any insurmountable technical hurdles. From an economic standpoint, Nextel's cost of implementing automatic roaming would be negligible and offset in any event by revenues from roaming fees. Additionally, other reasons for enacting an automatic roaming rule are the need to work towards regulatory parity for SMR carriers (as opposed to cellular and PCS carriers) and the fact that the remedies available under existing law are not adequate.

Finally, Southern takes this opportunity to raise antitrust concerns evidenced by Nextel's conglomeration of 800 and 900 MHz SMR spectrum and its corresponding conduct. While Southern acknowledges that full pursuit of such concerns is appropriate for another forum, it believes they are pertinent to this proceeding because they furtherillustrate Nextel's

anticompetitive behavior and, hence, the need for an automatic roaming rule. In short, Southern believes Nextel has obtained monopoly power and controls an essential facility -- 800 and 900 MHz SMR spectrum -- and that its refusal to enter roaming agreements to allow use of that facility may constitute unlawful conduct.

The Commission first sought comment on an automatic roaming rule over four years ago. In the interim, the SMR playing field has tipped further away from the competitive goals of the Telecommunications Act of 1996. The Commission must now take a step toward remedying that imbalance by adopting the automatic roaming rule and ancillary enforcement regulations proposed by Southern.

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| **Obligations Pertaining To Commercial** | ) | |
| **Mobile Radio Services** | ) | |

## COMMENTS OF SOUTHERN LINC

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission, Southern Communications Services, Inc., d/b/a Southern LINC ("Southern"), respectfully submits Comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") released November 1, 2000 in the above-captioned matter.[1] In this proceeding, the Federal Communications Commission is considering whether it should adopt an "automatic" roaming rule for Commercial Mobile Radio Service ("CMRS") systems and, if so, whether such a rule should be sunset at some point in the future. It also asks whether it should sunset the "manual" roaming rule that is currently applicable to CMRS systems.

Southern proposes that the Commission adopt an automatic roaming rule for digital Specialized Mobile Radio ("SMR") carriers, pursuant to which carriers with technically compatible systems would be required to enter automatic roaming agreements upon request. Southern also proposes that the Commission retain and not sunset the manual roaming rule unless it adopts an automatic roaming rule. If it adopts an automatic roaming rule, it should not set a sunset date for it. Southern takes no position on whether automatic roaming should be mandated for cellular or broadband PCS systems.

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[1] *In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, FCC No. 00-361 (Nov. 1, 2000) ("*NPRM*").

As explained herein, the ability to roam is highly important to mobile phone customers. When outside their carriers' coverage area, an inability to roam not only prevents them from making ordinary business or personal calls, but also often prevents them from making the life-saving calls contemplated by the E-911 initiative or from taking advantage of the disabled access provisions of the Telecommunications Relay Service ("TRS") and TTY initiatives. Unfortunately, due to market failure in the SMR industry, Nextel Communications ("Nextel"), the only SMR carrier with a nationwide network, has refused to enter roaming agreements with any domestic carriers other than its majority-owned affiliate, Nextel Partners. As such, Nextel is depriving hundreds of thousands of SMR customers of the ability to roam.

Southern would note that it uses several terms throughout these Comments as terms of art. When referring to the *SMR service*, Southern is indicating the universe of all SMR carriers. In referring to the *SMR industry,* Southern is indicating the subset of SMR carriers that provide trunked dispatch services. In referring to *digital SMR*, Southern is further narrowing the discussion to wide-area digital SMR, which is primarily provided on Motorola's iDEN technology platform by Southern, Nextel, Nextel Partners, and Pacific Wireless Technologies ("Pacific Wireless"). While the SMR service encompasses both analog and digital SMR, at this time implementation of an automatic roaming requirement is of concern mainly to digital carriers with extensive service footprints. Unless otherwise indicated, *SMR service*, *SMR industry*, and *digital SMR,* or derivations of them, should be given the meanings set forth in this paragraph.

## BACKGROUND

Southern LINC operates a state-of-the-art digital wide-area SMR system covering 127,000 square miles and serving over 200,000 customers in Georgia, Alabama, the panhandle of Florida, and the southeastern third of Mississippi. It provides the most comprehensive

geographic coverage of any mobile wireless service in Alabama and Georgia; its system is not limited to major metropolitan areas and highways corridors, but serves the extensive rural territory within its footprint as well. In fact, Southern serves areas of Florida, Georgia Mississippi, and Alabama that are not served by any other advanced wireless dispatch provider. In part because of this expansive and reliable coverage, its service is widely used by statewide public safety agencies, school districts, rural local governments, public utilities, and emergency services such as ambulance companies. It is also utilized by commercial entities and other government entities in both urban and rural areas.

Southern is considered a "covered SMR" for purposes of the roaming rules. Its system operates on the 800 MHz SMR band using Motorola's iDEN technology, which offers capabilities including dispatch, interconnected voice, internet access, and data transmission. While Southern's system provides its customers with some of the most sophisticated wireless capability available, due to the current state of technology its customers can only roam with other carriers using the 800 MHz SMR iDEN platform. For most of the United States, and certainly the areas adjacent to its coverage area, its only options for roaming partners are Nextel and Nextel Partners. In the several markets where their coverage overlaps, Southern competes vigorously with Nextel and Nextel Partners for customers that want a service that provides both dispatch and interconnected voice.

Nextel has roaming agreements with its close affiliate, Nextel Partners, which commenced operation in January 1999 with the general goal of introducing the Nextel brand to the small and mid-size markets where it does not presently have coverage. It is approximately 32% owned by Nextel, deals in its brand, contracts with it for various support services, and

shares its switches.[2] Nextel Partners claims its relationship with Nextel is "an integral part of our strategy" and boasts of an exclusive roaming partnership under which it is the sole provider of roaming services to Nextel customers who travel in its markets.[3] In Nextel Partners' most recent SEC Form 10-Q, it admits that Nextel "has certain approval rights that allow it to exert significant influence over our operations."[4] Southern submits that for purposes of securing voluntary automatic roaming agreements, Nextel and Nextel Partners are essentially one and the same. Certainly, Nextel Partners would refuse to enter any roaming agreements without Nextel's approval; at the least, its presumably Nextel-controlled Board would direct any decisions.

## DISCUSSION

Southern has sought for years to obtain an agreement in which its customers could roam on Nextel's national network. However, Nextel has steadfastly refused to permit Southern's customers to roam on its system either manually or automatically. With regard to manual roaming, Nextel essentially claims that technical issues still need to be worked out. As explained further below, Southern believes that any technical issues are easily resolvable and that Nextel is unreasonably delaying implementation. This failure to allow Southern's customers to even manually roam on its system is highly illustrative of the depth of its uncooperativeness, especially in light of the FCC's manual roaming rule.

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2 As stated on Nextel Partners' web site at http://www.nextelpartners.com.

3 *Id.*

4 Nextel Partners' SEC Form 10-Q for the Quarter Period Ended Sept. 30, 2000, p. 33.

## I. THE FCC SHOULD ADOPT AN AUTOMATIC ROAMING RULE FOR DIGITAL SMR CARRIERS

The *NPRM* marks the Commission's third pass at an automatic roaming rule. It first considered such a rule over four years ago in connection with its adoption of the manual roaming rule.[5] It connection with that same rulemaking, it sought additional comments in December 1997.[6] The rulemaking remained pending until August 2000, when the Commission reiterated its commitment to the manual roaming rule but held that the record had grown too stale to issue a decision with regard to automatic roaming.[7] Nonetheless, Southern had participated vigorously in that rulemaking, submitting pleadings contending that digital SMR carriers needed an automatic roaming requirement to achieve regulatory parity and compete against Nextel, which in 1996 already had a nationwide footprint but was not allowing other carriers to roam on it.[8]

Since 1996, Southern has continued to press its case through numerous *ex parte* presentations.[9] The Commission announced in August 2000 that it needed to refresh the record

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5 *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd. 9462, FCC No. 96-284 (1996) ("*Second R&O* ").

6 *Commission Seeks Additional Comment on Automatic Roaming Proposals for Cellular, Broadband PCS, and Covered SMR Networks*, CC Docket No. 94-54, *Public Notice*, DA 97-2558 (Dec. 5, 1997).

7 *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Third Report and Order and Memorandum Opinion and Order On Reconsideration*, 15 FCC Rcd. 15975, 15976, FCC No. 00-251, ¶ 3 (2000) ("*Third R&O* ").

8 *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Reply Comments Of The Southern Company (Nov. 22, 1996); Supplemental Comments of Southern Company (Jan. 5, 1998).

9 *See, e.g.*, February 18, 2000 letter from Southern Communications Services to Magalie R. Salas, CC Docket No. 94-54.

due, in part, to "the rapid expansion and development of the CMRS market in the intervening years . . . ."[10] While that may be true in regard to the cellular and PCS segments of the CMRS market, the SMR market has been contracting rapidly and has become more concentrated in Nextel's hands. In fact, Nextel acquired Pittencrieff Communications, a major provider, and is set to acquire Chadmoore Wireless Group, another major provider. Additionally, in January 2000 the FCC approved the assignment of Geotek Communications' 191 900 MHz SMR licenses to Nextel (with the exception of licenses in markets covered by a consent decree Nextel entered with the Department of Justice).[11] Consequently, competition among SMR providers has not increased and it is business as usual with regard to Nextel's refusals to enter into roaming agreements. Despite folding several of its significant competitors into its system and still being the only SMR provider with a national footprint, Nextel has yet to allow Southern or any other non-affiliated U.S.-based carrier to roam with it on even a manual basis.

As explained below, an automatic roaming rule is required due to the consolidation of the SMR industry, Nextel's dominance in this market, and its unwillingness to voluntarily allow automatic roaming on its network. The reality of the situation is that the SMR industry is experiencing market failure and there will not be significant competition unless Nextel is required to allow other digital SMR carriers to automatically roam on its system. Such roaming is technically feasible and the public interest benefits would outweigh the costs. Additionally, implementation of a rule would be a significant step toward equalizing the regulatory disparity between the SMR service and the cellular and broadband PCS services. FCC action to address

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10 *Third R&O*, 15 FCC Rcd. at 15976, ¶ 3.

11 *In re Applications of Geotek Communications, Memorandum Opinion and Order*, 15 FCC Rcd. 790, 806, DA 00-89, ¶ 35 (2000).

unreasonable or discriminatory roaming behavior would serve to correct abuses that marketplace forces cannot.

### A. SMR Providers Constitute A Distinct Industry For Purposes Of This Analysis

As an initial matter, the Commission should focus only on competition between trunked dispatch SMR providers to determine whether an automatic roaming rule should be implemented for digital SMR carriers. Although Nextel may argue that it competes in the greater interconnected voice market - cellular, PCS, and SMR - the degree to which it attracts the same type of customer as individual consumer oriented providers such as Verizon Wireless and VoiceStream Wireless is irrelevant. What is important is the fact that digital SMR is the only service capable of addressing the needs of customers that demand both advanced, digital dispatch and interconnected voice in the same handset. Because that sizable universe of customers can only look to digital SMR providers for their needs, the FCC must view them as a separate industry for roaming purposes.

Southern would note that the Commission's *Fifth Report* on CMRS competition mentions that several cellular and PCS carriers "attempt to provide" dispatch service by providing group calling features.[12] However, those are marketing-driven pricing plans, not dispatch service; the FCC actually refers to some plans as "family-oriented price plans."[13] The *Fifth Report* mentions only one non-dispatch carrier, SBC, that offers a service that approximates dispatch.[14] Even that,

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12 *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report*, FCC 00-289, p. 71 (Aug. 3, 2000) *("Fifth Report on Competition")*.

13 *Id.*

14 *Id.*

though, provides only a streamlined conference call service in which simultaneous calls are limited to 30 persons in a pre-programmed group, less than is possible with real dispatch.

### B. Manual Roaming Is Not A Viable Substitute For Automatic Roaming

Also as an initial matter, the FCC should not allow the existence of the manual roaming rule to weigh against enactment of an automatic roaming rule. Although Southern believes that the manual roaming rule has its place, manual roaming is extremely cumbersome, often requiring a customer to wade through a series of voice mail prompts to enter the roaming process or, worse, to place an entirely new call to reach a manual roaming operator. In a transaction that can take over five minutes, the customer must provide the operator with credit card and calling information. Even back in October 1996, in comments filed in this rulemaking's predecessor, the Alliance of Independent Wireless Operators characterized manual roaming as a "technological dinosaur" and noted that in its experience, 95% of customers prefer not to place calls at all rather than deal with it.[15]

For a public that has become accustomed to the type of seamless connections provided by automatic roaming, it is safe to say that the ability to offer manual roaming would not give a carrier the same competitive edge. Nor would manual roaming give customers the same degree of convenience and access to safety features. Additionally, from an implementation standpoint, it makes no sense to make the technical changes necessary to implement manual roaming when carriers can move to automatic roaming with less effort and expense.

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15 *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Comments of the Alliance of Independent Wireless Operators, p. 8 (Oct. 4, 1996).

### C. The Consolidated Nature Of The SMR Industry And Nextel's Dominant Position Prevent Market Forces From Ensuring The Widespread Availability Of Roaming Services

In the *NPRM*, the Commission states that it may be in the public interest to impose roaming requirements generally if "market forces alone are not sufficient to ensure the widespread availability of competitive roaming services, and where roaming is technically feasible without imposing unreasonable costs on CMRS providers."[16] With regard to an automatic roaming requirement specifically, it states that one should be adopted only if "it is clear that providers' current practices are unreasonably hindering the operation of the market to the detriment of consumers."[17] As explained below, there is market failure in the SMR industry; market forces alone clearly have not been and will not be sufficient to ensure the widespread availability of competitive roaming services. To the detriment of consumers, Nextel has taken advantage of its dominant position to unreasonably constrain existing and potential competitors from offering roaming.

The two overriding features of the SMR industry - the fact that the number of significant players has been greatly consolidated and the fact that Nextel dominates it - serve to prevent operation of the types of competitive forces that engender voluntary automatic roaming agreements. Simply put, Nextel has little reason to cooperate with other SMR licensees. Currently, consumers who need combined dispatch and interconnected voice functionality in an advanced digital form, and who also want the ability to roam beyond a regional coverage area, simply do not have the range of options that cellular and PCS customers enjoy.

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16 *NPRM* at ¶ 16.

17 *NPRM* at ¶ 18.

### 1. Nextel dominates the SMR industry and leverages its dominance to reject proposals for roaming agreements.

Nextel clearly dominates a highly concentrated market. The FCC itself acknowledges in the *NPRM* that "[d]igital SMR remains dominated by one provider, Nextel, which in 1999 had over 4.5 million subscribers . . . . "[18] At this time it has over 6.1 million subscribers,[19] the only nationwide network, and it continues to amass spectrum. Moreover, its majority-owned affiliate, Nextel Partners, is establishing facilities and gaining subscribers in the smaller and mid-size areas of the country that Nextel has not yet reached.[20] At the same time, the list of other significant players, never long to start with, is shrinking. In its *Fifth Report* on competition, the FCC lists just five major SMR carriers, and one of those, Chadmoore Wireless Group, is about to be bought by Nextel. The actual subscribership numbers of the major carriers set forth in the *Fifth Report* shed even more light on the disparity in the SMR industry. While Southern and Nextel Partners each have 200,000 subscribers, the numbers immediately fall off from there to 65,000 for Mobex; 37,475 for Chadmoore Wireless Group; and 11,400 for Securicor Wireless.[21]

Due to a confluence of several factors, the usual incentives that would motivate Nextel to enter into mutually beneficial automatic roaming agreements do not exist in this instance. In addition to the fact that it faces significant competition in only a few markets (for example, where Southern LINC operates) and has the only nationwide network, the only other carriers

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18 *NPRM* at ¶ 11.

19 As stated on Nextel's web site at http://www.nextel.com/information/fact_background.shtml.

20 As noted above, Nextel Partners, especially given its presumably Nextel-controlled Board, would refuse to enter a roaming agreement without Nextel's approval. Accordingly, it and Nextel should be considered one and the same for purposes of this rulemaking.

21 *Fifth Report on Competition* at p. D-2.

utilizing iDEN technology to provide advanced, digital SMR service are Nextel Partners, Southern, and Pacific Wireless (whose coverage currently does not extend beyond a region of California). Accordingly, given the current state of technology, Southern's and Pacific Wireless' customers can roam only on Nextel's or Nextel Partners' networks. However, because Nextel and Nextel Partners compete directly with Southern and Pacific Wireless in markets where their coverage overlaps, they have a strong incentive to refuse to enter roaming agreements. Although they would derive revenues from such agreements, Nextel and Nextel Partners have a greater economic incentive to dampen competition by denying their few competitors access to roaming.

Southern's actual experience with Nextel unequivocally confirms the foregoing. As noted above, for years Nextel has steadfastly refused to enter into a roaming agreement with Southern. In fact, it has constantly put off entering a *manual* roaming agreement, even in the face of the Commission's mandatory manual roaming rule, claiming there are technical difficulties with implementing manual roaming. As explained below, Southern does not believe there are insurmountable technical obstacles to either manual or automatic roaming. Southern cannot divine any reason for Nextel's refusal except for a deliberate intent to put Southern at a competitive disadvantage. For that matter, to Southern's knowledge Nextel has never entered a roaming agreement with a non-affiliated U.S.-based SMR carrier.

The only U.S.-based SMR carrier with which Nextel has a roaming agreement is Nextel Partners, which as explained above is a majority-owned affiliate of Nextel tasked with introducing the Nextel brand to the small and mid-size markets where Nextel does not presently have coverage. As stated on Nextel Partners' web site, this roaming agreement is comprehensive: "Our systems are operationally seamless with those of Nextel, enabling customers of both companies to roam on each other's portion of the Nextel digital mobile

network."[22] Nextel Partners also notes the importance of this roaming agreement: *"As customers increasingly choose national rate plans, we believe that the ability to offer national coverage is a competitive advantage."*[23] Southern would assert that Nextel's decision to push into smaller and mid-size markets and tout the benefits of its nationwide network, while simultaneously denying any roaming capability at all to its few remaining digital SMR competitors in those very markets, is a clear attempt to eliminate its remaining digital SMR competition in the United States.

Nextel's refusal to enter roaming agreements with non-affiliates has not carried over to foreign countries which its own network does not reach. Nextel has had an automatic roaming agreement with Clearnet Communications, a Canadian iDEN carrier, since 1997.[24] Also, in April 2000 it launched a worldwide calling service based on automatic roaming agreements it entered with carriers in Africa, Australia, Asia, Europe, South America, and the Middle East.[25] Although Nextel purportedly has been unable to overcome the technical difficulties posed by manual roaming with Southern, another digital SMR iDEN carrier in the United States, it apparently had no problem overcoming the technical difficulties posed by automatic roaming with carriers in 75 different countries, many of which use a GSM platform rather than iDEN.[26] Southern believes that Nextel's eagerness to roam with foreign carriers, while refusing to roam with domestic carriers, again demonstrates an undeniable motivation to eliminate any digital SMR competition in the United States.

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22 As stated on Nextel Partners' web site at http://www.nextelpartners.com.

23 *Id.* (emphasis added).

24 As stated in Nextel's SEC Form 10-K for 1999, p. 12.

25 Nextel Press Release dated Apr. 3, 2000 at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=NXTL&script=410&layout=9&item_id=83557.

26 As stated on Nextel's web site at http://www.nextel.com/products/servicecatalog/worldwide/country_list.shtml.

Notably, Nextel's international roaming agreements were part of a major initiative in which it invited carriers all over the world to roam with it, including nearly every iDEN carrier, but pointedly excluded Southern. Southern became aware that in 1999 Nextel began promoting its proposed "iDEN World" service, a gateway through which carriers utilizing iDEN technology could capitalize on the international automatic roaming agreements Nextel was entering. Nextel was recruiting Clearnet Communications of Canada and carriers from many other countries to participate in iDEN World. Southern expressed interest in participating, but was discouraged from doing so because of what was labeled the "proprietary" nature of the dialogue among these carriers.

**2. Nextel's refusal to enter roaming agreements harms consumers.**

Nextel's anticompetitive conduct causes significant harm to consumers. The most immediate harm is to customers of Southern and other iDEN carriers not affiliated with Nextel (currently over 200,000), who are prevented from utilizing their mobile phones outside of their carrier's regional coverage areas. In Southern's case, it has received an increasing number of customer requests to roam. The inability to do so is especially problematic for customers located on the fringes of a coverage area, for whom everyday travel may take them beyond areas where they can use their phone. Letters from Harrison County School District and American Medical Response (attached hereto as Exhibits A and B), two Southern SMR customers, attest to this problem.

Also, Southern serves an unusually large number of governmental entities, law enforcement agencies, emergency service entities, and other public service agencies, many of

which rely on its system for critical communications needs.[27] For these organizations, roaming would be a highly valuable benefit. In addition to routine travel outside of Southern's service footprint, it is not uncommon for public safety workers such as firefighters and law enforcement personnel, as well as power utility crews, to assist with natural disasters and other emergencies in locations well outside their usual jurisdictions. Continued access to their mobile phones would greatly assist these workers by enhancing their ability to communicate amongst themselves and with others.

Additionally, the Commission has made an enormous effort to ensure that E-911 services are available to wireless customers. These efforts have been made pursuant to the Wireless Communications and Public Safety Act of 1999 ("911 Act").[28] As stated by the Commission, the purpose of the 911 Act is "to enhance public safety by encouraging and facilitating the prompt deployment of a *nationwide, seamless communications infrastructure* for emergency services that includes wireless communications."[29] Towards that end, the Commission has promulgated regulations that on the most basic level generally require wireless carriers operating compatible systems to "answer" the 911 calls of roaming units. In Phases I and II of the E-911 initiative, the regulations require that making a 911 call results in the automatic provision of caller location information to the call recipient (arguably the core aspect of the initiative).

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27 *See In the Matter of Southern Company Request for Waiver of Section 90.629 of the Commission's Rules, Memorandum Opinion and Order*, 14 FCC Rcd. 1851, DA 98-2496 (1998) (citing unique use of Southern's network by public safety organizations).

28 47 U.S.C. § 615 (1999).

29 *In the Matter of Revisions of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, FCC 00-326, ¶ 6 (Sept. 8, 2000) (emphasis added).

Without the ability to roam, it will be extremely difficult for many iDEN customers with handsets manufactured before 1999 to make even basic 911 calls outside of their coverage area. Even customers with handsets manufactured after 1999 will not have the full functionality contemplated by the Phase I and Phase II rules, without carrier to carrier roaming capability in place. Not only does this raise serious considerations regarding human safety, it is directly contrary to the Commission's goal of a "nationwide, seamless communications infrastructure for emergency services." Given the fact that today's increasingly wireless society relies on mobile phones for safety more and more when travelling, it is simply not in the public interest to allow carriers to deny roaming services when it is technologically feasible to provide them.

Likewise, disabled persons who do not have roaming capability are unable to take advantage of the FCC's disability access initiatives, including TRS/TTY services and 711 dialing access. This contravenes the spirit of Title IV of the Americans with Disabilities Act of 1990,[30] which, as noted by the Commission, requires it "to ensure that TRS is available, *to the extent possible and in the most efficient manner*, to individuals with hearing and speech disabilities in the United States."[31] Automatic roaming between iDEN carriers certainly comes within the purview of "to the extent possible," and is the most efficient manner of providing nationwide access to disabled services for digital SMR customers that do not subscribe to Nextel.

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30 47 U.S.C. § 225 (1994 & Supp. IV 1998).

31 *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 5140, 5141, FCC 00-56, ¶ 1 (2000) (emphasis added).

### 3. Nextel's refusal to enter roaming agreements harms the SMR industry.

Nextel's refusal to enter domestic roaming agreements also harms the SMR industry and the large category of consumers who look to SMR for their wireless needs but are denied the benefits of a competitive market. Meaningful future entry by other companies is curtailed in large part because Nextel is likely to deny roaming agreements with them, preventing them from offering roaming to potential customers and thus significantly hindering their ability to attract customers in the first instance. Accordingly, Nextel is able to raise barriers to entry for new SMR competition. This, however, is completely contrary to the FCC's expectations and goals for the SMR industry.

When the FCC permitted the assignment of Geotek Communications' 191 900 MHz SMR licenses to Nextel in January 2000 (with the exception of licenses in markets covered by a consent decree Nextel entered with the Department of Justice), it stated that "in the relatively near future, we believe that additional market entry is likely to ensure that competitive conditions facing consumers in these markets will improve."[32] That clearly is not happening, and it becomes less likely every time Nextel consolidates more SMR spectrum. And, of course, it has been doing that aggressively. Consider that in the August 2000 auction for 800 MHz General Category and Upper Band SMR licenses (Auction No. 34), Nextel was awarded 800 of the 1,053 licenses offered.[33] Additionally, in the November 2000 auction for 800 MHz Lower 80 SMR licenses (Auction No. 36), Nextel was the successful bidder on 2,579 of the 2,800 licenses

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32 *In re Applications of Geotek Communications, Memorandum Opinion and Order*, 15 FCC Rcd. 790, 806, DA 00-89, ¶ 35 (2000).

33 *Wireless Telecommunications Bureau Grants 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Licenses, Public Notice*, DA 00-2874 (Dec. 20, 2000).

offered.[34] Further, Nextel has a request pending with the FCC for approval of the assignment of 59 900 MHz licenses from Motorola and its subsidiaries.[35]

Given the foregoing, it is abundantly clear that any future competition is not going to come from companies with competitive amounts of spectrum.[36] Rather, competition needs to be enabled by narrowly targeted regulatory measures such as an automatic roaming requirement.

### D. Automatic Roaming Between Digital SMR Carriers Is Technically And Economically Feasible, And The Public Interest Benefits Outweigh The Costs

There are no substantial technical hurdles to enabling automatic roaming among digital SMR iDEN providers. In part, this is demonstrated by the fact that Nextel has successfully maintained an automatic roaming agreement with Clearnet Communications, an unrelated Canadian iDEN carrier, since 1997.[37] More directly, Southern has had discussions with Nextel regarding what Nextel believes are potential technical problems. Southern has closely analyzed those concerns and determined that they are either not problems at all or that solutions to them can be easily implemented at minimal cost to Nextel. Additionally, Southern has been advised

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34 *800 MHz SMR Service Lower 80 Channels Auction Closes, Public Notice*, DA 00-2752 (Dec. 7, 2000).

35 *Motorola, Inc. and Nextel Communications, Inc. Seek Consent to Assign 900 MHz SMR Licenses, Public Notice*, DA 00-2352 (Oct. 19, 2000).

36 As Southern has argued in many proceedings, Nextel's ability to dominate 800 MHz spectrum auctions was due to (1) the fact that auctions were structured in such a way that the holder of the incumbent 800 MHz licenses had an insurmountable bidding advantage; and (2) contrary to what it did in PCS and cellular markets, the Commission decided to place no restrictions on one bidder acquiring ***all*** of the 800 MHz licenses. Nextel's spectrum position at these auctions reduced the value of the spectrum to parties other than Nextel, further discouraging competitive entry into the SMR market.

37 *Clearnet Offers U.S. Roaming With Less Hassle*, Land Mobile Radio News, July 25, 1997.

by the iDEN vendor, Motorola, that the technical changes needed to enable full automatic roaming can be implemented.

Southern would also note that Nextel stands to generate substantial revenue through roaming agreements. In 1999, Nextel earned approximately $1,000,000 from its roaming agreement with Nextel Partners,[38] which at that time had less than 50,000 customers.[39] Given that Southern Company has over 200,000 customers, the roaming revenue from it, in addition to other iDEN carriers, has the potential to be significantly more. Surely, any negligible costs that Nextel incurs in implementing automatic roaming agreements will be more than made up for by the revenue it will gain from them.

In sum, there are tremendous public interest benefits to enacting an automatic roaming rule, including the restoration of competition in the SMR industry, enabling hundreds of thousands of customers to use their phones beyond their carriers' coverage areas, and facilitating E-911 and TRS/TTY capability. On the other hand, the costs of such a rule would be negligible for the roamed-on carriers. Thus, in this matter the benefits clearly outweigh the costs.

### E. An Automatic Roaming Requirement For Digital SMR Carriers Is Necessitated By The Need For Regulatory Parity

The Commission has established a regulatory scheme for the cellular and PCS services that ensures the existence of competition. For instance, FCC Rule Section 22.942 contains a cellular cross-ownership prohibition which generally prevents a party from having an ownership interest in licenses or licensees for both cellular channel blocks in overlapping cellular geographic service areas.

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38 As stated in Nextel's SEC Form 10-K for 1999, p. F-36.

39 Nextel Partner's Press Release dated July 11, 2000 at http://www.nextelpartners.com.

The SMR service, in contrast, does not have such competition-enhancing regulations, despite the fact that Section 6002(d)(3)(B) of the 1993 Budget Act directed the FCC to enact "comparable" technical requirements for cellular, PCS, and SMR.[40] Even the amount of allocated spectrum, the basic foundation of any mobile service, predisposes cellular to more competition than SMR; the Commission allocated 50 MHz to cellular but only approximately 19 MHz to SMR.[41] As such, the number of different SMR providers that can obtain enough licenses to effectively compete in any one area is inherently significantly limited. Due to those factors, Nextel has been able to accumulate the vast majority of 800 MHz SMR spectrum in most major markets and preclude potential competitors from gaining even a foothold.

The enactment of an automatic roaming requirement for digital SMR is a necessary step toward offsetting the FCC's failure to provide a comparable regulatory scheme. The FCC recognized the correlation between competition and regulatory parity when it brought SMR under the manual roaming rule in 1996, stating, "We are applying the manual roaming rule to [broadband PCS and covered SMR] licensees in order to ensure regulatory parity and to promote competition in the wireless market by enhancing all such carriers' abilities to compete."[42] Now, the passage of time, advances in technology, and refined consumer expectations have shown that the manual roaming rule is not enough. Although Southern believes the Commission's 1996 policy position continues to be relevant to the SMR industry, the Commission must update it

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40 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993).

41 *See, e.g., In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, Second Report*, 12 FCC Rcd. 11266, 11309, FCC 97-75 (1997).

42 *Second R&O*, 11 FCC Rcd. at 9470-71, ¶ 13.

through the implementation of an automatic roaming rule for technically compatible SMR carriers.

### F. The Remedies Available Under Existing Law Do Not Constitute Feasible Alternatives To An Automatic Roaming Requirement

In the *NPRM*, the FCC asked whether there are adequate remedies under existing law to address CMRS providers which engage in unreasonable or discriminatory behavior by refusing to enter automatic roaming agreements.[43] As noted in the *NPRM*, such remedies would stem from a complaint filed pursuant to Section 208 of the Communications Act of 1934 ("the Communications Act"), which empowers parties to file complaints and generally outlines the FCC's procedure for handling them.[44] Such a complaint would reference either Section 201 of the Communications Act (prohibition of unjust or unreasonable behavior), Section 202 (prohibition of discrimination), or Section 251 (interconnection requirements). While Southern agrees that those provisions apply to roaming services provided by CMRS carriers, it does not believe any of them provide a good alternative to an automatic roaming requirement.

In general, pursuing a complaint under Section 208 is cumbersome and unpredictable. The opportunity to conduct meaningful discovery is limited and the overall complaint process is time consuming; even under the FCC's expedited docket it can take months, to say nothing of preliminary negotiations and potential appeals. Further, the outcome is uncertain given the limited precedent for fully litigated roaming matters. The sum of these problems is of significant concern in the roaming context, in which carriers seeking to avoid agreements will be encouraged to delay as long as possible to disadvantage competitors seeking agreements.

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43 *NPRM* at ¶ 26.

44 *NPRM* at ¶ 26.

In addition to the foregoing problems with Section 208, there are problems with Sections 201, 202, and 251 individually. With regard to Section 201, which would involve allegations that a failure to enter a roaming agreement is "unjust or unreasonable," specific direction from the Commission would be helpful in clarifying when such failure rises to the level of being unjust or unreasonable. Given the numerous variables involved in roaming, pursuit of this option to obtain a roaming agreement is unduly difficult and uncertain.

In terms of filing a complaint under Section 202, which would involve allegations that a carrier is unlawfully discriminating by failing to enter a roaming agreement, a petitioner must show that it is "similarly situated" with the companies the carrier is favoring.[45] This gives carriers substantial room to allege differences between their chosen roamers and the petitioner, again raising the potential problem of unduly protracted, complicated, and uncertain litigation. Moreover, a carrier could potentially completely avoid discrimination charges by simply not engaging in automatic roaming agreements with any other providers at all. In that scenario, a carrier with an extensive network could maintain a virtual lock on the ability to offer roaming by simply denying it to all potential competitors. Such a possibility is at odds with the Telecommunications Act of 1996.

With regard to Section 251, which requires interconnection under certain circumstances, the Commission recently rejected the theory that Section 251 should encompass CMRS to CMRS interconnection.[46] That decision, in fact, was an affirmation of a previous ruling

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45 *In the Matter of the OTC v. South Central Bell Telephone Company and AT&T, Memorandum Opinion and Order*, 2 FCC Rcd. 4546, 4552, DA 87-974, ¶ 32 (1987).

46 *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Fourth Report and Order*, 15 FCC Rcd. 13523, 13534, FCC 00-253, ¶ 28 (2000).

contained in the *Local Competition First Report and Order*.[47] While those holdings would seem to preclude the possibility of successfully bringing a roaming claim through the interconnection obligations, Southern would additionally note that in a previous rulemaking several carriers raised arguments that Section 251 cannot be utilized to require CMRS carriers to accept interconnection requests until CMRS becomes a substitute for local exchange carriers for a substantial number of people.[48]

### G. The FCC Should Adopt An Automatic Roaming Enforcement Mechanism

In addition to promulgating an automatic roaming requirement, Southern submits that a specifically tailored enforcement mechanism should also be enacted. It should be designed to facilitate good faith negotiations and the need for rapid adjudication. The FCC has employed specific enforcement mechanisms in other contexts, such as pole attachments.[49] Below are parameters which Southern believes should be encompassed in such regulations.

If a carrier refuses to enter into an agreement with another carrier, within 15 days of the request to roam the refusing carrier should be required to provide a written statement of the reasons for its refusal. It should then be required to negotiate in good faith with the carrier seeking the agreement within 20 days of a request to do so, in order to attempt to resolve the issues on which the refusal to roam is based. If the carrier wishing to roam is not satisfied with the outcome of those negotiations, it may file a complaint containing a complete statement of the

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47 *Id.*

48 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15994-95, FCC 96-325, ¶ 1002 (1996).

49 47 C.F.R. §§ 1.1401 - 1.1418 (1999).

facts in support of its claim, along with any supporting affidavits or other documentation. Within 30 days, the carrier against whom the complaint was filed must file a response containing a complete statement of the facts in support of its defense, along with any supporting affidavits or other documentation. The complainant will then have 20 days to file a reply to the response. Thereafter, the Commission will conduct settlement negotiations within 20 days, unless both parties certify that such negotiations would be fruitless. If the settlement negotiations are not successful, within 30 days of their conclusion the Commission will issue a decision based on the merits of the written pleadings.

## II. ALTERNATIVELY, THE FCC SHOULD ADOPT AN AUTOMATIC ROAMING NON-DISCRIMINATION REQUIREMENT FOR DIGITAL SMR CARRIERS

Southern believes that the facts of this matter as set forth above compel the Commission to enact an automatic roaming rule for digital SMR. However, should the Commission feel such a rule is inappropriate, Southern requests that it at least implement a specific roaming non-discrimination requirement for digital SMR. Toward that end, Southern would endorse the Commission's suggestion in the *NPRM* that such a rule "could require, as a condition of license, that covered providers that enter into roaming agreements with other such providers make like agreements available to similarly situated providers, where technically compatible handsets are being used, under non-discriminatory rates, terms, and conditions."[50]

A non-discrimination requirement would not be a significant change from a regulatory standpoint because Section 202 of the Communications Act already prohibits discrimination generally. The principal of prohibiting discrimination has been a fundamental tenet of communications law since 1934, when Section 202 was passed with the original version of the

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50 *NPRM* at ¶ 21.