

other wireless services, have converged into a single marketplace – any one service substitutable for another. Southern states that “the degree to which [Nextel or Southern] attracts the same type of customer as individual consumer oriented providers such as Verizon Wireless [Verizon] or Voicestream Wireless [Voicestream] is irrelevant”⁴⁶

On the contrary, it is exceedingly relevant because Southern is seeking a roaming agreement to provide the very same interconnected mobile telephone service provided by Verizon, Voicestream, AT&T Wireless and many others. This is a fatal flaw in Southern’s position.

The obvious reason for Southern’s attempt to winnow away competitors from the appropriate marketplace analysis is to portray its services as in competition only with those of Nextel. This assertion ignores reality. As the Commission recently concluded “...the mobile telephone sector continues to experience heightened competition as a result of the expansion by broadband PCS carriers and Nextel.”⁴⁷ When it imposed a manual roaming obligation on only “covered SMRs” (rather than all interconnected SMRs), the Commission stated that it intended “to cover only those SMR carriers that compete directly with traditional providers of cellular service and broadband PCS service.”⁴⁸ The Commission’s statement recognized that covered SMRs such as Nextel and Southern compete directly with cellular and PCS providers in the CMRS marketplace. The reality of the wireless marketplace is simple: consumers seeking wireless services have numerous options beyond Nextel and Southern. As US Cellular

the operation of iDEN systems. On February 2, 2001, Nextel met with Southern and Motorola, Inc. (“Motorola”) to discuss iDEN roaming in greater detail.

⁴⁶Comments of Southern at p. 7.

⁴⁷Fifth Report on Competition at p. 11.

⁴⁸*Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Report and Order and Memorandum Opinion and Order on Reconsideration, CC Docket No. 94-54, FCC 00-251, released August 28, 2000 (hereinafter “Third Report and Order on Roaming”) at para. 13.

stated in its Comments, "[s]ince 1996, PCS **and SMR** carriers have become real competitors to cellular in much of the country."⁴⁹

Both Nextel and Southern offer interconnected and dispatch services substitutable for the suite of services offered by cellular and PCS carriers today.⁵⁰ Interconnected mobile telephone service and dispatch services are themselves similarly situated substitutable services,⁵¹ and they continue to converge in the CMRS marketplace. Both provide users the ability to communicate while on the move,⁵² and therefore, at certain price points consumers will find one service more desirable than the other. Moreover, many CMRS competitors have created pricing plans intended to attract customers away from Nextel's and Southern's dispatch services.⁵³ The Commission's Fifth Report on Competition chronicled this service convergence as cellular and PCS licensees offer increasingly competitive calling plans intended to compete with the group functionality of dispatch services.⁵⁴ Industry analysts have recognized the continued convergence of services as cellular and PCS licensees launch an array of service packages to compete with integrated interconnected mobile telephone/dispatch services:

- "You can't compare the SMR market as an independent market anymore. . . . They are part of the PCS market nowadays. Their services are definitely not marketed toward the dispatch market exclusively anymore."⁵⁵

⁴⁹ Comments of US Cellular at p. 5 (emphasis added).

⁵⁰ The Strategis Group reports that "[a]pproximately 85% of all [Nextel] net additions are former cellular telephone users...[who] are replacing a significant portion of their traditional cellular calls with Direct Connect calls." The Strategis Report at p. 49.

⁵¹ CMRS Third Report and Order at para. 58.

⁵² *Id.*

⁵³ See Exhibit B attached hereto, listing some of the innovative calling plans developed by cellular and PCS competitors to respond to digital SMRs' and other CMRS providers' integrated service packages in the CMRS marketplace.

⁵⁴ Fifth Report on Competition at p. 71 (Cellular and PCS licensees "now offer plans that allow unlimited calling among members of a defined group, such as a family, or among all of an operator's subscribers in a defined area.").

⁵⁵ Dan Meyer, *The Winds of Change: Southern Linc, Nextel Partners Define their Roles in Market*, Radio Comm. Rept., Nov. 13, 2000, at p.16 (quoting Elliot Hamilton, Senior Analyst, Strategis Group).

- SMR integrated voice/dispatch service “awakened the sleeping giant of the cellular industry, which previously had never paid much attention to the dispatch market.”⁵⁶
- “Many regional operators such as Bell Atlantic Mobile have been offering free or reduced rates for mobile-to-mobile calls in an effort to fight off intense competition for business users from Nextel, which is targeting work groups with its integrated cellular and dispatch service.”⁵⁷
- “Noel Salmi, director of corporate communications with AT&T Wireless, said the company’s group calling plan targets much of the same market segments Nextel is going after, but the advantage is that customers can call five landline numbers for free.”⁵⁸
- “The Strategis Group projects that by 2004, subscribers to workgroup and family calling plans will account for slightly more than 20% of cellular/PCS subscribers.”⁵⁹

The point here is compelling: regardless of the spectrum on which they initiated service, all CMRS carriers now must offer not just mobile telephone or just trunked dispatch service, but a full menu of mobile telephone, group calling and advanced data capabilities in order to remain competitive in the CMRS marketplace. Customers do not purchase mobile communications based on carriers’ spectrum classifications; they simply enjoy the benefits of vigorous competition among all CMRS carriers. For example, in recent exit interviews of departing Nextel customers, about half of those that had enrolled in a replacement CMRS service stated that their new plan had either a special price for mobile-to-mobile service or that this mobile-to-mobile service was free.⁶⁰ Approximately 60% of these former customers had used Nextel’s Direct Connect (sm) feature.⁶¹ These *facts* confirm the Commission’s expectations that “consumers may begin to use more of these wireless services interchangeably (and that carriers may

⁵⁶ Alan Tilles, *Is there still a place for plain old dispatch?*, Radio Comm. Rept., Feb. 28, 2000, at p.42.

⁵⁷ Lynette Luna, *Group Calling is Weapon in Wireless Wars*, Radio Comm. Rept., June 28, 1999, at p.20.

⁵⁸ *Id.*

⁵⁹ The Strategis Group Report at p. 67.

⁶⁰ Nextel Customer Satisfaction: November 2000 Exit Interviews, Dec. 15, 2000, at p. 24.

⁶¹ *Id.* at p. 26.

increasingly market such services to the same set of consumers).”⁶² Even more to the point, they expressly contradict Southern’s claims that digital SMR providers’ dispatch services do not face direct competition from PCS and cellular providers.

Still more intensive service convergence and CMRS competition is on the way. Wireless handset and infrastructure manufacturers are developing cellular and PCS handsets that integrate the interconnected mobile telephone service with dispatch functionality, much like Nextel and Southern’s iDEN technology. For example, OmniExpress, a joint venture between Qualcomm and Descartes Systems Group, offers an integrated wireless dispatch and route optimization solution that includes mobile terminals within the vehicle, a communications network to connect drivers to dispatchers and dispatch and route optimization that promotes the efficient use of fleet assets.⁶³ In July 1999 Sprint PCS purchased OmniExpress for \$400 million,⁶⁴ and Qualcomm has already obtained the trademark rights to “Q-chat.” Q-chat is the button located on the side of Qualcomm phones that will connect one user to all of the other users in a particular calling group.⁶⁵ This single-button push-to-talk fleet service will likely further intensify competition among Sprint PCS, Nextel, Southern and other CMRS providers.

Thus, today’s CMRS marketplace reality is that Nextel, Southern, AT&T Wireless, Verizon and other CMRS providers are competing head-to-head in providing a variety of wireless communications services. Nextel and Southern cannot be segregated

⁶² In re Geotek Communications, Inc., DA 00-89, released January 14, 2000 (hereinafter “Geotek Order”) at para. 27.

⁶³ Press Release, Qualcomm, *Solution by Descartes and Qualcomm Improves Communication and Smooths Logistics for Private Fleets, Less-Than –Truckload Carriers and Metropolitan Fleets* (June 15, 2000); www.qualcomm.com.

⁶⁴ Press Release, Qualcomm, *Sprint Signs Agreement Valued at Approximately \$400 Million with Qualcomm for the Purchase of CDMA Digital Handsets* (July 20, 1999); www.qualcomm.com.

⁶⁵ Press Release, Qualcomm, *Secure Wireless Handsets for Civilian Use* (January 2001); www.qualcomm.com.

from the overall CMRS marketplace for roaming purposes and, as competitors therein, must be subject to the same Commission regulations, as discussed further below.

B. Southern's Request for a Digital SMR-only Roaming Mandate Violates Congress' CMRS Regulatory Parity Requirement, Adversely Impacting Competition

In 1993, Congress passed the Omnibus Budget Reconciliation Act ("1993 Budget Act"),⁶⁶ creating the CMRS regulatory classification and mandating that all CMRS carriers be subject to comparable regulation. Congress concluded that a "regulatory parity" mandate was necessary "to establish a consistent regulatory framework for all commercial mobile radio services," and was "an essential step toward achieving the overarching Congressional goal of promoting opportunities for economic forces -- not regulation -- to shape the development of the CMRS market."⁶⁷ Southern itself stated as recently as last year that the 1993 Budget Act "established a national policy *mandating that all participants in the commercial wireless industry* be afforded *equal* regulatory treatment."⁶⁸ "Congress," Southern continued, "mandated that the [Commission] modify its rules to ensure that all licensees in the wireless industry are subject to the same rules."⁶⁹

Now, in a CMRS marketplace that has become even more competitive in the year since Southern sought regulatory parity for all CMRS, Southern ignores marketplace realities and the 1993 Budget Act in urging the adoption of a disparate automatic roaming mandate applicable to one carrier. Southern promotes this disparity to force Nextel to underwrite Southern's competitiveness in the CMRS marketplace. Pursuant to the 1993

⁶⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

⁶⁷ CMRS Third Report and Order at para. 29.

⁶⁸ Comments of Southern Company, PR Docket No. 93-144, filed March 27, 2000, at p. 1.

⁶⁹ *Id.* In that instance Southern argued, ultimately successfully, that its single site SMR licenses should have the same extended five year construction period as wide-area licenses held by competing CMRS carriers.

Budget Act, as Southern previously recognized, the Commission must treat each of these competitors comparably to ensure that “consumer demand, not regulatory decree, dictates the course of the mobile services marketplace.”⁷⁰ Southern’s eager abandonment of this legal principle further exposes its desperation to obtain competitive advantage through regulatory disparity.⁷¹

Additionally, in its order “establish[ing] regulatory symmetry among similar mobile services,”⁷² the Commission applied a single spectrum cap to all CMRS providers, whether cellular, PCS or SMR, limiting their spectrum holdings in any one market to 45 MHz.⁷³ When Southern sought an SMR-specific spectrum cap in 1999 based on the same marketplace “justifications” it applies to its proposal for a disparate roaming obligation,⁷⁴ the Commission rejected the request concluding that “the appropriate service(s) for a spectrum cap are all broadband CMRS, as CMRS carriers generally compete or have the potential to compete against each other.”⁷⁵ Given the overwhelming evidence that all CMRS licensees, whether originally licensed under the cellular, PCS or SMR rules, compete vigorously with each other, the same conclusion applies here. To the extent the increasingly competitive CMRS marketplace is in need of an automatic roaming mandate, it must apply equally, to the extent practicable, to all CMRS competitors.

⁷⁰ CMRS Third Report and Order at para. 1.

⁷¹ Interestingly, Southern initially had a competitive advantage over new entrant CMRS providers. First, using its position as a utility company, Southern was able to obtain spectrum free of charge by licensing 800 MHz Business/Industrial Land Transportation channels that have not been available to other commercial telecommunications service providers since 1995 (and still are not available to commercial providers for initial licensing). Additionally, Southern had a pre-existing system footprint in the Southeastern U.S. and a “captured” customer base via Southern Company’s utility employees.

⁷² CMRS Third Report and Order at para. 1.

⁷³ *Id.* at para. 268.

⁷⁴ Comments of Southern Communications Services, Inc., filed January 25, 1999 in WT Docket No. 98-205.

⁷⁵ Report and Order, WT Docket No. 98-205, FCC 99-244, released September 22, 1999, at para. 133.

C. The Facts Do Not Support Southern's Claims Regarding Monopoly Power and Control of Essential Facilities

To demonstrate the existence of an “essential facility” to which it is entitled government-mandated access, Southern would have to demonstrate: (1) control of an essential facility by a monopolist; (2) its inability to practically or reasonably duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the absence of any legitimate business or technical reason for the denial.⁷⁶ Southern's arguments fail on all counts.

1. 800 and 900 MHz SMR Spectrum is Not an Essential Facility, and Nextel is Not a Monopolist.

By ignoring that Nextel and Southern compete with any number of CMRS competitors – far larger by many measures than Nextel – Southern sets up its “monopolist” claim. As the fifth largest CMRS carrier in the United States, providing service to seven million of the more than 100 million total domestic wireless subscribers,⁷⁷ Nextel is hardly a monopolist (or even a dominant carrier). While Nextel provides service to a significantly larger customer base than Southern, has competed for and acquired significantly more spectrum than Southern, and has invested in and constructed a significantly larger network than Southern's, these factors have no bearing on whether Nextel is a “monopolist” that may or may not have control of an essential facility. In fact, Southern is expanding its wireless customer base at a rapid pace. In August 2000, Southern signed its 200,000th wireless customer.⁷⁸ This represents a 33%

⁷⁶ *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983) (“*MCI v. AT&T*”).

⁷⁷ See, e.g., News Release of the Cellular Telecommunications and Internet Association, “US Wireless Industry Continues to Experience Record-Setting Growth,” October 18, 2000, www.wow-com.com/news.

⁷⁸ Press Release, Southern Company, *Southern LINC Reaches 200,000 Customers* (August 29, 2000) (only about 15,000 of those users were power company employees), <http://newsinfo.southernco.com>.

increase in its customer base in less than a year,⁷⁹ thus demonstrating that Southern has identified a customer base that values its regional CMRS service. Thus, Southern's growing CMRS business in-and-of-itself adds to the evidence that Nextel, far from being a monopoly, faces competition in the marketplace.

With respect to Southern's assertion that 800 MHz and 900 MHz SMR spectrum, and Nextel's iDEN network thereon, is somehow an "essential facility," it fails to demonstrate that it has no other alternatives for achieving its objective of providing interconnected mobile telephone services outside the scope of its existing system footprint. All Southern has demonstrated is that Nextel's network is the easiest, cheapest path of least resistance to achieving its business objectives. The fact that an existing facility may make Southern's business plans simpler and more economical does not make those facilities "essential" requiring governmentally mandated access to them.⁸⁰ As described below, there are any number of ways that Southern could duplicate Nextel's nationwide network.

2. *Southern Can Duplicate Nextel's Facilities for Roaming Purposes.*

At the core of the essential facilities doctrine is the requirement that the facility at issue is "unique,"⁸¹ and that the supposed monopolist is "misusing control of [that] **unique facility** to foreclose competition in a downstream market."⁸² The Commission

⁷⁹ *Id.*

⁸⁰ See, e.g., *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) ("As the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.") (citations omitted); see also *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 380300 at *6 (S.D.N.Y. 1995) ("The essential facility doctrine cannot be read so broadly as to mean that a plaintiff is entitled to any facility it finds desirable or convenient. . .").

⁸¹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice Of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("Local Competition Third R&O and Fourth FNPRM") at para. 59 (citations omitted).

⁸² Local Competition Third R&O and Fourth FNPRM at para. 60. For example, in *MCI v. AT&T*, AT&T had "complete control over the local distribution facilities," and its denial of interconnection foreclosed MCI from providing end-to-end long distance telephone service. *MCI v. AT&T* at 1133.

has emphasized in explaining this requirement that it is not enough that competitors “are merely ‘impaired’ in their ability to provide services they seek to offer.”⁸³ Assuming Southern’s goal is to provide its customers a nationwide service, Southern has had and continues to have a number of avenues for achieving that goal.

First, Southern could acquire spectrum and construct its own nationwide network, using the vast resources of its corporate parent, Southern Company.⁸⁴ To date, the Commission has held thirty-two auctions for various types of radio licenses, of which sixteen were for licenses that could support broadband CMRS services. Notwithstanding the extensive financial resources of its world class electric utility parent company, Southern chose to actively participate in only three of those auctions spending less than \$53 million for fewer than 200 wide-area SMR licenses. In sharp contrast, Nextel has made successful bids totaling nearly \$350 million – monies it raised through equity and debt placements – for spectrum licenses in these auctions. Southern’s failure to even participate in the recent PCS C and F Block reauction fatally undercuts any argument that Nextel has monopoly control of an essential facility. Had it participated in the auction, it would have had the opportunity to obtain a near-nationwide footprint and deploy available TDMA, CDMA or other technologies, or work with a manufacturer to develop a dual-mode handset that could integrate its iDEN capabilities. Southern’s decision not to invest simply is not a decision that requires Commission redress.

⁸³ Local Competition Third R&O and Fourth FNPRM at para. 60.

⁸⁴ Southern Company is “the largest producer of electricity in the United States and one of the world’s leading independent power producers.” Press Release, “Southern LINC to Offer Customers Access to Wireless Data and Internet Using Motorola Internet-Ready Handsets,” July 14, 1999, www.mobic.com/news. Having operations that span the globe producing record earnings, Southern clearly has the financial ability and business acumen to participate in Commission spectrum auctions and to win them, as well as to acquire expanded coverage through secondary market spectrum acquisitions and mergers. See Press Release, “Southern Company Reports Record Earnings for 2000,” January 19, 2001.

In addition to Southern's decision to forego opportunities in Commission spectrum auctions, Southern has had and still has limitless opportunities to create a nationwide footprint via the secondary marketplace. The Commission has found that "there are now six nationwide or near-nationwide CMRS carriers offering service in the United States, as well as a large number of regional and local CMRS providers."⁸⁵ Nextel's CMRS network is only one of these networks. Southern, as other CMRS carriers have done, can develop dual mode handsets enabling its customers to roam with any of these providers. For example, Motorola already offers an iDEN/GSM dual mode handset; nothing prevents Southern from offering it or from working with Motorola to develop other dual mode (or triple mode) handsets to roam on non-iDEN systems.⁸⁶ Of course, this would require Southern to "undertake a significant investment to develop the necessary infrastructure to address these technical difficulties"⁸⁷ – investment Southern apparently believes it should not have to make or that it cannot pass on to its parent company's ratepayers.⁸⁸

3. *Nextel Never Refused to Deal with Southern.*

The third element of the essential facilities doctrine is a categorical refusal to deal by the monopolist controlling the facility essential to competition in a downstream market. So absolute is this tenet that the Commission has emphasized "the essential facilities doctrine allows monopolists to continue charging monopoly rates for use of

⁸⁵ Fifth Report on Competition at pp. 10-12.

⁸⁶ Southern contends that "due to the current state of technology its customers can only roam with other carriers using the 800 MHz SMR iDEN platform [and] its only options for roaming partners are Nextel and Nextel Partners." Comments of Southern at p. 3. This does not mean that Nextel's frequencies are "essential facilities." It only means that Southern's other alternatives may be more expensive than accessing Nextel's network.

⁸⁷ Comments of Southern at 32.

⁸⁸ Southern vociferously attacks Nextel's secondary market spectrum acquisitions; this is just "sour grapes." Southern has had equal opportunities to make such acquisitions.

their facilities[,]” so long as they do not refuse to deal with potential competitors.⁸⁹

Having failed to demonstrate that Nextel is a “monopoly,” that CMRS spectrum is an “essential facility,” and that it cannot reasonably duplicate facilities to provide nationwide CMRS services, Southern also fails to establish a “refusal to deal” by Nextel.

Significantly, Southern has yet to “bring to the table” any reasonable, economic bilateral roaming proposal under which both Nextel’s customers and Southern’s customer benefit substantially equally. All Southern has done to date is attempt to foist upon Nextel – via Commission intervention – an obligation to open its nationwide network to Southern’s customers so they can gain access to nearly all but some 100,000 square miles of the Southeastern U.S. while Nextel’s customers would have access to a few new areas of rural Alabama, Georgia, and Mississippi.⁹⁰ Nextel has discussed and will continue discussing the technical possibility of manual roaming among iDEN systems, and will welcome any written automatic roaming proposal that makes economic and operational sense for Nextel and its customers.⁹¹ Thus, Southern’s assertions that Nextel has “refused to deal” should be considered in the light in which they were made – not in the context of attempting to fabricate an anti-trust lawsuit, but in the context of gaining access to Nextel’s competitive CMRS system via regulatory fiat.

⁸⁹ Local Competition Third R&O and Fourth FNPRM at para. 60 (citations omitted).

⁹⁰ As Nextel Partners deploys its competitive services in those rural areas in competition with Southern, Nextel’s customers will not need access to Southern’s system to obtain service in even those limited geographic areas.

⁹¹ As noted earlier, Nextel met with Southern and Motorola on February 2, 2001 to continue discussions on roaming among iDEN systems, focusing in large part on whether in-market roaming can be technically avoided when there is a roaming agreement between iDEN carriers with overlapping coverage areas.

4. Forcing Nextel to Enter Non-Economic Roaming Arrangements Is Contrary to the Essential Facilities Doctrine and Would Inhibit Meaningful Competition.

The final element of the essential facilities doctrine “basically raises the familiar question of whether there is legitimate business justification for the refusal to provide the facility.”⁹² As the Commission has explained, the essential facilities doctrine “creates a narrow exception to the general antitrust presumption that a single firm may decline to deal with another firm.”⁹³ In other words, if there are legitimate business reasons for a carrier to choose not to enter into a roaming agreement, there is no justification for forcing that carrier to do so. In general, “a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare.”⁹⁴ While Nextel has demonstrated its willingness to discuss roaming agreements with its CMRS competitors, Nextel opposes governmental mandate that would require it to enter non-economic roaming arrangements – for example, a roaming agreement that provides significant benefit to its competitors’ customers but little or no corresponding benefit to its own customers.⁹⁵

A carrier’s decision whether or not to enter into a roaming agreement should be left to the marketplace in the competitive CMRS environment. Forcing carriers to enter into roaming agreements without regard for their economic impact will harm customers by imposing on them costs that otherwise would not be incurred by the carrier. By injecting these unjustified costs into the marketplace, while creating disincentives for

⁹² *Anaheim v. So. California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992) (citations omitted).

⁹³ Local Competition Third R&O and Fourth FNPRM at para. 59 (citations omitted).

⁹⁴ *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994).

⁹⁵ This, of course, is precisely the case Southern presents. Its customers would gain a nationwide roaming opportunity, while Nextel’s customers would gain redundant coverage in Greater Atlanta and some limited rural coverage beyond Nextel’s network in parts of Alabama and Mississippi. Similarly, Pacific Wireless’

carriers to invest in mobile telecommunications infrastructure, an automatic roaming mandate would inhibit meaningful competition to the detriment of all consumers.

D. Southern's Comments are Replete with Factual Misstatements on Which It Bases its Faulty Legal Analysis

Southern's arguments rely on a foundation of factual inaccuracies. This section exposes their most egregious inaccuracies and misrepresentations, and sets the record straight. When the facts are exposed, Southern's self-serving desperate attempt to build its business through government fiat, rather than marketplace competition, is readily apparent.⁹⁶

Southern Claim: *The SMR industry in the United States, "unlike the cellular and PCS markets," is "consolidating and there are fewer carriers today than ever before."*⁹⁷

Fact: Cellular and PCS carriers have consolidated significantly over the past two or three years, but because all CMRS carriers compete, competition has never been stronger.

Nextel agrees that the SMR industry has consolidated in recent years; it takes issue, however, with Southern's attempt to contrast SMR consolidation with the same trend in the overall CMRS industry. As the Commission recognized in the Fifth Report on Competition, there has been significant consolidation in the CMRS industry -- Voicestream Wireless Corp., Omnipoint Corp. and Aerial Communications, Inc. combined to create a nationwide footprint; mega-firms Bell Atlantic Mobile Systems,

customers would gain nationwide coverage while Nextel's customers would gain little, if any coverage, outside of Nextel's existing California footprint.

⁹⁶ Southern's efforts to enhance its competitiveness via regulatory mandates rather than marketplace innovation and investment is further demonstrated by its recent flurry of petitions at the Commission, wherein it seeks to block unrelated Nextel activities unless the Commission mandates automatic roaming between Nextel and Southern. See Comments of Southern LINC in DA 00-2352, filed November 20, 2000, and Reply of Southern LINC, a late-filed, unauthorized pleading submitted January 9, 2000 in DA 00-2352, both opposing the transfer of Motorola's 900 MHz SMR licenses to Nextel; see also Reply Comments of Southern LINC, submitted January 22, 2001 in CC Docket No. 94-102, requesting that the Commission condition approval of Nextel's Phase II Enhanced 911 implementation plan on a mandatory roaming agreement with Southern.

⁹⁷ Comments of Southern at Executive Summary p. 1 (emphasis added).

GTE, Vodafone, Airtouch Communications, Inc. and Primeco Personal Communications have merged to create “Verizon Wireless,” another nationwide competitor; and Regional Bell Operating Companies Bellsouth and SBC have created a joint wireless venture called Cingular.⁹⁸ Notably, each of these mergers was, in part, an investment by the carriers in facilities and spectrum necessary to create a nationwide footprint and achieve the economies of scale necessary to be more competitive, thereby benefiting wireless consumers.⁹⁹ Consolidation is occurring throughout the CMRS industry.

Thus, Nextel is far from alone in its efforts to expand its footprint and provide improved services to the public, and no negative anti-competitive inference can be drawn from Nextel’s actions. The Commission and the Department of Justice have approved such mergers and acquisitions precisely because they have strengthened competition among providers of CMRS services. Had the Commission viewed the CMRS industry as sharply segmented, as Southern proffers, such consolidation might have been problematic.

Southern Claim: *“[T]he Commission allocated 50 MHz [of spectrum] to cellular but only approximately 19 MHz to SMR. 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.”¹⁰⁰*

Fact: SMRs operate on 26.5 MHz of 800 MHz spectrum and 5 MHz of 900 MHz spectrum, in addition to the 120 MHz of PCS spectrum and 50 MHz of cellular spectrum also available for the provision of trunked dispatch SMR services.

⁹⁸ Fifth Report on Competition at p.11.

⁹⁹ *Id.* at p. 10. The Commission and the Department of Justice have approved such mergers and acquisitions precisely because they have strengthened competition among providers of CMRS services. All CMRS carriers offer substitutable, untethered communications for people on the go; Southern’s attempt to carve out a separate digital SMR or trunked dispatch SMR service for roaming purposes is factually inaccurate and misleading.

¹⁰⁰ Comments of Southern at p. 19.

In making this statement, Southern implies there is no spectrum – other than this limited block of 19 MHz -- on which to provide “SMR” services. This is incorrect. The Commission has allocated 14 MHz of 800 MHz spectrum and 5 MHz of 900 MHz spectrum specifically to “SMR services;” however, this 19 MHz is not the only spectrum on which the Commission permits SMR services. For example, Southern’s own SMR operations have limited use of channels from this 19 MHz. Nearly all of the channels on which Southern’s system operates are 800 MHz channels allocated to the Business and Industrial/Land Transportation (“B/ILT”) service pools for use by Business or Industrial/Land Transportation eligibles for internal employee communications.¹⁰¹

Southern also ignores the 150 General Category channels (7.5 MHz) at 800 MHz that are currently used for the provision of SMR services.¹⁰² Additionally, nowhere does Southern recognize that SMR services can be provided on the 50 MHz of cellular and 120 MHz of PCS spectrum, or on the new 700 MHz Guard Band channels, the 700 MHz commercial allocation, or at 220 MHz and 450 MHz. The Commission also is currently considering permitting commercial interconnected and dispatch service on the five MHz of 900 MHz B/ILT channels.¹⁰³

The fact is that the services Nextel, Southern, AT&T Wireless, Verizon, among others, provide the general public can be legally and technically offered using any of the more than 200 MHz of CMRS spectrum as well as the 700 MHz commercial and Guard

¹⁰¹ Comments of Southern Company, filed March 27, 2000, in PR Docket No. 93-144, at p. 5 (it is “crystal clear that the Southern LINC system is composed of more than 95% converted BI/LT channels.”)

¹⁰² These channels were recently licensed on a geographic area basis in the 800 MHz SMR General Category Service Auction. Public Notice, “800 MHz Specialized Mobile Radio (“SMR”) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes,” DA 00-2037, released Sept. 6, 2000.

¹⁰³ See Report and Order and Further Notice of Proposed Rulemaking, FCC 00-403, released November 9, 2000.

Band channels. All it takes is a licensee willing to undertake the attendant entrepreneurial risks and make the investments needed to do so. Carriers like Sprint PCS, Nextel, Verizon and Cingular have and continue to do so. Southern – despite having perhaps the most financial resources – has not and apparently will not. Southern appears to invest only when it gets favored monopoly utility treatment and a guaranteed return on investment. Faced with vigorous competition in the CMRS industry, it has turned to the next best thing: what CTIA calls a “free ride” for its customers on a competitor’s network.

Southern Claim: *In discussing Nextel’s relationship with Nextel Partners, Southern references Nextel’s “majority-owned affiliate, Nextel Partners” and Nextel Partners’ “presumably Nextel-controlled Board. . . ”*¹⁰⁴

Fact: Nextel does not control Nextel Partners.

Southern boldly makes this claim about Nextel’s controlling “majority” interest despite having stated just eight pages earlier that Nextel Partners is “approximately 32% owned by Nextel . . . ”¹⁰⁵ As Southern knows, Nextel does not own a majority interest in Nextel Partners, and Nextel does not have “control” over Nextel Partners. Had Southern checked any of the numerous public documents available regarding Nextel Partners, it would have found that Nextel holds only one of the five seats on Nextel Partners’ Board of Directors. Accordingly, Nextel does not control Nextel Partner’s roaming decisions.

Nextel and Nextel Partners created their affiliation for the purpose of deploying advanced CMRS services to rural and secondary markets more quickly than Nextel alone could have achieved. Nextel Partners is rapidly deploying services in a number of areas of the country, including rural areas of the Southeastern United States, areas previously

¹⁰⁴ Comments of Southern at p. 10 (emphasis added).

¹⁰⁵ *Id.* at p. 3.

covered by only a handful of CMRS carriers including Southern. To expand its network and enhance the quality and availability of its services, Nextel concluded that an investment in Nextel Partners would be an economic and pro-competitive avenue to achieving those goals. Thus, unlike Southern, Nextel's business arrangement with Nextel Partners demonstrates Nextel's commitment to the mobile telecommunications industry and its increasing competitiveness.

Southern Claim: *Southern suggests that Nextel has prevented it from achieving roaming agreements with iDEN and Global System for Mobile ("GSM") operators throughout the world.*¹⁰⁶

Fact: **Southern can provide its customers the dual mode iDEN/GSM phone, negotiate its own roaming agreements with worldwide carriers and thereby enhance the competitiveness of its service.**

By making a significant investment in technology development, Nextel worked with its chief infrastructure vendor, Motorola, to produce the i2000 iDEN mobile handset. The i2000 handset is a dual mode iDEN/GSM phone that can operate on many iDEN and GSM systems around the world. In conjunction with developing this new handset, Nextel, on its own initiative, negotiated roaming arrangements with over 100 iDEN and GSM operators worldwide to provide significant additional coverage for its customers and, conversely, provide new and expanded coverage areas for those foreign operators. As a result of Nextel's investment in technology development, Southern can offer the i2000 dual mode handset to its customers without incurring the costs, development time and risks that Nextel undertook. There is no reason that Southern cannot offer the i2000 handset on its network and initiate roaming discussions with any

¹⁰⁶ *Id.* at p. 13.

number of iDEN and GSM providers around the world. In fact, Southern can once again enjoy a “free ride” on Nextel’s accomplishments, without any governmental intervention.

Southern Claim: *Southern asserts that Nextel is in some way depriving Southern’s customers of access to 711 service.*¹⁰⁷

Fact: 711 access to Telecommunications Relay Services (“TRS”) is a contractual relationship between the carrier and its customer, and potential users have the ability to choose their wireless provider based on, among other things, where it can provide 711 access to TRS Centers.

Southern’s contention regarding 711 access is a red herring intended to inflate the legitimacy of its legal arguments. The Commission’s recent decision mandating that wireless providers offer 711 access to TRS Centers created a new contractual obligation between every wireless carrier and its customers.¹⁰⁸ Once 711 is fully deployed on Nextel’s system, every Nextel customer will have the right to expect that 711 will connect to that state’s TRS center. However, those customers will purchase Nextel’s service knowing that they will reach TRS centers via 711 only in those areas of the country where Nextel has coverage. They do not expect, and the Commission did not require, that they reach 711 in any city or state where Nextel does not provide service. A hearing-impaired person or a person who regularly uses a TRS center to reach a hearing-impaired person, therefore, will choose their wireless provider based on many factors, including the areas in which he or she will be able to reach a TRS center by dialing 711. Just as Nextel, AT&T Wireless, Sprint PCS, Voicestream and the rest offer different coverage footprints – which prospective TRS users consider in selecting a wireless carrier – prospective Southern TRS users will consider coverage in making their choice. Nextel

¹⁰⁷ *Id.* at p. 15.

¹⁰⁸ See *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Second Report and Order, FCC 00-257, released August 9, 2000.

is not responsible for remedying any shortcomings in Southern's strategic coverage decisions.

IV. CONCLUSION

The above sampling of major factual inaccuracies is the foundation of Southern's blatant effort to enhance its own competitive position at the expense of competition in the overall CMRS marketplace. The facts support an entirely different conclusion; *i.e.*, that Nextel and Southern are both competitors in the broader CMRS market and that all CMRS carriers are legally and technically free to develop and offer substitutable untethered wireless communications for people on the go. Attempting to put one sub-set of CMRS provider at a competitive disadvantage by forcing it into potentially uneconomic roaming arrangements -- while the remainder of the CMRS industry is free to make only economic market-based business decisions -- creates an enormous regulatory disparity.

The Commission's job is to protect competition; not competitors. As the record in this proceeding aptly demonstrates, competition is flourishing in the CMRS marketplace. The proposed governmental intervention is not necessary to protect or in any way enhance that competition. On the contrary, such regulation would protect certain competitors at the expense of wireless consumers. An automatic roaming mandate would create disincentives for carriers to build out networks and deploy unique, differentiated products. Additionally, consumers would be saddled with otherwise unnecessary costs as a result of carriers entering into uneconomic roaming arrangements in a competitive marketplace. Accordingly, this mandate is contrary to the public interest.

For all of the reasons stated herein, the Commission should not intervene in the competitive CMRS marketplace and impose a roaming mandate on any CMRS carrier.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

By, 

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Date: February 5, 2001

EXHIBIT A

SOUTHERN REQUEST FOR ROAMING – NOV. 14, 2000

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November 14, 2000

Morgan E. O'Brien
Vice Chairman
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191

Re: Request of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, Southern Communications Services, Inc., and Southern Company Services, Inc. (collectively "Southern") that Nextel (1) Implement Manual Roaming and (2) Implement Automatic Roaming

Dear Mr. O'Brien:

Thank you for meeting with us last Wednesday, November 3, 2000, at which time the Southern electric system commercial mobile radio service customers of Southern Communications identified above and Southern Communications requested that Nextel Communications (1) implement manual roaming procedures that customers of Southern Communications may use and (2) make automatic roaming available to customers of Southern Communications. These requests pertain to the 800 MHz Motorola iDEN interconnect service feature offered by Nextel and Southern alike. In brief, our clients request that Nextel immediately make manual roaming available to the customers of Southern Communications and also undertake to implement automatic roaming as soon as is possible.

Among the many reasons it is important that Nextel comply with the law and make these services available to Southern Communications and its customers, the Southern electric system electric utilities have an immediate need for the ability to roam onto Nextel's systems in areas outside the footprint of the Southern Communications system. An example outlined in our meeting was, if an ice storm strikes a neighboring electric utility system which would require aid and assistance from Southern, manual roaming would be critical to such assistance.

Last August the Federal Communications Commission denied Nextel's request to be exempted from the manual roaming requirement, and Nextel elected not to appeal the

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ATTORNEYS AT LAW
A LIMITED LIABILITY CORPORATION

Morgan E. O'Brien
November 14, 2000
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Commission's decision. As a commercial mobile radio service operator operating an 800 MHz Motorola iDEN system subject to those regulations, Nextel has an obligation to proceed to implement a manual roaming procedure that can be used by the 800 MHz Motorola iDEN system customers of Southern Communications.

Our clients also request that Nextel undertake to implement automatic interconnect roaming with the Southern Communications system. It is unlawful for the Nextel Partners joint venture participants to create what Nextel Partners characterizes as a "exclusive" automatic roaming relationship with Nextel. Federal law prohibits Nextel from engaging in an unreasonable refusal to deal with others and undue discrimination of that nature. Implementation of automatic roaming in cooperation with Southern Communications ought to proceed as soon as possible.

Southern opposes any delay in implementing roaming predicated upon the pending frequency auctions. Nextel knows well that it can comply with the applicable auction regulations while complying with its common carrier obligations.

You also indicated that Nextel might want to make a proposal to Southern Company that would be more advantageous to Nextel than a simple roaming arrangement. Southern opposes Nextel conditioning performance of Nextel's roaming obligations upon entry into extraneous business arrangements favorable to Nextel.

To summarize:

- Manual roaming is needed now and ought to be implemented immediately by Nextel, particularly with respect to the Southern electric system utilities;
- Automatic roaming is also needed and ought to be implemented by Nextel as soon as possible in cooperation with Southern Communications; and
- Roaming implementation ought to proceed now.

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November 14, 2000
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Once again, we appreciate your availability to receive this request, understand that you are undertaking to get an answer and await your reply.

Sincerely,



Robert P. Edwards, Jr.

RPEjr:chj

**EXHIBIT B –
CMRS MOBILE-TO-MOBILE CALLING PLANS**

Exhibit B – CMRS Mobile-to-Mobile Calling Plans¹

	Plan	Cost per Month	Group Size
AT&T Wireless	Unlimited mobile-to-mobile calls to all group members and five fixed locations in Group Calling Area	base plan	2-200
Verizon Wireless	Unlimited mobile-to-mobile calls to all Verizon wireless users in local area	base plan + \$10	All Verizon wireless users in local area
Cingular Wireless²	Unlimited mobile-to-mobile calling and text messaging to all Cingular wireless users in local area	Cingular home plan (\$29 or greater)	All Cingular wireless users in local area
VoiceStream Wireless	Unlimited mobile-to-mobile calls to all VoiceStream wireless users in local area	base plan + \$5	All VoiceStream wireless users in local area
Sprint PCS	Five hundred nationwide mobile-to-mobile calling minutes.	base plan + \$10	All Sprint wireless users nationwide

¹ Information is based on companies' Internet web sites.

² Cingular Wireless is the combined wireless property of BellSouth and SBC Telecommunications.

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 5th day of February 2001, caused a copy of the attached Reply Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

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Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
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Room 8-B115
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Commissioner Harold Furchtgott-Roth
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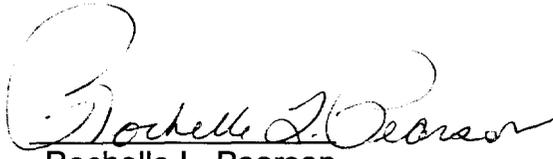
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Rochelle L. Pearson