

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
SOUTHERN COMPANY )  
 )  
Request for Waiver of )  
Section 90.629 of the Commission's Rules )

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 3, 1998**

**Released: December 4, 1998**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On February 20, 1998, Southern Company (Southern) submitted a request for a waiver of Section 90.629 of the Commission's Rules<sup>1</sup> to extend the implementation period for a wide-area Specialized Mobile Radio (SMR) network that incorporates Business and Industrial/Land Transportation (I/LT) channels. Although Southern received a five-year extended implementation period to construct its wide-area SMR network, Southern now requests a construction extension of five years, or until the Commission makes these 800 MHz Business and I/LT channels available for auction, pursuant to the Balanced Budget Act of 1997.<sup>2</sup> At the request of the Wireless Telecommunications Bureau (Bureau), Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch, Southern provided supplemental information regarding the construction status of its licensed channels on April 22, 1998.<sup>3</sup> The waiver request was placed on Public Notice on April 28, 1998.<sup>4</sup> We received thirty-six comments<sup>5</sup> and two reply comments.<sup>6</sup> Based on the record

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<sup>1</sup> 47 C.F.R. § 90.629.

<sup>2</sup> Southern Request for Waiver of 47 C.F.R. § 90.629 (filed Feb. 20, 1998) (Waiver Request).

<sup>3</sup> Southern Supplement to Request for Waiver (filed Apr. 22, 1998) (Supplement). As discussed *infra*, we grant Southern's request that the Supplement receive confidential treatment.

<sup>4</sup> FCC Seeks Comment on Southern Company Request for Waiver of the Construction and Operation Requirements for Business and Industrial/Land Transportation Channels, Public Notice No. DA 98-808 (WTB rel. Apr. 28, 1998) (Public Notice).

<sup>5</sup> Comments were received from AAA Ambulance Service, Affiliated American Railroads (AAR), Alabama Emergency Management Agency, Alabama Forestry Commission, American Petroleum Institute (API), Bayou Concrete Company, Beard Equipment Company, Briggs Equipment, Brinks, Inc., Budweiser-Busch Distributing Company, Clean-Rite, Inc., Ditch Witch, Floyd Bros. Construction, Inc., Forest Industries Telecommunications (FIT), Gatlin Lumber and Supply Company, Georgia Department of Public Safety, Hosea O. Weaver and Sons, Inc.,

in this proceeding, we conclude that Southern's request should be granted in part and denied in part. Specifically, we grant Southern an extension to continue construction of the originally authorized wide-area SMR network until the effective date of final rules implementing the Balanced Budget Act of 1997 with respect to the licensing of 800 MHz Business and I/LT frequencies.<sup>7</sup>

## II. BACKGROUND

2. Southern, a public utility holding company, operates a digital SMR system in parts of Mississippi, Alabama, Florida, and Georgia on 800 MHz Business and I/LT channels for which it was initially licensed in 1993.<sup>8</sup> The system provides internal communications for Southern's operating companies, and serves a growing external customer base that includes federal, state, and local governments, and emergency management agencies such as sheriff's departments and ambulance services.<sup>9</sup> The system provides voice dispatch service, full-duplex telephone interconnection, messaging service (similar to alphanumeric paging), and data transmission capabilities.<sup>10</sup>

3. While 800 MHz Business and I/LT channels are no longer available for SMR use,<sup>11</sup> Southern states that it relied upon the Commission's former inter-category sharing rule<sup>12</sup> to convert its Business and I/LT

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Industrial Telecommunications Association (ITA), Jackson County, Mississippi, Schools, Jordan Pile Driving, Inc., Kimberly-Clark Corporation Southeast Timberlands, Land Mobile Communications Council (LMCC), McPhillips Manufacturing Company, Mississippi Department of Transportation, Mobile County, Alabama, Emergency Management Agency, Nextel Communications, Inc., Okaloosa County, Florida, Department of Emergency Services, Okaloosa County, Florida, Water & Sewer System, Personal Communications Industry Association (PCIA), Santa Rosa County, Florida, Sheriff's Office, Small Business in Telecommunications (SBT), Taylor Made Transportation, Inc., Taylor Services, Inc., Tuscaloosa County, Alabama, Sheriff's Office, UTC, The Telecommunications Association (UTC), and Warrior & Gulf Navigation Company.

<sup>6</sup> Reply comments were received from PCIA and Southern.

<sup>7</sup> Of course, any Business or I/LT channels acquired after March 17, 1996, the effective date of the rule change eliminating SMR use of Business and I/LT channels, cannot be integrated into Southern's SMR network, but must be used only to meet Southern's internal communications needs. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rule Making*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1537 (1995) (*800 MHz SMR Report and Order*).

<sup>8</sup> Waiver Request at 1-2, Att. A. The system also uses geographic area licenses in seven Economic Areas, site-based SMR licenses, and General Category channels. *Id.* at 5; Public Notice at n. 1.

<sup>9</sup> *800 MHz SMR Report and Order* at 1-3.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> 47 C.F.R. § 90.617(b), (c).

<sup>12</sup> See former rule 47 C.F.R. § 90.621(e)(2) (1994).

channels to SMR use.<sup>13</sup> Under the former rule, inter-category sharing was permitted only when no channels were available in the category for which the applicant was eligible.<sup>14</sup>

4. Under the Commission's rules, Business and I/LT channels ordinarily must be put into operation within eight months of license grant or the authorization cancels automatically.<sup>15</sup> However, pursuant to the extended implementation rule then in effect,<sup>16</sup> on June 8, 1994, Southern obtained a five-year extended implementation period, until June 8, 1999.<sup>17</sup> Southern states that it has constructed all 392 base stations for which it is licensed, but has not constructed every channel at every base station. Specifically, Southern represents that it has constructed sixty-five percent of the licensed channels,<sup>18</sup> and that its system covers more than ninety percent of the population in its 120,000-square-mile service area, which includes the most rural areas of the South.<sup>19</sup>

5. In 1995, the Commission amended its rules for the upper 200 SMR channels in the 800 MHz band to provide for geographic licensing, and adopted a construction requirement for geographic licensees of coverage to one-third of the population of their licensing area, and construction of at least half the channels in their licensed spectrum block in at least one location, within three years of initial license grant; and coverage to two-thirds of the geographic area's population within five years.<sup>20</sup> Incumbent licensees that chose not to successfully bid for a geographic license could retain their site-based licenses, but would not receive the added flexibility and particular rights held by the geographic licensee.<sup>21</sup>

6. When the Commission adopted the 800 MHz SMR rules, it also eliminated SMR licensees' eligibility for extended implementation authority, and concluded that the termination date of all extended implementation authorizations previously granted to 800 MHz SMR incumbents should be accelerated. The Commission also concluded that incumbents should be required to rejustify the need for extended time to

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<sup>13</sup> Waiver Request at 5.

<sup>14</sup> 47 C.F.R. § 90.621(e)(1).

<sup>15</sup> 47 C.F.R. § 90.155(a).

<sup>16</sup> See former rule 47 C.F.R. § 90.629 (1994).

<sup>17</sup> See Letter from David L. Furth, Chief, Commercial Wireless Division, FCC, to Christine M. Gill, counsel for Southern (Feb. 9, 1998).

<sup>18</sup> Waiver Request at 2, 4. The Supplement, however, indicates that some sites have not been constructed at all. Because the grounds for our decision apply regardless of whether each site has been constructed, we need not resolve this disparity in the record.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> 47 C.F.R. § 90.685; *800 MHz SMR Report and Order*, 11 FCC Rcd at 1479, 1524, 1529.

<sup>21</sup> *800 MHz SMR Report and Order*, 11 FCC Rcd at 1479, 1514. In general, geographic area licensees are not required to license each of their sites, and can not recover use of unconstructed spectrum. See, e.g., Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, at ¶¶ 145-149 (rel. Oct. 21, 1998).

construct their facilities,<sup>22</sup> and that incumbents that rejustified their extended implementation authority would be afforded a construction period of the shorter of two years or the remainder of their current extended implementation period, unless the incumbent demonstrated that it needed more than two years.<sup>23</sup> The Commission was concerned that allowing licensees to retain extended implementation authority for up to five years after the adoption of geographic area licensing would impinge upon the construction requirements imposed upon geographic area licensees, because geographic licensees were estopped not only from directly utilizing encumbered but unconstructed channels, but also from acquiring them from the holder of the authorization due to the Commission's general prohibition against the transfer of unconstructed facilities.<sup>24</sup> In addition, licensees and commenters contended that extended implementation grants had resulted in spectrum warehousing.<sup>25</sup> On May 20, 1997, the Bureau, pursuant to authority delegated by the Commission,<sup>26</sup> concluded that Southern had justified a two-year (but not longer) continuation of its extended implementation authority, to May 20, 1999.<sup>27</sup> Southern filed an application for review of this decision, which remains pending.<sup>28</sup>

7. The 800 MHz SMR rules were adopted as part of the implementation of Section 309(j)(2) of the Communications Act of 1934 (Act),<sup>29</sup> which then provided that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscriber-based services, and competitive bidding would promote the Act's expressed objectives.<sup>30</sup> The Commission determined pursuant to this statutory provision that SMR channels were auctionable,<sup>31</sup> but Business and I/LT channels were not.<sup>32</sup> The auction for the upper 200 800 MHz SMR channels, which were divided into three blocks (a 120-channel block, a 60-channel block, and a 20-channel block) in each Economic Area (EA),<sup>33</sup>

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<sup>22</sup> *800 MHz SMR Report and Order*, 11 FCC Rcd at 1524-25; see 47 C.F.R. § 90.629(e).

<sup>23</sup> *800 MHz SMR Report and Order*, 11 FCC Rcd at 1525-26.

<sup>24</sup> *Id.* at 1524. The Commission provided a brief window for transfer of unconstructed 800 MHz licenses to, *inter alia*, facilitate geographic licensing. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19096-19098 (1997).

<sup>25</sup> *Id.* at 1525.

<sup>26</sup> *Id.*

<sup>27</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, *Order*, PR Docket No. 93-144, 13 FCC Rcd 1533, 1537-38, 1546 (WTB 1997).

<sup>28</sup> See Southern Application for Review at 10-12 (filed June 19, 1997).

<sup>29</sup> See *800 MHz SMR Report and Order*, 11 FCC Rcd at 1537-41.

<sup>30</sup> See 47 U.S.C. § 309(j) (1996).

<sup>31</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2359 (1994).

<sup>32</sup> *Id.* at 2353.

<sup>33</sup> *800 MHz SMR Report and Order*, 11 FCC Rcd at 1490.

closed on December 8, 1997.<sup>34</sup> Southern submitted the high bid for the smallest block in seven<sup>35</sup> of the twenty-two EAs wholly or partly within its service area.<sup>36</sup> Southern received seven EA license grants on March 10, 1998.

8. After the 800 MHz SMR rules were adopted, the Balanced Budget Act of 1997 (Balanced Budget Act)<sup>37</sup> extended and expanded the Commission's competitive bidding authority by amending Section 309(j) to mandate that the Commission use competitive bidding to resolve all mutually exclusive applications for initial licenses or construction permits, with certain limited exceptions.<sup>38</sup> As a result, we noted in the Public Notice in this proceeding, the Balanced Budget Act raises the issue of whether competitive bidding and geographic area licensing are appropriate for mutually exclusive Business and I/LT channels.<sup>39</sup> The Commission will soon commence a rule making proceeding to implement the Balanced Budget Act. At this time, the impact of this upcoming rule making on the future licensing rules for mutually exclusive applications for Business and I/LT channels is unclear.

### III. DISCUSSION

9. Section 90.629 of the Commission's Rules provides that an 800 MHz SMR operator is entitled at most to the two-year extended implementation period that Southern received in 1997.<sup>40</sup> Southern requests that we waive that rule, and extend the implementation period for its Business and I/LT channels for the shorter of five years or until the Commission makes those frequencies available for auction so that it may bid on the geographic license areas that correspond to its current license areas.<sup>41</sup> To obtain a waiver of the Commission's Part 90 rules, a petitioner must demonstrate that its circumstances are unique, and that there is no reasonable alternative solution within the existing rules.<sup>42</sup> Further, a waiver of the Commission's Rules

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<sup>34</sup> 800 MHz SMR Auction Closes, *Public Notice*, 12 FCC Rcd 20417, 20417 (1997) (*Auction Public Notice*).

<sup>35</sup> *Id.* at 20434-35.

<sup>36</sup> Waiver Request at 4.

<sup>37</sup> Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) (Balanced Budget Act).

<sup>38</sup> 47 U.S.C. § 309(j) (as amended by Balanced Budget Act, § 3002).

<sup>39</sup> Public Notice at 2. The Public Notice requested comment both on the Waiver Request, and on how the Waiver Request and the Petition for Rulemaking filed on April 22, 1998, by LMCC regarding the allocation of spectrum for the Private Mobile Radio Services, RM-9267, relate to certain issues the Commission is likely to consider regarding implementation of the Balanced Budget Act. *Id.* at 1-2. AAR, which represents the railroad industry; ITA, a frequency coordinator for 800 MHz I/LT frequencies; and LMCC, an association representing users and providers of land mobile services and manufacturers of land mobile radio equipment, address only Balanced Budget Act issues in their comments, and state that those issues should be resolved in a separate proceeding. AAR Comments at 3-4; ITA Comments at 2-3, 5-6; LMCC Comments at 3-4; see also API Comments at 6-7; FIT Comments at 2-3; Southern Reply Comments at 1 n.2; UTC Comments at 1 n.1.

<sup>40</sup> 47 C.F.R. § 90.629.

<sup>41</sup> Waiver Request at 1-2, 5.

<sup>42</sup> 47 C.F.R. § 90.151(a).

is, in general, appropriate only if the waiver request serves the public interest.<sup>43</sup> We find that Southern has met this burden in part, warranting grant of a waiver of Section 90.629 of the Commission's Rules, but not for the full period requested. Our basis for this determination is set forth below.

10. *Unique Circumstances.* Southern argues that its circumstances are unique because no other 800 MHz SMR system licensed on a site-by-site basis has such a large footprint, and thus is so burdened by the site-based construction requirement.<sup>44</sup> The Personal Communications Industry Association (PCIA), a trade association representing the interests of commercial mobile radio service and private mobile radio service users and businesses, and Forest Industries Telecommunications (FIT), an organization of land mobile radio users in the forest products industry, argue that Southern is indistinguishable from all the other SMR operators that had to rejustify their extended implementation periods, none of whom received more time than Southern to construct their systems.<sup>45</sup> We, however, believe that the provision of service over an unusually large area to a substantial number of public safety users that rely on the system to meet their growing communications needs can be a unique circumstance.<sup>46</sup> The Commission strives to avoid unnecessary disruption of critical state, federal, and local governmental public safety functions, and has repeatedly given special recognition to the protection of services that are integral to public safety needs.<sup>47</sup>

11. *Lack of Reasonable Alternatives.* Southern argues that it has no reasonable solution within the existing rules. Small Business in Telecommunications (SBT), an association of small businesses trading throughout the telecommunications marketplace, maintains that, given Southern's financial resources, Southern had the alternative of bidding more aggressively in the recent auction of 800 MHz channels, but simply chose not to compete with Nextel Communications, Inc. (Nextel).<sup>48</sup> Southern states that the auction of the upper 200 channels "offered virtually no opportunity for competitors to acquire significant amounts of new spectrum" because Nextel's incumbent status discouraged others from bidding for the encumbered spectrum.<sup>49</sup> With

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<sup>43</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>44</sup> Waiver Request at 3.

<sup>45</sup> FIT Comments at 2; PCIA Comments at 3-4; see also SBT Comments at 6-7.

<sup>46</sup> See, e.g., *Texas Utilities Services, Inc., Order*, 13 FCC Rcd 4258, 4261 (WTB 1997); *State of Florida, Order*, 12 FCC Rcd 11567, 11571-72 (WTB 1997).

<sup>47</sup> See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14664-65 (1997) (tailoring digital television allocations to protect public safety land mobile licensees utilizing the 470-512 MHz band in the Philadelphia area); *Redevelopment of Spectrum to Encourage Innovation in the Use of Telecommunications Technologies, Memorandum Opinion and Order*, ET Docket No. 92-9, 9 FCC Rcd 1943 (providing unique relocation procedures to 2 GHz fixed microwave public safety licensees because of the critical nature of their services).

<sup>48</sup> SBT Comments at 7; see also Nextel Comments at 15-16.

<sup>49</sup> Waiver Request at 10; see *id.* at 11, 15. In addition, Southern contends that participating in the scheduled auctions for the General Category and the lower 80 800 MHz SMR channels also is not a reasonable alternative, because Nextel's incumbent status in those categories will make it difficult for other bidders to compete. *Id.* at 15, 17-18.

respect to this matter, we conclude that what Southern might have done in a past auction does not constitute a current alternative.<sup>50</sup>

12. FIT, PCIA, and SBT argue that Southern can construct its I/LT and Business channels within the current implementation period.<sup>51</sup> SBT contends that, under Commission precedent, Southern's assertion that "this immediate expenditure would not be rational from a business perspective"<sup>52</sup> because the demand in rural areas does not yet merit a complete build-out<sup>53</sup> does not make this alternative unreasonable.<sup>54</sup> As an initial matter, we note that the cited cases deal with the question of whether the construction delay was beyond the licensee's control, warranting an extension pursuant to Section 319(b) of the Act, while the issue at hand is whether there is no reasonable alternative, warranting a waiver pursuant to Section 90.151 of the Commission's Rules.<sup>55</sup> Moreover, as discussed above, there are three planned or pending proceedings that may ultimately result in Southern's current time-based construction requirement being modified. Thus, we find that Southern has no reasonable alternative within the existing rules to an extension of its implementation period.

13. *Public Interest.* Comments were received from a number of Southern's SMR subscribers, urging us to grant the Waiver Request so that Southern may continue to meet their communications needs.<sup>56</sup> Many of Southern's subscribers are public safety agencies that have determined that they can best and most economically meet their communications needs by using Southern's wide-area, digital radio network, rather than each constructing their own system.<sup>57</sup> Southern states that its system is well-suited for public safety

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<sup>50</sup> See *Industrial Communications & Electronics, Inc., Order on Reconsideration*, 13 FCC Rcd 8417, 8423 (WTB Commercial Wireless Div. 1998).

<sup>51</sup> FIT Comments at 2; PCIA Comments at 6; SBT Comments at 2.

<sup>52</sup> Waiver Request at 17.

<sup>53</sup> *Id.* at 12-13.

<sup>54</sup> SBT Comments at 2-4 (citing, e.g., *AAT Electronics Corp.*, 93 FCC 2d 1034, 1047 (1983) (citing *Radio Longview, Inc.*, 19 FCC 2d 966, 968 (1969))).

<sup>55</sup> 47 U.S.C. § 319(b).

<sup>56</sup> See AAA Ambulance Service Comments at 1; Alabama Emergency Management Agency Comments at 1; Alabama Forestry Commission Comments at 1; Bayou Concrete Company Comments at 1; Beard Equipment Company Comments at 1; Briggs Equipment Comments at 1; Brinks, Inc. Comments at 1; Budweiser-Busch Distributing Company Comments at 1; Clean-Rite, Inc. Comments at 1; Ditch Witch Comments at 1; Floyd Bros. Construction, Inc. Comments at 1; Gatlin Lumber and Supply Company Comments at 1; Georgia Department of Public Safety Comments at 1; Hosea O. Weaver and Sons, Inc. Comments at 1; Jackson County, Mississippi, Schools Comments at 1; Jordan Pile Driving, Inc. Comments at 1; Kimberly-Clark Corporation Southeast Timberlands Comments at 1; McPhillips Manufacturing Company Comments at 1; Mississippi Department of Transportation Comments at 1; Mobile County, Alabama, Emergency Management Agency Comments at 1; Okaloosa County, Florida, Department of Emergency Services Comments at 1; Okaloosa County, Florida, Water & Sewer System Comments at 1; Santa Rosa County, Florida, Sheriff's Office Comments at 1; Taylor Made Transportation, Inc., Comments at 1; Taylor Services, Inc., Comments at 1; Tuscaloosa County, Alabama, Sheriff's Office Comments at 2; Warrior & Gulf Navigation Company Comments at 1.

<sup>57</sup> Southern Reply Comments at 2, 4, 6-7.

communications, because, in order to meet the internal communications needs of Southern's operating companies, the system is designed to provide uninterrupted service even in the wake of natural disasters.<sup>58</sup> In addition, Southern's system provides interoperability among participating agencies,<sup>59</sup> which the Commission has recognized as one of the most important public safety communications needs.<sup>60</sup> We conclude that the public interest would be served by a waiver that promotes reliable, state-of-the-art wide-area public safety communications and promotes interoperability.<sup>61</sup>

14. We also note that Southern's system serves rural areas, where wireless communications are particularly important due to the distances that must be covered and the relative scarceness of wireline communications facilities.<sup>62</sup> Southern states, however, that without an extension of its implementation period, economic realities will compel it to concentrate on constructing channels in urban areas, where there is higher demand, and to relinquish unbuilt channels in rural areas, which will leave Southern unable to meet rural needs when demand grows in those areas.<sup>63</sup> Nor does it appear that any other SMR operator will immediately meet such needs, as we previously have noted that 800 MHz digital SMR providers are unlikely to begin serving small cities and rural areas in the near future.<sup>64</sup> Thus, the public interest would be served by a waiver that promotes the expeditious delivery of service to rural areas.<sup>65</sup>

15. Several commenters argue in a conclusory manner that unassigned 800 MHz Business and I/LT spectrum is scarce, so the public interest requires that Southern's Waiver Request be denied and any

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<sup>58</sup> *Id.* at 6-7; see also Tuscaloosa County, Alabama, Sheriff's Office Comments at 1 ("We have experienced great success with the Southern Linc system through three hazardous storms and numerous law enforcement operations. During these three storms, noticeable interruptions of various types were experienced with our existing radio system, paging system, and cellular phone service.").

<sup>59</sup> Okaloosa County, Florida, Department of Emergency Services Comments at 1; Tuscaloosa County, Alabama, Sheriff's Office Comments at 1.

<sup>60</sup> See, e.g., Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *Second Notice of Proposed Rulemaking*, WT Docket No. 96-86, 12 FCC Rcd 17706, 17718-22 (1997); Public Safety Wireless Advisory Comm., *Final Report* 19-20, 45-48 (Sept. 1996).

<sup>61</sup> See Texas Utilities Services, Inc., *Order*, 13 FCC Rcd 4258, 4261-62 (WTB 1997); Central and South West Services, Inc., *Order*, DA 98-1686, at ¶¶ 9-11 (WTB Public Safety and Private Wireless Div. rel. Aug. 24, 1998); see also Wackenhut Corp., *Order*, DA 98-1196, at ¶ 7 (WTB Public Safety and Private Wireless Div. rel. June 19, 1998).

<sup>62</sup> State of South Carolina, *Order*, 13 FCC Rcd 8787, 8791 (WTB 1997); Public Utility District No. 1 of Snohomish County, *Order*, 13 FCC Rcd 7964, 7966-67 (WTB Public Safety and Private Wireless Div. Policy and Rules Br. 1997).

<sup>63</sup> Waiver Request at 12-13.

<sup>64</sup> Pittencrieff Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8935, 8952, 8956-57 (WTB 1997).

<sup>65</sup> See Echostar DBS Corp., *Order*, 11 FCC Rcd 16291, 16294 (IB 1996).

channels that it fails to construct be made available to Business and I/LT eligibles.<sup>66</sup> We agree with Southern's reply that there is no evidence in the record of any Business or I/LT eligibles in Southern's service area being unable to acquire spectrum.<sup>67</sup>

16. After consideration of the record in this proceeding we conclude that the public interest will be served by granting Southern a limited waiver of the Commission's Rules. We find that the public interest would be served by preserving Southern's ability to meet the communications needs of a substantial number of public safety users, particularly in rural areas, and that it would not be served by needlessly disrupting critical public safety communications now or in the immediate future.<sup>68</sup> While our current rules do contemplate the return of unused Business and I/LT channels to their pools for reassignment, rather than allow them to be retained for SMR service, the record before us suggests that the public interest would not be best served by such a decision. The record before us contains primarily conclusory statements about the spectrum needs of particular categories of users. In contrast, the upcoming proceeding to implement the Balanced Budget Act will examine the future licensing of these pools and provide commenters with the opportunity to present fact-based proposals for meeting the spectrum needs of the Business and I/LT community. Therefore, we will extend Southern's implementation period until final rules regarding licensing of the Industrial/Land Transportation frequencies in the context of the Commission's rulemaking proceeding to implement the Balanced Budget Act take effect, or until the Commission takes action pursuant to Southern's other related pending requests.<sup>69</sup> In this connection, we conclude that those stations constructed and placed in operation by

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<sup>66</sup> API Comments at 3-4; FIT Comments at 2; PCIA Comments at 6 and Reply Comments at 3; SBT Comments at 5-6; see also LMCC Comments at 4.

<sup>67</sup> Southern Reply Comments at 3-4.

<sup>68</sup> The Commission seeks to ensure that sufficient spectrum to accommodate efficient, effective telecommunications facilities and services will be available to satisfy public safety communications needs into the twenty-first century. The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *First Report and Order and Third Notice of Proposed Rulemaking*, WT Docket No. 96-86, FCC 98-191, at ¶ 1 (rel. Sept. 29, 1998).

<sup>69</sup> Southern, joined by UTC, The Telecommunications Association, which represents electric, gas, and water utilities and natural gas pipelines, argues that regulatory symmetry among CMRS providers requires us to bring the construction requirement to which Southern is subject more in line with the construction requirement governing 800 MHz SMR geographic area licensees, without regard to whether they acquired their spectrum by competitive bidding or site-by-site licensing, so granting the requested waiver will serve the public interest by promoting this statutory objective. Waiver Request at 15-16 (citing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a)(2)(A), (B), 107 Stat. 312 (largely codified at 47 U.S.C. § 332 *et seq.*)); Letter from Richard T. Yee, UTC, to Magalie Roman Salas, Secretary, FCC (May 22, 1998). *But see* API Comments at 6; Nextel Comments at 3; PCIA Comments at 4 (each arguing that Southern seeks not equal treatment, but preferential treatment compared to other site-based Business, I/LT, and SMR licensees). The Commission rejected this argument when Southern raised it in its petition for reconsideration of the *800 MHz SMR Report and Order*, concluding that different construction requirements were appropriate for site-based and geographic licenses. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order and Order on Reconsideration*, PR Docket No. 93-144, 12 FCC Rcd 9927, 9997 (1997). We agree with PCIA that an argument that the Commission already has rejected cannot constitute good cause for granting a waiver, so we note that we are not relying directly on regulatory parity itself as a grounds for concluding that this temporary waiver will serve the public interest. See PCIA Comments at 3.

the end of the waiver period may be retained by Southern on a site-by-site license basis, but licenses for channels that remain unconstructed at that time will cancel automatically.<sup>70</sup>

17. *Confidentiality Request.* Southern requested that the supplemental information it provided be withheld from public inspection pursuant to Sections 0.457(d) and 0.459 of the Commission's Rules.<sup>71</sup> The materials provide information about system use and the construction status of each frequency and call sign within Southern's system, organized by EA. A request that information be withheld from public inspection shall be granted when the applicant presents a case for non-disclosure consistent with the Freedom of Information Act (FOIA).<sup>72</sup> What is commonly known as "Exemption 4" to the FOIA allows for the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>73</sup> "Commercial" is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business's commercial operations.<sup>74</sup> Because Southern's list of sites and construction information sufficiently relates to its commercial activities in the communications field, we conclude that it satisfies this portion of the test. Information provided voluntarily satisfies the "confidential or privileged" prong of Exemption 4 "if it is of a kind that the provider would not customarily release to the public."<sup>75</sup> Because other businesses could use this comprehensive data to Southern's competitive disadvantage, we accept Southern's claims that it is market sensitive data, and we conclude that this is information that Southern would not customarily release to the public. Accordingly, we will withhold the supplemental information from public inspection.

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<sup>70</sup> 47 C.F.R. § 90.629(e).

<sup>71</sup> 47 C.F.R. §§ 0.457(d), 0.459.

<sup>72</sup> The FOIA is codified at 5 U.S.C. § 552. This procedure is outlined at 47 C.F.R. § 0.459(d)(2).

<sup>73</sup> See 5 U.S.C. § 552(b)(4).

<sup>74</sup> *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); see Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, GC Docket No. 96-55, FCC 98-184, at ¶ 3 (rel. Aug. 4, 1998) (*Confidentiality Report and Order*).

<sup>75</sup> *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-880 (D.C. Cir. 1992); see *Confidentiality Report and Order* at ¶ 4.

#### IV. CONCLUSION

18. We find that Southern has met the burden for limited waiver of Section 90.629 of our Rules. This *Memorandum Opinion and Order* grants Southern's request for waiver to extend the implementation period for its Business and I/LT channels, but only to the extent discussed herein. The action taken herein serves the public interest in that it will provide improved opportunities for interoperable communications by the public safety community, and encourage the provision of SMR service to rural areas that might otherwise go unserved.

#### V. ORDERING CLAUSES

19. IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151, Southern Company's Request for Waiver of Section 90.629 of the Commission's Rules to extend Southern's implementation period IS GRANTED IN PART and DENIED IN PART, to the extent indicated herein.

20. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

21. For further information, contact Scot Stone, Public Safety and Private Wireless Division, at (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon  
Chief, Wireless Telecommunications Bureau